[Intro: 3](#_Toc354240335)

[Types of Business Organizations 3](#_Toc354240336)

[Sole Proprietorships 3](#_Toc354240337)

[Partnerships 3](#_Toc354240338)

[Definition 3](#_Toc354240339)

[A) Carrying on business: 3](#_Toc354240340)

[A. E. LePage v Kamex 3](#_Toc354240341)

[B) Commonality (is contract and is fiduciary) 3](#_Toc354240342)

[Relationships of Partners to Eacher other and Third Parties/ Fiduciary Relationships 3](#_Toc354240343)

[-Deeds of Partnership 3](#_Toc354240344)

[C- Profitability 3](#_Toc354240345)

[S 27 of BCPA 3](#_Toc354240346)

[Unanimity 3](#_Toc354240347)

[Directors 3](#_Toc354240348)

[Liabilities of Partners 3](#_Toc354240349)

[s. 19 BCPA 3](#_Toc354240350)

[Ss 16 and 7 BCPA 3](#_Toc354240351)

[Limited partnership 3](#_Toc354240352)

[ss. 48-80 BCPA 3](#_Toc354240353)

[Becoming an LP 3](#_Toc354240354)

[s. 51 of Pship Act. 3](#_Toc354240355)

[s. 64 of Pship Act 3](#_Toc354240356)

[Regulatory aspect 3](#_Toc354240357)

[LLPs 3](#_Toc354240358)

[Ss 94-113 of BCPA 3](#_Toc354240359)

[Joint ventures (see Kamex) 3](#_Toc354240360)

[- Corporations : Sole 3](#_Toc354240361)

[Evolution of Biz Corps Law and Nature of Corporate Responsibility 3](#_Toc354240362)

[History of CDN Biz Corps Law 3](#_Toc354240363)

[Salomon v Salomon and Co Ltd. 3](#_Toc354240364)

[Canada Business Corps aCt 1970s. 3](#_Toc354240365)

[Securities aCt 3](#_Toc354240366)

[Insider trading: 3](#_Toc354240367)

[CDN Const. s. 91 (11) 3](#_Toc354240368)

[Citizens insurance Case 3](#_Toc354240369)

[Salomon v Salomon Cont: 3](#_Toc354240370)

[s 136 BCA 3](#_Toc354240371)

[S 64 BCA 3](#_Toc354240372)

[s. 19 BCA: 3](#_Toc354240373)

[Oppression remedy 3](#_Toc354240374)

[Lifting the Corporate Veil 3](#_Toc354240375)

[Clarkson v Zhelka 3](#_Toc354240376)

[De Salaberry Realties Ltd. v MNR 3](#_Toc354240377)

[Fraud 3](#_Toc354240378)

[Gilford v Horne EW case 3](#_Toc354240379)

[Theorizing Corporate Personality 3](#_Toc354240380)

[The Process of Incorporation 3](#_Toc354240381)

[Intro and Place of Incorporation 3](#_Toc354240382)

[Extra provincial licencing and filing requirements 3](#_Toc354240383)

[BCA s. 1 3](#_Toc354240384)

[Continuance Under the Law of Another Jurisdiction 3](#_Toc354240385)

[ss. 303-311 BCA 3](#_Toc354240386)

[Classification of Corporations 3](#_Toc354240387)

[a) widely held (public) vs closely held (private) corps. 3](#_Toc354240388)

[s. 1 BCA 3](#_Toc354240389)

[One person cos 3](#_Toc354240390)

[Constrained share corps 3](#_Toc354240391)

[Professional corps 3](#_Toc354240392)

[Unlimited liability 3](#_Toc354240393)

[Special act corps 3](#_Toc354240394)

[Names of Corporations 3](#_Toc354240395)

[BCA ss. 21-29 3](#_Toc354240396)

[S. 27 BCA 3](#_Toc354240397)

[Name changes 3](#_Toc354240398)

[s 263BCA 3](#_Toc354240399)

[The Nature of the Corporate Constitution 3](#_Toc354240400)

[Articles 3](#_Toc354240401)

[S 19 (3) BCA 3](#_Toc354240402)

[Eli case 3](#_Toc354240403)

[s 228 BCA 3](#_Toc354240404)

[Ultra Vires 3](#_Toc354240405)

[s 421 BCA 3](#_Toc354240406)

[S 33 BCA 3](#_Toc354240407)

[Judicial relief when co is about to violate restrictions in articles 3](#_Toc354240408)

[s 228 BCA 3](#_Toc354240409)

[s 33 BCA 3](#_Toc354240410)

[s 154 BCA 3](#_Toc354240411)

[Extra Prov Cos 3](#_Toc354240412)

[s 378 (2) BCA 3](#_Toc354240413)

[Comity 3](#_Toc354240414)

[Ultra Vires 3](#_Toc354240415)

[The concept of Restrictions [ss 30-33, 154(1)(a), 228(3)(c), 259, 260, 378(2) and (4) ] 3](#_Toc354240416)

[s 33 (2) BCA 3](#_Toc354240417)

[s 19 BCA 3](#_Toc354240418)

[Statutes on Restricted Acts 3](#_Toc354240419)

[s 228 BCA 3](#_Toc354240420)

[S 228 3 c 3](#_Toc354240421)

[Personal remedies (ss 228, 154, 201, 227, 238, 19) 3](#_Toc354240422)

[Pre Incorporation Contracts 3](#_Toc354240423)

[s 20 BCA 3](#_Toc354240424)

[Kellner v Boxter EW 3](#_Toc354240425)

[Black v Smallwood EW 3](#_Toc354240426)

[Wickberg v Shatsky 3](#_Toc354240427)

[Statutory Reform: S 20 BCA 3](#_Toc354240428)

[Remedies under s. 20 BCA 3](#_Toc354240429)

[s. 20 BCA Subs 5 and 6: 3](#_Toc354240430)

[Mgmt and Control of the Corporation 3](#_Toc354240431)

[Intro 3](#_Toc354240432)

[Salomon v Salomon 3](#_Toc354240433)

[s 136 BCA 3](#_Toc354240434)

[S 1 (3) BCA 3](#_Toc354240435)

[Types of Dirs 3](#_Toc354240436)

[s 136 BCA 3](#_Toc354240437)

[Automatic Self-Cleaning Filter Syndicate v Cuninghame 3](#_Toc354240438)

[s 136 BCA 3](#_Toc354240439)

[s 128 (3) BCA 3](#_Toc354240440)

[- If Dirs are unable to function (use powers properly) , on p 161: 3](#_Toc354240441)

[Baron v Potter EW 3](#_Toc354240442)

[Agency and Delegation 3](#_Toc354240443)

[Indoor Mgmt Rule 3](#_Toc354240444)

[s 136 BCA 3](#_Toc354240445)

[s 421 BCA 3](#_Toc354240446)

[s 421 BCA 3](#_Toc354240447)

[S 146(1) BCA 3](#_Toc354240448)

[Audit Committees/ Corporate Governance 3](#_Toc354240449)

[Ss 223 and 226 BCA 3](#_Toc354240450)

[s 223 BCA 3](#_Toc354240451)

[s. 204 BCA 3](#_Toc354240452)

[\_\_\_\_\_\_SCC case 3](#_Toc354240453)

[S 224 (6) BCA 3](#_Toc354240454)

[Sale of the Undertaking 3](#_Toc354240455)

[s 301 BCA 3](#_Toc354240456)

[Fayermann case 3](#_Toc354240457)

[s. 324 BCA 3](#_Toc354240458)

[Automatic case 3](#_Toc354240459)

[S 301 BCA 3](#_Toc354240460)

[s 136 BCA 3](#_Toc354240461)

[s. 301 Sub 6 BCA 3](#_Toc354240462)

[s. 301 sub 6 Paras C – F BCA 3](#_Toc354240463)

[S. 301 Sub 3 BCA 3](#_Toc354240464)

[s 33 BCA 3](#_Toc354240465)

[s. 33 (5) BCA (Appraisal/ Dissent Remedy) 3](#_Toc354240466)

[Undertakings 3](#_Toc354240467)

[Peoples 2004 SCC 68 (CAnLii) paras 62-64. 3](#_Toc354240468)

[s 142 BCA 3](#_Toc354240469)

[Duties of Directors and Officers 3](#_Toc354240470)

[s 142 BCA 3](#_Toc354240471)

[Self dealing/ contracting with Corp 3](#_Toc354240472)

[Corp Opportunity 3](#_Toc354240473)

[Competition 3](#_Toc354240474)

[Hostile Takeovers 3](#_Toc354240475)

[Avoiding responsibility retro actively or pro actively 3](#_Toc354240476)

[Common Law Duties of Directors 3](#_Toc354240477)

[Re City Equitable Fire Insurance Co. Ltd. 3](#_Toc354240478)

[Difficulties for s holders instigating proceedgins 3](#_Toc354240479)

[Foss v Harbottle EW 3](#_Toc354240480)

[s 232-233 BCA 3](#_Toc354240481)

[Statutory Reform 3](#_Toc354240482)

[S 142 BCA 3](#_Toc354240483)

[S 142 (1) (b) BCA 3](#_Toc354240484)

[s. 142 sub (2) BCA 3](#_Toc354240485)

[s. 142 Sub (3) BCA 3](#_Toc354240486)

[Re People’s Deparment Stores SCC 2004 3](#_Toc354240487)

[s 157 BCA 3](#_Toc354240488)

[Business Judgment Rule 3](#_Toc354240489)

[s 124 BCA 3](#_Toc354240490)

[Pente v Schneider 3](#_Toc354240491)

[Excuse 3](#_Toc354240492)

[ss 154 and 157 BCA 3](#_Toc354240493)

[s 142 BCA 3](#_Toc354240494)

[Exceptions: 3](#_Toc354240495)

[S 67 BCA 3](#_Toc354240496)

[Indemnity of Directors 3](#_Toc354240497)

[S 154 BCA 3](#_Toc354240498)

[Reliance defence 3](#_Toc354240499)

[Fiduciary Duties/ Roles of Directors 3](#_Toc354240500)

[Breaches of Fid Duty/ Self Dealing (Contracting with the Corporation) 3](#_Toc354240501)

[s 136 BCA 3](#_Toc354240502)

[s 192 BCA 3](#_Toc354240503)

[s 192 BCA 3](#_Toc354240504)

[Legislation 3](#_Toc354240505)

[ss 147- 153 BCA 3](#_Toc354240506)

[Aberdeen case 3](#_Toc354240507)

[Porcupine Mines case 3](#_Toc354240508)

[NW Transport and Beatty 3](#_Toc354240509)

[S 233 (6) BCA 3](#_Toc354240510)

[s 142 BCA 3](#_Toc354240511)

[S 153 BCA 3](#_Toc354240512)

[S 147 BCA 3](#_Toc354240513)

[S 148 BCA 3](#_Toc354240514)

[S 149 BCA 3](#_Toc354240515)

[S 150 BCA 3](#_Toc354240516)

[s 153 BCA 3](#_Toc354240517)

[What is disclosable? 3](#_Toc354240518)

[s 147 BCA 3](#_Toc354240519)

[S 147 (2) BCA 3](#_Toc354240520)

[S 148 (1) BCA 3](#_Toc354240521)

[Ways to avoid accountability 3](#_Toc354240522)

[S 150 BCA 3](#_Toc354240523)

[Shareholder approval 3](#_Toc354240524)

[s. 150 BCA 3](#_Toc354240525)

[s. 150 (2) BCA 3](#_Toc354240526)

[S 153 BCA 3](#_Toc354240527)

[Diffs btwn Stat and CL 3](#_Toc354240528)

[Corporate Opportunity 3](#_Toc354240529)

[Regal Hastings HL 3](#_Toc354240530)

[NW Transportation 3](#_Toc354240531)

[Regal hastings 3](#_Toc354240532)

[Boardman v Phipps EW 3](#_Toc354240533)

[Peso 3](#_Toc354240534)

[Canaero 3](#_Toc354240535)

[Competition 3](#_Toc354240536)

[London and Mashonaland v New Mashonaland 3](#_Toc354240537)

[s 153 BCA 3](#_Toc354240538)

[To whom is the Fiduciary Duty Owed 3](#_Toc354240539)

[Re BCE Inc. (Bell Canada ) 3](#_Toc354240540)

[s 227 BCA 3](#_Toc354240541)

[Hostile Takeovers and defensive Tactics by target MGMT 3](#_Toc354240542)

[Comparison of Bell case and Teck Corp v Milar 3](#_Toc354240543)

[Hogg v Cramhorn EW 3](#_Toc354240544)

[Bonisteel CDN case 3](#_Toc354240545)

[Afton Mines 3](#_Toc354240546)

[TECK Corp v Milar 3](#_Toc354240547)

[Relief from Liability 3](#_Toc354240548)

[Common Law 3](#_Toc354240549)

[Bell 3](#_Toc354240550)

[Unicoal 3](#_Toc354240551)

[s. 233 (6) BCA 3](#_Toc354240552)

[ss. 233 (6) BCA 3](#_Toc354240553)

[Fose v Harbottle 3](#_Toc354240554)

[Oppression remedy 3](#_Toc354240555)

[Relief From Liability 3](#_Toc354240556)

[- s. 233 (6) BCA 3](#_Toc354240557)

[Common Law 3](#_Toc354240558)

[NW Trans c ase 3](#_Toc354240559)

[s 142 (3) BCA 3](#_Toc354240560)

[s. 142 (1) BCA 3](#_Toc354240561)

[S. 142 Sub (3) BCA 3](#_Toc354240562)

[S 143 BCA 3](#_Toc354240563)

[s 233 (6) BCA 3](#_Toc354240564)

[S 147 BCA 3](#_Toc354240565)

[S 234 BCA 3](#_Toc354240566)

[Indeminification and Insurance 3](#_Toc354240567)

[ss. 159-165 BCA 3](#_Toc354240568)

[s 165 BCA 3](#_Toc354240569)

[- Shareholders’ Meetings 3](#_Toc354240570)

[Rules for how Dirs can be reimbursed for legal expenses. 3](#_Toc354240571)

[s 164 BCA 3](#_Toc354240572)

[s 160 BCA 3](#_Toc354240573)

[s 159 BCA 3](#_Toc354240574)

[s 161 BCA 3](#_Toc354240575)

[s 163 BCA 3](#_Toc354240576)

[Shareholders and members’ Rights 3](#_Toc354240577)

[Voting Rights 3](#_Toc354240578)

[BCA ss. 173-174 3](#_Toc354240579)

[s 173 BCA 3](#_Toc354240580)

[s 237 BCA 3](#_Toc354240581)

[Shareholders’ Meetings 3](#_Toc354240582)

[ss. 166-186 BCA 3](#_Toc354240583)

[s 169 BCA 3](#_Toc354240584)

[s. 198 BCA 3](#_Toc354240585)

[S 182 BCA 3](#_Toc354240586)

[s. 172 BCA 3](#_Toc354240587)

[s 181 BCA 3](#_Toc354240588)

[Court Ordered Meetings 3](#_Toc354240589)

[s. 186 BCA 3](#_Toc354240590)

[Requisistioned meetings 3](#_Toc354240591)

[ss. 167-168 BCA 3](#_Toc354240592)

[ss. 187-191 BCA 3](#_Toc354240593)

[ss 188 BCA 3](#_Toc354240594)

[Varity Corp v Jesuit fathers 3](#_Toc354240595)

[S. 188 Sub D BCA 3](#_Toc354240596)

[Dow Corp Case US 3](#_Toc354240597)

[Removal of Directives 3](#_Toc354240598)

[- s 128 (3) BCA 3](#_Toc354240599)

[Shareholders’ Remedies 3](#_Toc354240600)

[Fosse v Harbottle 3](#_Toc354240601)

[Statutory Derivative Action 3](#_Toc354240602)

[ss 232 and 233 BCA 3](#_Toc354240603)

[Farnham v Fingold Ont case 3](#_Toc354240604)

[Re Northwest Forest Products Ltd. 3](#_Toc354240605)

[S 232 – 4 elements 3](#_Toc354240606)

[Re Northwest Forest Products Cont. 3](#_Toc354240607)

[S 232 sub 6 3](#_Toc354240608)

[Nw Transportation 3](#_Toc354240609)

[Bellman case 3](#_Toc354240610)

[Personal Action 3](#_Toc354240611)

[Statutory Oppression Remedy 3](#_Toc354240612)

[Standing 3](#_Toc354240613)

[First Edmonton Place v 315888 Alberta Ltd. 3](#_Toc354240614)

[Ferguson case 3](#_Toc354240615)

[Ibrahimi case 3](#_Toc354240616)

[Diligente case 3](#_Toc354240617)

[Re BCE Inc. 3](#_Toc354240618)

[Furry Creek (1992) 75 BCDCR 2d 246 (S. Ct.) 3](#_Toc354240619)

[R v Jackman 1977 (BCsc) 3](#_Toc354240620)

[Compliance and Restraining orders 3](#_Toc354240621)

[s 228 BCA BCA 3](#_Toc354240622)

[s. 19 (3) BCA 3](#_Toc354240623)

[s. 228 BCA 3](#_Toc354240624)

[R v Goldhaar (Ont case) 3](#_Toc354240625)

[s. 229 BCA 3](#_Toc354240626)

[Ss 230-231 BCA 3](#_Toc354240627)

[S 143 BCA 3](#_Toc354240628)

[Right to dissent/Appraisal Remedy (ss 237-247 BCA) 3](#_Toc354240629)

[S 238 (1) BCA 3](#_Toc354240630)

[S 260 BCA 3](#_Toc354240631)

[S 260 subs bcd BCA 3](#_Toc354240632)

[s. 260 Sub f BCA 3](#_Toc354240633)

[S 301 BCA 3](#_Toc354240634)

[S 240 BCA 3](#_Toc354240635)

[S 240 (3) BCA 3](#_Toc354240636)

[Notice of Dissent 3](#_Toc354240637)

[S 238 (2) and s 242 BCA 3](#_Toc354240638)

[s. 244 BCA 3](#_Toc354240639)

[S 239 BCA 3](#_Toc354240640)

[S 246 BCA 3](#_Toc354240641)

[S 246 (g) BCA 3](#_Toc354240642)

[Price for Shares/relationship btwn this remedy and other personal remedies under act 3](#_Toc354240643)

[Payment for Shares 3](#_Toc354240644)

[S 245 BCA 3](#_Toc354240645)

[S 237 BCA 3](#_Toc354240646)

[Share valuation 3](#_Toc354240647)

[R v Domglas 3](#_Toc354240648)

[Wall v REddikop 3](#_Toc354240649)

[Squeeze-outs 3](#_Toc354240650)

[RE BCE Inc. 3](#_Toc354240651)

[Wall v Redikopp 3](#_Toc354240652)

[Domglas 3](#_Toc354240653)

[Winding Up 3](#_Toc354240654)

[S 234 BCA 3](#_Toc354240655)

[Ebrahimi 3](#_Toc354240656)

[Diligente 3](#_Toc354240657)

[S 234 (1) BCA 3](#_Toc354240658)

[Shareholder Agreements 3](#_Toc354240659)

[Reguet v Bergeron 3](#_Toc354240660)

# Intro:

##  Types of Business Organizations

### Sole Proprietorships

- non profit was a legal term, these were called clubs. Groups of ppl based on sport/ books etc. There were generally fees (not for commercial purposes). NO profit motive. Entitlements are impt bc some of them own valuable land now (some by accident ). Members have no claims on entitlement, might get some proceeds if club were dissolved. Sub set of NPs : charities. CL decides what charitable purpose is (Heads – educ, relief of poverty etc). If what they are doing can be claimed to be charitable in nature , rule vs perpetuities does nto apply, no tax on earnings- if someone wants to make sure they don’t have to pay tax, they go to Rev Can and get non profit certification. This is rarely an issue, RevCan would have to push this. Most of these clubs incorporate under Prov Legisl. This = new legal entity alongside the members (non profit corporation). In BC: Society Act. Incorporation clarifies to credibility of Rev Can re tax on profits inadvertently arisen from enterprise.

- Fed Stat: Canada Corps Act. Throwback: Fed Biz Act had been partly repealed. Hm. No obvious advantage in Fed inc’ation vs in BC. **Structure of Soceity act in bc echoes BC Biz Corps Act. Hm.allow artificial creation of new legal person.** How do we separate people from biz as person? Small businesses are often seen as the people, but even one person corps are not the same person in law.

**CDN law only has three types: sole prop, partnership and Biz Corp (which can be only one person!)** this was not possible in past, Corp should not be an alias, but is now. Consultants are often called Associates (even when these people do not participate day to day). This is ego driven! Indivs who are carrying on for profit activities are not seen as any different in terms of responsibility – you pay tax just as you do on any sort of income or capital gain. Law does not distinguish sole props in any way, they are, in a way, NOT orgs. But certain types of biz may = diff regs (travel agent, pharmacist, lawyer). This is under prov regs re licences. Indivs are liable for losses and liabilities in tort to outsides, but also so profits. Main diff re tax on indiv sole prop and one who incorporates is that there is only one person who pays tax under sole prop, but if inc’d you get two entities and two potential tax payers. This = diff options in terms of tax. In BC only; other provs have biz name tax protection stats. You can register name you wish to do biz under , ONT allows for registration of those names. This gives some level of protection vs others doing biz under similar or identical name. Only BC Partnership Act will be used here, not ONT provisions which are used in text. BCPA s 88- names that imply plurality must be reg’d , this may or may not give some level of protection. CL is usually main basis in BC to offer name protection for sole under intentional tort of passing off (intention to cause harm/loss).

- it is unusual for ppl not to incorporate, some reasons are misguided (prestige is unwarranted, but this can depend on the biz and circs of indiv). Tax advantages change over time, too.

### Partnerships

- all provs have partnership stats, all based on Eng Stat 1890 drafted by Pollack L- partnerships are characterized by internal friction due to changing nature of ppl involved. Some will be more active than others in daily activity, others might be older but have invested more. Dichotomy btwn ownership and control. Pships have partners that are just as involved as others. But in Corps, the more passive person is a shareholder or member, has property rights only. In family businesses, some of these people will be on board of directors. These ppl are involved in larger decisions re biz. If passive person feels board is making mistakes, ...CAN be on when an outsider tries to get payment off someone’s partner, as seen in first case. Eng CL struggled with this. Pollack tried to codify this under Eng Pship Act 1890. This was copied in all provs, this codifies CL approach. S. 2 on pg 4 defines Pship- two or more ppl carrying on biz with view to profit.

#### Definition

##### A) Carrying on business:

###### A. E. LePage v Kamex

**- on the facts, was this arrangement pship pr not? Focus was on this element which had to have comml purpose and A- continuity.** Alleged partners were not partners, relationship was not ongoing, was narrow, did not cross threshold into pship territory. But this is unpredictable! It has been suggested that if you enter into a venture with another and give it a limited term (will terminate in three years), this usually shows it is not a pship. But our act in s 30 says it CAN be limited term.

##### B) Commonality (is contract and is fiduciary)

- even passive partners are partners, although they have no role in daily running of biz. If what you have is a pship, you have a contract of agency. Pships: when indiv ps act on behalf of biz are agents of selves and others who are principles. Every time a p buys X on behalf of biz, those not involved intransaction share responsibility to pay for X. (although this can vary in caselaw, see Kamex). Pship is a special contract,

#### Relationships of Partners to Eacher other and Third Parties/ Fiduciary Relationships

NB- those appointed must be compensated by appointer (and their suppliers then paid etc). This means that ps are fiduciaries. If ps make a profit, they are accountable to other ps for profits.

##### -Deeds of Partnership

- these establish legal rel btwn ps and firm, most pships will have gone to Ls and asked for one of these (is just a contract), bc they dont’ want to rely on CL. Law firms- senior ps do not want juniors to get more! If there is not such contrat, it should be done on pro rata basis. Btu this is rare, senior partners rarely want to make juniors equal. These terms are variable, can or can not modify CL. In absence, there is presumption of equality.

**Directors:- bc they have power ARE fiduciaries, shareholders do not. This is much as a partner owes to other Ps. Parties are in fiduciary relationship to one another.**

##### C- Profitability

- this excludes clubs who can make profits but members have no claim on them. This is assumed, but ‘carrying on’ is more impt as it become all encompassing.

- there have been some attempts to argue that pships are...the rel that two or more people have may or may not = pship under s. 2, but this does not create a new legal personality beyond that which indivs already have.

Corporations are legal fictions, can only act as result of humans purporting to act on its behalf. Pships in CDN law are NOT separate legal people, indivs (be they Corps or not) retain separate legal personality. Eg. Injured partner in wCB claim cannot say he is an employee of pship bc they are not an employee of anything , there is no one other than those who make up pship.

Problem- when outsider deals with one p, they don’t necessarily know who other ps are. This arises when this outsider wants to make claim, and to make sure that all possible Ds will be named in lawsuit , rules of court: name as many indivs you know exist and add ‘carrying on biz as a pship.’ At This lets this be applied against anyone you later find was a p at time you entered biz with them.

- law and accounting firms may do biz in pship form, but most pships are family bizs or fairly small group who have NOT incorporated. In BC, rule used to be that if there were more than 20 ps it had to inc ate and could not stay as pship. Problem is one of delegation if you have thousands of ps, could not all be involved in running of biz. Inc’ation mandates board of directors , this suggests control in running of biz eg to fire and hire. Is more efficient to make this a Corp than as a pship for this reason.

###### S 27 of BCPA

- is default statutory contract, rules that apply to all pships unless members agree to vary application eg equal entitlement to profits. This is where Deeds of Pship come in. L will vary it for them.

BCPA also varies authority needed for different types of decisions. Each partner has authority to act on own behalf without having to get consent for diff ps to do so, will then be entitled to contributions form other ps. BUT this is a contract, you would think any amendment to its terms would require

##### Unanimity

 – this is only true for pships re matters of fundamental nature eg bringing in person X as a new p. All existing ps must agree to admit. Also expulsion from pship.

##### Directors

 have all power to run biz, are focus of power in corp. Corps need directors , could only be one in cases of one person corps. Are they any limits on what dirs can do that non dir shareholders can seek relief from? Not many. Stat has demarcated matters and called them fundamental: these require shareholder approval, either unanimous or at a very high level before those things can occur. Eg dirs want to sell main asset / property. This would need shareholder approval. This is also true in pships, but there is more overlap than in a corp of management and ownership. CL countries do not differentiate btwn multi nats and cornershops. Regulation differs only when a biz goes to outsiders to seek capital. Family bizs do not go to capital markets in NY, they go to friends and family. As soon as enterprise tries to get this capital, they are subject to rules on disclosure re this sort of investment and risks. This is law outside BCPA under Securities Act- this is an investor protection Stat, tries to protect Bizs, see Bains in Sun. Passive partners might exist, but majority of partners will likely be involved and are like shareholders and directors at the same time. Small inc ated biz and pships don’t look that different, larger corps get, the more of a dichotomy btwn shareholders and mgmy becomes. Control of large corps does not lie functionally in board of dirs, it lies with senior execs of company bc they are only ones with authority over daiy affairs and expertise to do so. Ppl on board might just be there due to political connections or APPARENT expertise. Canada is very clubby, many sit on multiple boards. Only exception is chartered banks due to fiduciary concerns.

##### Liabilities of Partners

- LLPs, LPs only exist due to Stat. Are US creations adopted in Canada under amendments to BCPA , all prov acts now allow for pships to be organized on this basis. LPs are trying to be even more like corps, allow for separation of ppl who only wnat to put in capital. LLPs are from Texas, are attempts to protect ps from huge damage awards (Enron). Are about protecting ps from prof misconduct of other ps. Joint ventures ( are these ar fourth category, B and book say no!)

######  s. 19 BCPA

 sets out civil damages for debts.. liability is joint (each for whole, but fullpmnt by one discharges all). Several = one liable for debts incurred. Ss 14- wrongful acts- liability is joint and several (plaintiffs can go after one for all if they can’t get it from all). This = limited liability partnerships. Intl acct’ing firms in US folded, so plaintiffs went after all partners worldwide. This is not what these accts want. Unlike ordinary pship , llps are creations of statute bc you cannot modify liability on your own.

###### Ss 16 and 7 BCPA

 – about ability of third party to rely on ‘apparent authority’ to go after another partner. P knowlingly lets agent act as if they were a partner, so is liable for acts of real (and not real) agents. Hm. Check these sections

### Limited partnership

 - BC law on this are in part three of Pship act,

###### ss. 48-80 BCPA

 Is a separate code within statute for sub category of pship. One or more general partners and one or more limit partners. These were introduced not to protect professionals from negligence. This is in order to allow ppl with spare money to invest. These ppl believe (and gov agrees) that they can expose some capital to loss. But there is a limit to their risk (they are ready to lose the capital but not for bigger problems in future). In past, this required adding Ltd. To name of co. All biz corps in CDN have limited liability in this sense, this is about limiting liability of shareholders not co. Speculative small enterprises are assisted by govs who create this vehicle in getting capital. **This is about extending limited liability under s. 57 Pship Act and BCPA s. 55.** Only diff btwn them is that s 57 Pship act is about more limited forms of compensation, must be money or goods. Under BCPA can also be services. But as soon as ppl are getting shares for services, q is if value has been given for shares. Risk here is that you will set up co , try to reward self with shares for this effort, and maybe then to buy property. There is no way to see if person has overvalued what they have given co. Acts do not deal with this, only deal with adequate consideration in law not in fact. This is addressed by Securities aCt and Commisison. They come in btwn vendor and arm’s length publisher and say you cannot sell shares or pship interest, must put them in excrow until we see that asking price = value. Govts have not come to assistance of home buyers who overpay, butthis protects vulnerable ppl who have been talked out of their money. State has entered fray due to ppl being ripped off. This is under s 64 Biz Corps Act**. A) limited partners also get better tax treatement, allows ppl to calculate at source of income. Hm. B)second advantage: limited partners have no mgmt responsibilities.**

- shares are freely transferable, for large corps this is an advantage in terms of credibility corp has. Diff btwn small inc co and a limited pship is not all that great, except in law. Sometimes even called inc pships. In a small group, nobody wants shares to be sold to anyone else. Sharelholders in small inc businesses are equally nervous about strangers as partners are. Securities act is a policy decision by state to protect investors, Securities aCt is based on **disclosure**. This tries to avoid deciding what a person’s indiv interest is. New Deal legisl in US established Securities and exchange commission which still exists, this is a fed law. There have been attempts to copy this isn Canada, but this failed under SCC . B says this is wrong. ONT Sec Commission regulates largest financial market in Canada and is trendsetter.

 LPs are Securities (any kind of investment contract, can include deals that are more informal than a share in a corp or LP). These commissions protect gullible investors, but there is an exemption for sophisticated investors (this does not require filing of a prospectus). This is a further incentive for creation of LP. You retain mgmt freedom AND do not have to comply with Securities Act re filing of prospectus.

##### Becoming an LP

- must go to registrar of Cos in Vic, get cert of inc. Under

######  s. 51 of Pship Act.

 All partners must sign cert, need name of partners and biz, term, what kinf od biz, addresses of partners, all financial contributions to biz actual and promised etc. If do not do so, thired parties can go after assets of general and limited partners.

###### s. 64 of Pship Act

t- in order to maintain status as limited pship, limited ps must NOT involve selves in ‘mgmt of business.’ This is copied from US stat, so most caselaw on this meaning is US law. Has moved away from UK Companies Act 1860. CDN law has been influenced by US but 1980s UK law was harmonized with EEC law and UK caselaw was less relevant. Day to day mgmt functions contrast with long term decisions, but do these words reference one or other or both possibilities. Does it encompass narrow def only? We don’t know! But if we ask selves why do you ‘need to know’? this was USSC re prospectus requirement, US firm tried to sell shares only to employees. English had said ‘public’ meant over X no of ppl, but US said it’s ‘need to know’ for purpose of prospectus requirement.Low level employees (Ralston Purina case) have no status that will get them answers to qs they have as investors, so USSC said this WAS a public offer and needed a prospectus.

- is what A (limited partner who might lose limited privilege) is doing creating an impression on Third party (T) that A can bind other parties (is authorized, is a general partner in all but name)? You CAN be a ltd partner involved in long term planning bc these actions will NOT impact on third parties, but if you start to move into implementation of these you will create impression that you are an ordinary partner. Most small bizs in BC will inc under prov act, would only inc federally if they wanted to do biz outside BC. Even large bizs will inc under single prov statute, will not choose Fed. This is sometimes about who has the newest act, Ls will get excited about new provisions.

##### Regulatory aspect

- Q is of statutes: if BC issues you a cert of inc or licence to be LP, it is creating a new legal person in former case and indivs wtih limited liability in latter, this will usually be honoured in other jurisdictions (like marriage), most statutes require ‘extra provincial LPs or Corps’ (Eg Alta biz in BC) them to register in prov capital (Vic in this case). Test here is about ‘carrying on business’ in prov (means some kind of presence in doing transactions.) this allows third parties to bring actions.

### LLPs

###### Ss 94-113 of BCPA

. S 94 is definition of LLP. Lawyers CAN incorporate in BC, most other jurisdictions permit same thing but must use ‘Law Corporation.’ But all be members of Law Soc, cannot be an LLP and Law Corp. ONT partnership act s. 10 is equivalent of BCPA s 104. Though ps in LLPs are liable for actions against them, their partners are not liable. Partners who are not personally resp for actions that led to civil liability do not share in damages against partner that was. You are a pship, lp or llp. LLPs- These are not about investment, they are bout proteting ps from liability. This segues into law act hm re law corps.

### Joint ventures (see Kamex)

- are not pships, on p 46 judge is trying to say what is NOT a pship. This is not a legal term, but CAN be a statutory term (Investment aCts etc). This has no def in CL, term exists bc some American states says that pships cannot be corps bc courts thought that shareholders in these corps should not be bound by acitons of persons who were not really partners. Hm. This is NOT rule in Canada, is unusual but if a corp wants to be a partnership and all agree it’s ok. Is not a separate category of biz org, see Kamex- court is trying to decide if X is a pship. If they say no, this does not mean that indivs involved do not have responsibility to each other. In Kamex , although not partners they did stand in fiduciary rel to each other. Like trustees who are not ps but are fiduciaries. Joint vs are special contracts, but does not reference legal principle. Read Salomon.

### - Corporations : Sole

- not a fish. Is a person like the Queen who is by her nature a Corporation, a legal entity, beyond her personal capacity. Not in book!

# Evolution of Biz Corps Law and Nature of Corporate Responsibility

## History of CDN Biz Corps Law

- exercise to create co in Canada eg ICBC, BC Hydro are creatures of ‘Special Act’ process due to investment of public funds, only shareholder is Crown. Were usually created by own statute (Bc Hydro Act etc). As long as they are not inconsistent with this act, provisions of BC Corps Act will applyl. Internal rules re shareholders’ rights in ordinary statute apply on residual basis. Deeds of Settlement were used to create trustees like directors and shareholders like beneficiaries. 1850s = big change, was not fully understood as acheiveing what we now take for granted but was prototype for present. Co was separate person with shareholders and dirs and gave s holders limited liability in law. **CDN history on p 48: see Wagoness book from 1930s- gives CDN system re letters patent system in 1860s ONT, QC etc and what other provinces (registration jurisds- Maritimes, Alta and BC who all copied UK Act. ). Book says BC is sui generis, B says this is true bc we are not a letters patent jurisd but we have been less enthusiastic about provisions that ON etc have recently broght in. BC is a combo of Canada Business Corps aCt and earlier English law.** Distinction eg def of board in s. 136 BC Act comes from Joint Stock Cos in England established through trustees. Is a vesting of all powers in board, LP jurisds give more reference to s holders’ powers if they act unanimously. This is not a meaningful distinction! Systems have coalesced. 1960s- CDN ON Royal Commission set up due to fraud by Atlantic Acceptance co, Lawrence report 1967 = new ON Biz Corps Act 1970. This act abolished incorporation by letters patent, bc this carried idea that state had discretion whether or not to incorporate you but this had never occurred in ON if you had paid fees and filed. One person corps became possible, prior to this it had under a myth that it required a person.

### Salomon v Salomon and Co Ltd.

**- was all about Mr S, law at that time required at least 7 ppl to incorporate, so he dragged in his family to do so and gave them one share each and kept rest for self. He was really a one man show, except for complying with statute.** Ls in 20th C would put secretaries on forms to get no of ppl. NB: corps that issue shares to larger group of ppl making them public cos (reporting cos AKA), these terms come to us from UK: family bizs were private, those on stock ex were public. Today this is more impt for securities Act purposes (if a business is trying to get capital from public, it has to show a prospectus. This makes it a reporting issuer, in BC these must have at least three s holders under BC Act. 1970 On act also abolished ultra vires: bc a corp is artificial, it does nothave powers of a natural person. So theory in UK in 20th C was that if corps did not state what powers were, they did not have them. Courts held: if a co did s thing beyond its legal powers (eg set up an airline), these powers were null and void and s holders did not suffer but the creditors would! Two types of Creditors in world: trade creditors (suppliers) without lawyers and banks who insisted on personal guarantees. Unsoph creditors were prejudiced by this doctrine, as they lacked sophistication to protect selves. Doctrine got bad name. Illegality of ultra vires act was validated in this act and this is case in BC today. Hm

###### Canada Business Corps aCt 1970s.

This is still in force, main feature of report was not to tidy up outdated aspects of CL but to enhance CL insofar as it was seen to .....eg Mr Salomon got full powers, others were puppets. This sort of dominance of a single s hodler or groupd of managers has persisted to present and is commonest prob for courts re internal affairs of corps. S holders not on boardwill never be members as incumbent members will make sure they never get to board. Directors are not employees of corps, are elected by shareholders as officials. If statute applies, thye have total power to conduct affairs of artificial person.

BC: only two major acts since 1960s: new act in 1973, newest in 2004: has new provisions.

###### Securities aCt

- there was no such thing in CDN until 1960s, was part of New Deal legisl in 19333-34 acts which set up securities ex commission in US . this is most powerful body in world re this area. Fed law ousts state regulators. Its innovatios have = CDN law as it is now. There was no Sec Agency in UK, City ran City. UK govt condoned self reg by institutions, old boys network. Continuous disclosure : issuers of shares must inform public of material changes in biz at any time they occur, in addition to annual reports. Eg takeover bids, M and A. Commissions regulate this disclosure. Proxy solicitation hm- these are shares you use to vote in favour of a nominee to board. When a co makes a takeover bid for another, it is telling s holder of that co to sell to them. If incumbent mgmt of this co don’t like this suitor, they will tell s holders not to sell and to keep shares. Offeror must say what intentions are, what their stake in co already is and any conflict of interest.

###### Insider trading:

- there was no law on this in CDN until 70s. Fiduciary duties of directors gives us CL origins of this, but insider trading does not involve dirs- it involves inner circle or associates of them, even family. These ppl are ‘tipees’ in US law, and they can be liable. This is particularized in CDN, our Securities Act says when liability arises and when not. Fed Govt has also established a securities regulator.

- we are now in interim period, some provinces wanted a fed regulator, others did not . B says it is a a good idea as present system is convoluted. You only want to comply with one securities act, but you have to comply with all prov acts if you want to raise capital across country. You prepare a master prospectus which has to be approved by other regulators. Is untidy. Securities acts like BC act apply to anything in prov. If B as an insider breaks the act in BC, it does not matter that shares were foreign. It is the conduct that is beign reulated, the trading itself. But Corporations Acts create corps with certain powers and rights/responsibilities that are sourced in place it was incorporated. See p 51. Also with solicitation for shares: you have to be careful in CDN not to trigger US law, if you post a letter to the US asking them to buy shares in biz this brings in Securities act 1933 bc delivery of letter is under US postal service and this means they will regulate whole of distribution if they can.

P 53-

###### CDN Const. s. 91 (11)

 in Const lets provs incorporate : Bonanza Creek case: ‘prov objects’ words are only re a corp incorporated in one prov to carry on biz in another. Each prov can have a stat, but this cannot dictate to another that it can do biz in other provs. This is one of reasons for registration requirement re partnerships, ie BC cos incorporated here who want to go to Alta can be limited by prov- they only want you to register as an extra provincial co so that third parties know who to serve process on to sue to process an obligation.

###### Citizens insurance Case

- parl had authority in own right to incorporate under fEd Biz Corps aCt are immune from prov acts be they are sourced in fed valid power to do biz throughout country. Have exemption from prov acts, this is now rare. Only recent case is multiple access case v McCutcheon: bc there are insider trading laws in fed law, ON said these were ultra vires to Parl bc this is to do with securities. Held: as long as they don’t go too far, there is parallel jurisd to regulate this trading.

###### Salomon v Salomon Cont:

- **corp is a separate person!** This was required at time. S ran biz as sole prop, decided to incorporate. Legal advisors told him to transfer assets to a trust as a trustee, they will then transfer assets to newly formed co. He as acting as ‘promoter’ in language of day, for promoting his own company. They were under some finduciary duty to s holders, there were no securities acts at that time and judges were filling in gaps. NB: monetary value that S put on biz for transfer suggested that he had a proprietary interest in what his biz was worth. **This reflected laissez faire attitude, courts felt he did not have to be criticized for placing too great an emphasis on value of co.** He transferred all assets to business which became separate legal person, he took cash back/ a shareholder position along with nominee shareholders in family (this created equity for them. You don’t own property by being a shareholder, but you do have equity if co is wound up/ a debenture (s. 2 of BC aCt- an acknowledgement of debt by a company usually secured over its assets. This is hte only type of debt whose registration process is in our act itself. Other types are provided for in separate legislation which applies whether person is an .... only corps can issue debentures bc they are the only ones who can register it in ss 90 and on in our act. Debentures have the best of both worlds: you register charge in Vic against assets of co, but in meantime co can buy and sell its assets without asking you to modify terms of debenture to allow that. **This does make S a secured creditor and his family too.)**

- S got cash, position and debenture bc he is dominant force in co, penultimate power under

###### s 136 BCA

 is in board of dirs: power to supervise co vests with board. S could tell these puppets what to do, it really vested in him. This includes issuing shares to him! This is provided for separately in act. S 136 is generic power to manage a corp,

######  S 64 BCA

is a subset of this re power of board to issue shares. Board has power to issue shares at prices they determine. They tried here to say that he abused the exercise of this power. HL reversed lower court and said he had total authority of this , board could only contest this by alleging breach of fiduciary duty. Two probs with this:A) person with standing to complain about breach is the company! Duty is owed to co, not to dirs. He is the company, so he’s not going to sue himself! He is in charge of litigation, s holders cannot tell him to bring proceedings in co’s name bc under s 36 he is in charge of litigation. Co is separate person to whom duty is owed, but it is controlled by defendant. B) freedom of contract: courts said they would not get into second guessing , s 136 vests power in dirs , total power. But they are accountable for breaches , so you can investigate the consideration re selling shares for too little. Answer : business judgment rule: courts will not second guess corp mgmt. Big issue we face is this re mgmt compensation in 21st C. Public is shocked re how much dirs reward selves. This could amount to breach of fiduciary duty: how can we justify paying you so much re how much co gets for yoru service? Courts say no, biz ppl know biz. We will not touch these decisions, this hs created pressure for new legisl and rules on stock exchanges and securities legisl.

- Salomon failed argument: co ran up large debts, was failure and went into liq. **Was debenture that S had arranged for co to issue him that had now been transferred to another creditor, Broderip, entitled to the ordinary priority that secured debt had over unsecured debt?** Was a fight btwn new owner and secured creditors. S was prepared to toss as much money as he could at failing business, but he ran out. Only party not willing to be deferential was Broderip. CA: S had used this co as his agent, it was not separate from him. As principal, he had to reimburse it. **HL: no, not only was co that S incorporated a separate legal person apart form sharloders and Broderip and able to contract on own behalf but on facts he had not abused statute in any way and he did not have to pay back trade creditors.** B’s venture got normal priority that such debts enjoy. There are laws about protection for creditors in specialized situations, but none of these were involved here. **Case: upholds corporate form (trade credtiros were not happy), endorsed utility of corp and enshirines business judgment rule in UK and US law as it showed deferenc courts will show to misfeasance and even reduces fiducirary duty if dirs can be shown to have acted reasonably.** Go to pearson and corporate bail, maybe even to BC act. Hm.

- imaginative Ls in Eng had to be creative to create something like this Corp structure. Before Co legisl came into place, it set out K rights of signatories (later = shareholders). In other provs Articles of Inorporation create co, but are there to define co’s capitalization in terms of no of shares. This is AKA the Charter, Stating Doc, Const etc. But in BC the pub doc is Notice of articles. The private document which is not filed in Vic is the articles. In ONT, these are called bylaws. The 1862 act that came into being brought idea that

###### s. 19 BCA:

contents of articles/bylaws were a type of K.: a co and its shareholders are bound by companies articles in manner under sub s. 3 (which says that these have the effect as if they had been sealed by co and each shareholder separately ...

- if you are a shareholder in BC co, and articles are i nvariance with Stat that there has to be 2 mos notice of AGM and you find out that board has called meeting with one week’s and you wanted to speak at it, you could witout Stat itself, you could use rights under s 19 that this meeting be suspended until proper notice had been given. This is a personal K right you have, esp good for minority shareholders.

##### Oppression remedy

- is impt for minority shareholders, is a Stat provision under s 227. Check this. This allows them to complain about breaches of fiduciary duty. Catch 22 was that presidents were in charge of the corp, which was only person that could bring suit against them (themselves). This is a broad form of relief available to all shareholders. Maybe even a creditor, if court is convinced they should be able to use this provision. This would have totally changed the outcome of Salomon! It’s a very impt provision, one third of internal affairs of cos = this remedy. Is family affairs act. You need Const and/or articles to enforce it properly. Hm. Post Salomon, the position of creditors was one of their lack of enjoyment of same rights re shareholders. Broderip only had rights coming from the debenture as security. B could not use the language from Co’s memorandum/articles. Creditors are not parties to Co’s const. This is known as contract in the articles theory. This is bad bc creditors think they have equal rights to equity investors but no! Are only residual rights.

- B in Salomon claimed co was S’s agent, a mere instrumentality of S (theory that allows courts to go behind who owns and directs a co in the US, Anglo/CDN law does not say this. It says that S does not say a co could never be the agent of a shareholder, but this will be rare.

### Lifting the Corporate Veil

- court has NEVER said X is not a corporation, they have just said that consequences that would have flown from saying this is not a co will not be applied. To say it is not a co would be to say the registrar had it wrong in Victoria eg the cert of inc ation had been forged, fees had not been paid or something. There iss no coherent theory on this, the US is closer to having one with its instrumentality doctrine. Courts have sometimes attached personal liability to tort claims ie to dirs. But there are examples in Canada re intentional torts like IP fraud where courts have come close to this. B says:

###### Clarkson v Zhelka

- property speculation, Selkirk had all shares in co named Industrial. This co tried to avoid S’s creditors by transferring prop to S’s sister. Trustee in bankruptcy wanted assets , sought declration that sister held this property in turst for Selkirk. But there were two transfer. Held: transfer from Industrial was voluntary, without consideration and an attempt to defeat creidotrs. Sister had land on trust for Industial . but could the court look behind the corporate personality of Industrial and say that it held this land in turn in trust for S? No! Court did not go this far, would not find on facts that I was agent of S. Conceded that he dominated the co, all of its real estate transactions but its creation was not part of a plan to defraud creditors. Is application of Salomon, either the co is a separate legal entity fomr shareholders or no? He could protect assets , but this was natural outcome of it having a separatelegal personality. It might hve been different if he had been in significant legal difficulty at time of inc ation, but this was just his MO. He did not stand to lose on basis of limited liability, was not liable for debts of this co. CDN courts uphold Salomon.

######  De Salaberry Realties Ltd. v MNR

after Salomon, despite lack of examples**, there may be cases where a court will find the corp to be the agent of its principal shareholder** . this is an example of lifting the veil, this was endorsed by Salomon. B) this is most common, when the copr structure is designed to avoid something like tax aliability (Salaberry)- wanted better treatment of capital gains**. Each sub subsidiary was one piece of land co was buying, was structuring self this way to give tax man idea these props had been bought to be run as businesses.** Court disagreed, but said they would look at who owned shares in them and asked about how shares had been acquired and not the structure of the cos. Courts here enjoy collecting tax! When ppl claim deductions based on argument that Rev Can should look behind corp;s personality to who owns it, they are less willing to do so. - is a classic example of holding subsidiary structure. Cos use terms of art eg being affiliated with another. Subsidiaries one and two are affiliated bc they have same parent co. Horizontal or vertical linkages. BC statute does define when cos are holding and subsidiaries of one another. This is defined as whether or not the holding co controls the subsidiary.

BCA S s (3) b

- control is de facto. You normally mean that holding co has more than 50% of voting shares in subsidiary. Holding co has ability to decide who board of dirs are, need simple majority at AGM.

**STronach, Weston/Loblaws- these are publically traded cos but there is little doubt which company controls.** But in US, ownership is more diversified eg GM. When Ralph Nader tried to get GM to build better cars, he began Campaign GM to elect him to board of GM with lots of little investors. They could put motions on table, board voted and he got 5% of shareholders votes. Failed. This is an example of lack of influence of shareholders on co. Stronach owns large bloc of shares, **does indiv or co that is shareholder have ability to elect majority of board? If** you have ten or fifteen percent of shares of a co like GM your influence would be much more than wht this number reflects, bc you will be largest indiv shareholder. You can probably maintain control of board. **De salaberry claimed he was buying these props as businesses/ shopping centres, court held this had just been done to flip them. Very few had enough money to operate independently, every time they did something the moeny came from holding co. Also- they never dealt with one another, all transactison were vertical. Dirs were all nominees, did not do daily businesses. Were vehicles for acquisition of property. Court agreed with tax man that purpose of trading in properties was not that argued by taxpayer, so were liable for more tax.**

- holding cos are not always dishonestly formed. Eg GE has an aerospace division and an appliance division. The corp structure is in opposed areas, so it makes sense not to merge them. This is also impt in foreign in vestment, sometimes you are forced to inc ate overseas. Eg China says you cannot own all shares, must sell to locals too.

##### Fraud

###### Gilford v Horne EW case

- civil liability upheld, EW case. 50s, former employee of car dealership made a covenant that he would not set up another d ship within X miles of former employer. So he incorporated self! Other party sued for breach of K/covenant. The pre existing liability was upheld. Hm. This is probably what would happen in Canada: a pre existing liability cannot be avoided by shrouding self in corp personality, you are still answerable. The pre meditated nature of this dictated against them.

- US tort cases were similar, but had no pre existing liability as above.

### Theorizing Corporate Personality

- US judges in 19thC- corps are total fictions, dependent on state legislatures. this was changed by enviro and labour legislation, these are ad hoc responses to lack of change in corp statutes. Therrien theory- Chicago school: law and economics theory, emphasis was on markets and their force. Emphasises contractual nature of Corp, revisited s. 19- is a nexus of Ks, creditor and debtor, shareholder and co. This allows us to evaluate market forces in terms of how corps are run. This sidelined crim law and equity , had a theory of market control. If you run a bz efficiently, it is a matter of time before you are bought as someone will always have the money and expertise to do so. This is not as widespread in Canada because of families like Westons etc.

# The Process of Incorporation

### Intro and Place of Incorporation

- the chief problem here is the name! Articles are often standard form, schedule to act has model set/ standard form of adhesion. You cant’ use registerd trademarks, or a name someone else has, the Registrar is like the Mormon church! But the Vic reg does not check in other provs, has guidelines on this online. Some Statutes prohibit this, eg UN Act, can’t connect self to Govt or royals. Differentiation is impt, you should describe self as you really are. **No longer must be CDN or BC residents, CL sees your place of inc ation means which act governs your affairs re shareholding and powers of co etc.** Pps 150-53 talks about US situation: different, is going in opposite direction, states do not try to differentiate selves and are harmonizing! Read up to bottom of pg 2 f outline. Up to p 160 in book. - no residency requirements anymore, conflict of laws: go to home statute. Pp 150-53 on theory. Fed incorporation is sometimes more popular if there is a new fed act, but ppl then usually go back to incorporating under prov stat. A BC biz COULD incorporate under NFLD law, but there’s no point.

### Extra provincial licencing and filing requirements

 : this imposes certain requirements on cos inc’ated outside or prov, but doing biz outside prov. This is about how to civilly serve against them. **(in civil law, law refers to seat of business- Sitzt).**

###### BCA s. 1

Terms

Company

: a corp inc’ated under its provisions or under a predecessor to this act. But act also uses word corp (this is generic, includes companies incorporated under act). So

extra prov companies

are not companies!

 CL test for determining jurisdiction: where do they do business. Court has discretion, eg person in transit lounge has no connection to BC, will not assert jurisdiction.

Foreign Entitites

: those under part 11 are extra prov companies. So what **is test for having to register? This is under**

s 375 BCA

: carrying on business in prov. Sources of law for meaning of this: stat and CL. Text notes

 Weight Watchers case

: NY state corp, entered into a franchise agreement with a CDN to carry this on in Ont. was parent co in NY doing business in Ont bc it had franchised someone else to do so? **Held: no, under a franchise. Similar one off rels are NOT doing business.** Same with principal and agent : if you are an agent in another jurisd, this does not mean p is doing biz there.

s. 375 BCA:

Q is: is there continuity of presence? Sub 2- put name in phone book, have warehouse in prov.

 s. 376 BCA

:how to establish: need attorney, etc.

S 384 BCA

: must display name of entity, if you don’t, personal liability is imposed on dirs.

S 378 (4) BCA

- if you don’t register as extra prov co when you should, nothing you do is invalid bc of this failure to register. Onus is on person who should be registered to prove that they were not doing business in prov.

Merger

- eg a friendly takeover bid. Eg two BC cos want to become one, have options: one can wind itself up and commit suicide (shareholders vote , need high enough level of approval and assets are sold, stat creditors are paid, then secured, then unsecured, then shareholders.) normally these funds would then be used to buy shares in new co. B) first co can buy all assets of second , making it worthless. But these re untidy, act allows for merger and amalgamation. These require that shareholders of each co whose shares have votes attached to them (not all have this, but some MUST. In small cos, most will, but cos like Magna try to set it up so that family will always control co.) anything like a merger or amalgamation comes within term of fundamental change.

- distinctions are made when shareholders voting in person or by proxy btwn matters requiring majority or a special resolution. If two cos want to merge, boards must decide this and go to act. There must be separate meetings of shareholders of co, special resolution is put to them. This must be passed if merger is to go forward. Special resolution is defined in act as vote of 2/3 or more or a higher percentage if co const specifies this. Most do NOT, but they can. This is then referred to BCSC, acts as a protector for minority shareholders (who are not enough to defeat this but will say they are being screwed. Judge looks at whether formalities are complied with. If so, this is the presumption of fairness. Dissenters/sentients must find something else wrong.) BC cases often concern J Pattison. But these provisiosn in act cannot be used if one co is extra prov. So we have copied US acts: continuation provisions. There have to be matching provisions in both acts. Alta co and BC co merge- Alta co is emigrating to BC, so there has to be a provision allowing this and also allowing it to come in. This is the only way for a foreign co to amalgamate with a BC co. This is under part 9 div 3 of act ss. \_\_\_. This is a territorial statute.

### Continuance Under the Law of Another Jurisdiction

###### ss. 303-311 BCA

### Classification of Corporations

##### a) widely held (public) vs closely held (private) corps.

###### s. 1 BCA

- def of ‘public company’ , ‘reporting issuer’ and ‘reporting issuer equivalent.’

- statutes do not make difference between corps clear, this is only impt for securities regulations. Widely held, closely held etc are colloquial terms. This is lawyers’ law! Only impt for these ppl. They are legal advisors, have idiosyncratic opinions**. BC Act calls ‘public company’ what others call widely held or reporting company.** Is defined as co registered with prospectus in US, any of its securities are traded on floor of stock exchange, or they are the subject of a trade body like NASDAQ. Shares of these companies are traded in wider world amongst public.

- what is an issuer? Ppl can distribute shares to public, this does not make them corps. But they are an issuer, and have to have securities and do other things to protect public. Does prov think this issuance of securities should be subject to disclosure requirements? Test is whether or not you are issuing shares to public, but what is ‘public’? Ralston Purina case in US- why is term public there? Why do some get prospectuses and not others? Public is those who need to know what these disclosure requirements are . this is now the test. When is it ok to let issuers off the hook? These are very expensive to do, there is civil and crim liability coming out of this. They are onerous. So public companies under our act turns on whether they are a reporting issuer , this turns on whether or not they are selling to public and this turns on need to know basis. Securities act does not just cover BCCA cos that are public, it covers all issuers in prov where need to knw test is satisfied. Eg a FR co trying to sell shares in BC must comply with our laws bc what you ar doing triggers need to protect investors here under secs act.

- you are either a public company under act OR a company or a company that is not a public co. There is no residual category. B says you shoul d have used reporting co, this would have matechd up with secs act. So sometimes act does differentiate. Sometimes you need to know which one you are. Financial statements of public companies under s 210 must be audited, but others can dispense with this and most do bc audits are expensive and there is no public interest in the accts being audited. But if you are publically traded, it’s prob on the TSE so you will ahve to be audited in ON. If we had a Fed securities commission, we wouldn’t have to do all this cross checking. S 120- all cos inc’d under act must have at least one dir, but reporting cos need at least three (will always have at least three shareholders too). This plays into s 223- audit requirement. Reporting public cos under the act must have committees on board of dirs who meet with auditors to discuss financial statements of co. This is only for public companies. S 197- there are differences in financial statements, heavier in public cos.

##### One person cos

Sole cos under s 172 allowsfor one person meetings , sub 3. S 140 sub 4- dirs meetings with only one person.

###### Constrained share corps

- this is mainly media, insuracen, financial cos like banks, publishers. These are all fed regulated businesses that parl has usually put lmits on foreign ownership. These are hard requirements to deal with when these cos are publically traded. Sometimes even accidentally. So there are regs und Canada Biz Corprs aCt that allow these corps to put in place rules about restrictions on trading in these shares pursuant to these regs.

##### Professional corps

- this is connected to LLPs, many law firms inc ate perhaps as one person co. This is driven by tax, but when prof activities are involved there are other laws that come into play eg law socs

##### Unlimited liability

- only in NS, to do with tax liability in US. Not impt.

##### Special act corps

- these are corps that owe existence to statutes passed by prov legislature other than bca or its predecessor. Eg bc ferries, hydro. Their charter is not at bc registry, it is in the statute which creates them. This wil say exactly what they do eg transport etc. Eg Royal Museum in Vic is under Museum act. These acts overrule the BCA.

##### Names of Corporations

###### BCA ss. 21-29

- for most solicitors, this is the most impt and point of entry into this area. This gives monopoly power to prov, others are excluded from using the same or similar name. So this affects how discretion is exercised: eg one word names are no good like Electricity Ltd. As this restricts other cos in area, these are only allowed where you have trademark in this are like Coke. No confusingly similar names that might confuse consumers. You can object to a name that has been approved, eg a co wants a name given withdrawn by suing for passing off in tort in CL. Second remedy is fed one under trademark act, if this is infringed you can attack it. But under

s. 406 BCA

**- those affected by any ruling of the registrar can challenge permission granted.** Courts have mainly looked at similar criteria used by registrar itself. They like names that describe what you do eg WPG plumbing inc. Like distinctiveness , but is hit and miss as they dont’ know names given in other provs. You CAN get a number name eg 123 BC ltd, but need BC ltd. This is used when it has nothing to do with public, eg only used to own a piece of land and have no need to make argument for distinctiveness. Names can be restricted for any good reason: offensive names, but these standards change. Eg licence plates and child names can be restricted too. Stats fed and prov : you can’t call self RCMP, UN etc. No foreign language names, but translations are ok. Hm. You must display name on biz place, this shows you have limited liability. But people don’t like to tell you who they are.

###### S. 27 BCA

- co must say who they are. Endings: Corp, incorp, ltd if you are in fact incorporated under stat.

##### Name changes

###### s 263BCA

- this needs an amendment to cos notice of articles. BC Corps : these are equivalent of memorandum. Articles in BC are eq to by-laws. Big changes in 2004 under present act. Name of co must appear in notice of articles, if dirs then want to change it they have to amend notice of articles. This requires 2/3 shareholders of those present and entitled to vote or a higher percentage up to ¾ if articles require. Read up to black and smallwood.

# The Nature of the Corporate Constitution

**- s 30 powers, s 33 restrictions. S 259 amendments and appraisal remedy (ss 237 fe hm)
- remedies A) standing s 228 b) grounds s 33 (i). C) relief s 228.**

- BC is odd bc it keeps term company and has retained terms articles and not of arts that are out of sync with other provs. ‘promoter’s ie those who want to start co enter into agreement under s 10 which shows who they are and which shares they are buying. Charter/stating/const of are two in no: not of arts (was memorandum, this term is retained bc of grandfathered corps. Is a 2002 act not proclaimed until 2004.) NOA is filed with registrar, must use form 1 (U)- names and addresses of dirs. Need not bea shareholder, but in most small fam businesses they are same ppl. Also name and addresses of two officers (registered office and record office. Former is address of corp where civil process is served. This might even be of law firm that incorporated them. Form must also show authorized share structure of company.

Shares

- choses in action. Bundles of rights. Have share cert although e trading means you never see them. These have name and no held on them. Statement of capital of co in terms of number of shares, legal ownership of corp. As a legal fiction, this can only occur through person who owns these shares. Dirs are incharge of distrib, when co inc ates owners take positiosn acc to those stated in NOA, but these can then be sold. That buyer has an eq interest as shareholder, not legal. This is not perfected until they take share certs to secretary of co and ask taht their name replace name on cert. This is rarely done. Risk: when you present doc of transfer and share cert asking them to cancel and replace and issue new share cert, there are confusingly two types os shares under stat. S 52- authorized shares structure. Cos can give

Par value and no par value shares

- auth share structure of co in NOA could say this consists of 1000 no par value shares. These can be issued immediately ie sold to founding shareholders or held back and issued later. Initial def is authorized share capital of co which may consist of capital and unissued share capital. This is in opposition to borrowing money to raise capital from creditors. Only diff that corps can do is issue debenturs.k hm. If an investor is willing to be an owner of biz, they can be sold unissued shares. Co never has to pay back this money. Before 1970s in BC it was NPV shares did not exist, only PVs (so your statement of capital is 500 shares with PV of one dollar. PV= nominal monetary figure assigned to each share. Courts: these cannot be sold for less than one dollar? No, this is a discount over its NPV. This creates impression that co raised 500 bucks, hm. PV prob- it bears no rel to value of shares. Maybe dirs sold this 500 in assets! So this lost cred! US Dollar is now immutable. US preferred NPVs , if you own half you basically own half of co. But you can’t take assets, dirs sitll have these. PV is nominal value, has no market based value.

Powers of shareholder: right to vote at AGM, right to dividends (if any declared on pro rata basis), and right to return on capital winding up. share value is not fixed in NOA, if they need to be amended you need a special resolution. Classes of shares: in Can, Magna and Weston etc will give class of shares to fam members with weighted voting rights so that in concert they can control AGMs. They are nervous about losign control. Class differentials are sometimes made to give preference to these ppl. There may also be non voting shares. These also have first right to payment of dividends if declared bc these are at discretion of dirs. You rae also repayed capital first on winding up. bene share owners can instruct legal owners how to show.

### Articles

- are an inhouse doc kept at records office, are internal rules of cos. Model set is in table one of act. Share certs, agms, election of dirs etc. Completing party hm signs off and attests to certification and procedure. Cert of inc ation is issued.

Legal effect of stating docs

- contents of these are part of law applying to co combined with prov law and fed law.

###### S 19 (3) BCA

 hm- docs have contractual effect. Old fashioned wording; comes form 19th c. Drafting deeds of corps which used trusts to created cos. Wanted to say that by the wya all of these terms are bindig on everyone so they can enforce them against one another. Staetmetn that NOA and articles are K. Bind shareholders to each other and to co. Ie if you were denied right to vote at AGM when you were you could go to court and get declaration that co be forced to let you vote in contract. No case has ever awarded damages, but declrs and injunctions yes and have also denied standing to third parties ( eg

###### Eli case

**- Ls with clauses saying they must be used have no standing**.) this theory is ananchronistic, CL judges in past thought that joing an assoc with others when not a majority participant meant that you give up indep to others’ visions for co and cannot disagree on everything. So Js were less understanding of complaints. But change has occurred: there are a lot more minority shareholder friendly provisions in stat itself. Eg **derivative actions in s 227 and appraisal remedy in s 237.**

This enforces freedom of contract notion / laissez faire VS idea that courts should do as little as possible. Standing under

###### s 228 BCA

: those with this have been extended beyond shareholders even outside of act to those you can convince judge should have stganding. Eg creditors can as juduge to get remedy under oppression remedy bc they have been treated in oppressive or prejudicial way . this gets around privity of K. In letters patent jurisds, there was no theory of

##### Ultra Vires

- in LP jurisds, corps were assumed to have all powers of natural persons. You had to clothe self with objectives that you wanted to do as a business and powers that were set out in doc. Joint stock cos had long lists of every conceivable power shareholders could have . NOA was 20 pgs long! Was a reidiculous attempt to define all the objectives and powers that anyone cold have bc consequence of not doing so was that if you did s thing you hadn’t thought of in memorandum it was null. This got even worse bc nobody read them, but you had constructive notice of them bc they were public docs. Catch 22- you were demed to know, but if co did s thing they should n’t you couldn’t enforce rights. This prejudiced creditors bc banks knew all this and got arond it with personal guarnatess etc but unsoph creditors could exploit these and say they could not buy X bc this was not in K and Ks buying X are null and void. This led to tracing etc. Ultra vires and constr notice were abolished in BC in 70s. Under

###### s 421 BCA

. (no constr notice) . but it does accept situations where you should have known. Eg a dir must have known. S 30- abolishes CL UV doctrine: cos under this act have power s rights and privs of indiv of full cpapacity so NOA does not need to set these out.

###### S 33 BCA

- this replaces CL notion of UV with new stat system that allows for restrictions. Co can restrict anywhere in arts or NOA powers under s 30, but sub 2: no act of co is invalid if it violates such a restriction. Act abolishes const notice by law of contents And that even if co violates restrictions, those actions are no longer void. All such restrictions can be amended: new restrictions added, removed or modified. This is a const change to stating docs so needs special resolution of shareholders to pass under s 259. It triggers a civil remedy on part of shareholders who are unhappy and dissent to this amendment. Dirs have to convene by notice a s holders meeting, put motion to meeting eg deleting restrictions. This needs a 2/3 up to ¾ spec resolution , s holders might be unhappy with tihs bc they liked this restriction bc it protected your investment so you dissent and vote against it but you dont’ hve enough votes to affect it. Unlike the oppression remedy which is dependent on judge, you rely on judge’s discreation. Here you are guaranteed rights and get money. Hm. Appraisal remedy is referred to here under ss. 237. This is a tech rememdy re time limits etc.

##### Judicial relief when co is about to violate restrictions in articles

- **CL : UV remedies were breach of fid duty of dirs**. They could not aruge they were allowed to do UV acts, such acts are violations by their nature. S holders could ask for remedy this way, but it was more likely that standing issue here (fid duty was owed to co, not s holder), but you had powers under NOA as K and you could assert K rights to ask court to issue injunction or declr. S holders had standing in CL to complain about K breaches that got around this standing prob. Some argue this remedy still exists, but this is unclear. Given that there are stat remedies in act for breaches of these restirctinss, these are exhaustive.

- **there is no remedy provision for ss 30 and 33**, but

###### s 228 BCA

 is a catch all provision : complainants can apply to court ifa violation fo a restriction in NOA is imminent. There is reference here to

###### s 33 BCA

, so clear relief for violatin and there is even compensation that can be paid for K breach to extent that third party might be disadvantaged by K being set aside. Also

###### s 154 BCA

 says that dirs cvan be personally liable for this. So s holder does not suffer, dirs do! It does not come out of corp funds.

##### Extra Prov Cos

– powers in

###### s 378 (2) BCA

. Read this: EPCs doing biz in prov must reg , have powers /capacities as in their Charter docs.

#####  Comity

- is built into CL CDN system. When judges hear X is inc ated under another jurisd, they defer unless they feel there is fraud etc. They defer to it being a corp under another system.

##### Ultra Vires

- other CL countries prob still have this law, tiny fragments of Eng Empire who have not reformed statutes eg Ireland, HK were hold outs. Bermuda? No matter what laws re foreign EPC’s capacity are, any act it does or on its behalf in BC is valid. Persons doing biz with those EPCs or agents can rely on these being valid. S 33 (2) re actions of local cos that might have:

### The concept of Restrictions [ss 30-33, 154(1)(a), 228(3)(c), 259, 260, 378(2) and (4) ]

###### s 33 (2) BCA

. protects trade creditors and others prejudiced by CL ultra vires doctrine. Corpss incorporated under provisions are natural persons, no restrictions but can self impose them under s 33. Public is not deemed to know what these are under constr notice (abolished by s 421 of BC act). But what if a co is engaged in an act its constitution restricts it from doing? Can anyone seek relief? Eg why would restrictions be imposed: not common! But where a creditor insists on them (maybe an investor, passive shareholder or even lender), they are possible. Under UV theory, s holders had standing to say that part of K had restrictions and these have occurred (or are about to) an that they want an injunction. OR that there was a fid breach, although this is owed to co not s holders so they don’t really have standing. But in K theory under

### s 19 BCA

, this does not matter, they are a party to K and its articles and want non pecuniary relief. Prob at CL was that creditors were not party to articles, so for them to seek an injunction was not really possible, but they are the MOST threatened by restritced acts.

##### Statutes on Restricted Acts

- starting point is

###### s 228 BCA

- borrowed in 1970s from US Uniform Law Business Corporations Act whereby states work together to develop uniform statutes on basic matters eg sale of goods. **Who has standing? Complainant is s holder OR any other person appropriate ( eg creditors- but they have to go to judge and argue for standing- courts generally sympathetic.**) if any co or dir is about to contravene act/Regs or memo /NOA this kicks in. This is relief on top of relief, their standing was already recognized at CL. Eg Eli (sol) arguing co must hire him as sol. (this is not taking into acct Ks of service.) this section has much wider scope: is a stat provision for relief when cos are about to infringe , but has wider scope re s holders’ rights**. Enlarges s 19 (idea that Const is K) to cover whole statute.** - eg Dirs cannot without s holder approval borrow more than 100 dollars in 6 mos period. If so, cred could ask for order. Eg co cannot sell assets without s holder approval, there could be an injunction.

###### S 228 3 c

 – court can order re violation of restrciont- anyting incl one re K in s 33 that compensation b e paid (reimbursing them for losses consequential to borrowing). This compensation is paid by co, but what if there are other s holders who were not involved in commission of restricted act? S holders, not dirs. This remedy has been sought, but they have to pay share of compensation. This is addressed by s 154- this lists infractions of stat and makes dirs personally liable. Mostly acts done by dirs as agents of corp, so would argue this is corp responsibility (money paid from co acct). BUT if co does have to pay under s 228 re s 33 infracions: dirs are liable, pierce corp veil, impose liability where fault lies. S holder gets restrictions that protect them.

##### Personal remedies (ss 228, 154, 201, 227, 238, 19)

- Dirs have fid duty to co they are liable for breaches of us eg using conf info to make profit. This is breach of fid duty under s 142, BUT this is owed to co not s holders. Prisioners are in charge of jail. If minority s holder asks why dir has not reimbursed them for profit made, dirs can say they are in charge of civil proceedings in co name! Under s 136- dirs have power to start civ proceedings on its behalf. Lawyers need resolution of board authorizing L to sue in co’s name. Witout this you are not sure you actually have authority to act on X’s behalf. Minority s holders are left hanging, not fair. BUT Court will question they have standing under s 142 asking for relief, they are NOT the company! If there is a change in ownership, they might authorize proceedings in co’s name (corp right of action), this is duty to breach alleged fid duty under s 142. Is unusually impt to be able to advise a s holder as to rights X has in capacity as s holder (personal remedies- there is not standing prob). Stat is untidy! S 154 is for compensation under s 228 orders, s 20 is pre incorporation hm s 227 is most impt s holder remedy – oppressgion remedy. S 238 is appraisal remedy if cos want to inc ate in another jurisd , can force to purchase their shares. Very impt too, allows s holders to get out of town with some money and seek compensation. Act calls it Dissent Proceedings. S 19- K and Articles theory.

 Corporate Remedies

Derivative action under ss 232-33 (and 142 hm?) allows s holders leave to bring action in co’s name. Court lends co’s name to a groupf of applicants who can bring action vs miscreant dir and other dirs willnot allow proceedings in co’s name. Usually a minority s holder asking for permission from court. is no more or less a group of rights than what co usually have, is a parallel action. Conversely, any recovery belongs to co , s holder indirectly benefits bc this money returns to coffers. This is very expensive civil action, two –tiered.

# Pre Incorporation Contracts

- problematic area,

###### s 20 BCA

 is only area- intends to remedy CL mischief through Stat. Is unclear area, does not entirely work. How do you figure out when it applies? This is not K law, Conflict of Laws which are clear. This is a K area, historically the prb is that : when a promoter or agent purports to act on bhalf of a co not yet in existence, they are acting for a non existant principal. (like entering a K on behalf of an unborn child. Law will not allow this.) CO has or has not been in corporate. Kellner and Baxter and Black v Smallwood are templates here. B v S is still relevant: B’s main prob with s 20 is: what if co is never inc ated at all? A facilitator starts to enter into K with A in expectiation that co will come into being under act, but it never does. Does s 20 aply? B says no! It cannot apply. K rights are enforceable or not, cannot be tied to this section bc it is only relevant to cos inc ated under act and there is not one!

###### Kellner v Boxter EW

- early case, prob: Ais supplying alco to hotel about to be inc ated, but would be agent and supplier both know co does not exist. This is made clear on p 167: ‘proposed’ appears in signing line, this suggests it does not exist at time of agreement. Co was, however, inc ated and then collapsed, had no resources to pay A for prodocuts supplied to T, so A sues T . Hm.Court agreed both knew co did not exist at time, there must have been common intent that T would be personaly liable for goods. Unclear: would A always be personally liable? Or did it mean that in these circs when both knew co did nto exist they must have intended that T would assume personal liability . CL was so uncertain before this point, when cos performed this performance did NOT create K. Nothing would do except a new agreement, co could manipulate agreement in own interest. BC let this sit until 2004- there is still a lot of uncertainty , see text. Even when there was an agreement to vary terms, this variation did NOT create a new agreement. Courts in BC and other provs showed some attempt by judges to deal with situation, begs for orders to say that co takes benefits from T. Quantum meruit was used, so were trusts with analogies to unborn children.

###### Black v Smallwood EW

- both these cases were followed in Canada, are example of how law was prior to Stat. This was exact opposite of Kellner v Baxter, both parties mistakenly thought a co had actually been in corporate when A purported to act on its behalf. Court distinguished and disagreed with Kellner, seems like Mistake under K law. Parties had mistaken ideas about landscape, held: K v B does not mean that personal liability arises on A’s part when co not in existence in EVEY situation. It was only on the facts of that case, particularly bc both parties knew co did not exist. In this case, given that there was a mistaken belief that co did actually exist on part of A and T, if it did not exist it would be inconsistent with the common intention ....result: no K, nullity, nothing binding on corp. (which did not exist anyway). CDN follows this in GMAC v Wiseman and in EW in Newborn case. CL is now complex, courts: if you K with someone else, let’s statrt with presumption you intend personal liability. In Smallwood, findings are consistent with idea that both parites had same identical belief to undermine that T or intended to be personally bound. Mischief: promoters could manipulate circs to get benefits for co they are involved with but try to eliminate possibility that they and later the co would be liable for these benes. S 20 is impt, but be aware there are other rules in CDN on written notice etc

###### Wickberg v Shatsky

- on p 9 in text , there is reference to very rare civil remedy called action for breach of warranty of authority. Ie if A represetnts to T that he or she IS the agent of principal, and has authority to act on behalf and this is a false representation, T can seek damages but thisis a pyrrhich remedy. T got K to be a manager (K of employment with co’s promoter) similar sit to Black v Smallwood: parties thought co existed, but it did not , **so court applied Black v Smallwood :** s**ince parties intended that co be bound and not A personally, A cannot be personally liable.** Outcome same as B v S , but held: T , ex manager, has remedy for breach of warranty vs A bc a represetnted that co existed. Bizarre case: co could not have paid you anyways! This remedy has lack of credibility based on seeing in action. This is like s 20, but does provide elements of a remedy that was lacking here. Under s 20- P is calleis the d new company , A is called facilitator, and T is outsider. No matter what A intends, A is personally liable for Ks entered into prior to co’s inc ation but his or her personal liablility disappears once co is inc ated and does anything to signify its intention to adopt arrangement that A had ostensibliy entered into ostensibly on its behalf. T has action against A until inc ation, if after this Co takes benes it become subrogated and co has K rel with T.

- B asks: what if this Co never comes into being? A and T are in BC, a tells T co is going to be inc ated and is a promoter and wants to buy X so co can use it. And then there is no inc ation. At CL, Sols would say inc ation was easy and ppl could act as if co was in existence and sol does not inc ate for weeks. What about liability for things in this time period?

### Statutory Reform: S 20 BCA

- QC courts: s 20 is un Const bc it ceded Parl’s jurisd over property rights, but this has had no impact. This section is unusual, is more outside general scope of act overall. Framework for rules on pre inc ation Ks where co is set up under act . sub 2- hm ‘facilitator’ / promoter by entering into agreements with outsiders warrants to them that co will be inc ated and will adopt agreement A is entering into. ON equavlents do NOT use this method of setting up a deemed warranty, p 177 s 14 ON act- promoter is PERSONALLY bound. This is like finding in Kellner being morphed intoa a presumption of personal liability, B says this is better- if co does not come into existence and/or does not adopt K that A is entering into , T’s remedy is not just to enforce personally against A under s 14 of Fed act but also to sue A for breach of warranty. These are rare and if Wittberg v Shatzky is right they are damaging. Hm. Para 2 – damages and how to calculate them. If we use the CL matter, this case says: the loss of T does not flow from breach of warranty, it flows from co not coming into existence. So this si unhelpful for T. See also: s 20 sub 8- facilitator is not liable under sub 2 above if parties to pre inc K have in writing agreed that that person will not be. A can K out of presumed warranty to T if T agrees to this. B : this sets up probs, T may say to self that they are happy to seek relief elsewhere but what if she has been misled and co has no assets/ is a sham to allow A and co to avoid responsibilities? May have been a sham. T can sue in fraud or for negl misrep, but this not a happy ending. Section goes on to provide that the ‘new co’ (P) can adopt K by any conduct signifying its intention to be bound by K. This is broad, do not need a new agreement. This reverses CL, just by performing terms of arrangement P becomes bound as if a new agreement had been entered into. If this happens, promoter is not personally bound/ his warranty dissolves. Devil is in details: Q is then what are the remedies? B thinks this is intended to be an exhaustinve code, CL remedies under Kellner are not available. You must use warranty claim against A, you can’t say you are not going to use s 20. We both knew did not exist, so I want to sue A bc there is a K. (This is what happened in Kellner, but can you do this? It’s simpler than getting into breach of warranties, but B says it is clear that this seciont is to exclude the CL/ exhaustive). Code is NOT exhaustive, some pre inc K issues would have to be resolved outside s 20.

##### Remedies under s. 20 BCA

###### s. 20 BCA Subs 5 and 6:

**5 – only applies if co does not within reas time adopt K.** Is premised on assumption that co is inc ated under act and there has been a pre inc ation arrangement but you canot find any basis to say that new co P has adopted pre inc ation K. This provision is like quantum meruit for T: if co does not adopt K in reas time the faciliatotr or any party incl T can apply for order than new co resotre benefits it has received to applicant. Eg T has provided supplies to A (co), but co does not adopt this arrangement so T’s expectation to be paid does no arise. T can go to court under sub 5 for order for reas payment for services or good supplied. Classic remedy for this was tracing: if co still has the goods you have provided and there is no K to enforce payment you can get them back, but this is an equitable remedy. Turns on whet or not intervening equities have occurred, eg if co has re sold godos to bfpfv you can’t trace anymore/ things that do not originate from your side of bargain. **Sub 5 only applies when co does not adopt K.**

**Sub 6- whether it does or not.** Anybody (promoter, third party , even co itself if it has adopted the K) can apply to court to re arrange the obligations of parties. This is unusual, court is asked to re write Ks incl for joint and several liability. Will be applied where T has some problem with arrangement. Facilitator may have kept some benefits T has provided, partial adoption. Most order (none in BcC so far) would involve shared liability btwn T and A acc to B. Judges can do equity to figure out what is best for parties based on their behaviour. This is diff from anything under CL, flies in face of privity of K.

- hm Act or conduct signifying intention to be bound: is broad, even non action might suffice. Is fact specific, what was dnoe and not done by agents of co. Is like estoppel. P 179 in Q 6: does the Fed provision prevent promoter from assigning the pre inca ation K to the co? Would this relieve A from personal liability? Our provision in BC does NOT (under Arbutus case- not on exam) allow this, B agrees. Rare instance where courts might ignore principles, is this an exhaustive code? How do you know when this section applies? B thinks that unless co is inc ated , this section has no application to prelim steps. Acc to B: if people were mistaken as to in action, it would be a nullity and to no effect (Blac v Smallwood would still be good law in BC). In Kellner: there was a K btwn A and T, this is fine. But as in b v Smallwood mistake enters picture and you have basis to say this does not apply). **Act here steps outside law of corps and goes into K law.** You really have a conflict sit: law of K is proper law of K (either what parties said would govern or what court says).

##### Mgmt and Control of the Corporation

##### Intro

- courts talk about these insts as principle organs of corp. One is s holders at AGM (public cos must have AGM with opportunity for them to give views, maybe even give proposals for agenda not supported by dirs. These events are infrequent, in very large cos very few s holders show up for AGM as are bored/busy.) other organ is b of Dirs: it too meets under articles/bylaws, but is more of an ongoing concern bc they have power to manage affairs of co (very broad def). Corps can only act through human intermediaries, purport to represent as agents of co itself. Scope of power vested by board is so grand that is more or less excludes AGM meetings re running of co.

###### Salomon v Salomon

- this upholds this principle**: if powers under**

###### s 136 BCA

**(uses similar provision to articles) are used, there is very little power left over for aGM.** Most impt thing AGM does is elect Dirs.

###### S 1 (3) BCA

 **gives def of Dirs , sub three gives ways Dris can attain office : be named in NOA, or elected.** For an ongoing biz, the normal way a person asserts status is to say they were elcted to board. This is not in Stat , elction process is set out in articles. Boards usually have 20-30 ppl, are not all re elected in one year. Some are rotated in. Incumbent Dirs are in charge of AGM! This is a prob, they determin within paramaters of articles where and when it will occur, how proxy system will work (invites s holders to appoint Dir or some other agent to vote your shares on your behalf). If you are a little engaged, you might fill it out. The only thing you can practically do if you hate the Dirs is to sell shares.. so what keeps Dirs on their toes? Highest paid CEOs make big money, is male old boys’ club. But this is what Dirs Want! Law and economics would say that there is something else governing these ppl, that someone will eventually take co over (s one with enough assets will realize they could make co worth a lot more). **L and E ppl say this is more efficient for controlling Cos than any laws could. B says this does not work in CDN context bc ownership of largest cos is not as diverse, but might work in US.**

##### Types of Dirs

- **outside and inside: inside are employees of co, outside are not. Inside are senior mgmt eg Pres, CFO, general counsel etc. So board has two groups on it, those with hands on rel and those without.** Outside Dirs might be retired employees or ppl form industry co is in but in CDN many of these people sit on multiple boards (more than in US, more clubby here). S holder democ mvmt in US in 70s : s holders wanted to demand meeting of s holders outside AGM although not obliged to, or s holder proposals ( agenda items that can be added to agenda of AGM).

######  s 136 BCA

- vests mgmt in board, not in indiv member but collectively. Powers under s 136 are not personal unless has been delegated authority to do that by board as a whole. Board meets and makes decisions collectively, are exercising powers under s 136. Any indiv has to be able to point ot authority of board to do this. **Duties that Dirs have (eg fid duty under s 142 ) ARE owed individually, not collectively. S 136: grant of power it establishes is subject to act and regs**. We will soon look at s 301 which gives s holders veto power if Dris want to sell main assets and buy new ones. S holders get veto here to affirm or reject proposed action of co. **S 136** is also subject to memorandum of articles that limits powers of board. This is not the same as restrictions , those are on power of co itself, these are limits on grant of pwer in **s. 136** that are specific in this co eg dirs ahve power to declare dividends but need s holder approval to do so (this is unusual bc there is a circular insularity here). Dirs are running things, incl AGM, so if there was such a provision in articles they would try to convince Dirs (s holders?) to remove it. Hm.

###### Automatic Self-Cleaning Filter Syndicate v Cuninghame

- p 208, **classic decision on meaning and scope of B of Dirs authorit. Language in**

###### s 136 BCA

 was in co’s articles, gave mgmt and control in board. S holders got together in AGM and resolved to sell most of co assets. Told Dirs they had done so, told them to implement it. Dirs said no, members then went to court and said they wanted declr that board was bound to carry out resolution to sell assets. Held: s holders cannot impose will on board in this way. Articles put all mgmt powers in board, this leaves s holders without such powers. Only way they can get their will is ot amend rticles, to re allocate grant of power to Dirs to revert and re allocate this back to them in AGM. This would need resolution at an AGM where Dirs would argue against this and likely win. CDN has provision to short circuit this procedure: automatic dismissal procedure in

###### s 128 (3) BCA

 **This says that at any time during tenure in office, Dirs can be dismissed by special resolution in favour of their dismissal.** This sounds good, but is rarely to dissenting minority s holders: it requires the convocation of meeting of s holders, and under act the only way s holders can convene meetings that are under control of Dirs is if 5% or more request it. This gives material group of dissidents auth to convene AGAINST Dirs, could then put a resolution under **s 128 (3)** firing some or all of the Dirs. Prob: the threshold for a special resolution is so high, Dirs will have more credibility to overall s holders just by virtue of holding office and managing co. Most ppl are cautious re money , choice is sober ppl in charge or rebels in audience.

##### - If Dirs are unable to function (use powers properly) , on p 161:

###### Baron v Potter EW

- knife edge majority, one person had majority at meeting of s holders, another who was dire enemy had majority at Dirs meetings. Both had desired meetings to get their way, deadlock. Board couldn’t function bc of inability of two sides to even speak to each other. Held: must resolve, when you are dysfunctional to this extent your powers revert to members in AGM. Whoever controls this decides who is on board. Today prob would be under oppression remedy: is family law of act, more common in small businesses with deadlock, so court will resort to this to sort it out. **- so which organ is primary organ? Dirs are more powerful, but s holders OWN assets! But grant of power in s 136 makes Dirs more powerful, esp in widely held public cos.**

- in view of abolition of constructive notice, B is surprised editors have included this on hm. But Tercon is still good law re indoor mgmt? Also audits- anti fraud device , also sale and undertaking.

**- ss. 223-226 are only controls Canada puts on dirs**. Germany puts workers on boards, state decision under Bismarck, but this has no traction in NA. EU corp laws are harmonized: Boards have to be in two parts (supervisory and mgmt, this is inside and outside dirs). But CDN act does not try to do this at all. Scan countries put quotas on women on boards too. Outside dirs get to check on how mgmt are doing tasks, enhances overall competence and prevents misfeasance. Separate incompetent mgmt and dishonest mgmt. Person responsible for fraud disappears, but are others responsible? Might be...

##### Agency and Delegation

**- three types of agency re corps A) actual authority- agent has it! B) usual authority- can be claimed on what would normally be attached to someone holding their job. C) apparent or ostensible authority (p 226)**- involves estoppel, eg someone acts as if mngr of co and involve it in K rels with another but does NOT have this authority, but it is known to superiors and they do not disabuse third party of this notion. So when T tries to enforce A’s representations against P, they have no argument. Agency revolves around whether or not they are bound. This is a prob when P is a corp bc they are an agent acting on behalf of the corp, is no prob when p is an indiv. S 136 vests almost any power a person could exercise in board- broad language re board as a whole acting usually through majority vote has powers to do almost anything a corp can do. Is this ultra vires? Ie the board having only clothed itself in powers of corp, this related to outsiders bc they were never sure if what board did could be done by corp.

-delegation: internal issue- if you have a power you can delegate this and supervise, if you have a power you can delegate but you must retain power to revoke it. **delegatus non potest delegare, 'one to whom power is delegated cannot himself further delegate that power'- this would contradict s 136.**

### Indoor Mgmt Rule

- ulta vires at CL- act has made inroads into doctrine A) has abolished idea that corps only have powers they confer upon them by Charter but

###### s 136 BCA

says that co has powers of indiv in full capacity. ALL cos start off with full powers, and can impose restriction on selves. Act also in

###### s 421 BCA

 abolishes CL doctrine of constr notice (outsiders were deemed to know of limitations, this is abolished). No one is deemed to know what they were. During time that ultra vires doctrine was in full bloom, CL dealt witha problem in a compromise : any borrowing over 100K required a majority shareholder vote on this. But an outsider who lent this money could be told that they were deemed to know under constr notice at CL that said shareholder approval was needed for a loan of this size. NOW outsiders are entitled to assume a vote took place, so this is now enforceable at CL. It’s not for outsider to find out if there are any limits on borrowing. You might say that if you actually knew there was a limit, see

######  s 421 BCA

- you are not deemed to know merely by fact that docs are publically registered, so if you knew from another source you could still be liable.

###### S 146(1) BCA

- co may not assert against a person claiming that he co’s NOA had not been complied with. This seems to be the same as s 18 in CBCA which upholds indoor mgmt rule. Board powers are under s 136.

### Audit Committees/ Corporate Governance

- ppl have concerns on how publically traded cos are managed, audit committe is initiative that has come out of these concerns. Huge debate on remuneration for CEOs and Dirs, this has been elusive in terms of remedies. Law and econ crowd; if corp mgmt pay selves too much the co will be vulnerable and market will take them over. Others say this is too optimistic and there should be something done about this. Shareholder approval and stock exchange requirements are premised on prestige of listing and are self regulatory, ie will not let them trade unless they implement methods on standards for corp remuneration. Only sanction these ppl have is expulsion from membership.

###### Ss 223 and 226 BCA

**only apply to public cos. These do not really make much sense for BC act cos that are not public bc most of those cos do auditing function on their own**. In

######  s 223 BCA

: boards of public cos must elect an audit committee at first meeting and its members must already be members of board so they are not delegating powers that board otherwise has to outsiders/mgmt/employees- they are electing selves to committee. This is the closest Canada gets to supervision of mgmt of boards of public cos. **There must be at least three members and a majority must not be officers or employees of co or an affiliate, this means that they cannot be an outsider director**. By requiring that a majority be outside dirs , this is moving towards an indep body. **Cos that are not public can get away with one dir on this committee. Hm.**

- most boards of large publically traded cos have diff committees eg compensation committees, litigation committee (co is frequently asked to decide if it recommend to the board that the co bring legal action in co’s name against a dir). **Auditors are under**

######  s. 204 BCA

 **and following- is only built in mechanism to prevent fraud, auditor is NOT en employee of co and has to be hired for public cos under stat and must be professional, must investigate co’s accounts as prepared by its internal accountants and advising if there are any probs with these accounts.** There have been many cases on the liability in negligence of these firms. Given the complexity of what these firms do, their work is more complex. They don’t check everything, but they have to do inquiries (however, these involve schemes to deflect this discovery which often work.) eg

###### \_\_\_\_\_\_SCC case

- employe bought platinum from co and then resold it to ppl who provided it, person in charge was putting money aside for himself and ran to Brazil so issue was about his supervisors.

**Requirements: auditor must get notice of any meetings of this committee and must appear if requested.** BUT there is no requirement he be asked to appear, although he has right to appear. Outside dirs are often former auditors, job is well paid and prestigious. So there is a cozy relationship here and there are incentives for auditors NOT to do job too well. This is under s. 224 (5)

###### S 224 (6) BCA

- auditor can but does not have to demand that audit committee meet. audit committee must study accounts and the outside auditor’s report are required by statute, these must be given to audit committee for its perusal. But most ppl in senior positions cannot read financial stmnts! So only professional standards are those on auditors, even accountants donot need any nor do members of audit committee. This is about linking the auditing function to mgmt supervision in hope that this will uncover fraud if it exists. B says there are big probs; auditor may not appear if requested and there are no sanctions, auditors are compromised by loyalty to corp – have to please masters and can be fired, outside dirs on audit committee maynothave financial literacy it is assumed they have to do their job as committee members properly.

### Sale of the Undertaking

###### s 301 BCA

- idiosyncratic, not in text. Is IMPT- lots of caselaw on this. At CL board could liquidate corp, see

######  Fayermann case

Hm. P \_\_- this was on basis of implied contract btwn shareholders. B questions this, in CL there was a failure of sub strata (massive sale of assets = winding up with s holders getting return on capital). It was said at CL to be an unjust act so it justified s holders asking for co to be wound up. if a s holder is totally at wits end to just get out of co, they have standing to go to court to have it wound up. this remedy is premised on same relief that partners were entitled to seek at CL. Eg if a partner believed his involvement was unworkable, they could ask for a dissolution . this is under

###### s. 324 BCA

of act , applied to corps as well. **Fayermann**: it was sometimes seen as just to wind it up at petition of s holder if mgmt had sold all assets. It was not denying mgmt did not have power to do what they had done, but it had consequences. This happened in

###### Automatic case

**S hodlers passed resolution for winding up but board refused. Could Dirs do so? No! This was not a power that belonged to s holders, it had been vested in NOA in board. S holders could not even usurp this by unanimous vote.** This would be decided the same way now even though we have **s 301 BCA** while s holders can veto selling assets they still cannot order them to do so! Bear in mind the limitations of this act.

###### S 301 BCA

**- if board wish to sell all or most of co’s undertaking, unless such a sale is in ordinary course of biz, they have to go to s holders in extraordinary meeting and let them vote for or against sale.**

**- most isues on this section involve meaning of phrases: ‘all or substantially all of co’s undertaking.’ And ‘in ordinary course.’** There has to be a special resolution but only role it can play is to vote down wish of board to sell assets. If s holders vote in favour, board can still refuse to make sale under own judgment and power in

###### s 136 BCA

 to change mind. Thye cannot then be told they have to . Automatic would be decided in same way in BC now despite **s 301**, but if board don’t like this by more than 2/3 they cna prevent sale. Ask self: does it apply (it a sale not in ordinary course) and has the act been complied with? This is a veto power, a stat condition precedent. Vote in favour of this by s holders is needed for board to proceed with a sale big enough to be caught under s 301 but if vote is in favour of sale, board can still decide not to. If vote is not in favour of sale, board can still not sell.

###### s. 301 Sub 6 BCA

has exceptions to application of 301- co giving mortgage over al assets or lease of less than three years are not sales.

###### s. 301 sub 6 Paras C – F BCA

: treat sales btwn corp affiliates as outside scope of section. This is a statutory lifting of veil ie if holding/subsidiary rel continues to exist, this is outside section. This is a deemed lifting of corp veil.

###### S. 301 Sub 3 BCA

- what is T’s position/ sale is valid even thogh section is not complied with. Outsider’s rights are protected, but T has to be a bona fide purchaser for value. See also

###### s 33 BCA

- even though co does restricted act, it is still enforceable even though it may have other consequences. This is to protect outsiders.

###### s. 33 (5) BCA (Appraisal/ Dissent Remedy)

**Sale of undertaking (if subject to this setion) is a fundamental change, anything that requires a special resolution**. These fund changes which are perfectly in powers of mgmt to enter into, give s holders right to get out under **appraisal remedy in s 237. AKA dissent remedy in BC – under su b 5 in BC act. This is not just another personal remedy, it’s one that does not turn on you proving any wrong doing- it is an automatic entitlement**. You just have to dissent (not vote in favour of sale)- once you dissent from special resolution, you can then trigger this entitlement to sell shares. In Canada, not all shares in public cos are tradeable! Some shares are moribund in market, this is a valuable remedy if this is the case.

Other provisions in s 301 relate to it not being complied with eg what if vote on sale should have been taken but it was not. This is another personal remedy but it turns on section not being complied with- ie when vote that should have been taken is not put to s holders. Standing is for s holders AND creditors and dirs! A creditor might want to protect a loan in this way. Remedies: provision for an injunction to prevent sale, rescission of sale and any consequential relief. This is the same as commission of restricted acts. Similar remedies are available for restricted acts, co may have to pay compensation. NB s 154- bad dir in restricted act could be made personally liable for compenstiona to third party, but there is no provision in s 301 like this. Plaintiff cannot go behind corp and attach personal liability . s 301 is not listed in s 154 so there is no way to do this unless ocurt exte3nds discretion in this way but this has never been done.

##### Undertakings

- has no precise legal meaning, but is understood to mean at CL: all assets of a biz/copr or partnership. Eg real estate, personal proprety, licences, trademarks, goodwill. All of these property rights = undertaking. In BC and other provs in reported and unreported cases on this provision, Canadian courts have been willing to apply CL from US precedent eg

People v Katz (US)

- US case, US co with large assets in Canada but were 51% of assets though only generated 45% of revenues. **Held: this WAS a sale of substantially all of its assets. Test from FAyermann was applied, looked at word substantial and said it has quantitative and qualitiatve aspect.** It would be too simplistic to cut off sales as not substantial if less than 50% on qualitattivley grounds. Starting point is quant (analyze what percent on book value are being sold) and they qual (does sale strike at heart o fbiz, does it destroy co’s business -Fayermann). This is vague, 75% in a quant test would be hard to argue was not a sale of subst all. But what if a co like GE with many divisions sold off whole divisions as routine and replace them, the dollar value might be huge but for this co it migh tnot be that unusual. Higher percent book value wise, the more likely it is to be qualitatively significant. You just need data on nature of co’s business. Fayermann was a family business, certain indivs in mgmt decided that co which was a Home Depot type place would keep stock and not replace it. This is dissolution of retail without a vote by s holders as a change in details, court held this WAS winding up.

- prob with section is rel btwn ‘subst all of assets’ and phrase ‘not in ordinary course of biz’. So can a sale of subst all assets EVER be in ordinary course? Fayermann – ‘ordinary corse’ is stat language for qualitative test. Sale might not meet the quantitiave test re non replacement of inventory, but it DOES meets the qual test. This would destroy the co’s biz bc it would run out of inventory and be unable to function, tantamount to winding up. they place more reliance on fact that it met in qual sense the substantiality of the act. The act has an internal contradiction. Essence of this section is sequential application of quant and qual aspects of meaning of word substantial. Start with raw data and then ask if this means the end of the org. Cos can get away with unusual transactions, eg sell something large, but if it means destroying their income generating power it is winding up. go up to care and skill on pg 4.

###### Peoples 2004 SCC 68 (CAnLii) paras 62-64.

###### s 142 BCA

restates scope of CL. Is dec laratory, but has been suggested that maybe it adds s thing to CL. Two CL duties, in some jurisds they are not seen as distinct. Eg AUS duty of care is seen as part of fid duty, this relates to remedies bc fid duties are purely equitable but duty of care is tort so you can’t sue for damages in equity, although jurisds are fused. This is mostly ignored in Canada.

# Duties of Directors and Officers

- if you say only Dirs owe duty in

###### s 142 BCA

, you are setting this up for people to categorize selves as other than Dirs to avoid this duty. This pots duty on Dirs AND officers, Dir is defined in this act but officer is NOT so it’s impossible for those who manage corps to avoid responsibility by doing this ie can be deemed subject regardless of what they call selves. CL duty of care is gross negl standard: fid duty is richer legal mine. There is a major prob in corp law: Dirs and officers have duties imposed but they are not strictly speaking trustees. They are held ot highest standard of all bc have powers they can use only for benes so courts are strict on their responsibility.

##### Self dealing/ contracting with Corp

- these sections deal with prob of when a Dir is on both sides of a deal with own corp eg are Dir of one corp and enter K with another one where they are a s holder.

##### Corp Opportunity

- dir becomes aware of s thing only bc he is Dir and wants to exploit it, decides not to do so for corp but for self. What is liability?

##### Competition

- multiple mini dir ships: more potential risk of liability, but not illegal.

##### Hostile Takeovers

- how to take self serving steps to prevent these? This may = keeping position on board, is this a breach of fid duty bc of this scenario?

##### Avoiding responsibility retro actively or pro actively

* these duties are owed as Dirs as indivs, not by board and are owed to Corp not to s holders. Only way a s holder can enforce is by suing derivatively (going to judge and getting permission to borrow co’s name for purpose of bringing suit. Proceeds will beliong to corp if they win, s holder only indirectly benefits.) OR you can ignore s 142 and seek CL remedy or stat remedy (personal remedies like oppression, dissent appraisal, enforcing under s 19, or 228 compliance order. ) main prob in cases with breach of duty of care for Dirs is perception that it is diff to establish breach of duty of care. See p 271

### Common Law Duties of Directors

###### Re City Equitable Fire Insurance Co. Ltd.

**- nature of duty of care: lax!** Some call this gross negl. Laissez faire re liabilities of Dirs. P 271 three elements set out by court : **A) Dir is only required to exhibit care and skill of person reas expected of her knowledge and experience.** Is subjective. There are no professional requirements for being a Dir, there is no source of spec knowledge. No pre ordained def of expertise **B) is also not requreid to give continuous attention to Dir duties.** Supports idea that job is not that hard, can play golf and parachute in. S 136: describes powers in board (management and supervision). This description in case speaks to supervision, not mgmt. Structure of large enterprise puts board in sup role, not mgmt. Esp re outside Dirs, have little to do most of time. Only formal obligation is to come to Dir meetings when called, and you might get away with not goig to all of them. This area is in tyransition, in past ppl used to stay away form board meetings for years. Courts now feel more obliged to respond to inactivity,real prob: most cases arise from sins of omission! Eg not going to meetings, not asking questions. Pro active breaches are rare bc when this happens courts say biz ppl have to make choices and courts have no expertise so cannot second guess. Are more comfortable with procedural issues. In and of itself, intermittent involvement is sufficient. **C) Dirs are entitled to rely on mgmt, don’t have to second gues them unless put on inquiry , are like auditors who cannot say we talked to everyone and saw no probs, so co is fine bc they have a defined prof responsibility as auditing standards evolve.** Now must do spot checks even though not put on inquiry by infor put in front of them. Dirs, not so. Can rely on discussions without need to investigate unless they sense a prob, have a sup role by very nature. Policy justificaiotn that it used by courts: judges lack expertise to second guess biz decisions. AMEX case in US: board had to clawback dividend and get tax benefit or distribute it. Went for former and were called negligent by s holders. Held: we don’t know if this was wrong. Lack of judicial activism here. In some cases like Bell and Peoples an allegation of breach of duty of care is thrown in without expectiation of success, fid duty breach has more roadmap in decided cases re liability so it’s easier to advise ppl. CDN courts are deferential to institutions, so in absence of procedural violation they stay away from substance of finding bc they lack tools to investigate.

##### Difficulties for s holders instigating proceedgins

1. S holders are on outside, corps are under growing obligations to make records available. Still cannot get minutes of Dir meetings, so it’s hard to compile ev to build case vs Dir for breach of duty of care. Smaller corps do not keep records at all, esp when 2-3 indivs bc they have no time so there is no trail for s holder to find. City Eq: action was in name of crop, not derivative claim, claiming negl against former Dirs but only reason for this is that co was in receivership by time actin was brought. Dirs have all records, if in course of forensic investigate THEY have duty to act if they find probs.
2. Primary organ that authorizes these actions is board itself, circular situation whereby either all potential defs are members of board or indivs are and others join ranks. This is why Deriviateiv action emerged. CL decision :

###### Foss v Harbottle EW

**- you lack standing as s holder bc you are not co. Co is separate legal person. This duty is owed to co, its representative should be in court arguing breach of duty not you.** There may be exceptions to this, these form basis of what became derivative action. ‘fraud on minority’ – something terrible. If Dris had essentially put all co’s money in own accts and spent them, s holder would say yes you are not the right person to allege breach of fid duty but this is to bad we will allow it with caveat that proceeds still go to corp, not to indiv. In a world where contingencies were illegal there was little incentive to do this as there was too mjuch risk and cost. Act actually addresses this in

###### s 232-233 BCA

. This replaces Foss v Harbottle: widens standing beyond fraud on minority exception, try to address costs. C) a breach of duty of care in so far as it was not seen as a dishonest act (which a breach of fid duty often connotes eg COI) ...wht if Dris call extraoridinary meeting of s holders to ratify what they have done, some will be the directors. Might say mea culpa: we did s thing that is a breach of duty of care in s 142, but are you prepared to affirm what we have done (this is called ratification). S holders in AGM ARE the corp. A majority of them affirming a breach are whitewashing it. Mere negl was reatifiable breach, fraud on minority was not as this was the exception that allowed derive claims in very limited circs. Big Q: what should be ratifiable and what not? There is a distincition btwn carelessness and dishonesyt, but it’s more complex , see s 233(6)- this has vague language.

- city equitable is a100 yrs old, are we in a diff plce now re law on dirs’ duty of care? Can test be applied more rigorously in modern world. B says yes to limited extent: if you have specialized skills you cnnot pretend you don’t have them when performing role on board.

### Statutory Reform

###### S 142 BCA

: courts in Canada have made clear that stat provisions were designed to expand the potential liability at CL. But this does not mean much!

###### S 142 (1) (b) BCA

 ‘in comparable circumstances’ what does this mean? S

###### s. 142 sub (2) BCA

- this section is in addition to and is not in derogation of CL in respect of duty of care and fid duty at Eq.

###### s. 142 Sub (3) BCA

- Defs are not allowed to contract out of this liability. Cannot say they are not subject to duties even though are Dirs. This is like trying to contract out of driving carefully, although Dirs can get insurance and seek indemnity. Little movement on this until

### Re People’s Deparment Stores SCC 2004

- context is relevant here. If you actually know info as a result of your position as inside Dir , this might be a basis for saying you had been nelg if you did not acquit self in best way. Text has QCCA , this went to SCC which affirmed this but with diff reasons. So read CanLii paras 62-64. P 284 in text, purchasing policy of two cos buying jointly led to prejudice of one co who in end at liquidation stage were forced to co operate with other. Trustee of Peoples sued Wise brothers alleging both breaches of duty of care and fid duty. Had standing as trustees bc powers of board moved to receiver so trustee could bring action in co’s name , did not need to get permission bc trustee IS the co. P 286: gross negl language, this is shorthand for standard that it is difficult to establish breach, must show more than mere negl . CBCA provisions is in operation here, there is no diff btwn it and s 142 here. Court emphasised comparable circs language and endorses language in another case ‘ standard of care is not purely obj or subj... act has both.’ SCC was confused too! P 16 CanLii para 62: enacted version re CBCA includes words in comparable circs which modifies stat standard, this is not intro of subj element re competence of Dir but a contextual element into stat standard of care. This provision requires more of Dris and officers than trad duty of care in City Eq. Standard of care as sub/obj can only lead to confusion. We prefer to call it obj: factual standards of actions of Dir or officer are more impt than subj nature of actions which is subj of fid duty. ‘ B **says contextual here means nothing! This does not change much, we are still left with need to marshall facts and sort out what is a breach of fid duty (eg reliance on others wheninappropriate, or acting without enough info- these are seen as things that require legal advice. If this is not done, this might be proof of negl but this is not easy area to generalize about.)**

- NB: there are sections :

###### s 157 BCA

- allows a Def to0 excuse self if they have relied on others, eg getting legal opinion and you act accordingly and it is wrong you might be exculpated. P 288: reliance on right hand man Clermont in Peoples. He had a BA in Commerce, this was good enough. SCC rejected this reliance, had no prof qualifications, it was not appropriate to excuse what Dirs did based on reliance on him. These are two main areas SCC disagrees with QCCA (Sub/obj and Q of reliance). Otherwise affirmed what Dirs had done based on low level of standard of care here.

### Business Judgment Rule

- courts are saying if the matter is one of business and there were a couple of choices and they made a reas one in circs, we will not scond guess them. This is why SCC affirmed QC case, AND it’s a QC case and QC is different re stakeholders having standing.

- Dirs are NOT professionals, act has only one part in

###### s 124 BCA

: must be over 18, capable of running own affaris, canont be undischargd bankrupt and there are many fraud offences that DQ you but you get off after a few years. It’s pretty slack. No need for univ, quals in business. this reinforces biz judgment rule.

 P 306- 9: meaning of term in US re onus of proof shifting. Onus shifts to plaintiff or Def depending on what is established as case evolves. This is not true in Canada, but we come close if claimant makes prima facie case of \_\_ the onus shifts to \_\_ hm. Biz judgment rule in Canada just refers to deference courts give, is not as formulaic as in some US jurisds

###### Pente v Schneider

case in text p 334

How can a Dir avoid liability in terms of formal reliance on others?

##### Excuse

##### ss 154 and 157 BCA

. S 154 is not about liability for breach of duty of care, it is about liability for being involved as Dir for specific breaches of act. S 154 lists **s 33** as one section where court can impost personal liability on Dir who decided to commit restricted act. This is section specific, these provisions the breach of which threatens the security of creditors and s holders to some extent. Money is being spent wrongly, s holders will say that reason for restriction was to do away with this. If this is broken, Dir should be personally liable. This is an extenstion of

###### s 142 BCA

 to sTat violations. Liability under s 154 is joint and several re Dirs responsible.

##### Exceptions:

 s 33

provides for payment of compensation to an outsider or a s holder can get an order to prevent the restricted act so outsider gets payment on quantum meruit.

###### S 67 BCA

: sale of shares at discount, at CL shares were not allowed to be sold this way eg 10 dollar shares for 5, this was a misrep of funds that co was receiving from outsider investors (co did not really get 10 bucks, but investors think they did.) law has been modified by act, this is a dated concept, investors can investigate what has happened. Securities commission manages this, shares can now be sold at discount in some situations but if you violate residual \_\_ you are liable. Payment when co is insolvent (cannot pay debts) – if it goes ahead and gives money to s holders anyway, Dirs can be liable. Redemption of shares: cos can now buy own shares, many reasons: they might be a good investment (they are insiders of themselves! Co has all info of co, so it’s vulnerable if Dirs know co is being taken over they cannot buy shares as this is insider trading under securities act). S 163- hm.

##### Indemnity of Directors

###### S 154 BCA

 says in way that 142 does not how you figure out personal liability. These can all be defined by specific vote of board authorizing purchase of share, unlike negl which is broad. So how can you avoid liability by not being at meeting? Dir is personally liable for involvement if they were at meeting where consent to the impugned act took place. You are deemed to have consented unless a formal dissent was recorded. If not at meetin allyou , **s 154 says are deemed to have consented unless you deliver in 7 days your dissent.**

- second series of provisions that DO apply to s 142 (breach of duty of care and fid duty) is in s 157: this sets out in addition to CL (City Eq says you can rely on info, but this includes hm. This is an attempt to supplement CL. If dir can prove they relied in good faith on info and its sources in s 157, this not only excuses them of breaches of stat provisions in 154, it also exculpates them from allegations of breaches under s 142.

- s 157 as in Peoples, gross negl. S 154 complements 142, creates new stat liabilities that did not exist at CL. If a Dir violates a Stat incl a restricted act you are subject to requrirements of this section, but liability in 154 it only applies to liability under Stat infractions. But s 157 is not only for an infraction of 154 restrcited acts but also to CL DOC under 142 and fid duty. Will come into almost any case, esp one re negl- ef Dir will try to say he relied on expertise of others and should be excused.

##### Reliance defence

- **must have relied on this honestly (if you had suspicions on accuracy of info you got, or actually knew info was wrong the def is not available).** There are three alternatives re sources you can rely on: financial statements form co or its auditor, written expert reports (lawyers, appraisers, accts), any record that court thinks reas. Reports of accountaint was in peoples p 288 in text, this defence was available acc to QCCA, they held; that it was reas to rely on Clermont their right hand man. Unequivocally showed that bros relied on his report , had BA in finance and 15 yrs experience. BUT in SCC (WHERE?) paras 77 and 78 : upheld result in this case, but varied reasons and said that this defence was unavailable: although he had a BComm the main prof groups named are lawyers, acc’nts etc. These professionals are subject to supervisions by their prof bodies, but C was not. **But bear in mind that many people have had their positions upgraded to professional eg tellers in banks now exec assts. But must prove that they had relied on them in good faith.**

### Fiduciary Duties/ Roles of Directors

- are normally elected on rolling basis, normally by s holders at AGM. You are not employed as a dir, have no right to employment. You are an elected person, this can create problems re remuneration bc you may not be able to sue for fees owed as there is no K basis for this. Term ‘senior officer’ is defined in s. 1 : re named positions , means chair and vice chair of Board, President, VP in charge of of principal business unit , ‘any officer whether or not a Dir who performs a policy making function and has capacity to influence direction of co.’ Third category uses term officer, but this is not defined in act. This gives opportunity for courts to impose duties when they think it’s appropriate to do so, and vice versa when they think person should not have been liable esp re fid duty. Eg insider trading provision under s 192 (hm) in CDN define exactly who is and is not an insider, this invites evasion bc you can figure out in advance if you will be liable for profits you make. US approach is CL, have not set out in this way who is and is not an insider- ‘tippees.’

- **as text points out, the starting point was idea that Dirs were like trustees**. Were in possession of two things: powers under s 136 and when they exercise these to buy sell assets, hire and fire they are supposed to do so under best interests of co, not themselves! Have power to issue shares, looks ok on surface but should not do so to raise money if this means saving their jobs. B) are custodians of co’s real and personal property, so similarly they cannot dispose of this prop in way that undermined interests of co eg sell it to another co of which they are owner at firesale price, cannot appropriate prop (steal it) – eg stealing from a one person co is possible, other person is fictional and this prejudices creditors if you divert prop to yourself and reduce their likelihood of being paid. Dirs are in fid duty to this prop and to co.

##### Breaches of Fid Duty/ Self Dealing (Contracting with the Corporation)

- text categorizes them into groups, but there are other ways of approaching it. eg s holders bringing derivative suits have standing, but employees do NOT usually. So what to do?

S 142 (3) BCA

: you cannot K out of this responsibility, neither CL DOC at 142 nor fid duty under sub 1 (a): **dirs and officers when exercising powers must act honestly and in good faith with view to interests of co**. This is analogous to duties that trustees are under. Eq and CL merger have merged, so we look at categories of people and ask if they have duty: trustees always do, but CL and Stat say that Dirs and officers do too! So are they are the SAME duties? **No, courts cannot hold Dirs and officers to high standards that trustees have.** Dirs are not as immaculate in the exercise of their powers as a trustee bc in the traditional sense of a trust they are under Trustees Act which governs their actions and investments, and this cannot work in a biz context where ppl have to take risks so to say they are fids on one hand but to put them to high standard of trustee is not workable. Courts are clear on this, but are not clear what guideleins are whena Dir or officer fid is in breach. Until Bell case, we thought that biz judgment had not room to affect this discussion . SCC cases on b iz decisions are not given to judges with biz expertise, and they are rare cases so Bell migt not be right. See also sub 2 hm.

- powers under

###### s 136 BCA

are vested collectively, but cannot be asserted by one Dir in order to assert entitlement to manage co by themselves, can only be delegated to do so. **Duties under s 142 ARE the responsibility of individual persons, each Dir and officer is responsible in own right to carry out in minimum accordance with s 142.**

**- there are only two instances in stat where there is a code on one aspect of Fid duty:**

###### s 192 BCA

 on insider trading (is usually the sale and purchase of shares in a corp by one who is motivated by inside secret info eg a corp is soon going to be subject or object of takeover and nobody elese knows this. Shares are at 5 bucks, and bidder will have to buy at 8 so you buy at 5 and sell at 8. So you are accountable for this profit bc you have misused this conf info to personally profit. Irrespective of

###### s 192 BCA

, as far as responsibilities to co are concerned, it is a breach of fid duty. This info belongs to co, if you profit from it you are accountable for this profit so you can be sued for breach of fid duty and argue it is entitled to the three dollars profit. Does this make sense: co has not suffered loss as a result of you making a profit, some say no so it should not be illegal.

### Legislation

B) contracting with co under

###### ss 147- 153 BCA

. These appear to have ousted CL, you cannot sue a Dir for a breach of one of these provisions and also seek (if this does not pan out) to sue them under s 142 for breach of fid duty. These are not an exhaustive code, only place officers and Dirs can be held liable is pursuant to these provisions. P 347

###### Aberdeen case

Dir was being sued, arranged for co to enter into a partnership deal with a co of which he was a partnership. **HL: once the dual interests were proven, the co of which he was a Dir could void it / rescind it.** it did not lie in his mouth to say this was a good deal for both sides, the potential harm to co makes it voidable. Right to rescind does NOT belong to s holders, but to co

itself. His fellow Dirs might be sympathetic and not want to rescind or to sue bc def Dir does not stand in fid rel to s holders but in fid dity to co itself. Duties in s 142 are to co, s holders can only act on them in derivative action.

###### Porcupine Mines case

- hoping that his cronies on board will co operate, he tries to get them to ratify what he has done ie to pass a resolution saying that yes this was a breach of fid duty but they can waive it. **PC : no , there had not been adequate disclosure by def re what he had done so you can’t ratify it.**

###### NW Transport and Beatty

-p 485 in text. interest in a K on part of a Dir with a co, co had purported to ratify the breach and court thought this was effective. But who has power to ratify? At CL, fellow board members were not seen as co for such a breach but s holders at AGM WERE seen as the appropriate body to exercise any ratification that courts saw as effective. Board could call AGM , put before s holders the nature of Dir’s breach and ask them to affirm it and allow Dir to keep profits. If that happened, at CL this was effective. This whitewashed the Dir, breach was dissolved by majority vote. But here: could **Def Dir vote his own shares in favour of this ratification? PC held: yes, bc when he was sitting in Board room he would compromise powers to exonerate self, but he could then become a s holder and therefore not a fid at s holders’ meetings**. But what about when this collides with derivative action? Minority s holders who did not vote in favour of this ratificaiotn, they would prefer profits going back to co.

###### S 233 (6) BCA

 – a vote o fkind above can be taken into acct in granting leave when provessing a derivative claim, but is not determinative. Maybenot all breaches can be ratified like this, also when a Dir is in a K with another co this CAN be ratified by s holders at AGM. When there is only a potential of harm, ratification is appropriate. C) would courts say that alleged misfeasor could vote to ratify own behaviour? Yes, as long as not doing so in capacity as Dir. These are an exhaustive code, Dirs and Officers have potential liabilyt for interests arising out of Ks with co, but only under these provisions. BUT

**- these sections only apply to Dirs and Senior Officers, not Officers, but**

###### s 142 BCA

**DOES apply to officers.** So if these breaches apply to officers, you have to use s 142 against them. Strange: given there was clearly an intent to hive off liability, they did not use word officer in section.

###### S 153 BCA

: creates positive obligation to make disclosure, CL never said this but just said when you would be liable if you did not. But this creates a Stat obligation to do so, this is a stand alone provision, does not modify others.

###### S 147 BCA

- definition of what a disclosable interest is, and if it is material (but what does this mean). There are also things you do not have to disclose, eg senior officer will want a stipend and this is not disclosable.

###### S 148 BCA

- accountability of profits, be careful to distinguish liability to disclose from liability to account (for any profit you make out of a deal).

###### S 149 BCA

- this sets up two situations where you can keep money ( be exonerated), : can get fellow board members to vote to allow def to keep profits. Board did not have this at CL, only s holders could affirm. If this is not possible, it has to go to s holders at AGM, but at CL a simple majority of these s holders would have been enough but you know need a clear majority.

###### S 150 BCA

- remedies, personal remedies that s holderts have . re standing and orders courts can be asked to make.

- B say: major diffs btwn these provisions and CL :

###### s 153 BCA

 makes disclosure mandatory, Dir or SO must disclose interests. Pro active, was not obligatory at CL. S **149 allows for a new sort of ratification not by s holders at AGM, but by board**. Def Dir is not supposed to vote, but rest of board can without having to go to s holders at AGM. C) you cannot K out of these provisions, s 143 (2) hm anything to do with liability .....this also reverses CL, bc CL courts said that if you were cunning enough to put article in NOA that if any Dirs had an outside K, this is not breach. This is ok, liability here is somewhat prophylactic, there is a chance your interest has not harmed co and if founders agree it’s effective. D) under s 150- the provision on seeking court intervention, others beside co have standing. Remedies here make need to get leave to sue derivatively irrelevant, s holders have personal standing under s 150 in contrast to CL position where they have to get a judge to order this. **These are ONLY for Dirs and Senior Officers, ‘officers’ could only be dealt with under s 142**

**S 153- is ambiguous, ‘where a Dir or SO has an office or holds property that COULD conflict with a person’s duties to co the nature and extent of the property and office must be disclosed’ BUT this is only disclosed to board. This is diff from CL, disclosure is not to persons with most interest in knowing it ( s holders).**

##### What is disclosable?

###### s 147 BCA

- disclosable interests under s 153 and following hm: ‘K transactions’ (what does this mean:? Negotiations to a K? ‘That are material to a co’ . what does this mean? or a K that a co ‘proposes to enter into.’ This does not mean discussions alone. Discussion must be material AND def must have material interest in it! CL courts did not use word material, but said that any sort of potential for conflict would be enough eg beign a dir or employee. But Stat brings in idea of materiality could mean that having a few shares in your RRSP is not material.

###### S 147 (2) BCA

- exclusions, Dir or SO’s remuneration is not a material interest. Matters to do with an agreement to indemnify or to take out insurance re accounatability is not a disclosable interest. Nor is a K btwn affiliates, piercing of veil.

###### S 148 (1) BCA

- but if this occurs, you are accountable. But whether you disclose it or not, you are accountable.

##### Ways to avoid accountability

- A) get fellow board members to approve transaction B) special resolution of s hodlers at AGM to approve it or

###### S 150 BCA

1. Go to court under civil jurisd to ask judge to approve you retaining profits. On Thursday, B will talk about ss. 149-151. (ways in which transactions can be approved and s holder relief re breach ) also corp opportunity cases (when a Dir is in discussions with own co re a lucrative biz opportunity and they say no, and he sets up own co anyway). Canada is full of these opportunities in mining. Info about profitable opportunites that come to you in position as fiduciary that you exploit for own gain.

- ss 148/149 on board approval. NB s 149 (3), shareholder special resolutions under s 61 (hm), s 150 (02) on Cart. Hm. Pps 355-357.

- Remedies under ss 147-153 are on breaches , if these were repealed you could still argue breach of fid duty under s 142 (with its probs on standing etc).

Ways Dirs and SOs can extricate selves from having to account for profits and remedies under s. 150 (2). Unlike CL under ss 148 and 149 the Dirs in Board meetings can vote to approve K with disclosure with majority vote. This could allow the indiv to keep profits, though at CL the board could not ratify in this way due to duty being owed to co not to dirs. This is inmates running the asylum. Dir who has the interest in the K (subject of vote ) cannot vote his shares, bt what if ALL Dirs have same or similar interests in co? Can this be affirmed? S 148 (2) (b)- if this is approved under s 149 (except unders 149 sub three where all Dirs are all interested ): board cannot vote to approve all of its members keeping money but a special resolution of s holders CAN. Approval by board is not available if all board members have interest in K. Then need alternate approval of an extraordinary s holders metting in a SPECIAL resolution (not with simple majority, but 2/3). This can be changed in NOA up to ¾ of s holders. But what if they are the same? It is prob ok bc CL makes distinction btwn s holders who are prop owners and Dirs . s holders are not compromised with any other constituency bc are not fiduciaries, just own shares. This can be effect ted, even when they are saem indivs.

##### Shareholder approval

- alternate to board approval, at CL only a simple majority would be needed to ratify breach but under Stat you need 2/3 approval.

###### s. 150 BCA

- in some other provisions in act, eg s 228- this section does not say ‘and any one else’ so this seems closed to creditors (who can still use ss. 232 and 233 on derivative action). Orders: A) that Dirs or SOs are NOT liable (this is a residual provision if board or s holder approval fail). Other sections we see later allow judges to excuse fid duty breaches (one comes fomr Trustee act – being incompetent as professional trustee.), but courts CAN excuse non professional trustees for lack of skill. B finds this problematic bc we are already taking into acct exigencies of commerce when we apply fid dity itself, this is additional excuses tht supplement the business judgment model. It’s a second get out of jail free card, second parole.

###### s. 150 (2) BCA

- Orders for A) injuctions (s holders can try to disallow interested transaction to develop into a firm agreement) B) accountability C) any other appropriate order.

###### S 153 BCA

- a K entered into in violation of NOAs is nevertheless valid, there may be accountability under s \_\_ and 154, but this is to protect innocent third party (T)- if they are at arm’s length, they are entitled to enforce agreement and any losses should be put on Dir or SO.

Text pp 355

**- CBCA s 126 is equivalent of s 148 (4) hm: what is effect of general notice that you have inerest?**

##### Diffs btwn Stat and CL

 Creditors are now ousted under s 150hm. Right to apply for leave to sue derivatively is ousted by specificity in s 150 acc to B. But court might say both allow for an action, but it’s awkward bc only basis for relief is these sections. When suing derivatively you can sue for every obligation under act, but s 150 is a personal remedy like oppression remedy but a specifc version of it. you can’t get leave to sue derivatively bc you don’t need to as you already have standing as a s holder.

### Corporate Opportunity

**Regal Hastings: – one of most impt decisions in co law, Peso- very permissive approach from SCC CAnaero- everything gets reopened , Laskin J – I will not follow black letter in Regal hastings and Pacer, I will make it contextual. Canaero is governing law in Canada, but where does this leave others? It’s unclear.** Corp opportunity is a term to describe scenarios with appropriation , fiduciary takes personal benefit from information or transactions that appear to have been part of corporate universe. Rules of accountability that are too precisely defined allow shrewd players to frame actions not to come in zone of acct’ity. And there is problem: how to reconcile preventative role that fid duty plays to not allow Dirs to allow personal interests to compromise fid duty and to allow business interests on the other. See **Norris J dissent in Peso on p 372 in text- ‘ it is necessary that Dirs’ activities be circumscribed, safety of mankind requires it.’**

###### Regal Hastings HL

- p 358 in text, language in aCt that articulates CL rule on fid obligations : ‘Dir must act honestly and in good faith.’ **They DID!** Believed what they were doing was in best interests of co. Co had set up subsidiary to acquire movie theatre, made godo money, got an offer to buy shares in co that owned this biz, sold them and made profit. New owners of co who had co seal then brought co in co’s name against former Dirs saying that profit arose from breach of fid duty for which they were accountable so they got a discount in price they paid for co. Is like buying a house and suing the owner. Many saw this as too extreme esp bc several of those who bought shares were not fiduciaries and they did not have to account for profits, only Dirs in fid position had to. This is not a derivate claim, new owners could make action in co’s name. Got a windfall, got some of what they paid for co’s shares back. There was no evidence of lack of good faith other than making profit. There was no real ev of harm to co ie minority s holders were not harmed, but new majority shareholders benefited. Pp 361-362 in text: HL in dicta ‘it’s a pity you did not take these facts and make disclosure (to yourselves) and pass a resolution ratifying it, bc then there would have been no breach and nothing new owners could sue over. ‘ btu then how could s holders ratify an act that is assumed to be a breach of bad faith, can they affirm such a breach? Nobody knew! Court would like to say they would never allow ratification of outright theft, but s holders can whitewash anything short of this.

###### NW Transportation v Beatty

- s hodlers even though Dirs are free to vote shares in personal interest on a ratification vote. This is now under s 236 in derivative action section.

###### Regal hastings

**Russell J: conflict rule: when does exploitation = breach of fid duty? It’s a proximity test, if they obtain shares only by reason of fac t they were Dirs of R ... when you exploit an opportunity for personal profit you are doing so when you stand in conflict btwn own greed and duty to co to give it benefit of opportunity. It’s not enough just to prove a person was a Dir and make a profit, but there must have been this conflict.** **Remoteness/ proximity test**- did the situation you were in when you learned about this arise from your duties as Dir or SO.

###### Boardman v Phipps EW

- if you’re a Dir you are acct’able. Conflict rule is more nuanced than this. Russell J on p 362 in text- ‘if Dir’s bon a fidely decide not ot invest co’s funds and a Dir then puts in own money , it’s ok.’ B says this puts an unrealistic premium on human nature, it’s absurd to say you can be trusted to turn down in name of co what you want for yourself. This language was adopted in Pacer, but is not ratification. It relates more to language on p 361 defining conflict rule.

###### Peso

- was a private co, went public . mr Cropper et al were Dirs, were offered mining claims for sale, board declined, C and cronies formed another co and acquired these claims and made profit. P was taken over by another co, new Dirs found out and did exactly what people in Regal Hastings did. Sued for acct’ity in exploiting these mining purchases, BC court set out test in Regal )(see p 369) said, hwoever there was only a conflict present when board first considered whether or not to buy shares. Once they decided not to , conflict disappeared. Norris J on p 372 , B says this puts too high a threshold on people to withstand this sort of pressure. Canaero – has changd criteria re corporate acountabiliyt and expectations of mgmt. If a board had paid for a report that seemed unbiased and said these shares were a bad idea, it might be ok. B says that this onus shift is ok, once you prove this kind of interest shift the onus shifts to Dirs. SCC- conflict that had been difined by Russell in Regal was missing once board had made bona fide decision not to exploit claims, opportunity ceased to be a co opportunity. Next week Canaero, see p 377 and 378 **Laskin J- key: it’s not just profit or conflict rules, it’s a wide variety of factors. But this is strange as it does not mention board decisions not to exploit something, but does not purport to be laying down exhaustive criteria either.** This is border territory between two tests. Next week see US cases sumamrized on p 378, also competition and Bell case.

###### Canaero

- action against former officers, had been sent to Guyana to negotiate for mapping contracts, decided to make money for selves, inc’d own co. Were sued by former co for perceived exploitation of knowledge, facts: this was not confidential info (publically available info in Guyana), resigned from board and were no longer in fiduciary rel to co. **Laskin J: his approach abandons profit rule from Boardman and Phipps (not corp law case, trust case), and conflict rule from Regal v Hastings. Laskin says test for liability is still language of fid rel (must act in bona fide interests of co). Wants to get back to basics. ‘open textured concept’ this position is also in Bell case: throw hands in air, re-invent selves. Does not think info has to be conf, nor that their resignation matters.** Esp here when departure was part of plan to set themselves up. NB: factors that are on p 377 in text – these are relevant to determining if breach of fid duty has occurred. This is not fid duty in general, but for corporate opportunity problem. Retains judicial hiving off. Statute is like common law, just reiterates s 142 hm. Corp opp as a subset of breach of fid duty is CL idea. Will not be bound by Regal and its controversial application in Pacer. Courts here turn back on pacer. These factors do NOT include facts from Pacer. It is strange he would try to reconcile the two (Pacer and Canaero). Would Pacer be decided the same way post Canaero? Court would have to reference Laskin, but in theory could do so. Read para on p 378, this is key to corp opp liability in Canada. No SCC case on this since then to undermine it.

- person’s position in co: more is expected the higher the position, the ripeness and rel of def to info mean that under

ss 147-148 BCA

 (material interest in co, covers transactions and contracts) something might be too minimal or speculative to = interest, also amount of knowledge and circs when it was required. Re indsider trading- when its it inside? This is called Tipping/ Tippees (some will not be fids at CL). If one person in Guyana had told another local person, they could not have been in a fid rel. Insider trading extends it beyond being in fid rel. Also: time btwn leaving co and exploiting opportunity. Facts of case influence case Laskin makes, list is not invalid but does not include ALL of material factors that might arise in another case. This is NOT ratification! This decision by board to not pursue a commercial opportunity under Pacer frees up other members of board to exploit it for selves, but this goes to whether or not the decision ceases to be corporate. What if people had come back and told the board and it had set up a committee to consider it and said no? Would it then not be a breach of fid duty to exploit i? S. 233 (6)- is a more generic way of dealing with this. Hm.

- but is the conflict rule of overriding significance. Pacer adopted this is cAnada and said there was no conflict, so no breach. Lasking puts this to one side and says it’s an open textured Q when he says there has been a breach, but these factors are skewed to facts of case and do not oust a judge;s freedom to look to other factors. B says conflict rule is part of that list. It would not make sense for court to say that Laskin abolished conflict rule and only factors on p 378 matter. Corporate opportunity never gets to USSC as it is under state law, eg negl cases. Only Corp cases from USSC involve Fed statutes like securities. Instead, we get many decisions from diff states which are often opposed.

- three approaches in US: A) p 378- mostly under Berg c Horne hm and its fairness test (is it fari for def to personally profit from this opportunity in light of corp rels?) this is a bit like Laskin and Bell case which talks about fariness standard. This has not been adopted as a qualifier of Canaero, but it tries to weigh interests of co vs fairness in crics of indiv exploiting this for profit. B says Canaero was not fair as co paid their way to Guyana and it’s like the special rel in tort law (unequal bargaining power of officer over co) B) interests or expectenacy test- this is most common , looks to what the rel is of the co to the info. Did they need it? were they seeking it? is a proximity test that seeks to protect co’s interest in opporotunties close to it and separate it from others. C) line of business test- what does co do? Is the opportunity close to what they do? This associates the relevance of the co to the opportunity. Biggest difference btwn US /CDN is the move of the burden of proof to the def, in analyzing facts of situation: once a conflict is established , the onus shifts to def fid to disavow it.

### Competition

###### London and Mashonaland v New Mashonaland

- pg 385: competition issues are the lowest level of applicaiotn of fid standard, there is much permissiviness in allowing indivs to be senior officers of more than one corp, there is no CL rule against this, is more common in CDN than in US as community is smaller and cos are often family controlled and these indivs set up close rels with orther cos who invite them to be on boards. The only section in act is

###### s 153 BCA

: we have looked at this already, says that is if a Dir holds an office whereby duty migt be created or that is in conflict with Duty as Dir he must disclose this to board of first co. Only applies to Dirs and senior officers , is tagged on. Is a new Stat provision, goes beyond CL. There was no CL obligation to make disclosure of such multiple Dir’ships, there is no consequence for failure to comply except what is in aCt, so Q despite s 153 is – **can you despite holding these multiple positions be in breach of fid duty?** Yes, but you are not necessarily responsible for breach of fid duty bc you have them. There is no good authority for proposition that merely bc you have two or more Dir ships you are in breach of fid duyt, but you are more likely to be so if you are trying to juggle them. This is also true for oppression, main problem here is that in acquitting responsibilities in one position you will compromise other. Liability depends on facts of carrying out multiple responsibilities, does not turn on just havin ghtem. Even if you disclose under sl. 153, this does not mean you will be insulated from future liability.

- but if you are anominee in one of these situations, what if you are not conflicted btwn personal interests and co but btwn govt’s interests that appoint you and co’s interests? Things like BC Ferries etc mean that it isnot unlikely that you could have an indiv who says he should have represented small businesses that want ot set up in Canada, but does not think we should be lending at rate we are in order to maintain this. But the only sharelholder is the Crown, so you cannot have a derivative claim unless you have a judge who lets taxpayer X do so. These are dealt with politi ally: indiv will be dismissed by Crown. In CDN, how does fid duty apply to Dirs of Crown corps? In a publically traded co, you have some pressure on them to pay profits. ICBC case: firings last year.

### To whom is the Fiduciary Duty Owed

###### Re BCE Inc. (Bell Canada )

- SCC, has upset editors of text, recall Peoples case re duty of care of Dirs who were not liable for fid duty breach see p 395 in BCE, but at same time, the SCC in Peoples made clear that it was not a breach of fid duty to consider interests of stakeholders (incl employees, suppliers, credtiros, govts and the environment!)- this is all new stuff, what does it mean? Is this a sea change? If so, how can these groups allege and enforce breach of fid duty. Case re engages with these sorts of Qs, this was an attempt by BCE (parent of Bell) to go private, this did not happen, deal failed. Group of investors incl Ont Teachers’ Pension Fund wanted to take over all shares of BCE, was a going private co, once these shares were all owned they would no longer be listed. It was based on notion that these shares would make more money for these private investors if held in this way. Controversial aspect of case: as part of an arrangement under ss 289-291 of act, investors would pay premium for BCE shares bc otherwise they wouldn’t be able to acquire them in this way, public were being offered bribe to sell them with a huge premium eg 20% and this would allow investors to get all of them, Bell (subsidiary) would guarantee 30 bill worth of payment price, contest was btwn pre existing secured creditors of Bell (debenture holders) and shareholders of BCE who were getting 20 pc bonus on shares, Bell guaranteed tpayment of this purchase price to tune of thrity billion dollars. The debenture hodlers (cridotrs) saw their debtor facilitiating a takeover of parent by guaranteeing payment for shares. B ut this was not rasied in case. Debenture holders said that our security is being undermined by the guarantee that co is now issuing to its parent, debentures which were publically traded securities dropped in price when this happened. But the deal was organized in terms of a merger under Fed requirements of these cases, and these are sections that apply when the ownership of shares and other securities is being merged. Hm. Normally, corps involved have to pass a special resolution to approve merger, and this occurred. BCE shareholders were happy but some of them were also debenture holders of Bell, so in this capacity they dissented from plan and said their other interest as s holders mean they did not like the merger. But these dissents were not not cumuliatively enough, but were evidence that it might not have been in best interests of co. Role of jdge is to protect minorities, must see that proper votes occurred, but court has residual power to not agree to endorse plan if it thinks that notwithstanding all that it is not in best interests of co (that of minority s holders). So there were only two legal issues in bell: should courts approve this plan? (should court use its discretion to turn it down as not in the best interests of co? These best interests in this context are the same language as under s 142 to define fid duty, so there was no q of whether Bell directors were in breach of fid duties, but indirectly the Q became the same. Anything the courts said about what was or not in the best interests of co...courts said it WAS in best interests to let deal go through. (if you transmute this into fid duty , the answer is no breach).

###### s 227 BCA

- personal anction by s holder or one with standing as debenture holders might get- can they prove they have been affected by what co has done in way that is oppressive or unfairly prejudicial. The oppression remedy has tiers, alternate grounds for getting relief. Hm. Court rejects oppression argument as well. Case set litigations of CDN law firms on fire, this was a big deal, huge fees. And what did this mean for the law? What was meant by fid duty? Was it a stricter or lesser approach? These cases rarely go to SCC, but B thinks this is too bad as courts do not get much experience here.

- facts: board of BCE set up a committee to study arrangement and report back to board if ti was in the best interests or no. This committte had key role here, was one of factors that led court to say that it was in best interests of co that plan proceed as it did. Case enhances credibility of these committees, there are no Stat requirements , nothing said about them at all.

- two issues in case: court’s approval of plan of arrangement that 98% of co had approved of , only opponentns were those who were also s holders. Type of relief re oppression remedy. P 399: talk about other issues, defer these to later. NB: the oppression remedy is a personal right of action, you have standing under s 227 to go into court to try to establish oppression or prejudice and get relief. But when it comes to duties owed to co by dirs, (duty of care and fid dty), s hholders do not have standing , this is where derivative action comes in un der ss 232 and s 233(6): when s holders can establish standing and say that Dir X has breached fid duty. This is an admission there is a problem with the artificial nature of co: those with most interest are s holders themselves. They ask for permission to sue for breach of duty owed to co, not myself- is a leave to get standing appilcaiotn, usually done in chambers not trial. Debenture holders in BCE would have been classic examples of this, could have asked for leave. If leave is granted, then there is a trial on the merits of the case (the s holder suing for breach of duty to co). If they can prove breach, the proveeds go to co not to person who is suing. But indirectly they might benefit if value of co goes back up (in stock). Rel btwn these two types of action (personal action in oppression and derivative action) is a centrial issue here. CL courts had said they didn’t like deriviate claims bc ppl were suing to enforce other ppl’s rights ie what if board sues at same time? This might lead ot proceudrla morass. Ss 232 and 233 (6) are designed to put acover on these claims eg a control person to speak on behalf of s holders so they don’t all take at same time to bench. But the oppression remedy avoids this type of control ie if you interpret oppression to include all sorts of bad behaviour, why would anyone ever want to seek leave to sue derivatively. Oppression remedy is the sexiest remedy bc it’s easy. We still don’t have a comfortable rel btwn these two causes of action. B has trouble with Qs in book: they seem to be saying there are more problems in BCE than there really are. See Qs. What survives of existing jurisprudence Q? B says everything! This is like Canaero and Pacer- they can both stand. B says the y can co exist, this is also true for Qs 7 and 8- re derivative action. BCE does not talk about this except indirectly and we have a reas idea what courts must do in those cases.

 But most interesting result of Bell decision is its rejeciotn of Revlon- US case, in US business judgment ruled cannto be used to exculpate Dirs from situation. Revlon says when Dirs jobs are at stake as in BCE takeover bid, business judgment rule does not apply and courts replace Dirs in deciding what is in best interests of co. EW case- Park v Daily News- a co was being wound up, old case, Dris felt sorry its employees, felt moral obligation so instead of giving money to s holders they would give them severance, s holders sued for breach of fid duty saying that in the closing of this co it could not possibly be in its best interests of co to make a payment for which no tangible benefits would accrue. If the co is a going concern, corps can pay money to charities etc bc it is for the Dirs to decide if they will improve image and profits, but here the co was coming to an end. This si analogous to Revlon where US courts said that when Dirs know they will lose jobs, they hve to be second guessed as they can only be trusted to ask in own interests. Held: court ruled against creditors both on oppression arugment and \_\_\_\_, said b oard had been shrewd and done due diligence by setting up a board on this issue and they had respected rights of debenture holders, Dirs did not interfere with this. Therefore, this was in best interests of co. Thurs: takeovers and defence, proper purpose doctrine (can Dirs stave off takeover bids when in doing so they are actually saving own skins.)

### Hostile Takeovers and defensive Tactics by target MGMT

###### Comparison of Bell case and Teck Corp v Milar

- in latter, incumbent mgmt are threatened by outsiders who want majority positin, will then be able to replace the incumbent board. Fear of loss- isolated exmpl of breach of fid duty. Personal interests and duty to co are in conflict. Incumbent mgmt of targer offerree are increasingly desperate so have taken steps to undermine bid (using poswer o board under s 136- issuing shares to groups favourable to them so offeror cannot get position). Run risk of being accused of NOT issuing shares to raise money, are trying to undermine the ability of offeror to get majority position. Some mgmt have tried recently , last twenty yrs, to introduce measures that would undermine this should it occur. Simplest of these is to set up calasses of shares with diff voting rights eg Magna probably has diff class of shares for Stronach family but those owned by public at large had no votes or just the ordinary one vote pershare. This entrenches the ability of this family to control resolutions at s holder meetings. Prevent change. Other methods are ‘poison pills.’- this is more conteoversial, they vary. Typically are a provision in co’s articles saying that if any one person has more than thirty percent of shares the voting rights of OTHERS double or triple. These are designed to pre emptively limit the possibility that a t over bid will work. Those voting to amend NOA in this way are oridinary s hodlers, not fiduciaries. EW authority and CDN authority say that these people DO owe some kind of dity, but not fid. Must vote these shares in way that does not target those who dissent from resolution. OR stock exchange and securities act methodology- informal control can say to a co that they do not want to facilitiate teh sale of this kind of shares on bourse. Ppl won’t buy them, so they won’;t list shares subject to these rules, BUT this has not gone far either. This sanction is rare. Securities regulators have role in takeover bids that has far more impact : 1973- th US amended Secs Act – set out requirements of disclosure re takeover bids. Offeror had to describe resources, offeree had to file Dirs Circular explaining what this could mean. In CDN, we have taken this further: many tactics possible under US law are not possible here. Our SEcs act with these requirements go beyond disclosure, have rules( this is only for publically tradd cos). Eg offeror will offer bid of 20% premium and gts few acceptances and then go to 25% percent so those who accept at 20 will get jealous, this balance has to be paid. Retroactive equality. Also , there are limits to whom a bid can beopen ie offeror cannot make offer only valid to some holders of shares and not others, must be on pro rate basis. An offer of 20% or more of equity shares of target company, 20% or more of the shares of co will give you influence over who Dirs of it are. If there is a s holder with say 40%, you would need to offer 41. You pay the premium to get control of board of Dirs.

######  Hogg v Cramhorn EW

Issuance of shares by target co clearly motivated by above , held: Dirs issue shares to raise money, but here it was done to defeat a takeover bid. This motivation to retain positions is a breach of fid duty. Is not bona fide under s 142. Issuance was set aside. This is proper purpose doctrine. Is controversial: A) how do you really know that you have accurately identified the purpose for which the purpose of powers can be exercised?hm. B) can you always tell what motivatd Dirs? There may be ambiguity. Dirs can say it had hte effect of defeating bid, but we actually needed to raise the oney (This was seen in TECK- mining co ws perpetually in need of funds. C) what is the relevance of their saying that what they did was in best interests of co? Does this exlude court from setting aside issuance? (Regal Hastings- board when they bough the cinemas really seemed to be for benefit of co.

###### Bonisteel CDN case

- closely held co, like Hogg case above, threatened with takeover, this is rare in such a co. Hm. Board issued shares in way designed to defeat this, ONT court said this was improper use of powers. Could only issue shares to raise money, did not matter they said this wsa in best interests of co. Could not underming this finding of breach. This case was good news for law and economics crowd in US bc of their theory which said that takeover bids are great bc nobody would pay a premium without thinking they could profit in the long run. These are an example of pure market forces that should not be interfered with, so they were against US Williams Act (above). They agree with both above cases (CDN and EW). This is good for GDP, greater wealth.

###### Afton Mines

 - Millar Dir and colleagues weighed up two sources of capital, prefgerred Canex case rather than TECK so they could retain positions on bid, argued that offeror did not have resources to pay for what they had offered OR it was only a half cash deal (other half in shares from them!). Millar thought this was bad, thought their s holders would be better off turning down bid.

###### TECK Corp v Milar

- p 427, Afton Mines was looking for cash, needed money for claims in mining , Millar was director of Afton Mines, drilling results took off and need for capital became obvious so they signed an agreement with Canex through Placer to get finance. Part of consideration was giving Plcacer shares in Afton Mines (cozy relationship, not a takeover bid. Placer was not trying to get rid of Millar, he trusted them. ) TECK was also aware of what was going on, also wanted to become s holder of Afton, offered shares at a premium (hostile bid). But throught this offer they were able to run up a controlling interests in shares of AM . were not yet on board but had majority of shares. Millar then made a second deal with Placer for them to give more assistance in developing this mine for further shares in Afton. This was an action for breach of fid duty against Millar based on second share issue , this was argued under Hogg and Bonisteel to say that issuing shares like this was not possible if it is being done to defeat a takeover bid. This is per se a breach of fid duty. Burgess J- subtle , criticizes Hogg and Bonisteel idea that isuseing shares in this way is a breach necessarily, opened up idea that this was in the best interests of the co. BUT he gives no criteria as to what a good bid is or a bad one. When is retaliation justifiable? Wanted to go back to basics, court has to determine case by case . this is subjective acc to B, but this is language of fid duty nder s 142. Looks at facts of case, asks what is the primary purpose for which Millar and others operated? Relies on AUS case Mills v Mills to find primary purpse for what this act was. This is not in Peioples and not in Bell in CDN. Looks at facts, does not think that issuing shares to Placer was not to defeat TECK bid, but it was to make a rel with another mutually beneficial company. It’s ok! Bona fide exercise of power. No breach. Defeat of bid was spinoff effect, no basis for claiming breach of fid duty. Para on p 428- Burgess: is not following Hogg , there are good bids and bad, if Dirs decide on reas grounds to protect co they are entitled to do so. This is technically dicta, bc he had already said issuance was ok, but it is impt bc it sets up a test: not that of Hogg and Bonisteel- may or may not be depending on whether there are res grounds for exercise of power. Is saying that in cases with bids irrespective of whether or not you have decided it this is a takeover bid or not, first you look at what htey did and try to isolate primary purpose, if not tinged with COI it’s ok. Business judgment rule protects Dirs’ exercise of power! But if the primary purpose was just to defeat TECK, they must show reas grounds for their decision. BUT B says he did not go so far as to say that onus of proof shifts, law in US is more sophisticated than in CDN. Revlon and Unical hm etc say that once you have decided that the primary purpose is to defeat a takeover bid,the onusshifts to Dirs to explain why notwithstanding their COI they had reas grounds. When a bid fails, this is a classic COI. But in Canada Berger J above is as far as it goes, puts Dirs on spot to give rationalization other than raw self interest.

### Relief from Liability

##### Common Law

###### Bell

- SCC seem to put significant weight in business judgment rule, but introduces idea that fid duty has minimum level of fairness. B asks if fairness is reasonableness. YES! Berger J in TECK (and maybe even in Pacer/Peso hm).

- CDN system is untidy, FED statute was struck down, new Securities Act is coming. We have a centralized market in Toronto, so why do we have provincial acts and prov regulators? In theory , you have to prepare a diff prospectus for each prov, but you are allowed to file in a lead jurisdiciotn which copies it to other Security Regulators who can comment on it and agree on a final document sent out. There is also a national policy on p \_\_\_\_, tries to say to target mgmt what they can and cannot do.

US position

- p 430 note 4: Unical hm and Revlon are Delaware cases, is state of convenience for incorporation as it is the most permissive.

######  Unicoal

- wanted a fairness test, thought business judgment rule was too permissive. This was an attempt to regulate, said that such events were inherent COI. Onus was on Dirs to prove reas grounds that actions were in co’s best interests ie reasonable. So Dirs should act inscrutably , often set up committees to advise on issue. you can pro actively give reas grounds for decision, should it be questioned later. This is esp true for inside Dirs who are salaried employees of co, outside Dirs are not typically so their claim to objectivity is higher. A co with outside Dirs which is given time to study bid, this enhances arguments later. There is an idea here of proportionality which looks at measures you take in relation to threat you are facing, eg a takeover bid which will make you lose your job, so it may be reas to defend co against bid. There is an order of magnitude aspect and a temporal aspect bc sitations are not static in takeover bids. US judges say anything Dirs do to protect selves is colourable. Some courts say they need no longer act in best interests of co, need only to act in interests of s holdrs. Should give up on managing co and see passage of mgmt as inevitable. Protecting selves is indefensible. This has NOT been followed in CANada, but...

- how does derivative claim play within oppression remedy? Board can sue in co’s name under s 136. Are only Co organ that can authorize L to rep co as it is an artificial person, you need a resolution of board to do so, this is an exercise of mgmt powers in s 136 (all about power, not standing). Older cases suggest parallel authority in s holders in AGM (two major organs) – that one of their s holder majority votes = authority too. This has been undermined by Automatic case and other explanations : no, the statute unless the NOA varies sit vests powers in board. Two types of suits: routine ones where co comes to you through board members and is owed money- sue creditor. This type of case is usually no prob re s holders ( is biz judgment rule.) things get more complex where action in co’s name is against one of the co’s directors or officers- (extra corporate proceeding). On face, this will never happen bc Dirs will not want to sue one of own. This usually arises when the control of hte co changes , and they uncover misfeasance on part of former board. There is no derivatie prob here, is an extra co function now. But in former case, co is in position where it might sue one of its incumbents (an action will not be brought). A minority s holder may have diff view, think their interests as minority s holder have been undermined so DO want X sued in co’s name. Their initial step under

###### s. 233 (6) BCA

- ask board to sue X. Board will usually refuse, so what does s holder do? This is where derivative claim comes in. Ss. 232 and 233 are only ss on this in BC. Held: code is exhaustive. As s holder you have standing, so you then go to judge and file affidavit ev in support of your claim. You ask for permission to sue in co’s name if they were willing to do so, but you have to prove they are unwilling to do so. If you can convince court of this, you will be allowed to do so. You sue in its name for a breach of an alleged wrong done to it, commonest of this is breach of fid duty under s 142. All cases so far are relevant to substance of claim. There is a separate process in court where you try to establish substance of claim in CL. But what if Dirs turn you down, convene a special meeting and they put forward a resolution that is not ultra vires but something that asks if they will waive and ratify this breach so that it no longer exists.

###### ss. 233 (6) BCA

‘No application made, (this is clearly derivative action) or legal proceedings prosecuted or defended under s. 232...’ (does this refer to trial and merits or only to derivative aspects?) These last two are procedural , do not refer to derivative actions. Ability of co to rescind a contract is not necessarily ev that co has been harmed in actions under ss. )\_\_\_\_\_ hm- ratification was possible here, thi sis what PC upheld in NW Trans v Beatty- SCC was reversed , this type of contract WAS revesible. S hlders can act in selfish way without taking into acct anything relating to co. But then at the other extreme we have theft- Dir with hand in till. CL judges say this could not be ratified, that s holders could not be ratified b c this cannot be in best interests of co. But in btwn cases like Regal hastings are problematic, test IS a fraud on the minority.

###### Fose v Harbottle

- developed civil proceedings equivalent of Salomon bc when a dir tried to sue for misfeasance, the court said only it could sue. Court had to deal with Q of when Dirs could sue, otherwise Dirs could insulate selves forever. Held: yes, eg ultra vires (unratifiable as illegal, totaly invalid. Cannot ratify an illegal act.) also : fraud on minority exception (its nature was unclear, B says this is ultra naughty behaviour. Clearly covers theft, but not simpletons in negligence.) this could have been a test, but it was not articulated in this way. This is somewhat irreleanvt due to derivative action being in code, judge in chambers application has freedom to look at depositions and to make up own mind. CL cases are not binding on court, but what would be raised is: **how indep was the vote of the board members against whom breach or negl was alleged?**  This is consistent with NW Trans: this does not say you cannot vote as a s holder when a board member in indep capacity, but it does not mean that the fact that they were not involved would not influence the judge here. Hm.

##### Oppression remedy

- this is where ppl get in trouble, look at cases re negl and deriviatve section and then see ss. 232-233 which give indiv s hlder standing ...in BC it is a dbl edged sword (oppression and unfair prejudice which is more about effect- have I been prejudiced in way that justifies me getting approval from court.) in BCE- one of the big probs is the rel btwn these two remedies (derive and oppression remedies). SCC in BCE uses EW test of reas expectations for oppression – if they have been violated, you may get relief under oppression. BUT your reas expectations in Microsoft are diff form those in a family business. (no family relationship in former, there is no expectation to have any effect on mgmt of co. This is ok to you, you only want to know how stock performs etc.) minority s holders williklely seek derive claims (although can do both!) this is like suing for negl AND breach of K , you need permission to sue in both. You need leave to sue derive, but also alleging some remedy connected with oppression. Same facts are basis for both, but you need permission to join claims in one proceeding.

### Relief From Liability

###### - s. 233 (6) BCA

 is ambiguous, B does not know if this applies to chambers appli re derivative claim or if it also applies to trial on merits. Appears to mean both, if so it means that CL has little relevance and facts will influence case. Key will be: how indep is vote of s holders of named defs? If a clear majority of minority s holders acting as others not named would make courts see it as truly indep. (just requires simple majority) ALSO- disclosure is key, and if a special committee had made an application that this vote not be recognised.

##### Common Law

###### NW Trans c ase

- p 485- re derive action, interests in a K , these are now under ss 147 and 152 as only aspect of fid duty apart from insider trading that has been separated from this. Hm. B says it is exhaustive code, but in footnote it says that these only talk about Dirs and Senior Officers (not Officers). Senior Officers is a term defined in act in technical and non technical way, third term used in act and in s. 142 (on who is subject to fid duty) is officer. So officers are subject to fid duty (means that anyone who judge decides is a fid , is a fid). But what’s left? Hm. These interests under ss 147 and 152 do NOT apply to officers, but they aRE subject to did duty re setting aside a K. Assuming def in NW Trans was a mere officer, is this case good law? P 485 in PC extract: reference to a provision in a NOA that if ony one Dir is interestsd in the co, they can avoid K once COI is revealed. Hm. Answer is in

###### s 142 (3) BCA

you cannot contract out of these duties. ‘no provision relieves Dir or officer of duty to comply with act.’

- p 485 says you CAN avoid responsibility prospectively, but this is not possible now due to this provision. This may not cover ratification, but surely covers a purported excusatory provisoin in NOA. You could not have one in a K that excuses responsibility or undermines co’s interest in deal.

- these provisions stand outside s 142, set down own rules. Are more permissive AND stricter than CL- more permissive bc if person discloses interests and board votes to confirm, it’s ok. None of thes provisions apply to corporate opportunity: you are seen as on both sides of deal. Hm

- ratification means a majority vote of s holders at AGM (this is how it is used in CL, is what s. 233 (6) refers to as well. B disagrees with text in para on 491 which says that s. 122(3) applies to derivative and oppression remedies. Hm. B says they are wrong, other ppl cannot ratify a right that you enjoy personally. The oppression remedy’s huge advantage over the derivative claim is that you do not have the costs of getting it prosecuted to sue. If you are seeking this, you go to court and claim relief under s. 227. Hm. Ratification was impossible except for yoru actions, nobody else can take this away from you. Hm. Focal point seems to be

###### s. 142 (1) BCA

- sets out duties.

###### S. 142 Sub (3) BCA

says these duties are fixed, you cannot have a K that says no Dir is a fid. You couldn’t do this at CL, so can’t under these provisions. This provision assumes there HAS been a breach, and asks if it can be ratified. But whether the duty appilies in first place is not at issue: you cannot K out of damages for hitting someone in your car, but maybe you can setlle later.

###### S 143 BCA

is on prospective duty,

###### s 233 (6) BCA

 is on retro active attempts to ratify in that particular instance ie s holders do not think it is in best interests of co that this occur. Dirs make this decision on more prosaic level: you don’t go to SCC over 50 dollar loan, you make own decision to waive liability in this instance. Most corp action is by co against third parties- board or delegates has to decide if each case is worth following .

###### S 147 BCA

is in Peoples case: attempt made to rely on accountant, Dirs said they had hired guy with BA in Commerce , thought this would excuse them from liability. SCC: no, he was not well enough qualified.

S 157 lists various infractions of statute, esp commission of restrictd act in violation of s 133 (in violation of own powers in own act, although this still allows outside creditors to be protected), but s 154 is about self imposed restrictions and imposes personal liability for board members how are involved, sets out technical rules re attending meetings and disavowing participation at meetings etc. S 157- lists various defenes that Dirs can use (supplemental statutoriy civil liability for Dirs beyond CL). Dirs that are party to non compliance are liable. This is like piercing the veil. S 157 is flipside, gives Dirs way sto try to justify alleged violation of act (most of them relate to some kind of reliance- these also apply to breaches in negl under s 142.) work for s 154 and 142.

- reliance arguments possible under s 157 should be borne in mind for anyone alleging negl or breach under s 142. This may also be found to be more appropriate for an outside Dir not involvd in daily affairs of co. Statements of claim and defence are complex, so you will trot out s 157 as a matter of form. You can abandon it later.

###### S 234 BCA

- this is also found in all of these claims, is called’ relief of legal proceedings.’ Standard for excuse here is whether the person has acted honestly and reasonably and ought fairly to be be excused. Problem here is that judges have already taken these sentiments into account.

- there are two types of trustees: professional and non-professional. Latter may have no skill. Inmany cases of latter, there have been problems (investing in non authorized investments), but through no fault of this person’s intention- they just lack skills. So if someone accuses them of liability for breach of fid duty, they can be exscused if in good faith. Same here, so this can probably only apply to outside Dirs. An inside Dir will always be assumed to hve the ability to follow duty. This provision has rarely been successfully, most courts will not excuse inside Dirs. S 157 is more recent than 234 hm but SCC in People’s say they do not take case at face level. Failure to take legal advice can stop inside Dris form relying on this. Hm. It can also give rise to partial relief, is not all or nothing, you can try to invoke 234. Bt this is a weak bsis for a court order that excuses you from established consequences for an established breach of dity.

### Indeminification and Insurance

###### ss. 159-165 BCA

###### s 165 BCA

- allows for professional liability insurance to be issued to Dirs and officers, is hard to get. In CDN, where you seek specialized insurance like this you are often dealing with a US co. They have diff view of civil liability of professionals, we have a branch plant problem. They will regard this as a potentially expensive liability so will turn you down or jack up fees. 50-75K premiums with high deductibles and many exemptions. In BC, employment standards acts make Dirs personaly liable for \_\_\_\_, liability to pay this is not insurable here. These policies are divided: A) insure payments that co may be required to make by way of indeminfiying Dir against outside Co for their acts. Co can insure self against having to make payments so they are not a surprise. But there may be some actions that Dirs are not insured against (court disagrees or they have failed to get co to agree to cover their losses). B) personal liability of Dirs, sometimes cos will only pay first part and ask Dir to pay second. This all makes beign a Dir problematic re your rights in indemnification. Deductibles are often 25K or so.

- subrogation: insurance law term, rights of an insurer after they have paid out on a policy. Eg you have car accident insurance and you injure someone and they sue you for 10K, you make claim against policy and insurer pays you the ten K to settle. As a result of hte payment, you assingn rights and responsibilities to insurer. So if it can reduce this liability eg through contributory negl, they have right to recover the difference from the pl. Insurer stands instead of a def or pl. Insurance cos re never named in these cases, are worried juries will be influenced and make insurance co pay!

- if indemnification occurs pursuant to a policy of this kind, does the co then get sub rogated to rights that Dir or officer might have? B does not know! One might say that specificity of these provisions ousts rules of subrogation entitltements. Next time see ss 160-164- are new, deal with agreements between Dirs and officers and co as to the co’s responsibilities to indemnify them for things like breach of fid duty, and legal entitlement indep of a separate agreement esp in defending a claim against co. Also with powers of court (residual) to order indemnification here.

- next provisions implement s holder democracy movement (s holder rights over Dirs).

##### - Shareholders’ Meetings

**: AGM under s. 169 and `82 (shareholder proposals ss 187-91) Special or extraordinary GM’s (s 128 (3)) Court ordered: s 186. Requistioned Meetings : 167-168.**

- Major amendment to act 1973: voteless shares and co’s ability to buy own shares legalized in BC.

##### Rules for how Dirs can be reimbursed for legal expenses.

 These apply to all levels of fiduciaries. A) legalize agreements for co to indemnify Dirs subject ot exceptiosn in s 163 esp 163 (2)- libiliyt to the co. B) when does this person have a RIGHT to be indemnified under s 161. Relates to legal costs for defending a claim. C)

###### s 164 BCA

- various ppl can apply to court and ask it for order in their favour. This offers best potential for favourable order. Is only way that a Dir who has been held liable for breach can have it reimbursed or indemnified by co.

- act allows Dirs to ask for forgiveness,

###### s 160 BCA

allows for indemnification. Has further opportunity for uncertainty bc this is preceded by

###### s 159 BCA

 which defines many terms that are just used in these sections (eleigible party, el penalty, el proceeding, expenses and proceeding). El penalty is a judgemnt , fine or settlement. Matter must be associated with that person’s liability as Dir or officer. This is NOT dealing with liability to co itself (this is what derivative action is about).

###### s 161 BCA

-sets out payments co MUST make (defence expenses incurred as Dir or officer in resisiting a claim). If you are successful or substantially successful, you can ask co to pay these expenses. Is you are successful in resisting type of claim in s 160, that success is s thing you can claim from co itself. Is a RIGHT to defence expenses. To the extent that these are personal expenses, you can claim them from co.

###### s 163 BCA

- payments you are not entitled to be indemnified for: (all from US )- see sub c – ‘if Dir did not act honestly and in good faith to best interests of co’ this is a breach of fid duty, but sub two says that actions against Dir of officer whether in co’s name or in derivative form cannot be indemnified for. But don’t these all come within good faith, what is left in subc that is not covered in sub two.

- B says this means that a liability on part of Dir is not s thing they can be indemnified for without going to court even if co agrees to indemnify them (this is not legit either as prohibited under s 163). This is a very hard threshold to meet bc most judges will say they have considered biz judgment rule et c and will say no. Hm. - court can order terms of the indemnification agreement,

#  Shareholders and members’ Rights

- you are not a member until your name is registered on the \_\_\_. In the past you would get a cert with your name and no of shares on it. records officer of co maintains list. If you want to sell these shares to someone else, the cert is like the title in land although it is not on file somewhere. It is just evidence of entitlement. But when you want to sell shares you fill out a transfer doc of sale to X.

**- rights have four sources A) co’s constitution (NOA in BC which is public doc and Articles which arenot). These often contain ---- B) common law C) governing statute- this sets out rights, personal rights and remedies like oppression remedy and appraisal remedy whereby on the occurrence of fundamental changes like intro of restriction the s holder can ask co to buy its shares. D) there may be agreements btwn co and s holder.** These are standalone Ks , these are US in origin. Biggest risk for s hodler in a closely held co is being able to get rid of shares, you are usually getting a minority position, intimate rel. You may want to ensure certain rights in addition to those under statue and charter, the main one is a buy-sell one (a process that allows you to sell them, and one to ddetermine price for shares). Fear is that others will refuse to buy shares bc their fear is that a stranger will be involved in running co**. This is like a pre nup.**

- s holders – are they owners of co? Well no, bc co is separate legal person. They have bundle of rights as chose in action. Have no entitlement to return of profit, may not even be allowed to vote. But these are key concerns! Under law, you have no such entititlement until a co is wound up, so you have no right to intercede and direct how these assets should be managed. S holders are after creditors on winding up. B) you also want dividends (your share of profit), this is totally at discretion of board. Covered by business judgment rule. They are under pressure to pay them , investors will avoid buying stocks in co if they don’t and price will go down. C) co must have AGMs- most motions will be resolved by simple majority of those Dirs present and voting or who have given power of attorney to X to vote on their behalf. Dirs really don’t want s holders there as inconveniences, at most they want you to let them vote by proxy on your behalf.

###  Voting Rights

###### BCA ss. 173-174

###### s 173 BCA

 gives one vote per share. Entitlement to vote by proxy. Basic characteristics of meetings is set out in s 174. Shares can be voteless, sometimes act enfranchises shares that do not carry a vote. If a co makes a fundamental change to its Const that you can dissent from under

###### s 237 BCA

 ( and consequence is that you can invoke appraisal remedy to buy your shares) your voteless shares are deemed to carry a right just for that purpose. So when does it become impt that your shares DO have a vote? In Canada, families or pension funds can have so many shares they cannot be ignored even though the latter want to be ignored. But they may be able to use this power in a critical sistuaoin.

- votes are also key in takeover bids re proxy solicitation- this urges s holders to vote or not in favour of a takeover bid by tendering their shares to bidder who is trying to take control. New s holder provisions give mechanism for minority s holders putting forward their nominees to be elected to board, but have almost no chance of success if incumbent board oppose.

- shareholder proposals – only at AGM, they can table a motion and discuss it there. This is not s thing they would otherwise be able to do bc Dirs are in control of aGM. At CL, they had no right to speak. These enforce a right to speak and table motion for first time. This has had limited success, but have had some political success – this has created sense in mgmt that they should care about minority s holders. Requisition meetings- other type of meetings that can be required under statute, these are meetings that are forced on mgmt outside of AGM. Ironically, these have not been used by dissidents but by powerful interests who want to remove incumbent board ie in a takeover bid which may use its s holding to requisition the meeting before date of aGM to replace board with their own nominees.

### Shareholders’ Meetings

###### ss. 166-186 BCA

###### s 169 BCA

- There has to be a two month notice under thIs for election of members of board, articles may provide for rotation.

###### s. 198 BCA

Co’s finances – s 198. Auditors are independent contractors, are not employees but are subject to fairly elaborate stat provisions. Should act as anti fraud device to use their indpe expertise to evaluate financial statements of co from accountants. Co’s can avoid auditing by passing a unanimous resolution to that effect, but this is only feasible in closely held cos (one with 4-5 s holders who are Dirs too). In a publically traded co, this is infeasible and stock exchanges would likely refuse to list you.

###### S 182 BCA

 \_\_\_\_. AGMs facilitate things for closely held cos, and monitor things in publically held ones.

###### s. 172 BCA

- quorum under s 172, chairs, minutes. Quorum is usually at least two s hodlers, at CL you could not meet yourself so this was allowed at CL. Special meetings are not under any rules,

###### s 181 BCA

says that rules above also apply to these. They are any meeting outside of AGM eg a requisition meeting. These will normally be held to address just one issue, eg a veto of the undertaking under s \_\_\_.

##### Court Ordered Meetings

###### s. 186 BCA

- court ordered meetings - this is a personal remedy, s holders have standing to go to judge under s 186 to order a meeting. This is not necessarily about s holder democracy. Eg all s holders killed in car accident, personal reps of deceased can apply under this section as to how co business will be directed. This would also arise when co is neglectful and says they will not deal with an AGM. These provisions are more honoured in their breach than in their observance. Years often go by before co holds meetings they should be holding. Registry in Victoria will check- you can be struck off the register if you don’t file for many years.

##### Requisistioned meetings

###### ss. 167-168 BCA

- standing: those who want to exercise this right under ss 167-68 must have at least one percent of shares of co. Must also have had these shares for two years. This is here to avoid free riders/ fellow travellers who want to attack a co’s policies and buy shares just to do so. Formalities: there must be three months notice of this before hte AGM.hm.

Shareholders’ Proposals

###### ss. 187-191 BCA

######  ss 188 BCA

sets out details, you can write ONE written proposal under s 188. Co has to pay for this proposal to be disseminated , they have to use their money to send out info about the proposal. This will be included in proxy proposal, notice of AGM. Co MIGHT ignore you, but act says that proponents can go ahead anyway and seek reimbursement if they go through requirements of act. None of the exceptions that have given grounds for mgmt not to have to include this proposal in the AGM material apply here.

###### Varity Corp v Jesuit fathers

###### S. 188 Sub D BCA

- **proposal does not relate in any way to business of co (this was invoked successfully in Jesuit case by co who wanted to put a proposal that co stop doing business with SA during apartheid). B says this decision makes no sense, it involved a relationship between two exceptions** : D which is on proposals that do not relate to business of co. This was dealt with in segregation era on greyhound buses in south , proposal to stop this segregation, court went down to D and said tihs was to secure publicity and addressing a grievance against co. Even though resolution had particular relevance to what co was doing, it was excluded under this provision. There is a **Catch 22 here: most people who use this provision DO have a social issue going on, they are not telling them what to do under a business principle but are asking them to conduct business in accord with some social principle.**

###### Dow Corp Case US

- they were challenged in 70s from making napalm on grounds it was killing civilians in Nam, court said Dow was making chemical bc it believes in Vietnam war so did not allow proposal to be put forward at meeting.

### Removal of Directives

- co has to send out proposal, it cannot argue one of the exemptions re notice. But what is the rel btwn these motions even if they pass vote and mgmt conduct? So if a resolution is passé to stop trading with SA, mgmt do nto have to follow through if they can say it’s where they are making money. Proponents can only change things by getting rid of incumbent board or by amending articles to derogate form grant of mgmt in s 136 and reserve power to s holders at AGM. But if power is with mgmt, s holder cannot tell Dirs what to do.

###### - s 128 (3) BCA

- s holders can dismiss a Dir from office, but threshold is where they have power to amend articles so is very high anyway. This avoids having to wait til next AGM, can get rid of Dirs mid term. Next time\_ we begin derivative action.

- s. 232/3 (raes efforts, notice to co, acting in good faith, leave in best interests of co.

- sharehlders’ meeting under s 167 hm. – board can be forced to meet, standing requirements are higher (s holders who indiv or collectively can require under 167 that meeting be held, formal reuiemetns, ID selves and deliver request to co. If so, must convene within 4 mos. Co pays costs of setting up meeting. Same list of exemptions in 167 (7): situations where, if Dirs can show subject meeting of meeting is in one, need not comply: (see Air Canada case)- res judicata exeption (matter already discussed), subs c and d- biz at matter does not relate to biz of co. Bc this does not involve public cos, these procedures are more likely to involve mgmt disputes with shareholders. Hm. Sub d-req’d meetings cannot be used to secure publicity, redress personal claim or grievance

- wide matter for mgmt to say no meetings under s 167. If Dirs ignore request under 167 sub 8 – requisitioners can convene on their own. Threshold is lower , only need 2.5 % of equity s holders who have to be in support- BUT they have to pay the costs of sending stuff out and NONE of the exceptions apply to this metting. Proponenets can go ahead without any worry about above.

Basic flaws- you need a realistic expectation that matter you want to be voted on will get majority support at meeting and fa t you had to go through back door to have matter discussed suggests you do not have a likely possibility that you can get majority support- either simple or substantial.

- AND- if resolution is telling MGMT what to do re line of business or what to buy or not , this is NOT what shareholders do! Special resolutions can at any time dismiss any member of hte board under s \_\_\_\_\_, so if an adversary of mgmt thinks that they can get this level of support THEY will convene and get themselves or own nominees elected.

Air Canada

P 630- takeover bid for AC, courts often go to narrow interpretations of aspects of act, this case is about FED provision in CBCA, attempt to req a meeting under fed 167 by co that wanted to takeover (Onex), AC mgmt argued against this, would all of these be relevant to our provisions or not. Bc AC incumbent mgmt had given notice of meeting PRIOR to requisition meeting, AC said this trumped atemtp to requisition parallel meeting so should be declined. Held: we cannot trust the mgmt to let requisitioners be heard at meeting. Mere fac t mgmt has called meeting does not oust right to requisition, need a reasonable likelihood that they be allowed to speak . this meeting would be controlled by incumbent mgmt, so a separate requistiin meeting was allowed to occur.

- requisitioners wanted to propose amendment to NOA, AC argued you could not move to do this at a requisiteioned meetgin of s holders . held-yes , you can. Why not? These meetings have no limitations on what can be voted on.

- sub 7 – when requistioners call meeting , Dirs refuse and they do it anyway. Held- these exceptions are not relevant, same in BC . p 636- relationship btwn these sections on req meetings and the provision in acts on court ordered meetings. This is s 186 in BC act, not 184 CBCA. : this power to order meetings by courts under application should be used cautiously. Otherwise they interfere with authority of board to run things. B does not understand this, courts just exercise best judgmeent over whether or not meeting should be ordered as per usual.

- insidier trading- CDN case is Allen v Hyatt PC – UK case is Percival v Wright- US case: Strong v Regide hm indiv Dirs in each case knew takeover bid was coming, approached a s holder and asked him if he wanted to sell shares, did so and shares value went up, seller claimed he had been taken advantage of , held: in circs of relationship (which was in a sense created by Dir), there was a fiduciary relationship on the facts between the two parties. Duty is usually owed to co, but could be owed to indiv s holders if facts gave rise. This is like Hedley Byrne: inequialty of bargaining power, stronger party has minimum responsibilities to use inside info in some ways and not in others.

### Shareholders’ Remedies

###### Fosse v Harbottle

**- UK, if s holders want to hold Dirs liable for fid duty to co, they cannot sue personally and claim fid duty was owed to them as indivs too. This was the primary case on seeking to sue derivateivley pre BC act. Pre this, you had to seek leave to sue. Hm.**

- when remedy is of a personal nature , this is why oppression remedy is so impt, s hodler has this right by virtue of the langague of s 227 hm. These new statutes in the 70s made it more impt in CDN company law to be able to define if remedy was of personal or corporate nature, latter could not be contested by individuals without seeking leave from court to do so. Derivative provision is about this: someone who is not the co seeks leave to seek redress for a wrong not done to them. Fraud on the minority exception: this was made redundant due to these Stats.

- these sections have notihg to do with an action being brought by co. If incumbent board appoints X as the co’s lawyer to sue a former Dir alleging breach of duty or K, this does not trigger derivative provbisions bc co is prosecuting a right that belongs to it. it’s only when someone who isn’t an authorizied agent of the co is trying to prosecute. Directros could get leave, have standing as of right under s 232 as complainants who can apply for leave. Hm.

**- dereivative claims are leave applications, not suit on the merits. Is a standing issue that also requires court approval. Fosse v Harbottle test was changed in 70s.**

- principle that only co can sue for wrong done it has substantive aspect (relates to ratification: a principal can at any time wiave a breach of authority of its agents. Retroactively validate what they have done, bc you gave them power to act on yoru behalf. This is why s holders were allowed to sue: wrongs would be whitewashed. AND a procedural aspect ( one of policy aspects vs derivateive claims was that they would lead to multiple lawsuits- what if board decided to sue in respect of same wrong as s holders? This could lead to multiple lawsuits on same facts. S holders were cornered: if they alleged breach of some kind, asked Dirs to sue on e of their own and they said no...

- derivative means that s one else with standing is bringing action in co’s name- claimants are lent the co’s name and the defs are Dirs (one or more)- so any award against these individuals belongs to company and not the persons allowed to bring actions on its behalf and no entitlement given to to them can be bigger than that give to the co. Cannot add personal remedies. Hm.

- s one usually comes into L’s office and tells a litany of horror, you ask what remedies are (eg oppression, breach of fid duty etc, but in CDN the remedies that belong to company that are corporate and not personal have to be de marcated now bc in respect of coproate ones you need to leave to bring the action if you are not the co ie a s holder. ) this gets into joinder of party in civil procedure. So if you get the leave to sue, you can bring suits alleging other causes of action (oppression, appraisal etc), but courts usually just say that if all of the problems arose from same story, the matter can be held in a unified proceeding bc eg ev of oppression might be the same as that for or related to that brought for fid duty.

- problem of what was ratifiable and fraud on the minority was a problem , and ev gathering was hard too bc minority s holders were on the outside and had fewer rights to see minutes of Dirs’ meetings etc, this made it hard to prove breaches of fid duty. So with the new Stats: did they replace the CL? In more than one case, minority s holders went to court and said they would use CL as an alternative.

### Statutory Derivative Action

######  ss 232 and 233 BCA

In BC there is a chambers application for leave , if ruling in favourable and claimants can sue in co’s name, then there is trial on merits. But at CL, everything was held at same time, s holders would allege breaches and claim an exception under Fosse v Harbottle. So Ls tried to argue these sections did not oust CL, p 719

###### Farnham v Fingold Ont case

: p 433 BC case- Shield Development : both cases arrived at same conclusion- you could NOT use F v Harbottle anymore, had to use Stat. So fraud on minroty exception etc was dead and no longer CDN law. CL does not apply. T was also decided in Shield where Ls raced into court and tried to stop a meeting bc issue of shares was a breach of fid duty as use of power to stop takeover bid was abuse of power. Court said woah, you need leave first, Ls tried to use f V H to make them discuss it now. Held: no, you can’t , stats oust CL. You cannot invoke CL except perhaps to add weigh to an arugmetn you make , see s 233 sub 6- court might look at what was ratifiable by s hodlers, hm. Few examples of what it means.

######  Re Northwest Forest Products Ltd.

- an early negl case in BC provision. Bellman- BC case too, but on Fed stat interpretation. S 232 allows a complainant to prosecute a claim in the name of the co if the court grants leave. Complainants are of four types: Dirs have standing as of right, s holders have standing as of right, beneficial owners of shares have standing too eg someone who has bought shares from a s holder but their name has not been put on register of s holders. You could argue that if discrimination was at heart of this, you could argue breach of fid duty as it could not be in best intersttss of co to do so. Ceomplainant also include any person ‘appropriate.’ – this type of standing also comes up in Bell case BCE- the protagonists there were complaining that Dirs actions had diminished value of shares they owned. Creditros: They do NOT have standing as of right, but are first in line in terms of courts deciding they are appropriate person, they may feel they are even more affected than s holders , but you MUST get leave. Dayon case- secured debenture holdrs, held: huge debenture trustee guarantteing their rights, so you don’t need leave as you’ve got enough contractual protection. BUT creidtors ARE the most likely to get leave. Employees, consumers, liquidators are at the bottom. They sometimes get leave, but rarely. Employees are at the very bottom, no cases.

###### S 232 – 4 elements

**- reasonable efforts to get the co itself to sue. This is to avoid mulitplicty of proceedings. Must also gve notice to co that you are seeking leave. Also acting in good faith (movable target), but NB – final element is that leave is ‘in best interests of company.’**

###### Re Northwest Forest Products Cont.

- p 707, alleged negl of Dirs in breach of s 142 hm. Deg tried to requisition a meeting of s holders to get them to vote on whther proceedings shold be brought incompany’s name, but it’s not clear if this vote would have succeeded. This was defeted anyway. Reas efforts: it is thought that these facts show that applicants HAD made them. Defs argued that writ had not been adequately detailied in specifiying the alleged wrongdoing, but held: no, did not need to support all ev that would be adduced at trial. Notice element was met. Did not talk about good faith. ‘best interests of co’ – this is majority of case, at time the language was different ‘prima facie in the company’s best interts.’ Defs said this meant the applicant/cliaimant had to adduce evidence that they had a fair changce at proving wha they had alleged. Held: no,m this just means sufficient data. Proof is not relevant. Hm. Case talks about evidence: sale of assets at low value, lack of solicitation of competing bids. This was crux of case and supposed ev of negligence on part o f board.

###### S 232 sub 6

B says- if you are looking for legisl intent, this section is intended to get rid of the effect of ratifiaion at CL. Principal had legitimately forgiven the hypothetical breach on the part of hte Def (Dir or Dirs). At CL, it was clear that mere negl on the part of board members could be ratified by a simple majority of s holders at AGM bc it involved lack of bad faith (just carelessness), s holders cold forgive this validly. This section appears to be saying that those kinds of arguments are no longer relevant. Ratification was a mixed bag at CL , it would be unfortunate if we were to continue this uncertainty. Even if there had been a vote of ratification on mere negl that might have been dispositive at CL, courts will nto ignore claim. Subsidiary issue: at the trial on the meris, does the trial judge revisist the issue of ratification and start talking about s 232 sub 6 again? Yes, the language here seems to opeate at two levels, but if so it again grants new freedom for court to reject the effect of ratification. Courts still have discretion to regard vote of rat and to confirm or rejct it. as in:

###### Nw Transportation

- if voters are all Dirs, this vote would not be credible.

- evidence of behaviour does not come labelled as oppression or breach, is coloured by Ls. Oppression is ostly a remedy that fits best with private closely held cos, expectations test addresses this. You know who others are and have clear expectations. Breach of fid duty fits less here, this is more fact independent: you are held to an artificially high standard taht you must not compromise interests of co with your own best interests. This is independent of you and your expectations, it CEis about behaviour of others. (under s. 142 you fit their behaviour into a category. So this suits publically traded companies where you had no expectations other than that Dirs would comply with law.)

###### Bellman case

See CAN

###### Personal Action

See CAN

- litigation committee, several US cases are similar. Also derivative suits: act is very specific with regard to costs, US had many strike suits where people would buy shares with view to suing Dris, tried to get LS to allege fid duty and asked for payment to avoid them seeking aciotn. This was a hostage taking, so courts have tried to address this on their own. Personal action too.

Mar 19th, 2013

###### Statutory Oppression Remedy

s. 227 BCA

- Si will talk on Th. OR came from s 210 1948 EW Companies aCt, based on Cohen Report 1948: this gave as examples sits where they saw s holders without remedy. Argued these were justification for introduction of new provision: where the company refuses on arbitrary basis not to enter name of transferee in registry (not perfecting legal title), excedssive remuneration being paid to directors and management (Dirs back then got less, since then get 80K for going to a few meetings, can have7-8 of them), when shares are issued on unequal terms (better than others). ALL of thes could be breach of fid duty depending on gravity, so there is a problem with the derivative claim. Average s holder could for financial or legal reasons follow through on a suit.This borrowed from s 234 of our act (this gives standing to judge re winding up, test here is if it is just and equitable to do so. This comes from eq jurisd of courts prior to corps in respect of partnerships.) Cohen report was saying this was kind of an over reaction to what is a complaint by a minority s holder re egregious conduct (there is nothing to address this, winding up is too extrement and courts are reluctant, and derivative is expensive and has legal impendimetn). This was a new form of stat relief, is big in UK but never big in US where courts like minority s holders (some states do have it though). Every prov has a form of it, now. Tre are three aspects : does person seeking advice have standing to do so, can they establish grounds for relief (oppressions and unfair prejudice- these are indep bases), what kind of relief can you convice coturt you should get? Forms set out in stat are not exhaustive.

##### Standing

- provisions differ in provs, BC section:

- in BC section A) s hlders have standing as right,B) beneficial s holders too (whose names are not on register but who have paid). C) ‘appropriate’ persons to make an application. Is like the discretionary action under s 232 but has diff language. In derivative action DIRS have standing as of right, here they do not and must fall into category C if court allows.

###### First Edmonton Place v 315888 Alberta Ltd.

- p 765: Alta court, diff stat. Standing is determined by you being a security hodler (debenture holder). Held: since there was no procedure for registering the lessor (landlord) in lease with co there was no way to register tenant. Hm. More relevant: was lessor seen to be a proper person to make an application under section? BC law used to say ‘proper person’: B says this the same thing as ‘apropriate.’ Problem here was that lessor was complaining about failure to pay rent during period when lessee was NOT obliged to pay, so lessor did not have standing or stature of beign a creditor so this was rejected. But case was technical, notes of p 768-9 talk about how courts view application to be a proper person- most who succeed are creditors (secured and unsecured- oddly secured ones might have more trouble in getting standing bc courts might say that this elaborate loan agreement is enough protection. Will get legal advice ifa a large co, so court might not also give them oppression remedy too but this is fact specific. ) B) trustess in bankruptcy have also been seen as appropriate, have taken over affairs of co and have fid duty to assume that any remedies. C) employees: B knows of no case where they got standing, courts might see them as having enough protection under labour law. D) consumers: B has never seen this either, but they could be.

- s holders have standing as right, everyone else incl Dirs have to argue. Sub two of section sets out grounds for relief: powers of co are being exercised in manner oppressive to s holders incl applicatnt. These are the same thing acc to courts, total overlap. Alternative ground under s 227: you can also argue for relief on basis that act of co or resolution of s hodlers has happened that is unfairly prejudicial to one or more s holders incl yourself. The diff btwn oppression and unfair prej : latter has lower threshold, oppression is more heinous. Some other stats (Ont and Fed) in Canada have a third ground, but not in BC: acts of Dirs have unfairly disregarded s holders or applicant. This is the lowers level of heinousness. In BC, if you are bringing section you are limited to two grounds in s 227.

BCE

- way mgmt had configured merger was seen as unfairly prejudicial. SCC : first time they ever commented on oppression remedy, incorporated UK jurisp and set up a way for Ls to argue these cases. Before it was amorphous, you didnt’ know how a court would respond to tale of woe. BCE: A) you have to first divine what reas expectations of applicant were entitled to have been. (what was this s holder reas entitled to? )B) were these expectations breached? C) And did this breach amount to oppression or unfair prej?

- this has not changed law but gives framework for analysis. House of lords: Socttish Co op and Meyer 1950s: holding subsidiary arrangement, s holders of subsidiary complained that Dirs of the subsidiary were just nominees of parent co and had not indep managed it in best interests of s holders , had done bidding of mangers of holding co. What does oppression mean? Di dnot require fraud, but requires s thing of regard (more than inconvenience): Simmons J ‘burdensome, harsh or wrongful’ B says this is a stab at fraud and or unfairness. Had to be seriously unfair. This test was used to separate what judges thought was unimpt and impt (disappointment with commercial results was out of the picture).

###### Ferguson case

 P 771- dispute over IMAX cinema chain, pre BCE. This IMAX started off as closely held co, court emphasised that this was an intimately held co, special rel btwn Dirs and s hodlers – knew each other or were each other. S holder (claimant) was a single partner who was a V of persecution by fellow s holders: used fact that as Dirs they could withhold dividends (she got no return of profits despite large success of co). She was marginalized by behaviour, this is classic example. You go into a co as a minority s holder with expectation that you will be treated on equal footing, court also says this is not a CL remedy. This s a new Stat remedy- its mischief is to assits minority s hodlers in sits like this where existing CL remedies fail, it is to supplement CL not restate it. this conduct in total showed lack of bona fides on part of mgmt authority, so she was justified in claiming oppression. They were assessing what the nature of her rel with other s holders – satisfied test from Meyer. See para 36 of BCE where SCC talk about fair treatment, B says they are talking about oppression remedy (not fid remedy bc they say they aren’t). This is not a remedy that ratification has any relevance to , is personal remedy vested in you as s holder. No procedural steps to claim it, other than Meyer test. You don’t have ask Dirs to sue bc this is not a corpo0rate remedy, cannot be taken away from you. Since these cases but before BCE another very impt case fro mEW:

###### Ibrahimi case

- EW case, not assigned but has application to BC case. NOT an oppression case, on p 409. Was case seeking the English equivalent of our s 234 (winding up on just and eq grounds). Tow ppl owned an art gallery, one had a son. The father wanted son to be in business, other partner said ok. Over time, the two founders quarrelled and son and father ganged up and marginalized the original co partner. So this person asked for winding up on just and eq grounds. The HL here gave relief: what were the reas expectations of aperson in this situation? Are manifestly different from an arm’s length investor in a publicaaly held co? Latter has little expectation of becoming MGMT, there is also no expectation to expect that past profits will expect self but here the HL said that given the intimate commercial rel btwn founders there WERE reas expectations of this on unspoken arrangement. When one partener diverged from this, that was an incurcsion of them.

###### Diligente case

- p 774 , BC application of Ibrahimi. S 128 (3): at any time a Dir is in office, they can be peremptorily dismissed at any time by special resolution of sholders. This is usually impossible bc proponenets will not get this voting out, but did here. Used s 128 : small, closely held restaurant co, one s holders was a Dir (all were both) was disimissed form board by spec resolution under s 128 (3). He claimed that losing his say in mgmt of biz was oppressive. Could he have done anything else? What if there had been a section in NOA that said Dirs were Dirs forever? Could he claim this? Rights under s 19 are s hodler rights, and he is claiming that his rights as a Dir have been flouted. Courts might say no, you are not protected under s 19 as a board member. Also, you might argue that the vote ousting him as Dir was not bona fide in best interests of co on basis of Goldex and Revel hm. (emerging idea in CDN law that Dirs were at someminimum requirement not to abuse s hodlers who dissent). There is more support in EW law for this. Or winding up remedy: this has always had a higher threshold than oppression. Maybe he just wanted to keep going. H wanted best of bth worlds, this was first case on new oppression remedy that had both oppression ground and unfair prej ground. It’s unfair for his L to say that the liberalized statute means he can do this and NB: he also claimed the appraisal remedy under s 237 (dissent proceedings/appraisal remedy)- this provision lists fundamental changes that, if they occur, all require a spec resolution (merger as in BCE, or restrictions to co;s articles). If you dissent from one of these, you are auto entitled to have co buy your shares . there is a rigd timeline to dissent and request they buy shares, this is personal but is automatic. This parachutes you out of co. Say you want out but also a fair price for shares. When you seek oppr remedy as Diligente did and that co buy your shares (also appr remedy) you have to prove this is appropriate. You don’t automatically get the court to order co to buy shares. Appr remedy is grante in context of oppression action when rel btwn you and s holders is so poisonous that court says they will bring end to it. BUT if you are not engaged in mgmt , just an investor, but are still being oppressed or unfair prej , court is more likely just to tell you to shape up rather than give you a free option to buy shares. Appr remedy is guarantee, oppression is not. D here DID seek oppression remedy, Defs argued reasonably that he was not complaining about conduct affe ting him in capacpity as s holder. He was only complaing about his actions as a Dir. Court then went on to consider whether this was oppression or unfair prej. BCE: discussion remedy discussion refers to prior jurisp as being in either Meyer caterogry that stresses heinous nature of behaviour and Ibrahimi which look smore at reas expectations and whether this had been violated. Courts thought the caselaw was too restrcitvie to allow them to fidn that his dismissal from board was sufficiently egregisou to amount to oppression (failed Meyer test)- saw Meyer as binding. This looks more at conduct, literal approach endorsed by HL but was modified by Ibrahimi and Bell here. This might be wrong post Bell.

- unfair prej ground: escape valve to assist Mr D. Intention of legislature was to give more liberalized basis, but still had a problem. D was only relying on his dismissal as = unfair prej, but court said this awsa prob as this conduct only affected him as a Dir. Court looked to Ibrahimia nd said they had a new approach that looked at reas expectiations- D clearly always expcted to be on board. They said , somewhat imaginateively, if you are a Mr D and you get fired as a Dir that affects you as a s holder in this sort of co. It was a reas expectation in a co like htis to expect to always be a Dir, this is a partnership not a co. There might also be a laches ground (putting up with abuse for so long that you are stuck with it).

- NB: Diligente was generally assumed to have drawn a distinction btwn oppression and unfair prej. Diligente did not change Meyer test, but there was no EW test on unfair prej so this was first trial court to examine it. held: oppression is on inherent nature of conduct, unfair prej focuses more on the effect on you of the behaviour. Just gives a different way to evaluate date and evidence to postion your argument on the two claims, even post BCE we still have the distinction. This is not discussed much in BCE.

-To come : Oppression: what SCC did in BCE, the forms of orders , rel btwn breach of fid duty in a derivative claim and in the oppression remedy. Are there situations where a breach of fid duty is only that, or is there more? Hm.

###### Re BCE Inc.

- p 759- court did two things re oppression: explains meaning of remedy and also discusses last issue – rel btwn oppression remedy to breach of fd duty. Read extracts, court held that oppression section is equiatbel in nature, so it goes beyond entitling people to relief bc they can establish a breach of a legal duty , goes further and suggests that claimants can say something was unfair or that it affected them in unfair way. Is most open ended, no surprise it is most commonly sought. Court was inspired by Ebrahimi, had unique way of setting out strategy. Would be hard now to go into court and ignor Bell and use earlier authority even if you case wwas strong. Held: reached into HL speeches and pulled our reas expectations cases A) is there evidence to support the claimant’s allegations that various maters were within his entitlement to reas expect , so breach of these expectations gave him grounds to argue this was oppression or UP? court said reeas expectations are related to commercial expectations, nature of relationship (changes if closely held) , must look at pre existing agreements btwn parties both express and implied. Court was also entitled to look at what Cl should have done indep of legal relief to protect themselves. If Cl is author of own misfortune, this undermines what they can later claim. If not, you could also claim estoppel. Are the reas exp claimed reas? B) was there a breach of that exp in this case. In Diligente it was reas for him to always expect to be a member of board, this was breached by him being dismissed under s 128 (3). Then you go on to look at whether than breach was sufficient to amount to UP. but are we still limited to Meyer test when we look at whether oppression can be found? If not, we still have UP. we have cases that say that if ppl are hurt in a meaningful sense, they can say that the consequences = UP. latter is more liberal, you don;t have to have been affected in same way so to = oppression. BCE facst: debenture holders who claimed remedy as entitled to do after being given leave to seek it said that they had a reas exp that Dirs would realize the negative effect on shares re takeover and would minimize the effect. Held: yes, reas exp but no had not been breached in circs. Establishment of advisory committee to board and detailed provisiosns in debenture itself which gave them legal protect tion as creditors all gave them enough protection. So they never got to discussing oppression or UP. perfect storm of procedural and substantive. Used pre existing legal theory but made it a mechanical approach. C) what the SCC said about the rel btwn oppression remedy and derivative action.

- two more aspects of oppression: forms of relief (list is not exhaustive), rel btwn Derivatvei action and oppression remedy. One of the original rationale in Fosse v Harbottle for courts being tight fisted in giving standing for breach of fid duty was that it would open floodgates and undermine the efficiency of cos. Liberalizaation of oppr remedy might = the same thing, boards might have to put up with dissatisfied s holders who dont’ want to get leave to seek derivative action but could use this smooth oppression remedy too easily.

- next time is compliance and restraing orders and finish with appraisal.

Mar 21, 2013-03-21

- BCE Bell (Si talk)- fed stat s. 241 and s. 192, BC s 227 and s 291. (respective equivalents)

Facts: two parties – BCE and Bell. Stock exchange , stock value fell BCE Dirs wanted to privatize , argued a share auction was in best interest of s holders. Formed indep committe to oversee this, Ont Teachers’ Pension Plan offered to pay highest premium, Dirs agreed. This was approved at s holder meeting, seemed everyone was happy. But some dissented (debenture holders)- bc Bell had agreed to be a guarantor of T’s of 30 mill if they couldn’t afford it. this decreased the market value of hte debenture holders, they thought they had been treated unfairly under BC s. 291 and oppression under s. 241 feds/ 227 BC. Argued that bell and bce were acting as one party.

- diff btwn fed act on oppression fed remedy and BC act. BC was argued to be narrower (fed act has three grounds: oppressive or UP or unfairly disregard), BC does not have latter. But BC court had kind of interpreted UP to accommodate disregard section. Further narrowing this @: BC stat categories are either oppressive or UP to s holders (they are only ones named), but Fed act talks about interests of security holders, Dirs, officers and creditors.

- BUT BC act has a benefit: it prescribes that you can sue over acts you fear might happen, but Fed act requires finished acts (has no prospective nature). BC act also has difference in category of who can sue: Fed stat has no appropriate people section so court can decide, BC act only allows officers and Dirs to sue if court lets them in. BC section has provision ot let corts allow anyone. Hm. Third difference: Fed stat lets court regulate co behaviour by modifying bylaws and articles of co. BC does not allow this. Hm.

Rel btwn fid duty and oppression remedy

- relevant to BCE, controversial issue. rel btwn s holders and stakeholders. In other areas of law there is a lot of talk about this re corp social responsibility. S holders have voting rights, can partifcipate in a manner in mgmt of co and can get money back in winding up but do not own co! Only own shares. But stakeholders have connection with the co by contract, have K right. Problem: in Peoples case the court mentioned that Dirs MAY consider best interests of stakehodlrs but this is not mandatory. However, you probably should. This was also confirmed in BCE.

- difference btwn derive action and oppression remedy is in who’s name you are suing. In latter, you sue in own name and bear the consequences.

- there is also overlap btwn fid duty and oppression remedy- but each have their own nature. Fid duty breach does not in and of itself = oppression or UP or unfairly disregard. So you need to prove that this breach amounts to one of above. OR concentrates more on Dirs’ behaviour rather than hwo they predict the result. Actual unlawfulness does not need ot be there, conduct itself can incur and oppressive remedy.

Issues and Analysis

- A) Oppression remedy B) court approval of arrangement.

- B) there is little on this in text, not on exam. A) two step test: para 56 and 68: was there reasonable expectation, does this amount to Oppression, UP or UD.

- So what is a reas expectation for the complainant:what did they think would be done and would the breach occur? Hm. If you cannot pass this step, you stop. This is a narrow decision on facts, will likely be limited in usage. Conclusions: paras 66-67 ‘reas exp of stakeholders is that the Dir will act in best interests of co.’ Only co interests, not s holders. This is different from Revlon and Peoples where s holders interest trumped that of creditors and stakeholders. Further: reas exp for complainant is whether or not the court objectively views that courts viewed the interests of debenture holders in making decision. Court emphasised this was enough, so there was no obligation beyond this. Dirs only need to consider that of s holders! Hm.

P 757 text- breach of fid duty is of itself oppressive in case law, but after BCE this is no longer the case bc step two was added (did this breach = oppression, UP or UD? Breach of fid duty does not qualify for oppression remedy anymore.) re step two- did the Dirs consider their case? Was this reas exp fulfilled? Para 113- SCC established a reas exp (Dirs need to consider) and that Dirs need to work in best interests of co, these WERE fulfilled so the reas exp was NOT breached and you don’t need to go to step two. Court gave checklist: paras 33-81. Hm.

1. Commercial practice B) nature of co C) rel btwn co actors D) past practice.

- debenture holders failed to establish a reas exp that could give rise to claim of oppression. Context: a takeover, fundamental change. Court felt that reas exp for creditors is that Dirs will act in best interests of co, so if the situation changed would htis be the same? No, would alter.

Comments on case:

- diff btwn fed act and BC act. Would hte result be the same if we used the BC act? Courts here gave strong defernce to business judgment rule.

- para 66- court talks about ‘good co citizens’ some think this is an expansion of Dirs’ fid duty! This talks about Dirs to consider the interests of creditors. If you act honestly and in good faith, you may not breach Fid duty but result might still = oppression remedy. OR was developed for minority s holdrs, was not for stakeholders. Stakeholders managed to make use of breach of fid duty, but this was blocked so they went to OR for remedy.

Does Fid duty still have a nature, is it standardizable or can it be decided on a cases by case basis.

###### Furry Creek (1992) 75 BCDCR 2d 246 (S. Ct.)

 Oppression remedy. Types of relief: S 227 (3) – judges have blank slate to come up with any kind of order they like. Sub 4- court may order undr (3) that application has been made in timely manner. Seems like CL laches defence (waited too long). Oppression remedy in book is described as equitable, but is actually statutory. Sub 4- this seems consistent with idea that it is an equitable remedy. Maybe other types of neglect on part of plaintiff may influence how judge decides if they are entitled to relief. You can identify UP, but if you seem to have contributed to this it might influence court as to what you should receive.

Interim Orders

Orders can be made that are interim in nature. Create a judicial role in co dealings. Applicants like U nlikeDiligente or Ebrahimi, some people never envisaged they would be managers/ on board. This often happens in family situations when an older member wants to be in co, but not involved.

###### R v Jackman 1977 (BCsc)

- applicant was wife of deceasaed s holder who had inherited his shares. There was no expectation she would take part in running of co. Debts of co increased, half of them were loans to a co controlled by managing s holders. They had excluded her from running of co. Held: applicant established UP and oppressioin, but she wanted the appraisal remedy (she wanted out as an investor). Courts did not think appr remedy was approp in case, as this was more for someone who was involved in running co so they ordered that mgmt shape up. (majority s holders had to personally guarantee loans – changed loans from corp to personal.) told them to run co in proper manner, to cease neglect. Remedies are super fact specific. This is unlike a Diligente type s holder. This approach has been followed in later cases.

**Final Q: what is the rel btwn oppression and a derivative claim for breach of fid duty?** Pp 757 -8: in BCE, most impt decision, court described diff as oppression being harm to legal and equitable interests of s holders and other stakeholders. Fid duty facilitates protection for co itself, although this could include stakeholders. This does not tell you where you situate your claim, most plaintiffs now seek both forms of relief at same time. Let survival of one or both depend on commmetns court might make, so very few of these cases go to final judgment so you need some kind of framework to argue some kind of remedy is best. A) we are in transitory period, expansion of oppression remedy and nuances re derivative action in BCE give some certainty but that might change. B) p 758- derivative claims for breach of fid duty have existed for 200 yrs, but oppression remedy has only been around for 40-50 yrs. Given liberalization of derive claim, we are still in a period of sorting this out. Diff btwn oppression remedy and derivative claim: fid duty has some degree of certainty to it (see categories like corp opportunity , have some framework), but oppression takes us into s thing more fact specific. Courts have not given tests for UP. BCE does not say a lot about difference, but a breach of fid duty CAN = oppression. If Dirs act oppressively or prejudice s holders, fid duty will be involved. Earlier BCE case said that in order for you to prove oppression you had to prove that claimant was affected in some different way than company was. But this is not referenced in BCE, they have just tried to talk about what the essence of a fid duty claim is. it’s best to treat them separately, start with breach of fid duty (ask if facts set out that defendant has acted in way that case law tells you = breach of fid duty, but you need leave to sue derivatively). Then ask if you can then also establish oppression, then you have to go back to authorities on oppression. This is more of a factual overlap than a legal overlap. You don’t say you have established fid duty, therefore you have been oppressed. Much conduct may be capable of upholding both claims, but this is not for sure. Oppression asks you to show heinous behaviour, court has said that oppression is more heinous than UP (and the U disregard remedy we don’t have in BC). One of the theoretical aspeacts is that we seem to have been thinking about liberalizing remedies for s holders, but the original reluctance of EW courts (in Fosse v Harbottle) to throw around derivative standing too much they would be faced by a slew of people making claims, so they constrained by tests like fraud on minority. We have liberalized the original CL exceptions that will give leave to s one to sue, but if we liberalise the oppression remedy we are disregarding the argument that was the foundation of hte reluctance to let s holders sue. Nobody says that Dirs and officers who have misused powers are ok, but simple business incompetence and bad luck should not be sued on every time. Courts have always said they did not want to get involved in this. If you were to liberalise the oppression remedy too much, you undermine the argument that courts should not encourage s holders to come to the court every time things don’t turn out perfectly.

- you cannot get damages for breach of fid duty as it is not a CL remedy, but an order to issue shares etc has the effect claimants want. Cases now seem to say that a breach of fid duty MAY = oppression, but you may need more. Eg a case that says that a contract is voidable if a Dir has an undisclosed interest, or s holders can ratify it but if they don’t , B says they would not win. Regal Hastings- bc Dirs made money on sale of shares, they were accounatbel for this profit but this was not oppression. Even in Jackman where managers ignored passive investor, did not have meetings or give out financial statements this is in middle ground as to whether or not it is oppression. Test for breach of fid duty is whether or not you are acting in best interests of co, but you can probably get away with quite a bit before you are in breach of fid duty. You would get to UP first, then you have to look at whether or not there is a materiality matter that = oppression.

### Compliance and Restraining orders

###### s 228 BCA BCA

- restrictions on co power, ss 30-33: allow co to compromise itself in some ways if it has this in NOA. Then the Q becomes, what if the co violates its own restrictions? What can be done on part of s holder to remedy this ? see s 228 (which actually references ss. 30-33).

###### s. 19 (3) BCA

: p 808, comment on Fosse v Harbottle (f v H is not good law anymore) is wrong- this is a personal action, so f v H has nothing to do with it. you don’t have to ask co’s permission to seek relief. S 19- comes form 19th C, state ws telling cos that docs by which you sought incorporation by use of a trust now allow ppl to incorporate under Stat. British solicitors had put in clause that said that all terms in Trust are binding on Dirs and on beneficiaries of trust. **S 19 is re stating the contractual principle that the co’s charter and docs are a contract btwn co, s holders and all stakeholders. The minute you become a s holder, the terms of this agreement are in the NOA and articles. This extends a personal remedy to all s holders in co at that point.** Eg if provision re notice of AGM is not complied with , s holder can get non pecuniary remedy for this. The only limitation that has become apparent with s 19 is that it may not be a basis for damages. this has been argued, but there are no examples of it occurring. Don’t for get, it’s only one of many personal remedies available. It’s more likely to be fact specific. Will not be of great importance.

###### s. 228 BCA

- is a new US provision, was first adopted here in 1970s. BC adopted it in 1973, is based on provision in Fed act (s 247)- when Stat talks about other categories of other (appropriate person) people who can gain standing, it does not use a consistent test. The way in which this standing process is set out is a source of great annoyance and confusion bc you cannot be sure of what standing mechanism is. this gives standing as of right to s holdrs, but then gives standing to an undefined group of persons (creditors have a shot, Dirs could ask for it but don’t have it as of right as s holders do). S. 228 extends s. 19 from NOA to whole of regulation, extends K theory to public laws as well. It covers every contravention, sort of overlaps with s. 19. Then it gives the court powers to make various orders. You can get an order that the co comply with the act/the regs or its own constitution. You can also get an injucitno (restraining order) to prevent co from doeing this contrary to own constitution. There is a reference to s. 33- if they do s thing they said they wouldn’t do in NOA, you can use s. 228 and s. 228 references s. 33. You might get an order reimbursing the co for any losses you can prove resulted from its violation of the restriction. You CAN get compensation under this section, this might = damages! not sure.

###### R v Goldhaar (Ont case)

- s holder got lawyer, L decided to get around derivative leave application process would be to use Ont equivalent of s 228 to say that the conduct that he or she argued to be a vioilation of act was a breach of fid duty under s. 142. The applicant is concerned about what they argue is a breach of fid duty, so you could argue s. 228! Doble win- you don’t need to get leave as you have it as a s holder, and if you get relief it is yours (up to the court). It would go to the co under s. 232 (3). Court can order a stoppage to the contravention and make any order it thinks appropriate. Could you stretch this into an order for compensation? B does not know. Goldhaar says no, you cannot use s. 228 to aruge a breach of s. 142 but as the book says the court cites a case on p 814 in note 1 (CAlleron) where the judge says a complainant is not precluded from......they are suggesting this case might be argued or decided differently in other provs. You would be relying on same behaviour with which you have established a breach of fid duty and using s. 228 to ask for compensation. Ont court here said no! It is now almost impossible to be definitive about differences btwn fid duty, oppression, compliance and restraining orders. Sub (3) is worded the way it is bc someone has imagined a s holder being harmed bc of drop in share value, so this person is complaining about a breach of a restriction and they should get some compensation under s 228 (3). B is trying to find another basis for paying of compensation, only one he can find is in (3). There is not much scope here for award of damages unless you are complaining about a breach of a restriciont. Puts it more in line with s. 19.

- who knows if Goldhaar was right? Most ppl say it was a nice try but no cigar, if you could use s 228 to sue for breach of fid duty it would confuse how you view remedies. These provisions are prosaic.

###### s. 229 BCA

- this has long existed in trustee act, is designed to tidy up infractions of the Statute that were innocent so as to validate the behaviour that flowed from it. there is again confusion about standing, here the term is ‘interested persons’ have standing to ask court. this is bc it was borrowed from another statute, obviolsy means s holders, beond that prob means Dirs and creditors. This section is about procedure , not substance. This is not designed to ask the court to wave its wand and say it was or was not breach of fid duty or oppression. Deals with things like failure to have a quorum of s holders, this section protects those who are affected by acts of the co and resolutions passed. Courts have applied a test that looks at the inconvenience of the co haveing to replay the meeting vs the importance of s holders not having the chance to speak. Eg meeting is two day slate, or quorum is 12 but you only have 10 ppl. Court will likely let this slide, but you have to prove co failed to do s thing meaningful. This is a pro active remedy. If they can make a strong case the judge won’t grant the application made by co.

###### Ss 230-231 BCA

: deals with application to correct co records. This is mostly prosaic procedural matters, CL on meetings is pretty unforgiving. If there is a failure to comply with these, CL says everything is invalid. 99.9% of the time it happens but nobody raises it. law is vilated, but a decently run co should be aware of these requirements. Not really impt.

###### S 143 BCA

- VERY IMPT. ‘an actor or Dir or officer isnot invalid merely bc of an irregularity in their appointment or bc of a defect in their...’ . If Dirs are buying and selling stuff in co’s name but have not been properly elected, this would be void at CL and creditors would not have to pay the money. Hm. This might mean that a minor age Director’s actions would be validated.

**Oppression Remedy and appraisal remedy:**

Ebrahimi- was a winding up case, not oppression. So there is some overlap.hm.

**Shareholder Agreements.**

- is a pre nup , usually close co situation so they are all Dris. They have a lawyer draw up an agreement, try to anticipate problems that might arise. Eg when a s holder dies, or there is an issue of payment for shares/ price. There are some legal issues bc if co is buying shares, they have to be solvent and there are other regs. Fettering discretion issues for Dirs, so they only can be entered into by them AS s holders.

### Right to dissent/Appraisal Remedy (ss 237-247 BCA)

- has own statute. P 237: many sections, don’t have to know them all. Issues: who qualifies, when it is available and price for shares. This is a US law, now in our act. Relates to fundamental change. When a co undergoes a change that can be called fundamental or const in nature eg sale of undertaking under s. 301, this is material enough to justify a s holder to say he wants to ask co to buy his shares to get out of this debenture bc this is not the co I bought into. This is more formalized than oppression remedy. You don’t have to prove misconduct of any kind. As long as you have standing, and you follow procedural aspects within time limit, you can make co buy your shares. **This is a Stat version of a s holder agreement that tries to do the same thing. Very impt for closely held cos bc these s holders don’t normally have a market for these shares unless outsiders are trying to take co over so this gets around it to keep strangers out unless other s holders want this to happen, is available for both types for strange reason. Most publically traded cos shares are actively traded!**

- appraisal remedy can be a remedy under oppression remedy, but it’s at discretion of court whereas here the court is not necessarily involved. If you follow requirement,s you are guaranteed the co will buy your shares.

###### S 238 (1) BCA

lists fund changes that the Stat has decided are sufficiently significant to justify a s holder having this right. We are familiar with most,

###### S 260 BCA

- restrictions on powers of co and change in them (removal etc),

###### S 260 subs bcd BCA

– relate to mergers, eg merger in BCE, restricitnos, amalgamations

###### s. 260 Sub f BCA

 – inter provincial emigration. Becoming re incorporated as an Alberta co.

###### S 301 BCA

- sale of the undertaking.

**- all of above require special resolution. These are Statute’s definition of fundamental change**.

Later sections set out detailed procedure- there are specific time limits, plenty of opportunity for missteps. You have little time to begin process for remedy and if you do you are in a detailed process.

###### S 240 BCA

 **First step – co must tell s holders about this right.** They must know they have the right to ask co to buy shares, if other elements necessary exist. It’s even irrelevant that their shares carry right to vote or not, s holder can file notice of dissent if their shares are otherwise voteless. This entitlement also requires being told there witll be a meeting of s holders to vote on resolution. There is a three week minimum requirement for this notice .

###### S 240 (3) BCA

- what if they don’t sent out such notice and voting goes ahead? S holders have 14 days after meeting, retro active right to assert this remedy.

##### Notice of Dissent

###### S 238 (2) and s 242 BCA

- these deal with the filing of a dissent, so if the s holder having been informed of their rights and vote can then file a notice of dissent. Must exercise their appraisal right under this in respect of all the shares they own. You can’t cherry pick, only sell half. All or nothing. There is provision for a sholder whose interests are only beneficial to direct the registered member to exercise the right of dissent on their behalf. You have two days to give this to co. - co must give you notice, you are then required within a certain period to tell them you intend to exercise this and co must respond with a notice of intent to proceed (with the vote).

###### s. 244 BCA

- At that point, you have to send the co another notice and you send them the share certificates! You are perfecting intent to sell what you own.

###### S 239 BCA

- is on waiver, but B says it’s redundant. This is like waiving oppression remedy in the abstract t, but you can waive it in respect of a special resolution. You can tell co you will not dissent.

###### S 246 BCA

- loss of right to dissent. These are self evident, if resolution does not pass (3/4 or whatever level is not achieved) you lose right to dissent. If for some reason the court orders that they vote not take place, ...

###### S 246 (g) BCA

- if you decide at meeting that you WILL vote in favour of what you have told co you will dissent from , this estopps you from insisting co buy your shares.

##### Price for Shares/relationship btwn this remedy and other personal remedies under act

- as long as you comply with these timelines, it is clear you will be ok. But what about when you argue over price. You are jumping ship! But can you also bring som other kind of application for relief under common law. This is made slightly more complicated bc of complex Stat provision.

##### Payment for Shares

- at CL this was illegal as a return of co assets to s holders as it reduced value of assets to co. It has never been against the law in the US and in 70s Canada adopted this due to high volume of trade with states. Some cos do this for investment purposes, realize co is undervalued and they hold these shares much like any other asset. Some jurisds do not allow them to maintain these shares on their books. NB- bc co is a legal person, so it’s an insider of itself.

###### S 245 BCA

- provisions on co buying own shares. Only significant restriction is that it is solvent (can pay debts). If a dissenter is not happy,

###### S 237 BCA

- court will define ‘pay out value’. Ie the fair value that shares had immediately before passing of resolution.

##### Share valuation

- more of an accounting issue than a legal issue bc Ls do not understand value of shares. Ha. Courts have said there are

###### R v Domglas

**three ways to value shares:**

**A) market value**- you go out and ask what they are trading for. Donglas case (QC)- p 823- is only approp for publically traded shares on stock exchange. This is what arms length buyers are willing to pay. But these fluctuate by the second. The New York rule isthe average of a mean price over a consecutive 21 day period, most recent 21 day period. Trying for objectivity. Judges have discretion. You would hve to convince judge this was a viable way. Hm. You are most likely to run into trouble when trading is erratic, few trades btwn arems’ length parties. If this is the case, courts shouldn’t use markey value and find another way to satisfy test in s 237.

###### Wall v REddikop

- bc case, held: co’s shares are so rarely traded that he would not use mar ket value but would use better test on facts of cases.

- this test only works when sthares are actively publicaly traded.

**B) asset value**- you add up all assets of co in their value (real estate, chattels) and divide it by no of shares outstanding. This is then the value of shares the applicant can rely on. This does not take into account inflation etc, judges will usually get or appoint an expert to advise them on this issue.

**C) intellectual property value**- HM. Check this. many cos have little physical value, so there is usually a discounting of future earnings. Their earning stream is discounted , is an attempt to value today the value of that earning stream going forward . Is like what currency market does when you speculate on foreign X. Domglass says this is the most common,

- court makes final decision on w2hich method to use.

##### Squeeze-outs

- when mergers and amalgamations under s. 238 (bcd) happen. Dirs of one co decide to become one, they need special resolution and approval of court who will aks if it is in the best interests of each co and its s holders that this occur.

###### RE BCE Inc.

- challenge to special re in favour of merger. Those in favour of merger are thought to have the expectation that the profitability of these merged cos will be higher than in the past. There may however still be s holders who want to take advantage or right to dissent and have theri shares acquired. So should they get a premium on their shares bc they are being removed from the co. This is a hostage taking, said they were prepared to dissent bc they want out but other paryt is getting a speicail benefit in tihs process. This is like the US Premium for Control (takeover)- should this premium be shared with all the s holders of the co. In QC, courts have come close to saying they SHOULD get a premium. Those who benefit from the amalgamation are asked to tip those who are not leaving. BC courts have been highly sceptical of this , say you own shares or not, there is no value entitleemetn based on assets others own. (Squeeze out premium). BCE d ho0lders were NOT s holders so could not have forced htis, were only trying to block merger.

###### Wall v Redikopp

-rejected this squeeze out premium

###### Domglas

- thought there was an EQ discretion for judge to do this. Was a 20% premium her on top of pay out value.

##### Winding Up

###### S 234 BCA

- A) its s holders can decide to do so theselves, if they want to they can vote by special resolution in favour of winding up (suicide). B) There is little provision in act for co being wound up by province. Registrar’s office will sometime hunt for cos that have not filed for years, tell them to contact them or they will be struck (homicide). There are issues about entitlement to assets. C)Third option- interms of it being a minority s holder’s remedy, a minority s holder (or some other party) is going before a party and saying it is EQ to order dissolution of co so that its assests will be sold be a receiver. If s holder is disabused by way co is being run. There is reluctance to do this when some other way is possible. Judges can order the oppression remedy instead of a winding up even when cos have not asked for it . this is from Chancery law, court had EQ jurisd to dissolve partners- now applied to cos.

###### Ebrahimi

- talks about winding up. HL- two indivs had art gallery, son ganged up on orig partner. Ebrahimi applied to courts , asked for EQ winding up. developed idea of expectations, that if balanced was upset that might be the ground for a s holder to seek winding up. two partners becoming three was enough to justify this.

###### Diligente

- two new majority holders used our equivalent of s 228 (firing of Dir by special resolution) had enough votes to use equivalent of EW s 238 (3) to get D out. D asked for a winding up on these gronds, court approached facts using an expectations test, he won. Hm.

- this is analogous to a partnership, there is a confidence by people working together and that they will all have certain property rights in future. Ebrahimi: once you are fired , your expectations have been undermined so it’s EQ for courts to wind up. this is a setting aside of a contractual rel. It’s hard to know what EQ means, is up to judge. Is more serious a violation of your expectations than oppression or UP. this is the most profound undoing of co, so nature of facts should be highest of all. But courts have used mealy mouthed lang ‘justifiale disappointment....that the Dir’s conduct has shown a lack of probity and good faith.’ ‘that they have been harmed in a way that’s more than just being out voted’ or that the co has disappointed them in terms of profitability. This is the Same language used for oppression etc. So what is intrinsic to just and EQ:? Has more to do with judge’s opinion that this is going too far or if the court can resolve this in another way. Court wants to allow cos to continue. Less illegality is being alleged, there are ways for police to de list cos in terms of fraud and crim activity. This is a residual remedy, but is EQ in the sense that oppression is so things like clean hands are impt.

- even though you have applied for s 234 winding up, they CAN grant oppression under s 227.

###### S 234 (1) BCA

- standing (s holder, bene owner, incl a creditor! Whom the court considers to be an appropriate person...the court may order the co to be liquidated.)

- don’t make too much of the differences in languge where there is an open ended peson, Stat intent is to give lots of discretion to court to see if person should get standing.

### Shareholder Agreements

- ‘two or more s holders mnay agree in writing that they will vote their shares in accordance with the terms of the agreement. ‘

- it’s clear at CL that s holders CAN agree with other s holders at any time, but it’s their personal property so this term is redundant. They are not fiduciaries of each other, so they can freely exploit their personal property rights and agree or disagree. They are fettering their discretion, if they don’t enter into such an agreement. Hm. CL is clear that Dirs cannot do the same thing, can only do it in their capacity as s holders. Dirs cannot agree in advance how they will vote shares bc to do so is a prima faciie breach of fid duty, this limitation may not be in best interests of co if facts change btwn how you agree to vote your shares in the meeting and later. Hm. In Civil law

######  Reguet v Bergeron

- case looks at an agreement btwn s holders in Quebec, there were ambiguities whether the meetings they talked about were meetings of s holdrs or of Dirs. In order to invalidate the agreement, it was argued ....under Civ code they say this is contrary to public interest (this is breach of fid duty in CL). Co had seven shareholders with equal number of shares, three got together and agreed they would buy shares of no 4 which would give themn control of co. The agreement btwn them provided they would all vote to elevt each other to the board (this is ok as they vote as s holders) and that they would all vote the same at meetings of the co. What did this term mean? There was a penalty clause providing for the forfeitrue of the shares of any one of them who did not vote re agreement. One sholder sued to sorce others to \_\_\_ bc they did not support his election to board, they in turn said agremement was contrary to law as in clause 11 it was invalid in law. **NB- make very sure what ‘meeting ‘ means.**