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# 1. Introduction

Non-Business Organizations (NBOs)

* Two or more people associated for a non-business purpose (social, charitable or sporting interest)
* Very limited liability for members – not liable beyond your subscriptions
* Not entitled to any profits that may be generated by the club
* Not required to pay taxes (determined by the CRA); including both charities and non-charities

Special NBO: Charities

* If a club has a charitable purpose, a different set of rules apply (i.e. not subject to the rule of perpetuities)
* CRA encourages clubs and non-profits to incorporate under either provincial or federal law
  + However if an NBO begins to make money, CRA may assess taxes and force them into a business model

Types of Business Organizations

1. Sole Proprietorship
   * 1 individual has the prerogative/responsibility of making all decisions; individual acting for profit-making purposes
   * *Pros*: Easily commenced and dissolved and moderate start up costs
   * *Cons*: CL does not distinguish b/w actions for commercial purposes and ordinary personal affairs, making them fully liable for the debts and obligations incurred by the business
     + Creates an incentive to incorporate whereby a separate legal entity bears liability
   * No incorporation creates need for *Business Names Protection Act* – allows individuals to register their business name to prevents others from adopting a name too similar to their own
     + Where a name is too similar, a sole proprietor is able to sue through the tort of “passing off”
2. Partnerships (see below)
   1. General Partnerships
   2. Limited Partnerships
   3. Limited Liability Partnerships
3. Corporations (CO)
   * Possess their own legal personality separate from that of its SHs, DOs and ORs
   * Has perpetual succession and is not affected by any changes in, deaths of or retirements of its members
   * SHs are not liable for the debts or other obligations of the CO
   * Why not? Tax advantages, professional requirements (*Legal Professions Act*), and a desire to avoid complications

## Partnerships

Introduction to Partnerships – *Partnership Act*

* **2 Definition:** Is the relation which subsists b/w persons carrying on business in common with a view to profit
  + Between persons – requires two or more individuals
  + Carrying on business in common – suggests continuity; does not include “one-off” activities
  + With a view to profit – excludes non-profit enterprises
    - Does not mean that a profit must actually be generated, only that “the enterprise is carried on with a view to profit in the future” (Backman v R [2001] SCC)
    - Clear intention to “carry on business in common” is required to create a partnership; mere co-ownership (house flipping) is not enough (AE LePage v Kamex [1979] SCC)
* Commonly small ops – the larger they get, the greater the pressure to incorporate. Investment requires incorporation.
* Developed at CL (which subsists), but governed by the BC *Partnership Act*
* *Pros:* Offered greater flexibility in designing the internal managerial structure and ease of formation & dissolution
* *Cons:* Unlimited liability of each partner (depending on the type of partnership and the type of partner)
  + Not a separate legal person; partners are not employees of the partnership
* Registered through a *deed of partnership* – written agreements that sets out the rules and liabilities among partners
  + If no *deed*, then **27** applies to enforce standard rules

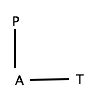
Relationship of the Partners to One Another – *Partnership Act*,ss. 20-31

* Based on principles of equality, consensualism, utmost good faith and the personal character of the partnership K
* Equality = right to share equally in the profits/losses, management of the business and duty to render true accounts/info
* Consensualism = requires decisions to be made with a majority of the partners
  + Though partnership is a K, it is subject to specific rules re: implementation and rights of the parties
* Fiduciary Character = partners are fiduciaries in relation to one another; risk that A may K to compromise P’s interests
  + If A breaches their FD, P is able to apply to the court to have the agreement b/w A and T set aside (equity)
* Personal Character = Partnerships end when a partner dies or leaves the partnership (ss. 35-57)
  + Dissolves and immediately re-continues w/ the partners who remain after the partner has left or is deceased

Relationship of the Partners to Third Parties

* Pre-partnership Liabilities
  + Not liable for your share of partnership debts incurred before you became a partner
  + Remain liable for debts and obligations incurred before you left
* Liability as a Partner
  + Partners are jointly liable for all debts and obligations
    - i.e. if Partner 1 incurs a debt to a third party (T), then Partner 2 becomes jointly liable for that debt
    - Independent of any rights of contribution and indemnity which a partner may have against another
    - N.B. May also be joint & severally liable under s. 14
  + However, the partnership agreement can modify liability (i.e. rights of contribution)
  + Tortious liability referred to as any “wrongful act or omission” under s. 13
* “Holding Out” Liability, s. 16
  + Applies when an individual represents himself as a partner; will be liable to any person who has on the faith of any such representation given credit to the partnership

Agency in Partnerships

* Partnerships are a specialized form of contractive agency; A can act as a P and as an A on behalf of the partnership (P)
* P = partnership or principle
* A = partner or agent
* T = third party

Limited Partnerships – *Partnership Act*, Part 3, ss. 48-80

* **50 Definition:** A partnership that consists of one or more general partners and one or more limited partners
  + **51** Must register a partnership certificate with the province; containing the name, type of business, names and addresses of all the partners, the partners contributions to partnership assets, the respective share that the partners have in the partnership profits
  + Provides constructive notice of the limited partnership
* Arose from two recurrent problems:
  1. Disputes between partners
  2. Dispute over partnership liability for torts or debts caused by one partner
* **64** General vs. Limited Partners
  + *General Partner:* Fully liable for the partnership’s debts and obligations
  + *Limited Partner*: Only liable to the extent of his/her contribution to the firm
    - Protection is lost if s/he “takes part in the control of the business”
    - Why? Public policy – wanted to encourage entrepreneurship by limiting liability for business risks
    - In BC and Ontario, the courts *objectively evaluate* the actions of the limited partner to determine their status (Haughton Graphics v Zivot [1986] Ont HC)
    - Other jurisdictions apply the “reliance by outsiders” test – based on what outsiders believe to be true
* Limited partnerships are often consider a cross-over b/w corporations and pure partnerships
* Commonly used by law firms since changes to the *Legal Professions Act*
  + Can protect broad partner membership from sharing in the liability or negligence of other partners
* What are the benefits of limited partnerships?
  + Particularly suitable to small, high risk business
  + Tax advantages – partners account for their partnership income/losses during income tax
  + Avoids securities requirements – not subject to securities legislation (i.e. disclosure obligations)
  + Limits partner liability – to the amount contributed re: partnership interest

# 2. Business Corporations & The Nature of Corporate Personality

History of Incorporation in the Anglo-Common Law

* Incorporation by exercise of the royal prerogative – i.e. HBC, London East India Company, etc.
  + Royal permission conferred corporation status for business purposes; not req’d by ordinary domestic businesses
* Incorporation by a private or general act of the legislature
  + *Joint Stock Companies Act* of 1844 allowed for incorporation by registration
  + *Limited Liability Act* of 1855 required that incorporated COs w/ limited liability add “Ltd” to their company name
* Canadian provinces divided among methods; somewhat resolved over the past 30 years
  + Letters Patent – applied in Ontario, Quebec, MB, NB and federally
    - Incorporation was a privilege; required permission from the state
  + Registration jurisdictions – applied in BC, AL, SK, etc.
    - Province could not withhold incorporation as long you submitted the requisite documents and fee
* Canada adopted the *Canada Business Corporations Act* (1975) – key features included:
  + **Incorporation by registration**
  + Protection for minority SH rights
  + Regularized pre-incorporation contracts
  + Introduced a new regulatory framework for the issuance and transfer of investment securities
  + Partially codified the duties of directors and officers
  + Regulated insider trading in the corporation’s securities
* BC *Business Corporations Act* (BCA) is an amalgam which includes the standard Canadian approach, influences from the US and influences from several government commissions in the 1970s
  + No longer look to the UK for influence; as they are subject to EU incorporation requirements
  + US has no federal equivalent; only states can incorporate
    - Case Study: Delaware “sells” corporate charters; use a very *laissez faire* statute to entice corporations to incorporate within Delaware at a very high cost. Used as a source of revenue for the state government.
* Currently working on revision of CBCA – industry wanted more uniform standards across the country
  + Currently required to register in every province in which you wish to sell your shares

Constitutional Basis for Business Corporation Law

* No express reference in the Constitution re: division of powers
* Citizens Insurance Co v Parsons [1881] Eng PC confirmed federal jurisdiction over incorporating companies under POGG
  + Has residual power for companies w/ interprovincial interest and other specific heads of power (i.e. 91(5) banking)
  + Federal COs remain subject to provincial laws of general application – i.e. employment standards, consumer protection and securities
* Bonanza Creek Gold Mining v R [1916] Eng PC held that provinces can incorporate companies “with provincial objects”
  + Cannot grant the right to carry on activities in another jurisdiction, but can confer *the capacity or power* to do so
  + Whereas federally incorporated companies are able to carry on business throughout Canada w/o any additional onus to register provincially
* Where conflicts are subject to the doctrine of paramountcy (Multiple Access v McCutcheon)

Statutory Provisions – *Business Corporations Act*, SBC 2002, c 57

* **3(1)** A company is recognized under this Act when it is incorporated under this Act
  + Company refers only to corporations incorporated under the Act
  + Corporation includes all corporations; whether or not incorporated under the Act
* **10(1)** One or more person may form a company by
  + entering into an incorporation agreement,
  + filing with the registrar an incorporation application, and
  + complying with this Part
* **17** Effect of Incorporation – On and after the incorporation of a company, the shareholders of the company are…a company with the name set out in the notice of articles, capable of exercising the functions of an incorporated company with the powers and with the liability on the part of the shareholders provided in this Act
* **18** Evidence of Incorporation – Whether or not the requirements precedent and incidental to incorporation have been complied with, a notation in the corporate register that a CO has been incorporated is conclusive evidence for the purposes of this Act and for all other purposes that the CO has been duly incorporated on the date shown and the time, if any, shown in the corporate register
* **30** A company has the capacity and the rights, powers and privileges of an individual of full capacity (CBCA, s. 15(1))
  + The Corporation is a separate legal entity for its shareholders (Salomon v Salomon)
* *Interpretation Act*, RSC 1985, c I-21
  + **21(1)** Words establishing a corporation shall be construed
    1. as vesting in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold personal property for the purposes for which the corporation is established and to alienate that property at pleasure;
    2. as vesting in a majority of the members of the corporation the power to bind the others by their acts; and
    3. as exempting from personal liability for its debts, obligations or acts individual members of the corporation who do not contravene the provisions of the enactment establishing the corporation

Incorporated Forms of Business

* **Distinguished from unincorporated forms of business through:**
  1. Legal personality – an artificial legal person
  2. Perpetual succession – not affected by death/retirement of members
  3. No shareholder liability (Salomon v Salomon)
* **136** Controlled by the Board – group of Directors who are vested w/ powers to manage the COs assets (can be employees)
* Important division between ownership and control/management – facilitates specialization
  + Shareholders – own shares in the corporation [ownership]
  + Board of Directors – BCA vests powers of the corporation in the Board of Directors [control]
    - Bell SCC – Board may also consider other stakeholders

Process of Incorporation

* Requires two public documents that must be filed with the registrar of companies
* **19** Constitution or Constating Documents
  1. **Notice of Articles (memorandum)** – the fundamental definition of what the company is; an outline of its powers and capacities
  2. **Articles** – the internal rules of how the companies meetings will be conducted, how SHs vote by proxy, how much notice SHs are entitled to, etc. Are essentially the company’s by-laws
* Outlines the legal nature of the company’s constitution; has a contractual effect b/w the CO and its SHs

Aside: Categories of Property

1. Shares – shareholders own equity in the company
2. Floating Charge/Debenture – debenture holders own “debt” in the company
   * A secured “charge” over the corporations assets; registered on the Corporations “title” per **90**
   * Meant to allow the company to carry on its business, and also give some security to the creditor

* Both can be traded on capital markets, to the public and other investors; lenders have the option to take shares or debts

## Piercing the Corporate Veil

* Modifies the consequences of the corporations separate legal personality for certain, limited purposes
  + Equitable doctrines make recourse available to individuals suffering harms caused by the corporation
* Used to moderate the application of Salomon – has two consequences:
  1. Disregards the separate legal personality of CO and treats the rights, duties, and liabilities as those of its SHs
  2. Non-recognition of the separate personality of a CO where a statutory or other legal standard so requires
     + Treat the corporation together w/ its parent, subsidiary, or SHs
     + Example: De Salaberry – rather than viewing the conduct of a CO in isolation, Court took into account the conduct of a group of COs under common ownership for tax purposes
* No clear cut rules lifting, but there are **four general exceptions** when courts may be flexible w/ the doctrine:

1. **Agency:**  Applies where the court thinks the CO is obviously an agent of its principal SH (sole or majority)
   * Cases in the US and UK which reversed the HL approach in Salomon; have found the corporation to be an agent of its principal shareholders
     + - Clarkson v Zhelka*;* Lee v Lee’s Air Farming
   * Allows persons with claims against the CO to pursue those claims against the sole or principal SH
   * N.B. No Canadian cases have found a CO to be an agent of its SHs, but it is possible 🡪 limited liability is one of the hallmarks of incorporation
2. **Avoidance of Regulatory Legislation:** Applies where incorporation is used to avoid regulatory liability; particularly tax liability – i.e. *Securities Act*, *Income Tax Act*, *Investment Canada Act*
   * Often under statutes which encompass elaborate regulatory schemes
   * When a CO is set up for purposes of tax avoidance – courts tend to defer to statutory purpose behind regulatory legislation and let it override strict legal personality
   * De Salaberry: The courts are more likely to disregard separate personality if doing so results in liability being imposed on **another CO** as the shareholder rather than on **an individual**
     + - Lists factors to determine if a subsidiary CO is the agent of the parent CO
3. **Fraudulent Purpose:** Applies when courts are convinced on the facts that the purpose for which the CO is engaged is fraudulent
   * When a CO was designed to commit fraud or to avoid some pre-existing legal obligation
     + - i.e. when an individual incorporates and uses the COs legal personality to do something they could not do personally; courts unlikely to exempt the principal SH from personal responsibility
   * Gilford v Horne: Shows courts in Canada may be more willing to accept that the veil can be lifted when the establishment of the CO seems to be part of a pre-conceived plan
4. **Justice:** “the cases on veil-lifting illustrate no consistent principle except that the separate personality of a CO will NOT be upheld where it would produce results flagrantly opposed to justice.” (Thompson J in Clarkson Co v Zhelka)
   * Difference if party seeking to lift the veil is an involuntary, rather than a voluntary, creditor?
   * Difference if purpose of lifting is for something other than holding SHs liable for CO’s obligations to creds?

* Kosmopoulos v Constitution Insurance: The corporate veil can only be lifted where it would be "just and equitable", specifically to third parties
* Lee v Lee’s Air Farming: A company is a separate legal entity – such that a Director could still be under a K of employment w/ the company he solely owned
* Clarkson Co v Zhelka: In order to justify lifting the veil, agency must be flagrant/very severe to be considered an alias of principal SH 🡪 such a CO is considered a sham
* Gilford Motors v Horne: Courts will treat SHs and a company as one in situations where the company is used as an instrument of fraud (Horne set up a CO to avoid issues w/ a non-compete clause after he was let go from Gilford Motors)

**Other Examples in Text of Lifting the Corporate Veil**

1. Where a CO is clearly **undercapitalized** to meet foreseeable financial needs;
2. Cases involving **tort claims** against the CO;
3. **Non-arm’s length transactions** between parent and subsidiary CO;
4. **Inactivity**: The power of the registrar to strike COs from existence because he thinks they are inactive (s. 422)

# 3. The Process of Incorporation

Introduction

* **Directors:** Owe a fiduciary duty to the corporation (**136**)
* **Majority Rule:** Principle running through corporate law that the majority rules
  + Buying shares grants a small % of control – individuals do not own/control the CO to anyone else’s exclusion
* US Legal Realism: Challenged the idea that legal reasoning is separate and autonomous from moral and political discourse
  + Promoted the idea that we shouldn’t be bound by the way we categorize and define business entities; what is important is how they actually look and operate
  + Corporate personhood is not artificial – it is a culmination of the interests of DOs, SHs and other stakeholders

Place of Incorporation

* **19** “Registration jurisdictions” effect incorporation by delivery of two documents to the Registrar of Companies:
  1. **Notice of Articles (memorandum of association)** – basic constitutional documents of the CO, containing its name, capital structure and a statement of its business purpose
  2. **Articles**
* Where to incorporate?
  + Jurisdiction regulates all matters of the corporations legal existence – even if litigation is in another province
  + Become a **corporate citizen** of the province and is subject **only** to that province’s Act
* In Canada, no strong evidence that one jurisdiction is preferred over others
  + Federal incorporation attractive for industries that are federally regulated (i.e. airlines) and want to be recognized by public as a nationwide business
* Idea of “shopping for corporate charters” – common in the US
  + Seeking advantages in other provinces or territories not offered in your home location
  + However, may be limited by courts equitable jurisdiction – Connections/Context Test
    - What jurisdiction are the parties, obligations, losses, profits etc. most connected to?
    - **Means:** BC courts may find that they do not have jurisdiction over the matter on the basis that the dispute is more appropriately suited to the law of Alberta or Washington State

Extra-Provincial Licensing – *BCA*, Part 11, ss. 274-379

* Provisions regulate foreign COs “carrying on business” in BC
* Grants the CO legal status w/n the province; means they can be served in matters of civil litigation
  + Penalty: Pittance sanction for not registering – real punishment has been removed from BC statute
* **1 Company vs. Corporation**
  + Company refers to a corporation incorporated under the BCA
  + Corporation is a generic term including any corporation wherever established if it is “carrying on business in British Columbia”; including those established in BC
    - Applies to foreign corporations and entities
* **375** A foreign entity must register as an extra-provincial company w/n 2 months of carrying on business in BC
* TEST: “whether the entity is **carrying on business** in BC”
  + *Common Law:* Factual – look at fact situations and see how they are defined in the jurisprudence
  + *Statutory:* **375(2)** lists situations that constitute carrying on business in BC
    - i.e. have your name listed in the telephone directory, name is announced in which any advertisement for an address or phone number in British Columbia is given, etc.
    - Case: Weight Watchers – Court found that the mere act of entering into a franchise agreement in Ontario, does not mean that the franchisor (NY based) is carrying on business in that place
* **376** Requires identification of an attorney and mailing address in province
* **384** Requires display of CO name at place of business

Continuance Under the Law of Another Jurisdiction – BCA, ss. 303-311

* A BC corporation may wish to continue into a new jurisdiction because:
  1. Of tax advantages
  2. It has shifted is business operations to the new jurisdiction
  3. Of a desire to amalgamate with a corporation in the other jurisdiction\*
     + BCA, ss. 262-282 deals with the amalgamation and merger of corporations
  4. The corporate climate is more hospitable in the second jurisdiction
* Two ways in which corporations cease to be under the control of their Boards of Directors
  + [**Take Over Bid:**](#_(v)_Hostile_Take-Overs) An offeror makes a bid for majority control of the target CO (20% of outstanding shares)
  + **Mergers:** Where the BODs of both COs are in agreement that they reorganize their corporate structure
    - Must obtain court and majority SH approval; court plays role of advocating for minority SHs
    - Only apples to BC companies – foreign COs must continue into BC before merging

Classification of Corporations

* COs vary widely in number of SHs, value of assets and involvement in the securities market
* Two main types:
  1. **WHC/Public COs** – “public company” in *BCA* is a reporting issuer
     + Means required by *Securities Act* to issue prospectus – info for public about a security not sold before
  2. **CHC/Private COs**
* Following sections differentiate application of their rules depending on whether a CO is public or not:
  + **120** Directors [public COs need 3, private COs need 1]
  + **192** Insider Trading (applies only if the trade involved a public reporting issuer)
    - Must common form of corruption amongst COs = breach of “fiduciary duty” + criminal charge
    - Public COs are subject to the insider trading provisions of the *Securities Act* – include triple damages, million dollar fines, etc.
    - BCA only holds insiders accountable for the profits made in any particular transaction
  + **197** – Financial Statements [private COs only]
    - However “reporting issuers” have reporting req’ts under the *Securities Act*
  + **202-222** – Audits [public COs only]
    - Only public COs required to undergo and report audits
    - For private COs, optional as decided by SHs – expense saving for smaller companies
  + **233** – Audit Committee [public COs only]
    - Only example in the statute where the legislature tries to manage governance of public COs – dictates how financial statements should be reviewed and discussed

WHC/Public Corporations – BCA, s. 1

* **1** Defined in terms of its reporting obligations. Means a company that:
  1. is a reporting issuer,
  2. is a reporting issuer equivalent,
  3. has registered its securities under the *Securities Exchange Act* of 1934 of USA,
  4. has any of its securities, w/n the meaning of the *SA*, traded on or through the facilities of a securities exchange, or
  5. has any of its securities, w/n the meaning of the *SA*, reported through the facilities of a quotation and trade reporting system;
* **120** Are required to have a minimum of 3 directors and do an annual audit of its accounts
  + Relates directly to the *Securities Act* – concerned w/ investor protection
  + Applies to COs selling securities in BC
* **Reporting Issuer:** Two ways that a CO is deemed to be reporting:
  1. Shares have to be listed on stock exchange for trading
  2. Shares have to be offered to public along with a prospectus
     + Where the deﬁnition of “public” is based on the “Need to Know Test”
* **Continuous Disclosure:** Any CO req’d to disclose information to the public must do so on an ongoing basis
  + There are more onerous ﬁnancial reporting requirements for public COs under *Securities Act*
* **Securities:** Generic term that encompasses primarily shares or secured corporate debts – i.e. debentures, bonds
  + However, the *SA* also covers “investment contracts”
  + The issuer does not have to be a CO, as long as the securities are issued to the public
* **Need to Know Test:** Public is deﬁned as those who need to be informed of the business of the CO through a prospectus and press releases, as opposed to those DOs or employees of the CO that are aware of its operations

CHC/Private Company

* Also known as unlisted CO or an incorporated partnership
* Are set up under statute, which do not trade stock publicly – have fewer SHs, most of whom are DOs
* Private COs require three things:
  1. Limits in constitution regarding transfer of shares
  2. Have less than 50 SHs – but unlike public CO’s, they can have only one Director
  3. Prohibition on the sale of shares to general public

Other Forms

* Joint Venture: In some States in US, a joint venture is recognized as a specialized form of business
  + Not officially recognized in Canadian law; refers only to joint liability in Canada
* Conglomerate: A large CO that has several centres running several aspects of business which are unrelated to one another in business terms. A multi-armed enterprise.
* Syndicate: A group of investors who act together when investing in a CO
* Special Act Corporation: A CO incorporated by an Act of Legislature – i.e. BC Hydro under the *BC Hydro Act*
  + Commonly Crown corporations; have significant government SHs
  + Often reference BCA for the more standard details of the CO’s operations ∴ two governing statutes
    - **Means:** Little difference in function; BUT state as sole SH raises issues of accountability wrt to SHs
* Constrained Share Corporation: CO constrained by combination of legislation and self-regulation
  + Such as restricting transferability of shares or foreign ownership of shares under the “25/10” rule in chartered banks, where foreign investors may own a maximum of 25%, and no one SH can own more than 10%
  + Also, *Investment Canada Act* applies to some very large COs such as banks, transport, and communications

Corporate Names – BCA, ss. 10, 21-29 (www.bcregistrynames.gov.bc.ca)

* Legislation regulates corporate names, primarily to ensure public will not be misled by confusingly similar corporate names
  + Looks at likelihood of confusion regardless of intention
* **Changing corporation name** requires changing of the company’s “notice of articles” – considered a **fundamental change** which requires a **special resolution**
* N.B.Where a lawyer is advising an unsophisticated or high-risk client, and fails to convey the importance of using the full corporate name, including the legal element, and there are consequences of personal liability for the failure to do so, the lawyer will be liable to this client for breach of the duty of care

# 4. Nature of the Corporate Constitution

Corporate Documents – BCA, ss. 10-19

* **Notice of articles (memorandum of association)**
* **Articles** – defined in **12** as setting rule for conduct and restrictions on CO activities; essentially a K b/w the CO and its SHs and DOs

**11** Notice of Articles contain:

1. The name
2. Address for each of its directors
3. Address of registered office and its mailing address
4. Identity of its records office (lawyer's office)
5. Any translation of the company’s name it intends to use in Canada
6. Its authorized shares structure
7. Whether there are any special rights or restrictions on each class of shares

**12** Articles contain:

* **1** “articles” means the record described in section **12**, and includes
  1. the **articles** or **articles of association** of a pre-existing company,
  2. the **bylaws of a company incorporated**
     1. under a former *Companies Act*, if that Act did not provide for articles or articles of association, or
     2. by a special or private Act, and
  3. **any other record** that under this Act constitutes the articles of a company
* **12(1)(a)** its bylaws (rules of conduct) and any restriction on the business or the powers of the Company

**19** Effect of Notice of Articles and Articles

* A company and its shareholders are bound by the company’s articles and notice of articles
* Changes can only be passed via special resolution (see def’n **1**)
* Provision basically *gives life to the contract* b/w SHs and the company and its DOs
  + Allows SHs to sue the DOs for breach of K – see Shareholder Remedies

**33** Concept of Restrictions – BCA, ss. 30-33, 154(1)(a), 228(3)(c), 259, 260, 378(2)-(4)

* COs are deemed to have the full powers and capacity of a capable person (**30**), although interested parties may see fit to place restrictions on its powers *within the notice of articles*
  + **33(1)(a) & (b)** A company must not carry on business that it is prevented from doing in its notice of articles or exercise its powers in a manner inconsistent with its notice of articles
* If SHs are unhappy w/ the restrictions, they can pass a special resolution altering the COs articles (**259**)
  + *Allows for the alteration of a company's notice of articles by a special resolution (2/3)*
    - Can impose/remove restrictions, alter shareholder agreements etc.
    - If a CO wants to change the % req’d for special resolution, requires another special resolution
  + With any dissenters having resort to the appraisal/dissent remedy (**237-246**)

Remedies for Breach of Notice of Articles

* **228(3)** Commission of a Restricted Act
  + Creates liability for breach of the BCA, its regs, the CO’s memorandum, notice of articles or articles
  + If a company or associated individual breaches its own restrictions in **33,** court may order:
    1. a pre-emptive injunction on a person or;
    2. a pre-emptive injunction on the company or;
    3. compensation to be paid to the CO or to any other party to the K (i.e. SHs, creditors etc.)
  + Where SHs or *anyone else* the court deems appropriate have right of standing
* **154(1)(a)** Directors’ Liability
  + Any DOs who voted for or consented to an act in violation of **33(1)** may be held **jointly and severally liable** to restore the company any amount paid or distributed as a result of the act
  + UNLESS **157** applies:
    - Exempts liability where the DO acted in good faith or in reliance on financial statements, written reports of a professional, or any info/representation the court holds provides reasonable grounds for the actions
* **237-246** Dissent (Appraisal) Remedy
  + Provision sets out a number of circumstances in which a SH can apply to have his shares bought out
  + Per **260**, requires opposition by a SH to a "fundamental change"

Old Doctrines

* *Ultra Vires* – abolished by s. 30
  + Held that in *memorandum* jurisdictions a CO could not act outside the powers of its notice of articles
  + Instead grants the CO the full capacity, rights, power and privileges of an individual of full capacity, subject only to the limitations set out in the restrictions
    - Including property rights (s. 31) and extraterritorial rights (s. 32)
* Constructive Notice – abolished by s. 421
  + Held that the notice of articles/memorandum of association was a public document and outsiders were deemed to have knowledge of restrictions

# 5. Pre-Incorporation Contracts

Common Law – turns on the *intention* of the parties to be personally bound

1. Both parties to the K know that the CO is not yet incorporated (Kelner v Baxter)
   * Narrow: If the promoter (agent) intended to be personally liable, the K is mutually binding
   * Wide: Where an individual is K’ing as an agent but has no principal at the time, he/she is bound [later rejected]
2. Neither party knows, or the promoter (agent) mistakenly believes the CO is incorporated and the contracting party relies on this representation (Black v Smallwood)
   * Remedy: A pre-incorporation K is void if there is a mistaken belief on both sides that the CO does exist
3. The promoter (agent) knows but the contracting party doesn't (Wickberg v Shatsky)
   * *Breach of Warranty of Authority* → if an agent purports to have the authority to act on the behalf of somebody, then the agent can be personally liable for any losses suffered by T due to reliance upon this representation
   * However, this requires a causal link between the falsity of the representation and the loss T claims
   * N.B. No breach found in Wickberg b/c the loss was not related to the misrepresentation

* Pre-incorporation K’s are valid if adopted by the CO after it is created
* If agent does not have authority to K = may be personally liable via “breach of warranty of authority”
* If CO refuses to adopt K after it comes into existence = may be personally liable

## Statutory Reform – BCA, s. 20

Application

* Company: Subject to BCA, s. 20 – codification of the law on pre-incorporation Ks
* Corporation: Common law applies
  + **Means:** Must be incorporated in BC to apply these provisions
* Where CBCA, s. 14 only covers written Ks (whereas BCA make no distinction b/w written and oral)
* HOWEVER, courts are likely to rely on equity and provide remedies to those who have provided services and are unpaid
  + CL principles also apply where the statute has exhausted its possibilities
* Section 20 isolated from the rest of the statute – has its own special set of terms/def’ns and operates in K outside of BCA

**20 Pre-Incorporation Contracts**

(1) “facilitator” is the agent

“new company” is the company created after the pre-incorporation K

**Option 1: Agent is Liable**

(2) If, before a CO is incorporated, **a person purports to enter into a K in the name of or on behalf of the CO**

(a) the person is deemed to warrant (to other parties) that the company will

(i) *come into existence* (w/in reasonable time), and

(ii) *adopt* *the purported K* w/in a reasonable time after that

(b) the person is liable (to other parties) for damages for any breach of that warranty

**Option 2: CO Adopts K**

(3) After a pre-incorporation K is entered into, the new company … may, within a reasonable time after its incorporation, **adopt that pre-incorporation K** by any act or conduct signifying its intention to be bound by it.

(4) On the adoption of a pre-incorporation K under subsection (3),

(a) the new company is bound by and is entitled to the benefits of the pre-incorporation K as if the new company had been incorporated at the date of the pre-incorporation contract and had been a party to it, and

(b) the facilitator ceases to be liable under (2), except as provided in subsections (6) and (7)

**Option 3: Apply to the Court for Restitution and to find CO/Facilitator Liable**

(5) **If the new company does not adopt pre-incorp K**…any party to the K may apply to the court for an order directing the new company to restore to the applicant any benefit received by the new company under the pre-incorporation K [i.e. restitution]

(6) Whether or not the new CO adopts the pre-incorp K, the new CO, the facilitator or any party to the K may apply for an order

(a) setting the obligations of the new CO and the facilitator under the pre-incorporation K as joint or joint and several, or

(b) apportioning liability between the new company and the facilitator

*NOTE: Only relevant for 3rd parties who want to go after both facilitator and new CO*

(7) On an application under subs (6), the court may, subject to subs (8), make any order it considers appropriate

(8) A facilitator is not liable… if the parties to the pre-incorporation K have, in writing, expressly so agreed

# 6. Management and Control of the Corporation

Organs of a Corporation:

* Two parallel and primary groups which control a corporation

1. Board of Directors have regular control (originals must be named in the Charter though they can change via election by SHs)
   * In public corps, they control when the AGM will be held and what is on the agenda – control
2. SHs only at the General Meeting
   * Must meet at least once a year (AGM)
   * Group possesses ability to elect DOs and pass special resolutions

Directors: Relevant Provisions

* **1(3)** Defines when an individual is appointed as DO
  1. Appointed in accordance with the BCA or articles
     + i.e. by a simply majority at a SH meeting (simple resolution)
  2. Designated on the notice of articles
  3. Declared by the court
* **128(3)(a)** DOs can be removed by special resolution or **(b)** less than a special resolution if the articles so provide
  + re: firing of DOs – requires a special resolution to dismiss a DO, this can occur at anytime
* **135** If there are no DOs in office, an individual may be empowered to call a meeting of the SHs to elect/appoint DOs if authorized by a *unanimous resolution* of the SHs (see provision)
* **136** Directors of a CO must, subject to articles, manage or supervise mgmt of the business and affairs of the CO
  + Power to manage/supervise the COs activities is vested in the board collectively– individual DOs must be authorized by the Board to take action
    - Where BJR applies to this decision-making
  + HOWEVER *fiduciary duties* are owed by individual DOs to the CO
  + Automatic Self-Cleaning: If the mandate of the Board is to be altered, can only be done w/n the procedures specified by the articles
* **137** Provides that these powers (above) may be delegated to one or more other persons
* **138(a)** Deems persons who perform the functions of board members to be subject to the responsibilities of board members
  + Precludes individuals from avoiding fiduciary duty based on job titles (CanAero)
  + **138(b)** limits **(a)** by specifying groups of individuals who perform “high level” duties that are not DOs
* **142(1)** Canadian corporate law requires DOs and ORs of a CO to abide by two duties owed to the CO:
  1. Fiduciary Duty – *act honestly and in good faith with a view to the best interest of the CO*
  2. Duty of Care – *exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances* (negligence standard)
  + **(2)** Provision adds to common law and equity; does not derogate from
  + **(3)** Provision cannot be contracted out of
* **143** If there is a defect in the appointment of a board member, the defect does NOT vitiate anything the DO has done in their capacity as a board member (their actions will be valid – *protects third parties*)

Indoor Management Rule (Royal British Bank v Turquand [1856] UK All ER)

* Limits the effect of constructive notice (now abolished by s. 421)
* **Common Law:** An outsider is entitled to rely on the presumption that all procedures have been followed on the part of the company; company cannot rely on any internal procedural irregularity after the deal with any outsider has been concluded
  + Because procedural compliance is a matter of “indoor” management
  + Seeks to balance the CO’s interest in not having assets dissipated by unauthorized acts of agents AND interests of outsiders in being able to conduct business with CO’s agents without undue restrictions
* MEANS: Only actual restrictions on the authority of agents in public documents (articles) will defeat a 3rd party’s claim
  + “When there are persons conducting the affairs of the CO in a manner which appears to be perfectly consonant with the articles of association, those so dealing with them externally are not to be affected by irregularities which may take place in the internal management of the company.” (Mahony v East Holyford Mining Co [1875] HL)
* **Statutory: 146** Persons may rely on the authority of COs and their DOs, ORs and agents
  + Addresses the rules governing CO for acts of agents – as an artificial entity, it must act through natural persons
  + A 3rd party dealing with a CO has no obligation to ensure that a CO has followed the procedures requires by its articles, by-laws, resolutions, policies or other contractual obligations to authorize a transaction or to give authority to a person purporting to act on behalf of the CO
  + Supplements the abolition of constructive notice in s. 421
* **N.B.** Whereas a natural principal is liable for the acts of his/her agent if the agent had authority from the principal to commit the act
* Three ways in which the authority of the Board can arise:
  1. Actual authority – can prove authorization (i.e. directive from the board)
  2. Implied authority – more difficult, arising from powers assumed to be had from a particular position
     + i.e. if the 3rd party was dealing with the CEO or another individual in an upper mgmt position, they would assume that individual had the authority to enter into such an agreement
  3. Ostensible/apparent authority (Freeman v Buckhurst)
     + A corporation will be held liable where ostensible/apparent authority is made out by the third party:
       1. if an agent had authority to enter contracts of a different but similar kind;
       2. the person granting that authority itself had authority;
       3. the contracting party was induced by these representations to enter the agreement and;
       4. the company had the capacity to act
* **Means:** IMR does not relieve 3rd party from having to establish actual or apparent authority to enforce its claim against CO
* Aside: Residual Powers Theory → residual authority remains with the SHs in a general meeting to break a deadlock among DRs (Barron v Potter [1914] Eng Ch)

## Corporate Goals and Social Responsibility

Introduction

* Much debate about the role of business corporations in modern society

1. **Contractarian View** – focus on profit maximization for SHs
   * Favoured by case law; DOs duties must focus on SHs interests. Any acts that respond to the interests of other stakeholders (i.e. consumers, creditors or EE’s) should be subject to SH interests.
   * DOs must always act in the best interests of the CO/SHs
     + Dodge: CO decisions done in the interests of EE/consumers/public cannot be the sole justification; Boards must always act in the best interests of the corporation
     + Parke: **Test:** Whether DR are acting in the best interest of the CO
       - Must determine if act is reasonably incidental to, and within the reasonable scope of carrying on, the business of the CO
       - Giving away such a large amount of assets could never be considered beneficial to the CO/SHs
2. **Impact on Society View** – requires balance between interests of SHs and other stakeholders (BCE)
   * COs have the power to think about these other interests and take them into account in decision-making
   * DOs owe duty to CO, BUT they nonetheless can consider interests of stakeholders
   * Peoples: SCC held that the DOs’ duty of care is “open-ended”. Thus, unlike the FD, which is owed only to the CO, the duty of care may allow the DOs to be fixed with liability in negligence if they cause harm to:
     1. the corporation (most common scenario);
     2. creditors of the corporation (Peoples); and
     3. other third parties, such as employees, within the “neighbourhood” of the DOs
     + **Means:** DOs owe a duty of care to creditors, but that duty does not rise to a fiduciary duty
     + Although DOs must consider the best interests of the CO, it may also be appropriate, though *not mandatory*, to consider the impact of corporate decisions on SHs (or a particular group of stakeholders)
   * BCE: Affirms that the FD owed by DOs is to the CO; however, the best interests of the CO may require considering interests of other stakeholders
     + Any conflict b/w stakeholder interests and the CO’s interests, must be resolved in favour of the CO – b/c the *“reasonable expectation”* of stakeholders is that the DOs will act in the best interests of the CO

* **Business Judgment Rule:** Protects DOs from liability for *bona fide* business decisions made on a reasonably informed basis
  + According to the SCC, no one has a right to complain about a decision of the DOs since it “may be” legitimate to consider the interests of various groups, of which the SHs are only one

## Limiting Board Powers

Two provisions modify/limit the power of Boards granted in **136**:

1. Audit Committee – BCA, ss. 223-226
2. Sale of the Undertaking – BCA, ss. 301

Audit Committee

* Audit Committee is the only example of a mandated Committee under the BCA or CBCA
  + Results from EU influence – have req’d that the supervisory board be representative of SHs and other stakeholders
  + Form of an “*engineered system of boards*” – must include both inside and outside DOs on the boards of public COs
* Three groups:
  1. Supervisory Board – not employees; are elected to office by the SHs at the AGM
     + However may be separately employed elsewhere in the company
  2. Management Board – employees of the company
  3. Audit Committee – outside directors
* Why? Most SHs cannot read or understand financial statements; designed to create a basic framework of accountability
  + Auditors themselves are not always as independent as they should be – consider that large multi-national accounting firms are not interested in “rocking the boat” of their long term, wealthy clients

Statutory Provisions – BCA, ss. 223-226

* **223** Only public companies have to establish audit committees
* **224** **Appointment and procedures of audit committee**
  1. Must be elected at the first annual board meeting of the directors
  2. Must be comprised of at least 3 DOs and a majority of the committee cannot be officers or EEs of the CO
     + Mean: The majority must be outside directors
  3. Quorum requires that a majority of the members not be officers or EEs of the CO
  4. Members must elect a chair
  5. Auditor of the CO must receive notice of meetings; have right to be heard and obligated to appear upon request
* **225** Committee must review and report to the DOs on the financial statements of the company and the auditor's report in relation to the statement
* **226** DOs must provide financial statements to audit committee in sufficient time to let the committee review

## Sale of the Undertaking – BCA, s. 301

Introduction

* Provision based in CL – constitutes a“fundamental change” to the corporation that requires special resolution to approve
* **Remedy for Non-Compliance**:
  + If the Board proceeds with the sale w/o special resolution, stakeholders can apply under **301(2)** [below]
  + SHs who dissent can apply for the appraisal remedy under **237** per **301(5)**
* Affect on Board Powers:
  + **301** is only a veto power – SHs can only prevent Board from going through with the sale
  + BUT in the event that the SHs approve of the sale, the DOs are not bound to proceed (BJR)
    - Automatic Cleansing – SHs passed a resolution telling DOs to sell assets and the DOs didn’t carry it out; court found the SHs didn’t have the power to force the directors to do something they didn’t want to
* **N.B.** Violation of **301** is not listed in **154** as a violation that DOs are personally liable for; can make the language of the BCA incredibly important in certain circumstances

**301 Power to Dispose of Undertaking**

1. The company must not sell, lease, or otherwise dispose of all or substantially all of its undertaking unless
   1. it does so in the ordinary course of its business (Patterson suggests this is meaningless)
   2. it is been authorized by a special resolution
2. If the company contravenes **(1)**, the court, on application of any SH, DO, or creditor, may
   1. issue an injunction [prior to the sale]
   2. set aside the disposition
   3. make any order the court considers appropriate
3. A contravention of **(1)** is not invalid if the disposition is
   1. for valuable consideration to a person who is dealing with the company in good faith, or
      * Protects BFPV w/o N; consider the abolishment of constructive notice under **421**
   2. ratified by a special resolution
4. Notwithstanding a special resolution or ratification authorizing the sale, the DOs may abandon the sale without further action by the SHs
   * **Means:** SHs can block sale, but cannot force it
5. SH is entitled to dissent to a resolution authorizing such a sale – can trigger the appraisal remedy in **237**
   * N.B. If the CO buys shares in any instance, incl appraisal, they’re subject to insider trading restrictions
6. Section does not apply to:
   1. security interest given in form of debenture
   2. lease of property not exceeding 3 years

(c-f) if the seller or purchasing CO are wholly owned subsidiaries or subsidiaries of the same parent CO

Relevant Considerations under **301**

* What is an undertaking?
  + **Common Law:** Anything that a company owns or has title to; any company assets worth money. Including real, personal or intellectual property, causes of action, licensing agreements, etc.
  + **Statute:** No definition in the BCA
* What is “substantially all” of the undertakings?
  + **TEST:** Takes a quantitative/qualitative approach (CBC Pension Plan v BF Realty Holding [2000] Ont CA)
    - *Quantitative:* Examines the total monetary value of the undertaking(s) as a percentage of the COs assets/total value/net worth. Must be a substantial amount of the COs assets.
    - *Qualitative:* Includes undertakings which “strike at the heart” of the business
      * i.e. undertakings which are core to the COs business objectives
      * Does the nature of the sale redefine the nature of the business?
  + **Rule of Thumb:** The higher the quantitative value, the harder to argue the qualitative value is insignificant
  + Katz v Berman, US Case
    - Although the assets they were selling off were significant, they did not strike at the “heart” of the business operation; failed both the quantitative and qualitative tests
* **301(1) EXCEPTION:** “Unless the sale was in the ordinary course of the company’s business”
  + Phrase does not seem to add anything to the qualitative component of the test – as undertakings sold by company’s which routinely sell off large assets do not “strike at the heart” of the business
  + What if the sale was for the purpose of replacing the assets?
    - i.e. selling off the corporation’s head office for the purpose of purchasing another office immediately following the sale; Patterson suggests that this would not engage **301**

**Sale of the Undertaking Summary:**

* Sale of the undertaking is an example of a fundamental change that triggers the req’t that the DOs get a special resolution
* SHs have right to veto, but if approved, Directors have freedom to do what they want
* If section not complied with, the specified stakeholders have standing to bring issue to the court
  + SHs can get their shares purchased by the company via the statutory personal remedy of appraisal **237**
* The arm’s length 3rd party **301(3)** is protected as long as they are acting *bona fide* and for value.

# 7. Duties of Directors and Officers

**142 Duties of Directors and Offiers**

1. A DO or OR of a CO, when exercising the powers and performing the functions of a DO or OR of the CO…must
   1. ***Fiduciary Duty*** – act honestly and in good faith with a view to the best interests of the company,
      * Analogous to trustees, but VERY different because duties are not clear and defined, and business decisions often need to be made quickly, without all info, etc.
   2. ***Duty of Care*** – exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,
      * Need to prove all elements of negligence incl. actual damage
      * Must execute their powers in a *reasonably careful manner* – difficult threshold to meet re: BJR
      * Minimum qualifications for DOs are set out in **124** – very minimal!
   3. act in accordance with this Act and the regulations, and
   4. subject to paras **(a)** to **(c)**, act in accordance with the memorandum and articles of the company
2. This section is in addition to, and not in derogation of, any enactment or rule of law or equity…
3. No provision in a K, the memorandum or the articles relieves a DO or OR from
   1. the duty to act in accordance with this Act and the regulations, or
   2. liability from any other rule of law or equity

* These duties are owed individually by each DO to the company – NOT the SHs
  + Creates an issue of standing – unhappy SHs can use derivative actions under **232/233**

## (b) Negligence (Care and Skill) – BCA, s. 142(1)(b)

* Difficult to determine if a Director was negligent; Judges are uncomfortable w/ deconstructing corporate decisions
* Widely described as a “gross negligence” standard; have to be palpably careless and disregarding of obvious facts
* Each senior officer owes a fiduciary duty
  + Courts do not define “officers” in advance; determined on a case-by-case basis
    - **138(a)** Precludes individuals from avoiding legal responsibility based on job titles (CanAero)
    - **138(b)** limits **(a)** by specifying groups of individuals who perform “high level” duties that are not DOs
* SHs who have reason to believe a DO or OR has breached a duty of care can:
  1. Derivative Action – can request leave to sue in the company’s name under **232-233**
  2. Personal Action – can pursue a [personal remedy](#_The_Personal_Action) arising out of the circumstances

**Common Law:** City Equitable Fire

* Elements of the Duty of Care:
  1. DOs need only exhibit the care and skill *reasonably expected* of a person of their *skill and knowledge*
     + **Subjective Standard**: DOs not expected to exercise any greater degree of skill than could be expected from a person of the *same knowledge and experience* (some context)
  2. DOs are not bound to pay continuous attention to company affairs. Only required to act intermittently at his/her discretion or upon meetings of committees with which s/he has been placed.
     + DOs can manage through supervision (incorporated via **137**)
  3. DOs can rely on mgmt (other CO officials) and their managerial recommendations absent grounds of suspicion
* Case affirms the standard as gross negligence – w/ a large amount of deference offered to the Board via the BJR

Modifications since City Equitable Fire

* Peoples rejects the subjective approach for a **pure objective approach**
  + Endorses the gross negligence standard, but adds consideration of the context under which business decisions are made. Seeks to lower the threshold for liability.
  + Patterson: Suggests that language of **142** “in comparable circumstances” allows courts to carefully evaluate the context in which decisions were made
  + Patterson: Objective approach should account for DOs which are also management – should have more knowledge than an outside director
  + N.B. FCA defined as a subjective objective approach in Soper v Canada

**Statutory Reform:** **142(1)(b)**

1. A DO or OR of a CO, when exercising the powers and performing the functions of a DO or OR of the CO…must
2. exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,

**154** Director’s Liability

* Supplements **142** – breach of DOC gives rise to damages and the standard is gross negligence (City Equitable Fire)
  + Section makes directors *personally liable* for infractions
* **154(1)** A DO who votes for or consents to a resolution to do any of the following are jointly and severally liable to compensate the company

1. an act contrary to **33(1)** [contravening the articles or notice of articles re: compliance remedy]
2. to pay a commission or allow a discount contrary to 67
3. to pay a dividend contrary to 70(2)
4. to purchase, redeem, or otherwise acquire shares contrary to 78 or 79
5. to make a payment or given indemnity contrary to 163

* **154(5)** A DO who attends a meeting is deemed to have consented to any resolution
  + UNLESS their dissent is **(a)** recorded **(b)** put in writing **(c)** and mailed to the company's office
* **154(6)** A director who votes in favour of a resolution under **(1)** cannot dissent under **(5)**
* **154(7)** A director who is not present is deemed to have consented unless **157(8)** within 7 days of becoming aware of the resolution they deliver a notice of written dissent to the companies registered office
  + Demands greater attention than #2 listed above; deemed to have consented even if not in attendance

**157** Limitations on Liability (CBCA, s. 123)

* Creates statutory defences for DOs (not ORs) against any allegations under **142** or **154**
  + Narrows the scope of DOs reliance on officers of the company
* **157(1)** A DO of a CO is not liable per **154** and has complied w/ his or her duties per **142(1)** if the DO relied, in good faith, on:
  1. Financial statements of the CO represented by a DO/OR or contained in a written report of the auditor of the CO;
  2. Written report of lawyer, accountant, engineer, appraiser, or any other persons whose profession lends credibility to a statement made by that person;
     + People [78]: Mr. Clément’s reports were relied upon, however SCC found that his advice did not reach the level of professionalism to satisfy 157 – not equivalent to those enumerated, not regulated, no professional insurance. His job title as “VP Finance” was not conclusive.
       - Suggests 157 requires a *designated professional*
  3. Statement of fact represented to the DO by an OR of the CO to be correct;
  4. Any record, information, representation that the court deems to provide reasonable grounds for the actions of the director, regardless whether **(i)** it was forged, fraudulently made or inaccurate
* N.B. Cross reference with City Equitable, Item 3

### Business Judgement Rule (Peoples)

* US Version: Creates a *rebuttable presumption* that the DO acted fairly and reasonably
* Canadian Version: Rule relates to *the standard of proof*
* **POLICY**: Courts reluctant to engage in extensive *ex post facto* review of the substantive merits of judgments made by DOs
  + **J**udicial “second-guessing” is inhospitable to effective business decision-making; often made with less-than-optimal information and time
  + N.B. BCE set out *reasonableness standard*; may suggest a slightly higher standard for the BJR going fwd
* **WHY:** No strong *a priori* basis for believing that courts are/will be better positioned than DOs to make decisions wrt the best interests of the corporation
  + Complex business judgments are the culmination of a host of complex judgments; judiciary role is highly suspect
* **BOTTOM LINE**: Courts continue to avoid interfering w/ with most business decisions, for three reasons:
  1. Judges lack the skills to evaluate business decisions, and they cannot get those skills from expert witnesses because there is no such thing as the “profession” of a director (for standards)
  2. Place a premium on the risks of hindsight – easy to look backwards and think it was a poor decision
  3. Placing too high a standard on DOs and ORs will dissuade good people from taking on these positions
     + Patterson thinks this is flawed; won’t dissuade people from taking on million dollar jobs!
* BCE: "The BJR accords deference to a business decision, so long as it lies within a range of reasonable alternatives."
* Pente Invesment: Challenges the traditional view of profit being the sole justification for Board decisions. Upheld a decision by the Board to accept less than the highest bid.

## (a) Fiduciary Duties – BCA, s. 142(1)(a)

* Prior to the development of corporations, private parties attempted to use trust law within businesses to enforce duties on management/stakeholders
* However, the strong influence of trust law then lead courts to hold Directors *strictly accountable*
  + Lead to the development of the Business Judgement Rule
* "The fiduciary duty to the CO is a broad, contextual concept. It is not confined to short-term profit or share value. It looks at the long-term interests of the CO. The content of this duty varies with the situation at hand…the FD owed is mandatory; DOs must look to what is in the best interests of the CO.” (BCE*)*
* “At all times, DOs and ORs owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.” (Peoples)
* N.B. Usury duties are designed to demonstrate certain community values, such as responsibility, fairness, and integrity that the law wishes to foster individual relationships

**Statutory Reform: 142(1)(a)**

* **142(1)**A DO or OR of a CO, when exercising the powers and performing the functions of a DO or OR of the CO…must
  1. act honestly and in good faith with a view to the best interests of the company,
  + *Components defined by CL; legislature avoided detail to prevent “loopholes”*
  + *Equitable in nature – damages not available and K is voidable*
* **142(3)** No provision in a K, or the notice of articles releases a director **(a)** from their duties under this act or **(b)** liability from any other rule of law or equity

Five Key Forms:

1. Self-Dealing
2. Appropriation of Corporate Opportunities
3. Competition
4. To Whom is the Fiduciary Duty Owed
5. Hostile Take-overs

### (i) Self-Dealing – BCA, ss. 143-157 [OMIT]

* Contracts or transactions concluded b/w the DOs or ORs of a CO, either directly or through their interest in another entity, and the corporation itself
  + Creates a separate and complete statutory code for a particular type of fiduciary duty
  + \*These provisions are *only* relevant when you have a K or transaction regarding a BC company, AND the officer or director has an interest in that K or transaction
* **Why?** Insiders contracting with the CO are under a *strong incentive* to cause the CO to enter transactions on terms that favour the insider (i.e. diversion of corporate wealth)
* **Common Law:** A director or officer of a corporation is *never entitled* to enter into a K in which s/he has a personal interest, *regardless of whether the K was fair and in the best interest of the corporation*
  + Makes the K voidable at the option of the primary CO (Aberdeen Railway)

Statutory Response – BCA, ss. 147-153

* Duties – ss. 147, 151-153
* Excuses – BCA, ss. 149-150
* Remedies – BCA, ss. 148, 150

DUTIES – ss. 147, 151-153

* **153** General notice – directors must disclose
  + A DO or SO who holds any office or possesses any property, right, or interest that conflicts with the company's interests must *disclose it to the directors* only
  + Creates a *mandatory* statutory disclosure obligation
* **152** Provisions are Exhaustive wrt self-dealing
  + All duties and obligations are contained within these sections; unlikely to need to refer to s. 142
* **151** Contract not invalid
  + Such a K is not void b/c of nondisclosure – per Aberdeen Railway, it is voidable at the COs discretion
* **147(1)** Disclosable Interests
  + A director or senior officer holds a disclosable interest if
    1. the K or transaction is material to the company,
    2. the CO has entered or proposes to enter, and
    3. the DO or SO has a material interest in the K
  + **Means:** NOT every interest is subject to disclosure
  + **Materiality Test:**
    1. Whether the content of the *K or transaction* is material to the CO
    2. Whether the person has a material interest in the *K or transaction* (or a material interest in a person who has a material interest in the K or transaction)
    3. What “material” means for either of those is not defined
* **147** Exceptions
  + Sets out certain interests where, whether material or not, they are excluded for the purposes of this Act
  + **147(2)** No disclosable interest where
    1. The current company and the other company are wholly owned subsidiaries of the same CO
    2. The current company is a wholly owned subsidiary of the other CO
    3. The other company is a wholly owned subsidiary of the current CO
    4. The Corporation is a one-person CO
  + **147(4)** No disclosable interest where
    1. The K relates to security for money loaned to the company
    2. The K relates to remuneration of the director (their wages and pay etc.)
* **148(4)** A general statement in writing is sufficient disclosure

EXCUSES – BCA, ss. 149-150

* **149** Approval of Ks and transactions (voting limits)
  + No self-dealing if disclosure is made and K is ratified by the DOs or approved by a special resolution of the SHs;***but***
  1. A K/trans in respect of which disclosure has been made may be approved by the DOs or by special resoluttion
  2. A director who has a disclosable interest may not vote on a directors’ resolution
     + Note: They MAY vote in their capacity as a SH – SHs owe no fiduciary duty (North West Transportation)
  3. If all of the directors have a disclosable interest in the K, any or all of them may vote to approve it
     + Although they are not eligible to retain the profits derived pursuant to **148(2)(b)**
* **150(1)** A CO, DO, SO, SH, or beneficial owner of shares (standing) may apply to the court to find that a K or transaction was fair and reasonable

REMEDIES – BCA, ss. 148, 150

* **150** Powers of Court provides remedies for two different situations:
  1. Where court deems K/trans “fair and reasonable to the CO” it may:
     1. order that the DO or SO is *not liable to account for any profit* that accrues as a result, or
     2. make any other order that the court considers appropriate
  2. Where court deems K/trans NOT “fair and reasonable to the CO” it may:

1. enjoin the company from entering into the proposed K/trans, or
2. order the DO or SO to *pay back any profit* that accrues as a result, or (see **148(1)**)
3. make any other order that the court considers appropriate

* **148(1)** Accountability for profits
  + If a party can prove that a fiduciary profits personally, then the DO/SO is liable to account the company for any profit that accrues as a result of the K or transaction
  + **148(2)** DO or SO is *not liable* to account for and may retain profit if:

1. the K/trans is approved *by the DOs* in accordance with **149(1)**
2. the K/trans is approved *by special resolution* in accordance with **149(1)**
   * **150(1)(a)** the K/trans was found fair and reasonable to the CO

SUMMARY: If the court finds the K was not fair and reasonable to the CO AND it was not approved under **149**, then the court can offer the remedies under **150(2)**

### (ii) Appropriation of Corporate Opportunity

What is an appropriation of Corporate Opportunity?

* Arises when fiduciaries to the CO independently invest in a project that *could* *have* been acquired by the CO
  + No clear agreement on the criteria that determines when a trans “belongs” to the CO
* **Core Issue:** Must determine whether the DO has usurped his/her authority in order to acquire some “unbargained for” personal benefit
  + Each case must be considered on its facts
  + Clear that DOs and ORs of a CO are entitled to take advantage of business opportunities which have been offered to the CO, but turned down for valid business reasons after full and fair disclosure (Peso)
    - Requires an “honest and considered opinion of the whole board”
  + However, those who deliberately misappropriate CO opportunities for their own gain will be liable to the CO
    - Even if the gain materializes after they cease to hold office (Peso and CanAero)
* **Common Law:** Current state of Canadian jurisprudence is CanAero
  + Peso: If a CO rejects an opportunity *bona fide*, it is not a breach of FD for fiduciaries to exploit that opportunity on their own
  + CanAero: Laskin distinguishes case from Peso (creating current confusion). CO had not rejected the opportunity, they were still in competition for it. Bottom Line: What is in the best interests of the company?
  + Rejects Regal v Gulliver – English strict liability approach, whereby DOs will always be held liable
* **CanAero Approach:** Contextual approach to be analyzed on a case-by-case basisthat include:
  1. The duty NOT to appropriate corporate opportunities is set out in **142** (fiduciary duty)
  2. The CL defines *when* a breach will have occurred (see Peso & CanAero)
  3. The defenses are set out in **157**
  4. If no defenses apply, the Director may be liable to account for profits to the CO (CanAero)
  5. **234** dos not apply b/c at this point the court has already found the DO did not act in the best interest of the CO
     + **234** Exempts liability where the person has acted honestly and reasonably and ought fairly to be excused

Modified Conflict Rule for Determining Liability (CanAero)

1. Did the opportunity belong to the CO?
   * **Maturity**: Has the CO done anything to develop the opportunity? How close was it to acquiring it?
   * **Specificity**: How precisely was the opportunity defined by the CO? Same general business area? How closely does the appropriated opportunity resemble the opportunity that the CO was working on?
   * **Significance**: Would the opportunity be a major component of CO’s business if acquired? Unique or one of many?
   * **Public or Private**: Was the opportunity publicly advertised/widely known? Was it one to which fiduciaries had access only by virtue of their positions?
   * **Rejection**: Had the opportunity been rejected in good faith by the CO before the fiduciary acquired it?
     + However, unless fiduciary did what was reasonably possible to get the Board to accept it and was not in a position to determine the outcome of the BODs vote, the rejection may not be sufficient (KP McGuiness)
   * Two lines of argument:
     + Present Interest or Expectancy Test – whether the company has a present interest or an expectancy growing out of an existing right (CanAero)
     + Line-of-Business Test – whether an opportunity could be adapted to the firm’s present business and is consonant with its reasonable needs and aspirations or expectations (Burg v Horn)
   * Where liability cannot be avoided merely b/c the details of the project have been altered – still liable if substantially the same opportunity
   * Where courts unlikely to accept the argument that it was not possible for the CO to pursue the opportunity
     + i.e. if the company did not have enough money
     + More likely to be successful where the COs articles prevented the CO from using the opportunity or where warehouse or labour limitations made the K/trans too large
2. What is the relationship of the fiduciaries to the opportunity?
   * Anyone in a supervisory or controlling role of a CO has a FD towards the company which includes the duties of "loyalty, good faith and avoidance of a conflict of duty and self-interest"
   * **Position**: The higher up in organization the fiduciary stands, the higher the level of duty imposed
     + Where **138(a)** deems persons who perform the functions of board members to be subject to the responsibilities of board members
     + Precludes individuals from avoiding fiduciary duty based on job titles (CanAero)
     + BUT **138(b)** limits **(a)** by specifying groups of individuals who perform “high level” duties that are not DOs
   * **Relationship b/w Fiduciary and Opportunity**: Was opportunity w/n his/her responsibility? Did s/he negotiate for it on behalf of CO?
   * **Knowledge as a Fiduciary**: How much knowledge did the fiduciary acquire *through* his position?
   * **Involvement in Competing Business**: Did fiduciary acquire the opportunity through an existing business that was similar to or competed w/ the business of the CO and in which the fiduciary was involved?
   * **Use of Position**: To what extent did the fiduciary accomplish the appropriation through his position?
   * **Time after Termination**: If fiduciary took opportunity *after* terminated relationship with CO, how long after termination? Leave voluntarily or fired? Did he leave under inducement of pursuing the opportunity?
3. What factors/context should be considered? [CONTEXTUALLY ANALYZE ALL CIRCUMSTANCES]

|  |  |
| --- | --- |
| 1. position or office held (was the opportunity an area of his responsibility?) 2. nature of the corporate opportunity (unique? Large portion of CO’s business?) 3. **ripeness** of the opportunity (not reject and not widely known?) 4. **specificity** of the opportunity | 1. DR or OR’s relation to the CO 2. amount of knowledge possessed (only had knowledge b/c of position?) 3. circumstances in which it was obtained 4. whether it was **special** or even **private** 5. factor of time in the continuation of the FD 6. circumstances of the relationship termination |

Should the profit be disgorged?

1. Determine relationship of the accused to the CO 🡪 is it a fiduciary relationship? (CanAero)
2. Is the opportunity a “corporate opportunity”? (Regal, Peso)
3. Did the CO consider and reasonably rejected the opportunity? (Regal, Peso)
4. Is there otherwise a breach of fiduciary duty? (CanAero)

* Where clean hands, laches (unreasonable delay), and other equitable defenses apply etc.

### (iii) Competition – BCA, s. 153 [OMIT]

“Competition” implicates a number of discrete fact patterns:

1. A DO serving on the boards of two competing CO
2. A DO or OR operating a business that competes with the CO
3. A DO or OR having a material interest in an entity that competes with the CO

**153** Mandatory Obligation to Disclose Conflict

* Any DO or SO who possesses any property (including shares), right, or interest that could result, directly or indirectly, in a conflict of interest with their duties to the CO, must disclose that interest to the DOs (not SHs)
  + This does not preclude holding multiple directorships, only makes disclosure mandatory
* Two common forms of liability that may arise:
  1. Breach of FD to the CO
  2. Oppression – arises where a SH of CO1 thinks the DO is managing CO1 in the interests of CO2; prejudicial to SHs
* London and Mashonaland: A Director may engage in a competing business, so long as s/he does not subordinate the interests of one corporation to those of the other
  + Affirmed in Bell v Lever Bros for this proposition
* Disagreement in Abbey Glen Property Corp v Stumborg [1976]
  + McDonald J (in dicta) “Even when there is no question of a DO using confidential information, there may well be cases in which a director breaches his FD to Company A merely by acting as a director of Company B.”

### (iv) To Whom is the Fiduciary Duty Owed

* Important to be clear about who the duty is owed to
* Peoples: Made it clear that it was acceptable for Directors to consider the interests of other stakeholders (i.e. creditors); however the FD was owed to the corporation
* BCE: Was consistent – however the court made some conflicting statements about whether the ability to consider other stakeholders was obligatory or discretionary
  + SCC rejects the Delaware Principle – requires Directors to focus on SH interests during change of control situations (i.e. takeover bids)
  + Affirms the idea that Directors are obliged to treat all stakeholders “fairly” (Peoples)
  + Found that the Board had acted in the best interests of the company, the BJR protected them
    - Decision was within a “range of reasonable alternatives”
* **Bottom Line:** Bests interests of the company encompasses consideration of stakeholder interests. However, shareholder interests should be given primary importance.

### (v) Hostile Take-Overs and Defensive Tactics by Target Management

Introduction

* Take overs *almost always* involve a conflict of interest – as Board members are likely to lose their jobs/positions; have a personal interest in blocking the bid
* Offerors likely to offer premium above FMV for control of the CO
* **Means:** Boards that resist takeover must meet a *high threshold* to justify that the takeover is not in the best interests of the CO – requires reasonable grounds that the takeover will cause substantial damage to the COs interest (Teck Corp)
  + Previous cases found that any actions to defeat takeover bids were a breach of FD

Hostile Takeovers

* Occur when:
  + a takeover bid is rejected by the target COs board, but the bidder continues to pursue it by appealing directly to the SHs to acquire some or all of the voting shares of the target CO, OR;
  + the bidder makes the offer w/o informing the target COs Board beforehand
* It is the ability of a new owner to sidestep the target COs management in obtaining control of the CO that renders the takeover threatening to management

Types of Takeover Bids in Canada:

1. Circular – Takes place outside the stock exchange by the offeror making direct contact w/ SHs
2. Stock Exchange Bid – Takes place through the facilities of a stock exchange only
3. Issuer Bid – CO is making takeover bid for itself (i.e. going private by re-purchasing public shares). Or, certain SHs may want to turn the CO into private/non-reporting CO and get rid of additional SHs. Premium likely needs to be paid.

Defensive Tactics:

* **Poison Pills:** Occurs when methodologies to prevent takeover bids *are written into articles of COs*,such as automatic increases of votes attached to certain person’s shares
  + Sometimes stock exchanges won’t list a CO if its Articles have such provisions
* **Issuing Shares:** Issuing a large number of shares to a trust or other reliable party who will not sell (see **62** for power to issue shares)
* Defensive tactics subject to Securities regulators (little case law in this area)
  + Provincial securities regulators have created a national policy – purpose is to protect the interests of offeree SHs and to permit takeover bids to proceed in an open and even-handed manner
* Whenever possible, prior SH approval should be obtained for proposed defensive measures
  + *Guiding Principle:* SHs rather than DOs should have the right to whom and on what terms they sell shares

Breach of Fiduciary Duty

* Improper Purpose Doctrine: Issuance of shares to prevent a takeover bid is always an improper purpose (objective standard) even if for the *bona fide* benefit of the CO (Bonisteel)
  + Objective standard per Hogg v Cramphorn (discussed in Teck Corp)
* **Proper Purpose Test** (Teck Corp)
  + Used to determine Director’s liability re: bona fide act in the best interests of the CO
  1. Courts must determine the primary purpose of the actions of the Directors. If the primary purpose was not to defeat the takeover, then the inquiry is over. If it was, proceed to 2.
     + Teck Corp: Primary purpose was not to prevent takeover; distinguishing from Bonisteel and Hogg
  2. Directors are entitled to consider corporate reputation, experiences and policies of anyone seeking to takeover the corporation. If they decide **on reasonable grounds** that takeover will cause *substantial damage* to the COs interest, they are entitled to use their power to protect the CO
     + If no reasonable grounds, then the issuance of shares can be set aside and no damages paid (Bonisteel)
     + If the purpose was to defeat takeover BUT was in the best interests of the CO, no breach (Teck Corp)
  + **N.B.** Talk about Justice Berger’s judgment – that he uses English and Australian case law to develop a novel approach and develop a new test out of *obiter dicta*
    - Approach was endorsed by the SCC in Peoples and Bell
    - Combine this with BCE’s comments re: the “fair treatment” component of fiduciary duty is fundamental to the *reasonable expectations* of stakeholders claiming an oppression remedy
* Proportionality Test (US ONLY):Response to threat can only be by taking proportional measures

## (c) Relief from Liability – BCA, s. 233(6)

|  |
| --- |
| Breach of Duty owed under 142 > Derivative Action (by minority SHs) |
|  |
| 1. Self-Dealing (can be ratified by SH special resolution per Beatty) |
| 2. Other (ratification does not stop action per s. 233(6)) |
| * 142(3) Waiver |
| * 157 Reliance (defense to 154 & 142) |
| * 234 Good Faith |
| 3. Remedies (“fraud on minority”) |

**232** Derivative Action

* A SH or DO of a company may, w/ leave of the court, pursue legal proceedings in the name/on behalf of the company to enforce a right, duty or obligation owed to the company

**233(6)** Effect of Ratification on Derivative Action

* No derivative action or application to have one, may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the CO has been or might be approved by the SHs of the CO [ratification]
  + Evidence of that approval or possible approval may be taken into account in making an order under **232**
* **Means:** Ratification is no longer determinative in derivative claims
  + Only clear foundation is *interested votes* – whereby ratification that was obtained b/c the alleged wrongdoers voted as SHs, may be ignored by the courts
  + N.B. Other proceedings continue to be governed by CL – part of managerial powers and BJR applies
* **Rejected Common Law:** Ratification likely precluded the possibility of a SH bringing a derivative action unless they could bring the conduct w/n an exception (fraud on minority)
  + Fraud on the Minority (North West Transportation): Limits the CL such that “ratification must not be brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those SHs who oppose it”

**149(2)** Approval of contracts and transactions

* A DO who has a disclosable interest in a K/trans is not entitled to vote on any directors’ resolutions to approve that K/trans
  + Exception: **149(3)** where all DOs have a disclosable interest in the K/trans
* **Means:** A director can, in their capacity as an individual (SH), vote their shares in a SH meeting, but is not allowed to vote in their capacity as a director (North West Transportation)
  + If too many Director votes, may lead to issue of *interested votes* or *fraud on the minority*

Relief from Liability – ss. 142(3), 157(1), 234

* **142(3)** No provision in a K, the memorandum or the articles relieves a director of officer from their fiduciary duties
* **157(1)** A director (*not officer*) of a company is not liable under **154**, and has complied with his or her duties under **142(1)** if the director relied, in good faith, on:
  1. financial statements of the CO represented by a DO or OR or contained in a written report of the auditor of the CO
     + Peoples [78]: Mr. Clément’s qualifications were not equivalent to those enumerated – not regulated, no professional insurance. His job title as “VP Finance” was not conclusive.
       - Suggests 157 requires a *designated professional*
  2. Written report of lawyer, accountant, engineer, appraiser, or any other persons whose profession lends credibility to a statement made by that person
  3. Statement of fact represented to the director by an officer of the company to be correct
  4. Any record, information, representation the court considers provide reasonable grounds for the actions of the director whether or not is was forged or fraudulent
* **234 Relief in legal proceedings**
  + If, in a legal proceeding against a DO, OR, receiver, receiver manager or liquidator of a CO, the court finds that that person is or may be liable in respect of *negligence, default, breach of duty or breach of trust*, the court must take into consideration all of the circumstances of the case, including those circumstances connected w/ the person's election or appointment, and may relieve the person, either wholly or partly, from liability, on the terms the court considers necessary, if it appears to the court that, despite the finding of liability, the *person has acted honestly and reasonably and ought fairly to be excused*
  + Consider a good faith/sheer desperation provision – designed to separate lay DOs from professionals
    - Unlikely to be accessible by a professional trustee

# 8. Shareholders’ Rights

Introduction

* Rights arise form the articles, common law, statute and contracts (i.e. shareholder agreements)
* Statutorily empowered to vote:
  + For directors
  + Respecting “fundamental changes” (i.e. sale of undertaking, continuance/amalgamation, changes to articles)
* Are limited and inclusive of the rights to:
  1. Vote
  2. Requisition meetings
  3. Table postals (SH proposals)
  4. Remove directors
  5. Receive dividends (at directors discretion per s. 136)
  6. Return of assets on winding up

## Voting Rights – BCA, ss. 173-175

* **173(1)** Unless otherwise provided in the articles, each SH is entitled to one vote for each share held, to be exercisable in person or by proxy
* **174** Unless otherwise provided, SHs may vote by telephone or other communication mediums, but the company is not obliged to facilitate such voting
* **175** Pooling Agreements: Two or more SHs may enter into a written agreement that when exercising their voting rights they will vote their shares in accordance with their agreement
* **Criticism:** SH voting has little effect on corporate activity:
  1. In the usual case the slate of candidates nominated by management will run unopposed
     + Unless a *proxy battle has* been mounted
  2. Problem of “rational shareholder apathy” – many SHs do not attend or vote at meetings
     + The cost/time to become sufficiently informed to vote effectively is quite large
     + For SHs in WHC, the probability that his/her votes will influence the outcome is small
     + When COs are generally profitable, may be difficult to overcome the faith SHs have in their current Board
  3. “Free rider” effect results when few dissentient SHs mount an action benefitting all SHs
* **Counter:** The existence of a voting class is a “check” on the potential tendency of Boards to depart, to some degree, from their duty to maximize corporate profits
  + Consider that a directors personal wealth is often tied to the CO; unlike more diversified SHs
  + Boards may select/invest in projects which are less risky to protect their own interests, despite lesser profitability

## Shareholders Meetings – BCA, ss. 166-186

1. Annual General Meeting
   * Extraordinary or Special General Meetings

* Shareholder Based Proposals

1. Requisition Meetings
2. Court Ordered Meetings

### 1. Annual General Meeting – BCA, ss. 182

* **182(1)** Must hold an AGM at least once per year **(2)** unless a unanimous resolution consents to the business to be transacted or waives the AGM (via consent resolution **180**)
  + Called, facilitated and controlled by management under **136**; commonly used to vote on/choose Directors
* Procedural Aspects – BCA, ss. 176-185
  + **177** A subsidiary is not entitled to a vote
  + **179** Minutes of a meeting must be kept
  + **181** The rules outlined for AGMs are applicable to Extraordinary (Special General) Meetings\*\*
  + **182** AGMs are to be held w/n 18 months of incorporation, and at least every 15 months after that
  + **185** The annual financial statement is to be presented at the AGM (**198**) and made available to SHs on request
* Formalities Prior To – BCA, s. 166-172
  + **166** AGM must be held in BC, unless the alternative location is provided by the articles
  + **169** CO has to send out notice of the AGM to all SHs
  + **172** Quorum specified by the memorandum of articles or a minimum of 2 shareholders
    - If the quorum is not met, then the AGM can be adjourned

#### Special Power: Shareholder Based Proposal – BCA, ss. 187-191

* ONLY applies to WHC/public companies (“reporting issuer”)
* **187(1)** Must be a qualified shareholder
  + Registered or beneficial owner of at least 1 voting share, who has held those shares for at least 2 yrs, and that has not failed to present a proposal at an AGM of which the person was the submitter and the CO complied w/ **189**
* **188** Must be signed by the submitter and qualified shareholders constituting at least 1% of the aggregate shares
  + Must be received 3 months prior to the AGM
  + May be accompanied by a written statement in support of the proposal; no more than 1000 words
* **189** Rights and obligations arising from proposal
  1. Company must send the proposal to all shareholders (means company bears the cost of distribution)
  2. With notice of the AGM or in the company’s information circular or equivalent
  3. Submitter must be allowed to present the proposal at the meeting
* **189(5) Exceptions to CO Obligations:** The CO need not process a proposal…if any of the following circumstances applies:
  1. the DOs have called an AGM to be held after the date on which the proposal is received by the CO and have sent notice of that meeting in accordance w/ **169**;
  2. the proposal is not valid within the meaning of **188(1)** or exceeds the maximum length established by **188(3)**;
  3. substantially the same proposal was submitted to SHs in a notice of meeting, or an information circular or equivalent, relating to a general meeting that was held not more than the prescribed period before the receipt of the proposal, and did not receive the prescribed amount of support at the meeting;\*\*
  4. it clearly appears that the proposal does not relate in a significant way to the business or affairs of the company;
  5. it clearly appears that the primary purpose for the proposal is
     1. securing publicity, or\*
        + Varity Corp: Seemingly includes proposals for economic, political, racial or social causes
     2. enforcing a personal claim or redressing a personal grievance against the company or any of its DOs, ORs or security holders;\*
  6. the proposal has already been substantially implemented;
  7. the proposal, if implemented, would cause the company to commit an offence;
  8. the proposal deals with matters beyond the company's power to implement
* **191(1)** Companies have the onus of arguing that one of the **189(5)** exceptions applies. Must send the submitter notice of its decision not to comply w/ **189** accompanied by a written statement.
* **191(2)** Upon receiving notice and an explanation, a submitter may apply for JR
  + Court has wide discretion to “make any order it considers appropriate”
* Why have these provisions?
  + Does not create a legal obligation for Directors to pass the resolutions; simply creates an “agenda item”
  + However they may “cave in” out of good governance practices – proposal w/ broad community support

### 2. Shareholder Requisitioned Meetings – BCA, ss. 167-168

* Applies to BOTH private and public companies
  + Commonly of interest to shareholders who are jockeying for *control*; requires at least 5% support
  + Not available to creditors
* Can be used at any time; but commonly used when SHs need to be convened quickly
* ONLY provision in the Act that allows SHs to demand a meeting of the company’s SHs; an incursion into the **136** powers
* **Challenge:** Provision goes to the business judgment of the Board; judges seem unsure of how to construe these provisions

**167** Requisitions for General Meetings

* **(1)** A shareholder(s) who **(2)** holds 1/20 (5%) of the shares of the company may requisition a general meeting for the purpose of transacting any business that may be transacted at a general meeting (Onex v Air Canada)
  + Unlike AGM, requisitioned meetings are stand-alone and only discuss the requisition topic; costs transferred to CO
* **(3)** Must be <1000 words, signed by the SH(s) requisitioning the meeting and delivered to the registered office of the CO
* **(5)** Requires the Directors to call a meeting w/n 4 months of receiving the requisition; must notify all SHs
* **(7) Exceptions:** The directors need not comply with **(5)** if
  1. the DOs have called a general meeting to be held after the date on which the requisition is received by the company and have sent notice of that meeting in accordance with **169**,
     + Only applies if there is some reasonable chance that the business stated in the requisition will be considered (Onex v Air Canada)
  2. substantially the same business was submitted to SHs to be transacted at a general meeting…and any resolution to transact that business…did not receive the prescribed amount of support,
  3. it clearly appears that the business stated in the requisition *does not relate in a significant way* to the business or affairs of the company,
  4. it clearly appears that the primary purpose for the requisition is
     1. securing publicity, or
     2. enforcing a personal claim or redressing a personal grievance against the CO or any of its DOs, ORs or security holders,
  5. the business stated in the requisition has already been substantially implemented,
  6. the business stated in the requisition, if implemented, would cause the CO to commit an offence, or
  7. the requisition deals with matters beyond the company's power to implement
* **(8)** If the DOs do not, w/n 21 days of receipt, send notice of a general meeting in accordance with **(5)**, the requisitioning SHs…more than 1/40 of the issued shares of the company that carry the right to vote at general meetings, *may send notice of a general meeting to be held to transact the business stated in the requisition*.
  + **Means:** If the Board does not comply, the SHs can go ahead and call the meeting anyways
* **(9)**A general meeting called, under **(8)**, by the requisitioning SHs must
  1. be called in accordance with subsection **(5)**,
  2. be held w/n 4 months after the date on which the requisition is received by the CO, and
  3. as nearly as possible, be conducted in the same manner as a general meeting called by the directors.
* **(10)**Unless the shareholders resolve otherwise…the company must reimburse the requisitioning SHs for the expenses actually and reasonably incurred by them in requisitioning, calling and holding that meeting
  + Issue: Can be difficult to get reimbursed, as SHs must pay up front costs
  + Issue: If the SHs vote on a matter in which the power rests with the Board, w/o the board’s approval or attendance, even a unanimous vote will not be binding on the DOs

### 3. Court Ordered Meeting – BCA, s. 186

* When a shareholder goes before a court and requests that a meeting among shareholders be convened
  + “The power of the court to order a meeting should be exercised cautiously, having regard to the business judgment and powers of the directors set out in 136 saves” (Onex v Air Canada)

**186** Powers of Court

1. On an application by the company, director, or shareholder, the court may
   1. order a meeting of the SHs to be held in a manner the court considers appropriate
   2. give directions it considers necessary as to the call, holding, and conduct of the meeting
2. The court can order a meeting under **(1)** if
3. it is impractical for any reason for the CO to call or conduct a meeting in accordance with this Act
4. if the CO fails to hold the meeting of the SHs in accordance with this act (i.e. 167(5))
5. for any other reason the court considers appropriate
6. The court may order that the quorum required may be varied or dispensed with in respect of the meeting

## Removal of Directors – BCA, ss. 128(3) and 131(a)

* **128(3)(a)** At any time during a Director’s tenure, a *special resolution* of the shareholders can remove them from office
  + Typically conducted at a requisition meeting
    - RE: requires 2/3 of the votes; unlikely to be used very often
  + However **128(4)** applies when the articles specify that only SHs of a class or series of shares can remove directors (re: form of special majority)
* **131(a)** Shareholder’s are then entitled to fill the vacancy with their own nominees
* ONLY relevant during a takeover situation
  + Typically the incumbent Board has been elected by the SHs; unlikely to have them removed from office
  + BUT if someone has rapidly acquired a majority of shares, they may be in a position to elect new reps to the Board
* W/o this provision, the SHs would have to wait until the next AGM to use their votes and secure the appointment of their own nominee(s)

# 9. Shareholder’s Remedies

Introduction

* Various forms of remedies today, many of which are *available simultaneously*
  + i.e. in response to directors’ alleged wrongdoing, a SH may commence a derivative action (under 232/233) for breach of fiduciary duty (under 142) and/or a personal oppression claim (under 227)
* Based in the Duties of Directors and Officers – possible claims include:
  + Breach of K – ss. 18, 228
  + Breach of fiduciary duty – s. 142(1)(a)
  + Breach of duty of care – s. 142(1)(b)
  + Other statutory remedies (i.e. oppression or appraisal)
* Must look at the articles, notice of articles and Constitution – these documents outline the responsibilities and obligations b/w the SHs and DOs of the CO

## The Derivative Action

Derivative Actions

* **SHs can seek leave of the court to pursue a right of action in the name/on behalf of the corporation based on duties owed to the corporation**
  + **Means:** The rights affirmed in a derivative claim can be *no greater* than those owed to the corporation
* “Where a corporation has been injured by some wrongdoing, a SH of that has also arguably been injured through the reduction in value of his or her shares that is traceable to the corporate injury. Under the derivative action, a SH, on behalf of the corporation, brings an action that derives from the corporation’s cause of action. This indirect or derivative action is in contrast to the personal direct action whereby a SH enforces his own rights as distinct from those of the Corporation.”
* Why not use oppression?
  + Oppression is easier to prove, but only in CHCs b/c it focuses on personal situations
  + Far more difficult to prove in large WHCs

a) Common Law – Foss v Harbottle [NO LONGER APPLIES]

* RULE: The Corporation, being a separate legal entity, is the only proper plaintiff when it has suffered a wrong
* EXCEPTIONS:
  1. *Ultra vires* acts
  2. Fraud on the minority – where the wrongdoers are themselves in control of the company, the aggrieved minority may bring an action on behalf of the company
  3. Special majorities
  4. Where the personal and individual rights of membership of the plaintiff have been invaded [not really an exception, as SHs have standing to bring personal actions]
* **Advantage:** No need to obtain standing prior to the trial. Standing may or may not be raised at trial.
* Though statute has now codified derivative actions (Shield Development 1976) CL continues to serve as a principle of interpretation for the BCA

b) Statutory Derivative Action – BCA, ss. 232-233

Step 1: Establishing Standing **232**

* **232(1)** Standing can be granted to:
  + complainants = shareholders and directors
  + shareholders = including *any other person whom the court considers appropriate* [may include a creditor, liquidator, or receiver manager]
* **232(2)** A complainant may, with leave of the court, prosecute a legal proceeding in the name of and on behalf of a CO to:
  1. enforce a right, duty, or obligation owed to the company and;
  2. to obtain damages for any breach of a right, duty, or obligation owed to a company
* **232(3)** Specifies that derivative actions are available for breaches of the BCA or at common law

Step 2: Getting Leave of the Court **233**

* Must follow the process outlined in the statute to have a court grant leave to a complainant to file proceedings in the name of the of CO
  + Style of Cause: *Name of CO v. DO1 and DO2*
  + COs name is “lent” to the SHs by the court
* **233(1)** Once standing is established under **232**, the complainant must convince the court that the action is based on suitable grounds to be granted leave. S/he may be granted leave if:
  1. s/he has made **reasonable efforts** to cause the DOs of the company to prosecute or defend the legal proceeding,
     + “**reasonable efforts”** means the CO must be aware of the general nature of the claim; do not need knowledge of the precise details (North West Forest Products)
  2. **notice** of the application for leave has been given to the company and to any other person the court may order,
     + Requires only notice of the SHs intent to the bring the action, not every detail (Bellman; letter did not include one of the multiple grounds of action)
     + Generally an easy burden to fulfill if any communication has been undertaken
  3. the complainant is **acting in good faith**, and
     + Also relatively easy to establish, as long as complainant is not vexatious
     + Simultaneous oppression claim will not oust this step, provided the relief sought is not the same (Bellman)
  4. it appears to the court that it is **in the best interests of the company** for the legal proceeding to be prosecuted or defended\*\*
     + Not about whether or not a *prima facie* claim exist, it is WHETHER, assuming it does exist, would it be in the interests of the company to pursue it?
     + Bellman states that it is sufficient that an arguable case be shown – court likely to consider the impartiality of the DOs (and potentially the litigation committee) and their decision *not* to bring the action

Step 3: Court Adjudicates Case on its Merits

* RE: the rights of the complainant can be no greater than the rights of the company itself
  + Therefore, the proceeds of the claim, if any, rightfully belong to the corporation
* **233** Powers of court in relation to derivative actions
  + **(3)(a)** Can appoint a person to control or give direction for the conduct of the legal proceedings
  + **(5)** Proceedings cannot be ended w/o approval of the court
  + [**(6)**](#_(c)_Relief_from) Courts can consider ratification, but a simple resolution is not determinative [see page 24]

**233** Costs

* **(2)** Complainant may be required to give security for costs
* **(3)(b)** The court may order CO to pay interim costs of litigation; but under **233(4)(a)**, complainant may be required to pay some or all of those costs back
* **(4)(a)** Court may order the CO to indemnify the complainant or the person controlling the proceeding for costs incurred
* **(4)(c)** Court may order the complainant to indemnify the CO, DO, or OR for expenses and legal costs incurred

Use of Committees & the Business Judgement Rule (US Jurisprudence)

* What if the committee set up to investigate the merits of the derivative action and its actions are squeaky clean?
* Auerbach v Bennett – if the recommendation of a committee was *truly independent* then the BJR would prevent the judge from overriding the decision of the board
  + Summary: Court concluded committee was independent. CO argued that the Boards reliance on the Committee’s recommendation precluded the court from approving derivative action and questioning the CO’s judgment.
* Zapata v Maldonado – Court did not accept that use of a Committee and the BJR precluded it from assessing whether or not the action was in the COs best interests; cannot eliminate jurisdiction w/ internal processes
* **Canadian Context:** re: use of sub-committees is UNKNOWN 🡪 Patterson thinks Canadian courts would be reluctant to see their powers undermined
  + However, likely to depend on the context – difference b/w undervaluing the COs undertakings and choosing not to take action against a small debtor

## The Personal Action

Introduction

* **Definition:** Any civil proceeding where a SH has individual standing to seek relief on his/her own behalf for his/her own benefit. The substantive basis of their claim can be found in K, in common law (though BCA limits this) or under the BCA.
* **No issue of standing** – the remedy belongs to a shareholder simply because of the event that occurred

Farnham v Fingold [1973] ONCA

* Issue 1: Court held that Foss v Harbottle no longer applies; must use statutory derivative actions
* Issue 2: Was a SH who sold their shares at a premium, to give the purchaser majority control of the CO, entitled to the profits from that sale? Or is the CO entitled to the profits?
  + Some American commentators have said that “control” is a premium that belongs to the CO
  + Issue not decided; case went back to trial on the first matter

Personal Actions: Relevant Statutory Provisions

|  |  |
| --- | --- |
| 19, 228 | Breach of K gives rise to compliance and restraining orders  including orders respecting restricted acts under 33(1) and 154 |
| 20(5) | Pre-incorporation contract |
| 150 | Breach of disclosable interests (self-dealing) |
| 167 | Requisition meetings |
| 186 | Court ordered SH meetings |
| 187-191 | Shareholder proposals |
| 227 | Oppression |
| 229 | Application by any person to rectify a “corporate mistake” |
| 237-247 | Appraisal remedy |
| 238 | SH right to dissent to “fundamental changes” and associated appraisal remedy (245) |
| 301(2), (5) | Sale of undertaking and associated appraisal remedy (245) |

Alternative Action: Breach of Statutory Duty (Tort)

* Resolves/minimizes need for derivative actions
* BCE SCC: Court seemingly suggests way around derivative action problem, is to claim damages for breach of statutory duty
  + CL justification for providing standing to persons who were intended to benefit from compliance with the statute
  + Patterson notes that this is inconsistent with other SCC jurisprudence
* Goldex v Rivell ONCA: If a CO fails to comply with provisions of the *Securities Act* (i.e. failure to disclose), does a SH have a personal right to seek relief?
  + Suggested that minority SHs could sue the majority SHs for abusing their responsibility under the *Securities Act*
* Jones v HF Ahmanson & Co Cali SC: The individual wrong necessary to support a personal action pursued by a minority shareholder need not be unique to that minority shareholder, but can affect a substantial number of shareholders

## The Statutory Oppression Remedy – BCA, s. 227

Introduction

* Purely statutory and powerful personal remedy
* Represents an attempt to give broad based, equitable jurisdiction to courts, which is accessible to stakeholders, to address concerns and make appropriate orders
* MOST important innovation in corporate law in the 20th century
  + Potentially transforms the relationship b/w corporate directors, officers and shareholders
  + However, most cases involve private or CHCs; unlikely to establish “reasonable expectations” of directors and others in public or WHCs
* Does NOT limit other forms of relief, and can be brought simultaneously with other actions (Bellman)

Why would you need the remedy?

* Used to remedy the exercise of majority power in an oppressive or unfairly prejudicial way (to SHs)
* Developed from Foss v Harbottle; courts had a tendency to respect majority rule and consider companies a private entity that was able to operate as it “saw fit”; would not interfere
  + Became clear that good faith was not adhered to and a remedy was needed
* Differences b/w CBCA and BCA:
  1. Party that can bring the complaint
     + BCA: shareholders only
     + CBCA: complainant
  2. In BC you can get the remedy for “threatened conduct”
     + CBCA only applies to actual conduct
  3. CBCA adds third action of “unfairly disregarding the interest” of
* Can be brought by *action* or *petition*
  + Where a petition offers a quicker remedy, but requires adequate evidence to support the necessary affidavit
* Issue: Dissident Directors and/or Shareholders
  + Possible in CHCs to have a single Director or Shareholder who is causing substantial problems. Attempts to push out that party may lead to oppression.
  + However, if evidence demonstrates a dissident SH, court may consider the other remedies available to them – i.e. appraisal remedy

Statutory Language – **227 Complaints by Shareholder**

1. "shareholder" is same as 1(1)…and any other person whom the court considers to be an appropriate person
2. A shareholder may apply to the court for an order under this section on the ground
3. that the affairs of the company *are being or have been conducted*, or that the powers of the directors *are being or have been exercised*, **in a manner oppressive to one or more of the shareholders**, or
4. that some act of the company *has been done or is threatened*, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares *has been passed or is proposed*, **that is unfairly prejudicial to one or more of the shareholders**.
5. BROAD REMEDIAL POWERS: On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to (4) of this section, **make any interim or final order it considers appropriate**, including an order
6. directing or prohibiting any act,
7. regulating the conduct of the company's affairs,
8. appointing a receiver or receiver manager,
9. directing an issue or conversion or exchange of shares,
10. appointing directors in place of or in addition to all or any of the directors then in office,
11. removing any director,
12. directing the company, subject to subs (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court, [APPRAISAL]
13. directing a shareholder to purchase some or all of the shares of any other shareholder,
14. directing the company, subject to subs (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company, [APPRAISAL]
15. varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,
16. varying or setting aside a resolution,
17. requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
18. directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,
19. directing correction of the registers or other records of the company,
20. directing that the CO be liquidated and dissolved, and appointing one or more liquidators, with or without security,
21. directing that an investigation be made under Division 3 of this Part,
22. requiring the trial of any issue, or
23. authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs [DERIVATIVE]
24. Court may make an order per (3) if it is satisfied that the application was **brought by the SH in a timely manner**
25. If an order is made requiring payment, the company must pay the full amount payable unless there are reasonable grounds for believing **(a)** the CO is insolvent or **(b)** the payment would render the CO insolvent
26. If reasonable grounds exist for believing that sub (5) applies,
    1. the CO is prohibited from paying the person the full amount of money to which the person is entitled,
    2. the CO must pay to the person *as much of the amount as is possible*… and
    3. the CO must *pay the balance* of the amount *as soon as the company is able to do so…*
27. If an order is made under subsection (3)(o), Part 10 applies

Standing – What is an appropriate person?

* BCA Shareholder: Only explicitly defined party under **227(1)**
* CBCA Complainant = directors, security holders, and anyone else the court finds to be appropriate
  + Security Holder = bond, debenture, note or other indebtedness of the CO whether secured or unsecured
  + Creditor = Depends on whether the creditor had an expectation that the repayment would not be frustrated by the contemplated action
* No *clear definition* regarding this issue; need to examine all the circumstances for the appropriate person
  + Are they analogous to a shareholder?
  + Did they have a reasonable expectation re: the company’s conduct?
* ALSO, did the SH bring the claim in a timely manner per **227(4)**?
* Case Law:
  + N’quatqua Logging v Thevarge: First Nation’s Band found appropriate person for claim against Society which held land in trust for the Band
  + Ginther v Rainbow Mgmt: Found a SH of a SH (intermediary step) satisfied the test
    - “must have some *particular legitimate interest* in the manner in which the *affairs of the CO* are managed”
    - “those persons who have a *direct financial interest* in how the CO is being managed and are in a position-somewhat analogous to minority shareholders – where they have no legal right to influence or change what they see to be abuses of management or conduct contrary to the CO's interest”
  + RBL Management v Royal Island Development: Beneficial owner of shares is entitled to bring claim (majority SH of CO who was minority SH in Royal Island)
  + Mayer v Mayer: Trustee’s can sue; however the claimant was also the beneficiary of the trust
  + First Edmonton Place v 315888 Alberta: Leaseholder found not to be an appropriate person, as they do not satisfy the definition of creditor

Establish Grounds for Oppression – BCA, s. 227(2)

* Provision gives court broad jurisdiction to enforce what is *fair*, not just what is illegal
  + “Equity enables a court to subject the exercise of legal rights to equitable considerations…” (Ebrahimi v Westbourne Galleries)
* Requires consideration of all of the circumstances – as conduct that is oppressive in one circumstance, may not be oppressive in others

1. Oppressive Conduct
   * Whether the affairs of the company have been conducted OR the power of the directors have been exercised **in a manner oppressive to one or more of the shareholders**
     + Whether the conduct was oppressive to the claimant qua shareholder
   * However may be more complex in a private company – where the understanding of the roles of Directors, shareholders, creditors, etc. may be less clear
   * Any act exercised in a manner *burdensome, harsh or wrongful* (Scottish Cooperative Wholesale Society)
   * Implies a *lack of probity and fair dealing* in the affairs of a company to the prejudice of some portion of its members (Elder v Elder and Watson)
     + Meaning bad faith on the part of the claimant may bar the claim
2. Unfair Prejudice
   * Whether some act of the company *has been done or is threatened*, or that some resolution of the SHs *has been passed or is proposed*, **that is unfairly prejudicial to one or more of the SHs**
     + Added later, easier to prove; lower threshold
   * Notion of fairness (Ebrahimi v Westbourne Galleries; unfair prejudice added to statute shortly after court found ‘winding up’ to be an unfair remedy)
   * Same as *unjust and inequitable* (Diligenti)
   * In certain situations there are equitable rights, expectations and obligations between SHs which exist independent of the company structure and the relevant legislation
     + May include right to continue as a Director if that belief is reasonably held (Diligenti)
     + Court will examine the history of incorporation and subsequent relations to determine (Ferguson v Imax)
3. Unfair Disregard
   * Only available in the CBCA; infrequently used despite its seemingly lower threshold

Remedies

* Broad remedies available – BUT should be done with “scalpel, not a battle axe”
* Should be directed to the rectification of the oppression and should not go beyond that (Naneff v Concrete Holdings)
  + F: Father gave sons equity positions in company. When son became a “bad actor”, father removed son from the company. CA overruled TJ, finding that the expectation was always that the father would control the company and that the sons would receive control upon his death; sons did not have a bigger right to the company than that.
* Novel Example: Shotgun Agreements
  + Often found w/n shareholder agreements; create a process for selling back your shares
  + A seller wanting out of the company must establish a fair price for their shares. The other SHs are required to accept the offer or refuse it. If they refuse, the seller must purchase the other SHs shares at the fair price they set.
    - Meant to ensure sellers set a fair value

**Two Step Oppression Test** (BCE Inc; court re-packages statutory language)

1. Establish standing
2. Does the evidence support the *reasonable expectation* asserted by the claimant?

* Where *reasonable expectations* are objective and contextual
  + Not frozen at ACC; court will examine the current state of the company and how those expectations have changed
  + Must have regard to the expectations of the stakeholders in relation to the facts of the specific case, the relationships at issue and the entire context
  + RE: Directors owe their duty to the CO, not to SHs – the reasonable expectation of SHs is simply that the DOs act in the best interests of the company (BCE)
* Meant to contextualize the analysis – must consider all of the circumstances of the CO and the intentions of the parties
  + Expectations likely to vary in CHCs vs. WHCs
  + The smaller the CO, the more important it is to understand the circumstances around incorporation
  + Shareholder agreements – need to examine carefully; identify restrictions and mgmt of the CO
  + Past practices – was it a partnership prior to incorporation?
  + Relationship b/w the parties – were they family members? Strangers? How did they meet?

*As is a [SH/creditor] of a closely held corporation, the expectation tends to be founded on personal relationships of trust and confidence. In this case … [talk about breach].*

*As is a [SH/creditor] of a widely held corporation, the sources of reasonable expectations do not depend on intimate relationships (like CHCs) but rather legal rights to dividend income and capital gains (upon sale of shares, at preferably as high a share price as possible). In this case… [talk about breach].*

*For the reasons above, I am of the opinion that [did/did not] have a reasonable expectation that was breached by the corporation.*

1. Does the evidence establish that the *reasonable expectation* was violated by the act of oppression, unfair prejudice or unfair disregard?

* First, must find actions that constitute oppression or unfair prejudice – BCE makes it clear that not all conduct that violates reasonable expectations will be unfair
  + “fair treatment” is fundamentally what stakeholders are entitled to expect
* Then, must determine if those actions violate the reasonable expectation
  + Actions that significantly undermine the value of the CO
  + Material breaches of the expectations of the complainant

Indicia of Oppression (perArthur v Signum)

* Lack of valid purpose of corporate transaction, such as excessive salaries
* Lack of good faith of part of Directors
* Discrimination among SHs, which gives benefit to majority over minority
* Lack of adequate financial disclosure of material info to minority SH
* Plan or design to eliminate minority SH
* Refusing dividends to SHs

*In my opinion, ‘s application [DOES/DOES NOT] pass the BCE test for oppression. Assuming this is true, the court will now have many remedies available to grant , as listed in section 227(3).*

Relationship b/w the Oppression Remedy and Fiduciary Duties (pp. 757-758)

* What is the distinction b/w conduct that constitutes a breach of FD and conduct that is oppressive?
  + Most actions that are a breach of FD will also constitute oppression
  + Why? Because compliance w/ the FD is something SHs have a reasonable entitlement to (BCE Inc)
* Most courts have allowed actions of a derivative character to proceed under the oppression remedy
* Turning oppression into both a personal remedy and a broader form of FD
  + Offers a broader substantive cause of action and more remedies than breach of FD
* Patterson says there has been a bias in oppression cases against the DOs of CHCs; whereas in FD cases, the bias was towards the DOs of WHC
  + re: oppression is more common among personal contacts; easier to establish reasonable expectations of conduct
* ONLY two places in the BCA where the general duty stated in **142** is made specific and where the SH/stakeholder would NOT likely able to sue under oppression:
  1. Insider Trading – BCA, s. 192
     + May be able to claim oppression where the statute did not provide the SH a remedy – however would need to show a reasonable expectation beyond expecting that the DO(s) will not breach the insider trading provisions
  2. Self-dealing – BCA, ss. 447-553
     + Would need to combine self-dealing w/ some other “fresh basis” to claim under the oppression remedy – would need to demonstrate some other reasonable expectation of the DOs that is not directly connected to the self-dealing provisions

## Compliance and Restraining Orders – BCA, ss. 19(3), 228 and 229

**19(3)** Effect of articles and notice of articles

* “A company and its SHs are bound by the company's articles and notice of articles or by its memorandum and articles”
* Recognizes the articles as a contract which binds the shareholders and directors of the CO
* Allows SH to go to court for violation of any provision of the articles that is not being complied with
  + Often invoked when a meeting has been held without adequate notice or documents and shareholders want a judge to order an injunction to delay the meeting

**228** Compliance or Restraining Orders

* Expands the scope of **19(3)** – to anyone who *contravenes or is about contravene* a provision of the Act or regulations or of the memorandum, notice of articles or articles of the company
* Extends the contract enforceability theory behind **19(3)**

1. Specifies that persons with standing are “complainants”; can also include “any other person whom the court considers to be an appropriate person”
2. Can obtain order directing the CO or representative to comply w/ a provision or restrain from engaging in the impugned act
   * Covers any contravention of the Act, the articles and the regulations
3. Court may “make any order it considers appropriate”, but may also order:
   1. directing a person…to comply w/ or to refrain from contravening a provision referred to in that subsection,
   2. enjoining the company from selling or otherwise disposing of property, rights or interests, or from receiving property, rights or interests, or
   3. requiring, in respect of a contract made contrary to **33(1)**, that compensation be paid to the company or to any other party to the contract

## Remedying Corporate Mistakes – BCA, s. 229

* Expands the scope of **19(3)** – allows any “interested person” to ask the court to remedy a corporate mistake
* Focussed on procedure, rather than substance. Aimed at inadvertent non-compliance w/ procedural req’ts.
* **ASK:** Was there any unfairness as a result of the formalities not being complied with?
  + Considering all of the circumstances of the CO and the procedure at issue

1. "corporate mistake" means an omission, defect, error or irregularity that has occurred in the conduct of the business or affairs of a company as a result of (a) a breach of the BCA, (b) a breach of the memorandum, notice of articles or articles, (c) a proceeding/meeting or (d) consent resolution have been rendered ineffective
2. The court…may make an order to correct or cause to be corrected, to negative or to modify or cause to be modified the consequences in law of a corporate mistake or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the corporate mistake, and may give ancillary or consequential directions it considers necessary.
3. The court must…consider the effect that the order might have on the company and on its directors, officers, creditors and shareholders and on the beneficial owners of its shares
4. An order made under (2) does not prejudice the rights of any 3rd party who acquired those rights
   1. for valuable consideration, and
   2. without notice of the corporate mistake that is the subject of the order.

**143** Validity of Acts of Directors and Officers

* “An act of a director or officer is not invalid merely because of an irregularity in the election or appointment or a defect in the qualification of that director or officer”
* Overcomes any issues raised under **229**; ensures that DOs are able to function in their role despite any procedural defects in their appointment

## The Appraisal Remedy (Dissent Proceedings) – BCA, ss. 237-247

Introduction

* Allows shareholders to force the company to purchase their shares when they dissent to “fundamental changes”
  + Certain “things” that the Directors/Board can initiate that are so significant to pre-existing SHs that they should have the option of pulling out their investments
  + Typically such change require a special resolution of the SHs (i.e. undertakings **301**)
* An automatic right; based on the *type of decision* rather than the *quality of management*
* Commonly used by SHs who are part of management
* Applies to ALL forms of companies
  + More commonly needed for privately or CHCs as there isn’t as large of a market to purchase their shares

Requirements:

* Must be a shareholder – do not have to have the right to vote
  + **238(1)** A SH of a company, *whether or not the SHs shares carry the right to vote*, is entitled to dissent…
  + Allows a SH to dissent even if their shares hold no voting rights; but for only this limited purpose
* Must prove that the resolution involved was a fundamental change
  + **238(1)(a)** resolution to alter the articles or alter restrictions
  + **238(1)(b)** adopt an amalgamation agreement
  + **238(1)(c)** approve an amalgamation agreement
  + **238(1)(e)** sale, lease or dispose of all or substantially all of the company’s undertaking
    - Where the SHs are able to approve or *veto* the sale; can use remedy upon approval
* Must follow the procedure to dissent and provide notice of your dissent under ss. 238(2)-244
  + **238(2)** A SH wishing to dissent must (a) prepare a separate notice of dissent under **242**, (b) identify themselves and (c) dissent wrt all of their shares
    - Means you cannot dissent *some* of your shares
  + **243** A company that receives notice of dissent under **242** must, if it intends to act anyways or has already acted, send a notice to the dissenter promptly
    - Must advise the dissenter of the manner in which dissent is to be completed under **244**
  + **244** The dissenting SH must send a written statement requiring the company to purchase all of the notice shares and the certificates of the notice shares
    - Dissenter is then deemed to have sold and the CO is deemed to have purchased those shares
  + **245** The company and dissenter must agree on or apply to the court to determine the payout value
    - **237** defines “payout value”
    - Three ways to value a company and its shares:
      * Market Value – easy to determine where the CO is traded on the stock exchange
        + Mean price of the share over 21 days
        + Not particularly effective for CHCs
      * Asset Value –the “net worth” of the company divided by the # of shares
        + More dated, traditional form of valuation
        + Assumes that hard assets are the only assets; increasingly COs hold more IP
      * Earnings – forecast the anticipated future income and discount it to current values
        + Similar to the futures market and shares in foreign exchange; speculative
    - **245(5)** CO can only refuse to pay if they are our would be rendered insolvent

Aside: What about the profits elicited from the resolution that the SH dissented to?

* Are they entitled to additional benefits for surrendering the opportunity to share in future profits?
  + sCommonly referred to as a “squeeze out premium”
* No BC court has agreed to pay a premium based on this speculative percentage
* In Quebec, a 20% pay out was offered in Domglas Inc v Jarislowski, Fraser & Co [1980] QCSC

**239** Waiver of Right to Dissent

* SHs waive their right to dissent for a particular transaction or resolution when they do not follow the procedures outlined above; no action required to waive right

**246** Loss of Right to Dissent

* Most commonly occurs where a SH has approved the special resolution; cannot dissent after the fact
* OR where the resolution does not pass (in which case you were not dissenting, you were among the majority)

Loss of Other Forms of Relief

* **244(6)**A dissenter who has complied with sub (1) of this section may not vote, or exercise or assert any rights of a shareholder, in respect of the notice shares, other than under this Division
* **Means**: If you claim appraisal, you cannot claim other forms of relief
* **Issue**: Would you have done better with another form of relief?
  + Likely going to have little time to make this decision; short turnaround time b/w receiving the proposed resolution and providing written dissent
* **Loophole:** “rights of a shareholder “
  + Clearly includes rights under the BCA and at common law
  + But what about rights acquired through SH agreements? Are essentially Ks or “pre-nuptial agreements”