Director's Duties/Corporate Governance

Corporate Governance

General

- SH's can either vote for members of the board or they can abstain - so you only really need one vote if you are the only one running

*not mandated by law but the proxy firms and TSX and NYSE are pushing for a majority *abstention provision* which says that if you want to be elected and more than 50% of SHs abstain, they want you to resign - Reasoning: if majority abstain that seems like vote of non confidence (about 75% of companies have included this provision now)

-Once elected, majority of directors must be independent (free from material conflicts - trying to get rid of employees, past employee, worked at the accounting firm or law firm that provides services, family relations on board)

*reasoning: if majority is independent there will be less abuse and more consideration of the SHs and organization as a whole

- 3 Mandated Committees:
  - (1) Audit Committee - Hires the auditors, approves FS, approves public disclosure, related party transactions, risk assessment - must be 100% independent and 1 member has to be financially literate (be able to read and comprehend FS) [SEE 52-110 BELOW]
  - (2) Compensation Committee - Hot seat right now - has to be 100% independent and their job is to set an approve the compensation practices (stock options to executives, salaries, bonuses, pension, change of control practices)
    - In US it is legislated that you have to give SHs advisory vote on "say on pay" - have to tell SHs why they are paid what they are paid - then SHs vote yes/no. You can't make it mandatory but if there is a say on pay is voted NO then likely the director will be replaced

    *In Canada this is policed by ISS
  - (3) Governance/Nomination Committee - runs governance practices (how many meetings we have, materials we get, how do we assess performance)
    - In Canada, half the regulators have said we want to know what your policy is on women directors
      - the security regulators don't have the power to say you have to have X amount of women on your board so the idea is to shame companies into better behaviour

NP 58-201 - Corporate Governance Guidelines

Because corporate legislation is so thin on the requirements of a BoD, Company's have turned to making their own internal guidelines - one hot button issue is whether the CEO/Chairman of the Board should be the same person - compromise now is that if the CEO and Chairman are same person, then there is a lead director as contemplated by this instrument

1.1 - Policy provides guidance on corporate governance practices, aiming to achieve balance between protecting investors and fostering efficient capital markets

1.2 - Applies to all reporting issuers other than investment funds

3.1 - Board should have a majority of independent directors

3.2 - Chair of board should be independent director. Where this is not appropriate, an independent director should be appointed to act as "lead director". In any event, an independent person should be the effective leader of the board to ensure the board's agenda will enable it to successfully carry out its duties.

3.3 - Independent directors should hold regularly scheduled meetings at which non-independent directors and members of management are not in attendance

3.4 - Board should adopt a written mandate that explicitly acknowledges stewardship of issuer, including:

(a) to the extent possible, satisfying itself as to the integrity of CEO and executive officers;
(b) adopting strategic planning process and approving a strategic plan that takes into account the opportunities and risks of the business;
(c) identification of the principle risks of issuer's business and implementing risk management systems;
(d) succession planning;
(e) adopting a communication policy for the issuer;
(f) issuer's internal control and management information systems; and
(g) developing issuer's approach to corporate governance that are specifically applicable to issuer

-Should also set out measures for receiving feedback, and expectations and responsibilities of directors (basic duties)

3.5 - Board should develop clear position descriptions for the chair of the board and each board committee. Should develop a clear position description for the CEO, including delineating management responsibilities. Board should also develop or approve corporate goals and objectives the CEO is responsible for meeting

3.6 - Board should ensure that all new directors receive a comprehensive orientation. All new directors should understand role of board and committees, and the nature and operation of the issuer's business.
3.7 - Board should provide continuing education opportunities for all directors so that individuals may maintain or enhance skills and abilities as directors.
3.8 Board should adopt written code of business conduct and ethics that is applicable to directors, officers, and employees. Should address:

(a) conflicts of interest;
(b) protection and proper use of corporate assets and opportunities;
(c) confidentiality of corporate information;
(d) fair dealing with issuer's security holders/customers/suppliers/competitors/employees;
(e) complain with laws, rules, and regulations; and
(f) reporting of any illegal or unethical behaviour.

3.9 - Board should be responsible for monitoring compliance with the code. Any waivers from the code that are granted should be granted by the board only.
3.10 - Board should appoint a nominating committee composed entirely of independent directors
3.11 - Nominating committee should have a charter that establishes purpose, responsibilities, qualifications, etc.
3.12 - Prior to nominating or appoint individuals as directors, board should adopt a 2 step process:

(a) consider what competencies and skills the board as a whole should possess, taking into account particular competencies and skills required for the issuer;
(b) Assess what competencies and skills each existing director possesses. Attention should also be paid to personality of each director, as these may ultimately determine the boardroom dynamic

-Board should also consider the appropriate size of the board, to ensure effective decision making.
-In carrying out these functions, board should consider the advice of nominating committee
3.13 - Nominating committee should be responsible for identifying individuals qualified to become new board members, and recommending the new director nominees to the board for the next annual meeting of shareholders
3.14 - In making its recommendations, nominating committee should consider:

(a) competencies and skills board considers necessary for the board, as a whole, to possess;
(b) the competencies and skills that the board considers each existing director to possess; and
(c) the competencies and skills each new nominee will bring to the boardroom.

3.15 - Board should appoint a compensation committee composed entirely of independent directors
3.16 - Compensation committee should have a written charter that establishes committee's purpose, responsibilities, etc.
3.17 - Compensation committee should be responsible for:

(a) reviewing and approving corporate goals and objective relevant to CEO compensation, evaluating the CEO's performance in light of those corporate goals and objectives, and determining the CEO's compensation level based on this evaluation;
(b) making recommendation to the board with respect to non-CEO officer and director compensation, incentive-compensation plans and equity-based plans; and
(c) reviewing executive compensation disclosure before the issuer publicly discloses this information.

3.18 - The board, its committees and each individual director should be regularly assessed regarding his, her, or its effectiveness and contribution. Assessments should consider:

(a) in the case of the board or a board committee, its mandate or charter, and
(b) in the case of an individual director, the applicable position description(s) as well as the competencies and skills each individual director is expected to bring to the board.

<u>NI 52-110 - Audit Committees (highlighted selections)</u>
1.2 <u>Application</u>
Instrument applies to all reporting issuers other than investment funds, issuers of asset-backed securities, and issuers that are subsidiary entities (if the entity does not have equity securities trading on a marketplace and the parent of the entity is subject to the requirements of the issuer or complies with US law)
1.4 <u>Meaning of Independence</u>
(1) An audit committee member is independent if her or she has no direct or indirect material relationship with the issuer;
(2) For purposes of sub (1), "material relationship" is a relationship which could, in the view of the issuer's board of directors, be reasonable expected to interfere with the exercise of a member's independent judgement;
(3) Despite sub (2), the following individuals are considered to have a material relationship with an issuer:

(a) individual who is, or has within 3 years, been an employee or executive officer of the issuer;
(b) an individual whose immediate family member fits (a)
(c) an individual who:
(i) is a partner of a firm that is the issuer's internal/external auditor,
(ii) is an employee of that firm, or
(iii) was within the last 3 years a partner or employee of that firm and personally worked on the issuer's audit within that time;
(d) an individual whose spouse, minor child, or stepchild, or child or stepchild who shares a home with the individual:
(i) is a partner of a firm that is the issuer's internal or external auditor,
(ii) is an employee of that firm and participates in its audit, assurance or tax compliance (but not tax planning) practice, or
(iii) was within the last 3 years a partner or employee of that firm and personally worked on the issuer's audit within that time
(e) an individual who, or whose immediate family member, is or has been within the last 3 years, an executive officer of an entity if any of the issuer's current executive officers serves or served at that same time on the entity's compensation committee; and
(f) an individual who receiver, or whose immediate family member who is employed as an executive officer of the issuer received, more than $75K in direct compensation from the issuer during any 12 month period within the last 3 years

(4) Despite subsection (3), an individual will not be considered to have a material relationship with the issuer solely because
(a) he or she had a relationship identified in sub (3) if that relationship ended before March 30, 2004; or
(b) he or she had a relationship identified in subsection (3) by virtue of subsection (8) if that relationship ended before June 30, 2005

(6) For the purposes of 3(f), direct compensation does not include:
(a) remuneration for acting as a member of the BoD or of any board committee of the issuer, and
(b) the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the issuer if the compensation is not contingent in any way on continued service.

(7) Despite subsection (3), an individual will not be considered to have a material relationship with the issuer solely because the individual or his or her immediate family member
(a) has previously acted as an interim CEO of the issuer, or
(b) acts, or has previously acted, as a chair or vice-chair of the board of directors or of any board committee of the issuer on a part-time basis.

(8) For the purpose of section 1.4, an issuer includes a subsidiary entity of the issuer and a parent of the issuer.

1.5 Additional Independence Requirements

(1) Despite any determination made under section 1.4, an individual who
(a) accepts, directly or indirectly, any consulting, advisory or other compensatory fee from the issuer or any subsidiary entity of the issuer, other than as remuneration for acting in his or her capacity as a member of the board of directors or any board committee, or as a part time chair or vice-chair of the board or any board committee; or
(b) is an affiliated entity of the issuer or any of its subsidiary entities
is considered to have a material relationship with the issuer.

(2) For the purposes of sub 1, the indirect acceptance by an individual of any consulting, advisory, or other compensatory fee includes acceptance of a fee by,
(a) an individual's spouse, minor child, or stepchild, or a child or stepchild who shares the individual's home; or
(b) an entity in which such individual is a partner, member, an officer such as a managing director occupying a comparable position or executive officer, or occupies a similar position (except limited partners, non-managing members and those occupying similar positions who, in each case, have no active role in providing services to the entity) and which provides accounting, consulting, legal, investment banking or financial advisory services to the issuer or any subsidiary entity of the issuer.

(3) For the purposes of subsection (1), compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the issuer if the compensation is not contingent in any ways on continued service

1.6 Meaning of Financial Literacy

For the purposes of this Instrument, an individual is financially literate if they have the ability to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally

comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the issuer's financial statements

2.1 Audit Committee

Every issuer must have an audit committee that complies with the requirements of the Instrument.

2.2 Relationship with External auditors

Every issuer must require its external auditor to report directly to the audit committee.

2.3 Audit Committee Responsibilities

(1) AC must have a written charter that sets out its mandate and responsibilities

(2) AC must recommend to the BoD:

(a) external auditor to be nominated for the purpose of preparing or issuing an auditor's report or performing other audit, review or attest services for the issuer; and

(b) the compensation of the external auditor.

(3) AC must be directly responsible for coordinating the work of the external auditor engaged for the purpose of preparing or issuing an auditor's report or performing other audit, review or attest services for the issuer, including the resolution of disagreements between management and the external auditor regarding financial reporting

(4) An AC must pre-approve all non-audit services to be provided to the issuer or its subsidiary entities by the issuer's external auditor

(5) An audit committee must review the issuer's financial statements, MD&A and annual an interim profit or loss press releases before the issuer publicly discloses this information

(6) An AC must be satisfied that adequate procedures are in place for the review of the issuer's public disclosure of financial information extracted or derived from the issuer's financial statements, other than the public disclosure referred to in sub (5), and must periodically assess the adequacy of those procedures.

(7) An AC must establish procedures for:

(a) the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

(b) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

(8) AC must review and approve the issuer's hiring policies regarding partners, employees and former partners and employees of the present and former external auditor of the issuer.

3.1 Composition

(1) AC must be composed of minimum 3 people

(2) Every member must be a director of the issuer

(3) Subject to sections 3.2, 3.3, 3.4, 3.5, and 3.6, every audit committee member must be independent

(4) Subject to section 3.5 and 3.8, every audit committee member must be financially literate

3.2 IPOs

(1) Subject to 3.9, if an issuer has filed a prospectus to qualify the distribution of securities that constitutes its IPO, subsection 3.1(3) does not apply for a period of up to 90 days commencing on the date of the receipt for the prospectus, provided that one member of the audit committee is independent

(2) Subject to section 3.9, if an issuer has filed a prospectus to qualify the distribution of securities that constitutes its IPO, subsection 3.1(3) does not apply for a period of up to one year commencing on the date of the receipt for the prospectus, provided that a majority of the audit committee members are independent

3.3 Controlled Companies

(1) An AC member that sits on the BoD of an affiliated entity is exempt from the requirement in 3.1(3) if the member, except for being a director (or member of a board committee) of the issuer and the affiliated entity, is otherwise independent of the issuer and the affiliated entity.

(2) Subject to 3.7, an audit committee member is exempt from the requirement in 3.1(3) if:

(a) the member would be independent of the issuer but for the relationship described in 1.5(1)(b) or as a result of subsection 1.4(8)

(b) the member is not an executive officer, general partner, or managing member of a person or company that

(i) is an affiliated entity of the issuer, and

(ii) has its securities trading on a marketplace;

(c) the member is not an immediate family member of an executive officer, general partner, or managing member referred to in paragraph (b), above;

(d) the member does not act as the chair of the audit committee; and

(e) the board determines in its reasonable judgement that

(i) the member is able to exercise the impartial judgment necessary for the member to fulfill his or her responsibilities as an audit committee member, and

(ii) the appointment of the member is required by the best interests of the issuer and its shareholders

3.4 Events outside Control of Member

Subject to 3.9, if an audit committee member ceases to be independent for reasons outside the member's reasonable control, the member is exempt from the requirement in 3.1(3) for a period ending on the later of:

(a) the next annual meeting of the issuer, and

(b) the date that is 6 months from the occurrence of the event which caused the member to not be independent

3.7 Majority Independent

The exemptions in subsection 3.3(2) are not available to a member unless a majority of the audit committee members would be independent

3.8 Acquisition of Financial Literacy

Subject to 3.9, an AC member who is not financially literate may be appointed to the audit committee provided that the member becomes financially literate within a reasonable period of time following his or he appointment

3.9 Restriction on Use of Certain Exemptions

The exemptions in sections 3.2, 3.4, 3.5, and 3.8 are not available to a member unless the issuer's BoD has determined that the reliance on the exemption will not materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of this Instrument.

4.1 Authority

An audit committee must have the authority

(a) to engage independent counsel and other advisors as it determines necessary to carry out its duties;

(b) to set and pay the compensation for any advisors employed by the audit committee, and

(c) to communicate directly with the internal and external auditors.

6.1 Venture Issuers

Venture issuers are exempt from the requirements in part 3

8.1 Exemptions

(1) The securities regulatory authority or regulator may grant an exemption from this rule, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite sub 1, in Ontario, only the regulator may grant such an exemption

Fiduciary Duties

General

- Two fiduciary duties outlined in BCBCA (come from CL) - 1) Act in good faith = act in the best interests of the company; 2) Duty to exercise care of diligent/reasonable person = duty of care

-If directors satisfy both of these duties - then their actions are protected by the BJR

*WIC def'n of BJR = operates to shield business decisions from court intervention, will shield those decisions which have been made honestly, prudently, in good faith and on reasonable grounds. In such case the BoD's decisions will not be subject to microscopic examination, and the court will be reluctant to interfere and usurp the BoD's function in managing the corporation

**Danier* - protects business decisions, does not protect business decisions re: whether to comply with the law or not

-*Peoples + BCE* are talking about the duty of loyalty

*4 components: (1) Act honestly and openly (must discloser personal interests, conflicts, collateral interests) ; (2) obligation of confidence (not supposed to be talking about what happens in the board room - not supposed to profit from knowledge that you gain as director); (3) Act independently - use your own best judgement; (4) avoidance of conflict of interest

-Who do you owe your duty to?

- *Peoples and BCE*: Court is adamant that you owe duty to corporation as whole - consider all stakeholders
* criticism of BCE - if you owe duty to everybody, you don't owe a duty to anybody - too nebulous

-W/regard to duty of care = objective standard: reasonably prudent person would have done in comparable circumstances

*as a lawyer you are expected to advise on how to meet duty of care = BoD should get written materials from management (fairness opinions, summaries, geologist reports, actuary reports) in making decision

-Minutes of meetings are a big thing in discharging fiduciary duties - lawyer keeps the minutes, maker sure appropriate buzz words are in there (courts are supposed to look behind the minutes, but a good set of minutes goes a long way to vitiating fiduciary duty if it is challenged) - can avoid conflicting reports by not letting people take notes in meetings

-In ToB context - fiduciary duties require the formation of a ToB committee (independent) to assess the bid and make recommendations to SH's

-What happens if you breach your fiduciary duties?

1. Oppression Remedy- broadest tool that security holders can use
2. Derivative Action - asking for permission for the corporation to sue the directors
3. Damages from breach of fid duty
4. Securities Act Violations - primary liability (when you raise money, you issue a P and you are supposed to provide full, true and plain disclosure of all material facts) and secondary liability (you have job as company to provide continuous disclosure - quarterly FS, MD&A, news releases for material changes - this allows the market to properly value your shares)

-*D&O insurance* - once you get company past a very small size, 99% of pubCos have D&O insurance to protect from such liabilities

BCBCA 120+136+142

120 - Number of Directors - A company must have at least one director; public company's must have at least 3 directors

*not usually going to be a problem with public companies because they need a CEO, and then they need to have an independent board/independent committee's, etc.

136 - Powers and Functions of Directors

(1) The directors of a company must manage or supervise the management of the business and affairs of the company

142 - Duties of Directors and Officers

(1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must

(a) act honestly and in good faith with a view to the best interest of the company,
(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,
(c) act in accordance with this Act and the regulations, and
(d) subject to (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 relating to the duties or liabilities of directors and officers of a company

(3) No provision in a contract, the memorandum or the articles relieves a director or officer from
(a) the duty to act in accordance with this Act and the regulations, or
(b) liability that, by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company

Peoples Department Stores Inc. v Wise (SCC)

Facts

-W bought P -There are issues with inventory integration, so they implement VP suggestion whereby each store is responsible for separate purchase, and inventory is transferred between stores with a subsequent debt obligation
-W goes bankrupt
-P says that the VP had favoured the interest of W over P through the stock transfer policy to the detriment of P's creditors

Issue

-Do directors owe a fiduciary duty to a corporation's creditors in a similar capacity as they do to the shareholders?

Ratio

-Directors fiduciary duty is to act in the best interests of the corporation, owe a duty of care to creditors and stakeholders and may take into account the interests of stakeholders, employees, supplies, creditors, consumers, governments, and the environment
*in general, directors should not favour the interests of one stakeholder over another - however, in the insolvency context, certain parties cannot expect remuneration (employees, maybe even shareholders where there are secured creditors first in line) so you might be able to favour their interests a little bit less in making decisions "in the best interests of the company" [however, can't make these interests paramount to other shareholders
-In assessing the actions of directors in the insolvency context, any honest and good faith attempt to repair the corporation's financial situation to benefit of shareholders will be the fulfillment of director's fiduciary duty, and the failure to carry through the action will not be a breach of the duty
*Here the directors implemented an honest and good faith attempt to redress the company's financial problems - it just failed

-the new policy was a reasonable business decision made with a view to rectifying a serious and urgent business problem, in adopting the policy the directors acted reasonably in relying on the reports provided to them

Case opened the scope of what directors could consider by allowing them to consider stakeholder interests in making decisions that are in the best interest of the corporation - however, duty to consider stakeholders is not a fiduciary duty

**High water mark for the BJ rule - didn't say that the inventory plan was a winner but that it was a reasonable decision made in the circumstances and that was good enough **

Also a note in here about expatriation - you can rely on expert opinions, but you have to make sure they are an expert commensurate with the complexity of the company + decision

<u>*BCE (SCC)*</u>

Facts

-Bell debenture holders argued that the heavily leveraged buyout of BCE would reduce short-term trading value of their debentures

*debenture holders claim that by failing to consider their interests, directors breached fiduciary duty to corporation

Issue

Were debenture holders unfairly prejudiced by the transactions? Do directors have a fiduciary duty towards debenture holders

Ratio

Duty of Good Faith

-Where conflicting interests arise, directors must resolve them in accordance with their fiduciary duty to act in the best interests of the corporation

*"to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen."

-Directors decisions will be sheltered by the BJR as long as it is in the best interest of the corporation and does not violate the legal rights of the parties affected

*plan of action must be within a "range of reasonable alternatives" given conflicting interests - Directors don't have to find the perfect arrangement but that they had regard to everyones interest and make a reasonable decision

-Whose interests should be considered?

*generally only security holders whose legal rights stand to be affected by the proposal, however in some circumstances interests that are not strictly legal can be considered

-In this case debenture holders rights were left intact, but faced the reduction in trading value, which generally does not constitute a circumstance where non-legal interests should be considered

*only their economic rights were harmed - so without more they can't be considered as being unfairly prejudiced by the arrangement

-Given the 98% approval, the consideration of the debenture holders and their rights by the special committee, and the ability of the debenture holders to predict this outcome and avoid it through contractual terms - the court has no basis to reject the transaction

**So case says that you have to consider wider interests in acting in the best interests of the corporation and try to take care of these interests as best as you can, while still acting in best interests of the corporation

-practical implication - if you are using a plan of arrangement to gain control of the company, you have to consider wider interests

Oppression

-Oppression isn't just that you are adversely affected, someone's interests will always be adversely affected, the court is looking for unfair prejudice or disregard

*oppression only works if the person complaining had a reasonable expectation that their rights would be protected

-look at general commercial practice, nature of corp, relationship between parties, past practice, steps claimant could have taken to protect themselves, representations and agreements, and resolution of conflicting interests

-"The cases on oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible

corporate citizen. Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one."
-Here, BoD didn't ignore the bond holders - considered their interests, and came to the decision that despite that the PoA was in the best interests of the corporation
*again, meeting minutes were key, because had they not considered the interests of the bond holders they might not have been protected by the BJR

Continuous Disclosure

General

Continuous Disclosure
-First step is when the prospectus is filed - but after this you must continue to keep people up to date through material change/insider reporting requirements
*done through securities laws as well as TSX/TSXV requirements
    -venture exchange requires more than a material change standard - for ex. any share issuance is deemed material
-Types of disclosure
1) Periodic Disclosure - quarterly, annual financial filings - Interim Financial Statements, Annual Financial Statements, MD&A
*MD&A - narrative of the company's finances from the prospective of management
    -tells an investor why the financials are the way they are - breaks out the financial numbers
    -discusses trends and risks, forward looking information
*Annual MD&A/financials are much more fulsome than quarterly statements
*AIF - detailed description, update on the prospectus level disclosure
*proxy circulars - executive compensation disclosure, gives report on governance issues (how many meetings they have, approvals, any problems the directors have had with the securities commission, etc)
*notice of meeting
2) Events based disclosure - disclosure triggered by specific events
*early warning reports
*insider reporting
*business acquisition report - on significant acquisition, have to give information on the details of the acquisition
*technical reports - in 43-101, important for mining issuers, requires disclosure of assay results -addressed Briex problems - requires disclosure about mining projects
*notice of change of auditor
3) Timely Disclosure - news releases + material change reports
*51-102 - Contains timely disclosure requirements
-If you don't disclose you are looking at insider trading issues, fines, lawsuits, cease trade orders, individual officers can get sanctioned
-In the MnA context, disclosure is a bit more strategic
*if you are the target - you want to disclose early that you are being acquired to attract other bidders + create auction
*if you are the acquirer - you want to wait to disclose so that you have certainty in the deal before disclosing, and you don't have to compete with other buyers that might get brought in
*for both sides, there is always the issue about the reputational effects of disclosing before you have a deal - as it might show that something is wrong (for the target); or that you were outbid/that you are weak (for the acquirer)
-When you are working on the MnA, you will have a non-binding letter of intent right away that is usually subject to board approval/due diligence
*then you will disclose when you have a firm commitment to the deal, with necessary board approval, etc.

51-102-7.1

(1.1) Material change means:

(a) a change in the business, operations or capital of the reporting issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the reporting issuer; or
(b) a decision to implement a change referred to in Para (a) made by the BoD or other persons acting in a similar capacity or by senior management of the reporting issuer who believe that confirmation of the decision by the board of directors or any other persons acting in a similar capacity is probable

*note that it has to be in the business of the issuer, doesn't cover external changes that are not specific to the issuer

*Material change definition focuses on both price and value value (covers off situations where your stock doesn't trade much, so it doesn't move, but value requires you to focus on the overall value of the stock)
*proposed material changes are only material once they are approved
7.1 Publication of a Material Change
(1) Subject to sub (2), if a material change occurs in the affairs of a reporting issuer, the reporting issuer must
(a) immediately issue and file a news release authorized by a senior officer disclosing the nature and substance of the change; and
(b) as soon as practicable, and in any event within 10 days of the date on which the change occurs, file a Form 51-102F3 Material Change Report with respect to the material change.
*news release has to describe the nature of the material change, and the substance
-If you are listed on the TSX, you have to pre-clear the press release with them if you're doing a release during trading hours - they might halt trading to ensure people aren't trading on insider information
*material change reports usually get filed on the 10th day - even though you are supposed to do it sooner
-have to include the issuer's name in, the date on the material change, have to disclose how the press release was filed, have to describe the material change so that a reader can know what's going on without having to refer to other materials
(2) sub (1) does not apply if,
(a)in the opinion of the reporting issuer, and if that opinion is arrived at in a reasonable manner, the disclosure required by sub (1) would be unduly detrimental to the interests of the reporting issuer; or
(b) the material change consists of a decisions to implement a change made by senior management of the reporting issuer who believes that confirmation of the decision by the bod is probable, and senior management of the reporting issuer has no reason to believe that persons with knowledge of the material change have made use of that knowledge in purchasing or selling securities of the reporting issuer,
and the reporting issuer immediately files the report required under para (1)(b) marked so as to indicate that it is confidential, together with written reasons for non-disclosure
(5) If a report has been filed under (2), the reporting issuer must advise the regulator or securities regulatory authority in writing if it believes the report should continue to remain confidential within 10 days of the date of filing the initial report and every 10 days thereafter until the material change is generally disclosed int eh manner referred to in paragraph (1)(a), or, if the material change consists of a decision of the type referred to in paragraph (2)(b), until that decision has been rejected by the BoD of the reporting issuer
(7) If a report has been filed under subsection (2), the reporting issuer must promptly generally disclose the material change in the manner referred to in para (1)(a) upon the reporting issuer becoming aware, or having reasonable grounds to believe, that persons or companies are purchasing or selling securities of the reporting issuer with knowledge of the material change that has not been generally disclosed.

BC Securities Act Definitions
Material Fact - A fact that would reasonable be expected to have a significant effect on the market price or value of the securities
Material Change
(a) if used in relation to an issuer other than in investment fund,
(i) a change in the business operations, or capital of the issuer that would reasonable be expected to have a significant effect on the market price or value of a security of the issuer, or
(ii) the decision to implement a change referred to in (i) made by
(A) the directors of the issuer, or
(B) senior management of the issuer who believe that confirmation of the decision by the directors is probable, and
(b) if used in relation to an investment fund,
(i) a change in the business, operations, or affairs of the investment fund that would be considered important by a reasonable investor in determining whether to purchase or continue to hold a security of the investment fund,
(ii) a decision to implement a change referred to in (i) made
(A) by the directors of the investment fund or the directors of the investment fund manager,
(B) by senior management of the investment fund who believe that confirmation of the devision by the directors is probable, or
(C) by senior management of the investment fund manager who believe that confirmation of the decision by the directors of the manager is probable
Misrepresentation

(a) an untrue statement of a material fact, or
(b) an omission to state a material fact that is
    (i) required to be stated, or
    (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made;

Pezim (SCC)

Facts

-Directors and officers of C1 - controlled a whole bunch of other companies as well
*directors and officers were in management of C2, and owned 23%
-Commission brought proceedings against the respondents alleging violation of the timely disclosure and insider trading rules in 3 material respects:
1) Assay results - C1 granted a whole bunch of stock options while they were in possession of undisclosed information about the assay results
2) That C2 had failed to disclose that C1 was going to be the major subscriber in the new private placement that would take them up to 33% ownership
3) C1 had failed to disclosure that a broker was disputing its obligations under the financing
-C1 tried to use Chinese wall between technical people and directors to defend charge #1 - said that directors didn't know material change
*reports were prepared on the project and were sent to the president of C1, and the president was in charge of figuring out whether the material change was disclosable, and then there was a chinese wall between the president and the non-geological directors
-Also argued that drilling results obtained on a continual basis aren't a material change because they are continuous

Issue

-What is a material change? material fact?

Ratio

-Material fact is broader than material change and encompasses any fact that can reasonably be expected to significantly affect the market price or value of the securities of an issuer
*not only restricted to material changes = changes in the business, operation, assets, or ownership of the issuer that would reasonably be expected to have such an effect
    -Test for material change: 1) Must be in the affairs of the issuer; 2) in relation to the business operations of the issuer; 3) must be material (would reasonable be expected to have a significant effect on the market price or value of the securities of the issuer)
-BoD has a positive duty to inquire about material changes and to ensure that any such changes are disclosed before the issuer enters into a securities transaction
*while duty to inquire is not expressly stated in statute, such an interpretation contextualizes the general obligation to disclose material changes and guarantees the fairness of the market
*not incompatible with insider trading provisions - director's will inquire, will learn knowledge of undisclosed material facts and changes = inside information = disclosure or sanction for insider trading
-The duty to inquire is not erased by the erection of a Chinese wall
-SCC says that drilling results are material changes, despite the fact that their reporting to the Company was continuous
*new information relating to a mining property had a great deal to do with the value of the property
-With regard to the private placement - it was material who was buying the stock, because the shareholders want to know who has important holding positions - here prime was acquiring 33% so this was material
*failed to disclose the substance of the change before entering into securities transaction
Probably don't read the duty to inquire too broadly, as it seems fact specific in this case

YBM Magnex

Facts

-YBM is reporting issuer in Ontario - One of YBM's largest shareholders was a russian mobster
*there were questions about one of the subsidiaries, and the payments that were being made to these guys
-Deloitte came out and told them they are not going to perform any more audit procedures until they cleaned up their house
*if you don't meet the auditing requirements, and the deadlines, then the commission will automatically cease trade you

-YBM tries to argue that Deloitte's refusal to provide audit services was not a material change, and even if it was they released the information in due time
*they issued a press release saying that they were extending the filing deadline - but didn't disclose why, the nature of the dispute with the auditors, etc.
Issue
-Should YBM have disclosed fact that auditors weren't going to do their audits as soon as they knew?
Ratio
-Affirm 3 elements of the material change definition from Pezim - test for materiality is objective and should centre around market impact, have to focus on the view from the shareholders and what they want to know
*assessments of materiality are not to be judged against a standard of perfection or with the benefit of hindsight - should be considered in the broader factual context using common sense
-Then outline the P/M test used to evaluate whether to disclose a potential change
*when facts point to a future event, you use the probability magnitude test - analyzes the current value of information and discounts for future uncertainty
-In this case, potential magnitude of publicly traded company missing its filing deadline and having its securities cease-traded is self-evident
*moreover, given that the auditors had backed out of doing financials barring a forensic audit, it was probable that YBM would be unable to obtain an audit opinion to make its filing deadline
-Thus, b/c YMB did not disclose failure to meet audit deadline until 18 days after notice of audit suspension was provided = failure to continuously disclose
*only disclosed food news and restricted disclosure of bad news - so they did not allow the investors to properly inform themselves
*made it seem like they were facing ordinary risks when in fact they were facing special risks
When in doubt disclose

Finance/Liability

General

-We live in a closed system, so you either have to get an exemption or issue a prospectus if you want to distribute shares
-2 types of exemptions:
1) Transaction exemptions - what you are dealing with is exempted
*Rights offering - you already know everything you need to know about the company, so you don't need more protection
*Offering Memorandum
*Dividend re investment plan
*150K exemption - if you spend 150K that's enough money that the securities authorities assume you are doing the due diligence
*Private issuer exemptions - not reporting companies, who have no more than 50 shareholders, and have restrictions on your shares - you can sell securities to friends/family/relatives/employees
2) identity exemptions - who you are dealing with is exempted
*Accredited investor - don't need protection of prospectus
    -ex. banks, cities, municipalities, high-net worth individuals (1 million dollars in assets, where you make over 200K/year, family assets of 5 million)
*family, friends, associates exemption
-If you can't find an exemption - then you have to do a prospectus
-3 main types of prospectus:
1) Long form - most IPO'S
2) Short form - get to incorporate things by reference - used mostly in secondary markets because you can incorporate all your continuous disclosure stuff
3) Shelf prospectus - for existing public companies - file a prospectus, commission reviews it, and you finalize it
*then it goes on the shelf - so that when the market is right the prospectus "comes off the shelf" - and it's much faster, can be priced much more easily, and can close exactly when you want
-Process for creating a prospectus
1) Creating a draft prospectus
*there will be a ton of numbers in the prospectus - which the underwriters will tie back to financial statements to ensure correctness (tick and tie)

*before submitting - there will be bring down due diligence calls - where the auditors/lawyers get on the phone and go through a ton of questions about the prospectus (this builds a DD defence for the underwriters
2) Certificates - both issuer and underwriters
*basically they certify that the prospectus has true, full and plain disclosure - so that if something goes wrong they can sue everything
3) You file the prospectus with the securities commission - securities commission gives a receipt
4) Then the banks go out and start marketing the financing - meanwhile the securities commission reviews the prospectus
*we get around the different provinces through the passport system - just have to file one prospectus
5) You get your comments back - you incorporate them
6) Then you resubmit it - and the Commission gives you a receipt
7) Then the underwriter goes out and sells the prospectus, has an obligation to give a copy of the prospectus to everyone they're taking money from
*these people have a recision right of 2 days

NI 41-101

(1) IPO Venture Issuer means an issuer that
(a) files a long form prospectus
(b) is not a reporting issuer in any jurisdiction immediately before the date of the final long form prospectus, and
(c) at the date of the long form prospectus, does not have any of its securities listed or quoted, has not applied to list or quote any of its securities, and does not intend to apply to list or quote any of its securities, on
    (i) TSX
    (ii) US marketplace, or
    (iii) marketplace outside of Canada and the USA
-Junior Issuer means an issuer
(a) that files a preliminary prospectus
(b) that is not a reporting issuer in any jurisdiction
(c) whose total consolidated assets as at the date of the most recent balance sheet of the issuer included in the preliminary prospectus are less than 10 Million;
(d) whose consolidated revenue as shown in the most recent annual income statement of the issuer included in the preliminary prospectus is less than 10 million, and
(e) whose shareholders' equity at the date of the most recent balance sheet of the issuer included in the preliminary prospectus is less than 10 million taking into account all adjustments to asset, revenue, and shareholders' equity calculations necessary to reflect each significant proposed acquisition of a business or related business by an issuer that has progressed to a state where a reasonable person would believe that the likelihood of the issuer completing the acquisition is high, and each completed significant acquisition of a business or related business that was completed
(f) for paras (c) and (e), before the date of the preliminary prospectus and after the date of the issuer's most recent balance sheet included in the preliminary prospectus as if each acquisition had taken place as at the date of the issuer's most recent balance sheet included in the preliminary prospectus, and
(g) for para (d), before the last day of the most recent annual income statement of the issuer included in the preliminary prospectus, as if each acquisition had taken place t the beginning of the issuer's most recently completed financial year for which an income statement is included in the preliminary prospectus
-Marketing Materials - written communication intended for potential investors regarding a distribution of securities under a prospectus that contains material facts relating to an issuer, securities or an offering but does not include:
(a) a prospectus or any amendment;
(b) standard term sheet;
(c) a preliminary prospectus notice
(d) a final prospectus notice
-Waiting Period - period of time between the issuance of a receipt by the regulator for a preliminary prospectus and the issuance of a receipt by the regulator for a final prospectus
2.1 - Application of Instrument - Instrument applies to a prospectus filed under securities legislation and a distribution of securities subject to the prospectus requirement
2.3 - General Requirements - Time Limits [IMPORTANT]
(1) Issuer must not file its first amendment to a preliminary prospectus more than 90 days after the date of the receipt for the preliminary prospectus

(1.1) Issuer must not file a final prospectus more than 90 days after the date of the receipt for the preliminary prospectus or an amendment to the preliminary prospectus which relates to the final prospectus
(1.2) If an issuer files an amendment to a preliminary prospectus, the final prospectus must be filed within 180 days from the date of the receipt of the preliminary prospectus
(2) An issuer must not file
(a) a prospectus more than 3 business days after the date of the prospectus, and
(b) an amendment to a prospectus more than 3 business days after the date of the amendment to the prospectus
4.1 - Financial Statements & MD&A - Issuers that file a long form prospectus must include in the long form prospectus financial statements and MD&A required by this Instrument
4.2 - Financial Statements must be audited - Financial statements included in a long form prospectus must be audited, or must meet audit requirements in other instruments
4.3 - Unaudited Financial Statements - Any unaudited financial statements included in, or incorporated by reference into, a long form prospectus must have been reviewed in accordance with relevant standard for review of financial statements by the person or company's auditor or public accountant
4.4 - Financial Statements must be approved by BoD - An issuer must not file a long form prospectus unless each financial statement, each MD&A, and each management report of fund performance, as applicable, of a person or company included in, or incorporated by reference into, the long form prospectus has been approved by he BoD of the person or company
5.3 - Certificate Required - Except in ON, a prospectus must contain a certificate signed by the issuer
5.4 - Certificate Signatories - Except in ON, if the issuer is a company a prospectus certificate that is required to be signed must be signed by the CEO, CFO, and 2 directors of the BOD
(2) If the regulator is satisfied that either or both of the CEO and CFO cannot sign a certificate, the regulator may accept a certificate signed by another officer
5.9 - Certificate of Underwriters - Except in ON, a prospectus must contain a certificate signed by each underwriter who, with respect to the securities offered by the prospectus, is in a contractual relationship with the issuer or a security holder whose securities are being offered by the prospectus
6.1 - Amendments - An amendment to a prospectus must be either:
(a) an amendment that does not fully restate the text of the prospectus, or
(b) an amended and restated prospectus
6.2 - Amendment Formalities - An issuer that files an amendment to a prospectus must
(a) file a signed copy of the amendment
(b) deliver to the regulator a copy of the prospectus black-lined to show the changes made by the amendment,
(c) file or deliver any supporting documents required under this Instrument or other securities legislation to be filed or delivered with a prospectus unless the documents originally filed or delivered with the prospectus are correct as of the date the amendment is filed, and
(d) in case of an amendment to a final prospectus, file any consent letter required to be filed with a final prospectus, dated as of the date of the amendment
6.4 - Amendments must be Distributed - Except in ON, an issuer must deliver an amendment to a preliminary prospectus as soon as practicable to each recipient of the preliminary prospectus
6.5 - ***Disclosure of Material Changes Preliminary Prospectus [IMPORTANT]***
(1) If, after a receipt for a preliminary prospectus is issued but before a receipt for the final prospectus is issued, a material adverse change occurs, an amendment to the preliminary prospectus must be filed as soon as practicable, but in any event within 10 days after the day the change occurs
(2) Regulator must issue a receipt for an amendment to a preliminary prospectus as soon as practicable after the amendment is filed
6.6 - ***Disclosure of Material Changes Final Prospectus [IMPORTANT***
(1) If, after the receipt for a final prospectus is issued but before the completion of the distribution under the final prospectus, a material change occurs, an issuer must file an amendment to the final prospectus as soon as practicable, but in any event within 10 days after the day the change occurs
(2) If, after a receipt for a final prospectus or an amendment to the final prospectus is issued but before the completion of the distribution under the final prospectus or the amendment to the final prospectus, securities in addition to the securities previously disclosed in the final prospectus or the amendment to the final prospectus are to be distributed, an amendment to the final prospectus disclosing the additional securities must be filed, as soon as practicable, but in any event within 10 days after the decision to increase the number of securities offered
(3) the regulator must issue a receipt for an amendment to a final prospectus filed under this section unless the regulator considers that there are grounds set out in securities legislation that would cause the regulator not to issue the receipt for a prospectus

(4) Cannot refuse to issue a receipt without giving the issuer who filed the prospectus an opportunity to be heard
(5) Issuer must not proceed with a distribution or additional distribution if an amendment to a final prospectus is required to be filed until a receipt for the amendment to the final prospectus is issued by the regulator
6.5 - Receipt of Amendments
(3) - The regulator must issue a receipt for an amendment to a final prospectus filed under this section unless the regulator considers that there are grounds set out in securities legislations that would cause the regulator not to issue the receipt for the prospectus
(4) Regulator must not refuse to issue a receipt without giving the issuer an opportunity to be heard
(5) An issuer must not proceed with a distribution or additional distribution if an amendment to final prospectus is required to be filed until a receipt for the amendment to the final prospectus is issued by the regulator
7.2 - Fixed Price Prospectus Offerings
(1) A person or company distributing a security under a prospectus must do so at a fixed price
(2) Despite sub (1), securities may be distributed for cash at non-fixed prices under a prospectus if the securities have received a rating on a provision or final basis, from at least one Designated Rating Organizations at the time of filing the prospectus
(3) Despite sub (1), if securities are distributed for cash under a prospectus, the price of the securities may be decreased from the initial offering price disclosed in the prospectus and, after such decrease, changed from time to time to an amount not created than the initial price, without filing an amendment to the prospectus to reflect the change if,

(a) the securities are distributed through one or more underwriters that have agreed to purchase all of the securities at a specified price,
(b) the proceeds to be received by the issuer or selling security holders are disclosed in the prospectus as being fixed, and
(c) the underwriters have made a reasonable effort to sell all of the securities distributed under the prospectus at the initial offering price disclosed in the final prospectus

8.2 - Best Efforts Distribution Period - Unless an amendment to the final prospectus is filed and the regulator has issued a receipt for the amendment, if securities are being distributed on a best efforts basis, the distribution must cease within 90 days after the date of the receipt for the final prospectus
*filing of additional amendments can extend the completion of a best efforts distribution further, but not beyond 180 days from the date of the receipt of the prospectus (see **2.3(1.2)**)
9.1 - Required Documents for filing preliminary long form prospectuses - You have to file a signed copy of the preliminary long form prospectus, articles of incorporation/amalgamation/continuation/constating documents, by-laws, SRPs, material contracts, technical reports, valuations, marketing materials, personal information forms for directors and officers/promoters, auditors comfort letter regarding audited financials
9.2 - Required Documents for filing final long form prospectuses Required docs for a final long form prospectus: signed copy, constating documents, material contracts, technical reports and valuations, issuer's submission to jurisdiction, expert's consents, undertaking in respect of continuous disclosure, marketing materials, communication with the exchange
10.1 - Consents
(1) An issuer must file the written consent of any solicitor, auditor, accountant, engineer, or appraiser, or any other person who makes authoritative statements in relation to the prospectus
(1.1) Sub (1) does not apply unless the person is named in a prospectus or an amendment to a prospectus directly or, if applicable, in a document incorporated by reference into the prospectus or amendment,

(a) as having prepared or certified any part of the prospectus or the amendment,
(b) as having opined on financial statements from which selected information included in the prospectus has been derived and which audit opinion is referred to in the prospectus directly or in a document incorporated by reference, or
(c) as having prepared or certified a report, valuation, statement, or opinion referred to int he prospectus or the amendment director or in a document incorporated by reference

(2) Consent must

(a) be filed not later than the time the final prospectus or the amendment to the final prospectus is filed,
(b) state that the person being named consents to the use of that person or company's report, valuation, statement, or opinion
(d) contain a statement that the person or company referred to in sub(1)
    (i) has read the prospectus, and
    (ii) has no reason to believe that there are any misrepresentations in the information contained in it that are
        (A) derived from the report, valuation, statement, or opinion, or

(B) within the knowledge of the person or company as a result of the services performed by the person or company in connection with the report, financial statements, valuation, statement, or opinion

13.1 - Disclaimer on Advertising during Wait Period - A notice, circular, advertisement, letter, or other communication used in connection with a prospectus offering during the waiting period must contain a disclaimer that the prospectus is not complete and subject to amendment - and say where the person can get a copy of the prospectus

13.2- Disclaimer on Advertising following final receipt - A notice circular advertisement, letter or other communication used in connection with a prospectus offering following the issuance of a receipt for the final prospectus must include a disclaimer that the offering is made by prospectus, that the prospectus contains detailed information, and that the prospectus can be obtained from an address

13.4 - Exception for solicitation for IPO

(2) Prospectus requirement does not apply to solicitation of an expression of interest in order to ascertain if there would sufficient interest in an IPO:

(a) the issuer has a reasonable expectation of filing a preliminary long form prospectus in respect of the IPO;

(b) the issuer is not a public issuer before the date of the preliminary long form prospectus;

(c) an investment dealer makes the solicitation on behalf of the issuer;

(d) the issuer provided written authorization to the investment dealer to act on his behalf before the investment dealer made the solicitation;

(e) solicitation is made to an accredited investor, and

(f)the issuer and the investment dealer keep all information about the proposed offering confidential until the earlier of:

(i) the information being generally disclosed in a preliminary long form prospectus or otherwise, or

(ii) the issuer confirming in writing that it will not be pursuing the potential offering

(3) Investment dealer must not solicit an expression of interest from an accredited investor unless

(a) all written material provided to the accredited investor is approved in writing by the issuer before it is provided, is marked confidential, contains a legend stating that the material does not provide full disclosure of all material facts relating to the issuer/the securities/ the offering is not subject to liability for misrepresentations under applicable securities legislation, and the issuer makes the investment dealer sign a confidentiality agreement before providing the investor with any information

16.1 - Distribution of Preliminary Prospectus and Distribution list - Any dealer distributing a security during the waiting period must

(a) send a copy of the preliminary prospectus to each prospective purchaser who indicates an interest in purchasing the security and requests a copy of such preliminary prospectus, and

(b) maintain a record of the names and addresses of all persons and companies to whom the preliminary prospectus has been forwardedLapse Date

17.2 - Lapse Date

(2) - Lapse date means, with reference to the distribution of a security that has been qualified under a prospectus, the date that is 12 months after the date of the most recent final prospectus relating to the security

(3) An issuer must not continue the distribution of a security to which the prospectus requirement applies after the lapse date unless the issuer files a new prospectus that complies with securities legislation and a receipt for that new prospectus is issued by the regulator

(4) Despite sub 3, a distribution may be continued for a further 12 months after a lapse date if,

(a) the issuer delivers a pro forma prospectus not less than 30 days before the lapse date of the previous prospectus

(b) the issuer files a new final prospectus not later than 10 days after the lapse date of the previous prospectus; and

(c) a receipt for the new final prospectus is issued by the regulator within 20 days after the lapse date of the previous prospectus

(5) The continued distribution of securities after the lapse date does not contravene sub (3) unless and until any of the conditions of sub 4 are not complied with

(6) Subject to 7, if a condition in 4 is not complied with, purchaser may cancel a purchase made in a distribution after the lapse date in reliance on sub 4 within 90 days after the purchaser first became aware of the failure to comply with the condition

(7) The regulator may, on an application of a reporting issuer, extend, subject to such terms and conditions as it may impose, the times provided by sub 4 where in its opinion it would not be prejudicial to the public interest to do so

19.1 - Exemption - The regulator of the securities regulatory authority may grant an exemption from the provisions of this Instrument, in whole or in party, subject to such conditions or restrictions as may be imposed int he exemption

Form 41-101F1

-In general, have to disclose risk factors relating to cash flow, assets, management, environmental, political elements of the distribution - disclose if there is risk that shareholder will have to make further contributions
-In determining the degree of detail required in disclosure, a standard of materiality must be applied. An item of information, or an aggregate of items, is considered material if it is probable that its commission or misstatement would influence or change an investment decision with respect to the issuer's securities
*disclosure must be understandable and easy to read
-Basically they just want disclosure to be as plain, straightforward, easy to read as possible
1.2 Preliminary prospectuses must have in red ink and italics a warning that it is a preliminary prospectus, and is subject to change
1.4(1) If the securities are being distributed for cash, the issuer must provide the underwriting discounts or commission, proceeds to issuer, and the per security total
1.4(3) If distribution is on a best efforts basis - provide totals for both the minimum and maximum amount
1.4(4) If minimum subscription amount is required from each subscriber- provide the details of this
1.4(5) If debt securities are being distributed at a premium or a discount, must state in bold the effective yield if held to maturity
1.4(6) Disclose separately those securities that are underwritten, those under option, and those to be sold on a best efforts basis
1.10 Include cross-reference to sections in the prospectus where information about the risks of an investment in the securities being distributed is provided
1.11 Have to disclose the name of underwriters, how many securities the underwriter is getting
3.1(1) Briefly summarize information appearing elsewhere in the prospectus that would be likely to influence the investor's decision to purchase the securities being distributed (ex. principal business of the issuer, price of offering, expected proceeds, use of proceeds, risk factors, financial information, and restrictions on re-sale of securities)
3.2 At beginning of summary, include a warning in italics that the summary is just a summary and you should read detailed information in prospectus
4 - Describe the name of the corporation, it's subsidiaries/parents, what statute it is incorporated under, etc.
5- Describe the business of the issuer, issuer's GAAP, if the issuer has been bankrupt/receivership, has been through restructuring, social/environmental policies, complete financial 3 year history, whether they have mineral/o&g properties, etc.
6 - Use of proceeds, principal purposes, whether the proceeds will be used for debt/asset acquisition/R&D, business objectives/milestones, other sources of funding, etc.
6.2 - Junior issues must disclose the total funds available, breakdown of the funds
8 - MD&A for the most recent annual financials and the most recent interim financials, disclose outstanding securities, most recent financial information
8.6 If you are a venture/IPO that doesn't have significant revenue in las 2 years, have to disclose a breakdown of material components of exploration/evaluation of assets/expenditures, expensed R&D costs, intangible assets arising from development, general and administrative expenses, and any other material costs
8.7 - For junior issuer's with negative cash flow, must disclose the period of time the proceeds raised under the prospectus are expected to fund operations, estimated total operating costs necessary for the issuer to achieve its stated business objective during that period of time, and the estimated amount of other material capital expenditures during that period of time
10 - Describe all equity securities to be released including voting rights, dividend rights, rights on dissolution, exchange rights, etc.
12 - If you're not a reporting issuer, you have to disclose information about options to purchase securities of the issuer that are held or will be held upon completion of the distribution by persons directly related to the company (directors/ employees/consultants/etc)
15 - Provide information for each principal security holder, and for each selling security holder (ex. name of holder, number/class/amount of securities held, number of securities being distributed on account of the holder, etc.)
16 - Provide information for directors and executive officers such as whether they have been cease traded, bankrupt etc.
16.4 Junior issue must provide management names, education, employment status, whether they are independent contractors, previous occupations, individuals experience in industry, and non competition agreements
17 Must disclose executive compensation

21 Disclose risk factors relating to the issuer and its business, such as cash flow and liquidity problems, experience of management, general risks inherent to the business of the issuer, reliance on key personal, regulatory constraints, etc.
23 Describe any legal proceedings the issuer is or was a party to, or that any of its property is or was the subject of
26 State the name and address of the auditor of the issuer
27 Give particulars of any material contract
28 Name each person or company who is named as having prepared or certified a report, valuation statement or opinion, and whose profession or business gives authority to the report, valuation, statement, or opinion
29.1 Give particulars of any material facts about the securities being distributed that are not disclosed under any other items and are necessary in order for the prospectus to contain full, true and plain disclosure
30.1 Requires Prospectuses to have disclosure informing the consumer of their rights of withdrawal and recession = 2 days
32.2 Have to include Annual financial statements for each of 3 most recently completed financial years ended more than 90 days before the prospectus, or 120 days before the date of prospectus if the issuer is venture issuer
(2) If the issuer has not completed 3 financial years, include the financial statements described under subsection (1) for each completed financial year ended more than 90 days before the date of the prospectus, or 120 days before the date of the prospectus if the issuer is a venture issuer
32.3(1) Include a comparative interim financial report of the issuer for the most recent interim period ended subsequent to the most recent financial year in respect of which annual financial statements of the issuer are included in the prospectus, and more than 45 days before the date of the prospectus (60 days if the issuer is a venture issuer)

TSX Company Manual

602 - Requirement to inform exchanges regarding a distribution
(a) Every listed issuer shall immediately notify the TSX in writing of any transaction involving the issuance or potential issuance of any of its securities other than unlisted, non-voting, non-participating securities
(b) A listed issuer may not proceed with a 602(a) transaction unless accepted by TSX. failure to comply may result in suspension and delisting got issuer's listed securities
(c) subject to 607(c), TSX will advise the listed issuer in writing generally within 7 business days of receipt by TSX of the subsection 602(a) notice of TSX's decision to accept or not to accept the notice, indicating any conditions to acceptance or its reasons for non-acceptance. They might request further documentation before it decides to accept or not accept
(d) where a lister issuer proposes to enter into a subsection 602(a) transaction, any public announcement of the transaction must disclose the transaction is subject to TSX acceptance.
(e) A press release or information circular filed with TSX does not constitute notice of 602(a) transaction, must be a letter should state whether
(i) any insider has an interest in the transaction and the nature of the interest; and
(ii) whether and how the transaction could material affect the control of the listed issuer

603 - TSX response to 602a request - TSX has discretion to:
(i) accept notice of a transaction;
(ii) impose conditions on a transaction; and
(iii) to allow exemptions from any of the requirements contained in parts V or VI of this Manual. In exercising discretion, TSX will consider effect that the transaction may have on the quality of the marketplace provided by TSX based on:
I) involvement of insiders;
II) material effect on control of the listed issuer;
III) Listed issuer's corporate governance practices;
IV) The listed issuer's disclosure practices;
V) The size of the transaction relative tot he liquidity of the issuer; and
VI) The existence of an order issued by a court or administrative regulatory body that has considered the security holder's interests.

604 - Requirement for Shareholder Approval
(a) In addition to specific requirements for security holder approval, TSX will generally require security holder approval as a condition of acceptance of a notice under 602 if in the opinion of TSX, the transaction:
i) material affects control of the listed issuer; or
ii) provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the listed issuer, during any 6 month period, and has not been negotiated at arms length (insider has a beneficial interest in proposed transactions which differs from other security holders of the same class)

(b) for other transactions, TSX's decision as to whether to requires security holder approval will depend on the particular facts.
(c) If TSX requires security holder approval of a transaction, the resolution to be voted upon must relate specifically to the transaction in question, rather than an unspecified transaction that may take place in the future.
(d) Security holder approval will be obtained from a majority of voting securities at a duly called meeting. In certain situations, an issuer can provide TSX with written evidence that holders of more than 50% of the voting securities of the listed issuers are familiar with the proposed transaction and are in favour of it, in which case the TSX will give consideration to permitting the listed issuer to proceed with the transaction without holding a meeting. If you use the exemption you have to issue a press release at least 5 business days in advance of the closing of the transaction disclosing the material terms of the transaction, and that the listed issuer has relied upon the exemption.
(e) Listed issuer may apply to be exempted from security holder approval requirements. Have to explain why the issuer cannot seek security holder approval in a timely manner at a meeting or in writing, and be accompanied by a board resolution stating that the issuer is in serious financial difficulty, the application is made on recommendation of the board, the transaction is designed to improve the issuer's financial situation, and that the board has determined that the transaction is reasonable. Have to issue a press release 5 days in advance of the closing disclosing the material terms and that the issuer has relied on the exemption
(f) security holder approval will not be required where at least 90% of a listed issuer's equity+outstanding voting securities are held by 1 person or company. If you rely on the exemption you have to issue a press release 10 day in advance of the closing disclosing the material terms of the transaction and that the issuer has relied on the exemption
605 - Notice required if increase or decrease in the number of issued securities - TSX must be notified immediately of any increase or decrease in the number of issued securities of a listed issuer. Must be filed within 10 days after the end of any month in which any change to the number of outstanding or reserved listed securities has occurred. If no such change has occurred, a "nil" report must be filed quarterly
606 - Filing Preliminary Prospectus in Lieu of 602(a) notice
(a) Issuers proposing to issue securities pursuant to a prospectus must file one copy of the preliminary prospectus with the TSX concurrently with the filing with applicable securities commissions. Notice requirement in 602 will be satisfied by the filing of the preliminary prospectus, together with a letter which must state:
(i) whether any insider has an interest in the transaction and the nature of the interest;
(ii) whether and how the transaction could materially affect control of the listed issuer; and
(iii) the anticipated number of purchasers under the offering.
(b) TSX will generally accept notice of distributions by way of prospectus. TSX may, however, apply provisions of 607 to a prospectus distribution. In making such a decision, TSX will consider factors such as:
i) method of distribution;
ii) participation of insiders;
iii) number of places;
iv) offering price; and
v) economic dilution.
(c) Prior to the filing of the final prospectus, TSX will notify the listed issuer of any required additional documentation. If TSX accepts the offering, TSX will advise the securities commissions
(d) The additional securities will normally be listed as soon as the prospectus offering has closed.
607 - Private Placement
(a) Private Placement = an issuance of treasury securities for cash consideration or in payment of an outstanding debt of the listed issuer without prospectus disclosure, in reliance on an exemption from the prospectus requirement sunder applicable securities law
(c) Private placements not subject to 604 that are:
i) offered at a price per security at or above market price, regardless of the number of listed securities issuable, or
ii) for an aggregate number of listed securities issuable equal to or less than 25% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis, prior to the date of closing of the transaction where the price per security is less than the market price but within the applicable discounts set out in 607(e) will be accepted by TSX within 3 business days of notice.
(d) Unless otherwise provided in 607(c), TSX will advise the listed issuer in writing generally within 7 business days of receipt by the TSX of the notice, of the TSX's decision to accept or not accept the notice, indicating any conditions to acceptance or its reasons for non-acceptance. Further information or documentation may be requested before TSX decides to accept or not accept notice of a transaction.
(e) Applicable discount formula: Market Price < 0.5 = 25% discount; MP = .51-2 = 20% discount; MP>2 = 15%
TSX will allow the price per security to be less than provided if the issuer has received security holder approval
(f) For all private placements:

i) subject to para ii, the transaction must not close and the securities must not be issued prior to acceptance by the TSX and not later than 45 days (or 135 days where you need shareholder approval) from the date upon which the market price of the securities being issued is established

ii) a written request for an extension of the time period prescribed in paragraph i) may be filed with the TSX in advance of the expiry of the 45/135 day period. Such extension will generally be granted if the price at which securities are issued still comply with the requirements set out in 607(e). Otherwise, TSX may grant such extension unjustifiable circumstances;

iii) in the case of a private placement of convertible securities, the underlying listed securities will be considered as being issued at a price per security less than the market price, unless the conversion price of such convertible security is defined as at least market price at the time of conversion, and will be regarded as being part of the number of securities being issued pursuant to the transaction;

iv) listed securities issuable upon the exercise of warrants will be considered as being issued at a price per security less than market price and will be regarded as being part of the number of securities being issued pursuant to the transaction

v) successive private placements will be aggregated for the purposes of (c)(ii) and 607(g)(i) if they are within the 3 preceding months, have common places, and/or a common use of proceeds; and

vi) the listed issuer must give TSX immediate notice in writing of the closing of the transaction

(g) TSX will require that security holder approval be obtained for private placements:

i) for an aggregate number of listed securities issuable greater than 25% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis, prior to the date of closing of the transaction if the price per security is less than the market price, or

ii) that during any 6 month period are to insiders for listed securities or options, rights or other entitlements to listed securities greater than 10% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis, prior to the date of closing of the first private placement to an insider during the 6 month period.

(h) in order to list the additional securities issued and/or reserved for issuance pursuant to a private placement, listed issuers must:

i) on the same business day of the closing of the private placement provide the TSX with

(A) an email or fax of the press release announcing the closing of the private placement; or

(B) a written confirmation by e-mail that the private placement has closed; and

ii) prior to the close of business on the business day following the closing of the private placement, file with TSX all the required documents as outlined in the TSX conditional approval

6.11 - Issuing Securities for Property

(a) where a listed issuer proposes to issue securities as full or partial consideration for property (which may include securities or assets) purchased from an insider of the listed issuer, TSX may require that documentation such as an independent valuation or engineer's report be provided;

(b) Security holder approval will be required in those instances where the number of securities issued or issuable to insiders as a group together with any securities issued or made issuable to insiders as a group for acquisitions during the preceding six months, in payment of the purchase price for an acquisition exceeds 10% of the number of securities of the listed issuer which are outstanding on a non-diluted basis, prior to the date of closing of the transaction. Insiders receive securities pursuant to the transaction are not eligible to vote their securities in respect of such approval;

(c) Subject to 611(d), security holder approval will be required in those instances where the number of securities issued or issuable in payment of the purchase price for an acquisition exceeds 25% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis;

(e) Where an acquisition by a listed issuer includes the assumption of a security based compensation arrangements of a target issuer or the creation of security based compensation arrangements for employees of a target issuer as a result of the acquisition, securities issuable under such arrangements will be included in the securities issued or issuable for the purposes of the security holder approval requirement in 611(b) and (c). For the purpose of 611, the assumption of security based compensation arrangements includes:

i) a direct assumption of security based compensation arrangements of the target issuer; and

(ii) the cancellation of security based compensation arrangements of the target issuer and their replacement with arrangement of the listed issuer

(g) in calculating the number of securities issued or issuable in payment of the purchase price for an acquisition, any securities issued or issuable upon a concurrent private placement upon which the acquisition is contingent or otherwise linked will be included

(h) in order to list the additional securities issued and/or reserved for issuable pursuant to an acquisition which has been conditionally approved by TSX, listed issuers must:

(i) on the same business day of the closing of the acquisition provide TSX with

(A) an email or fax of the press release announcing the closing of the acquisition; or
(B) a written confirmation by email or fax that the acquisition has closed; and

(ii) prior to the close of business on the business day following the closing of the acquisition, file with TSX all the required documents as outlined in the TSX conditional approval.

BCSA - Definition of trade/distribution/security + Prospectus Filing + Liability for Misrepresentation in a Prospectus

Distribution - means, if used in relation to trading in securities,
(a) a trade in a security go an issuer that has not been previously issued
(b) a trade by or on behalf of an issuer in a previously issued security of that issuer that has been redeemed/ repurchased/donated to the issuer
(c) a trade in a previously issued security of an issuer from the holdings of a control person,
(d) a trade by or on behalf of an underwriter in a security that was acquired by the underwriter, acting in capacity as an underwriter, before February 1, 1987 and continues to be owned by or on behalf of that underwriter so acting
(e) a trade deemed to be a distribution
(i) in an order made under section 76 by the commission or the executive director, or
(ii) in the regulations
(f) a transaction or series of transactions involving further purchases and sales in the course of an incidental distribution
(g) a prescribed class of trade or transaction

Security - includes:
(a) a document, instrument or writing commonly known as a security,
(b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings, or royalties of a person,
(c) a document evidencing an option subscription or other interests in or to a security
(d) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, reorganization certificate or subscription other than
(i) a contract of insurance issued by an insurer, and
(ii) an evidence of deposit issued by a savings institution
(e) an agreement under which the interests of the purchaser is valued for the purposes of conversion or surrender, by reference to the value of a proportionate interest in a specified portfolio of assets, but does not include a contract issued by an insurer that provides for payment at maturity of an amount not less than 3/4 of the premiums paid by the purchaser for a benefit payable at maturity,
(f) an agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interest at the option of the recipient or any person,
(g) a profit sharing agreement or certificate
(h) a certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate
(i) an oil or natural gas royalty or lease or a fractional or other interest in either,
(j) a collateral trust certificate;
(k) an income or annuity contract, other than one made by an insurer,
(l) an investment contract,
(m) a document evidencing an interest in a scholarship or educational plan or trust
(n) an instrument that is a futures contract or an option but is not an exchange contract, or
(o) a permit under the OGAA

Trade - includes:
(a) a disposition of a security for valuable consideration whether the terms of payment be on instalment, margin or otherwise, but does not include a purchase of security or a transfer, pledge mortgage or other encumbrance of a security for the purpose of giving collateral or debt
(a.1) entering into a futures contract,
(b) entering into an option that is an exchange contract
(c) participating as a trader in a transaction in a security or exchange contract made on or through the facilities of the exchange or reported on the facilities of a quotation and trade reporting system;
(d) the receipt by a registrant of an order to buy or sell a security or exchange contract;
(e) a transfer of beneficial ownership of a security to a transferee, pledgee, mortgagee, or other encumbrance under a realization on collateral given for debt;
(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the above specified activities

61 - Requirement to File a Preliminary + Final Prospectus - Unless exempted under this Act, a person must not distribute a security unless
(a) a preliminary prospectus in the proper form, and a prospectus respecting the security have been filed with the executive director, and
(b) the executive director has issued receipts for the preliminary prospectus and prospectus.
62 - Shelf Prospectus (sort of) - Even though a person is not distributing securities, a preliminary prospectus and a prospectus that are in the required form may be filed for
(a) the purpose of enabling the issuer to become a reporting issuer, or
(b) any other prescribed purpose
63 - Full, True, and Plain Disclosure of Material Facts
(1) A prospectus must provide full, true, and plain disclosure of all material facts relating to the securities issued or proposed to be distributed
(2) A preliminary prospectus must substantially comply with the requirements of this Act and the regulations respecting the content of a prospectus
64 - Executive Director May Impose Additional Filing Requirements
(1) Before issuing a receipt for a preliminary prospectus or for a prospectus, the executive director may impose additional filing requirements and conditions if the executive director considers that it is in the public interest to do so
(2) The executive director may accept a form of prospectus or preliminary prospectus that is in accordance with the law of another jurisdiction if it contains full, true, and plain disclosure of all material facts relating to the security to be distributed
65 - Receipt
(1) Subject to section 64(1), the executive director must issue a receipt for a preliminary prospectus as soon as practicable after it has been filed under this Part
(2) Subject to the regulations, the executive director must issue a receipt for a prospectus filed under this part unless the executive director considers it to be prejudicial to the public interest to do so
(3) The executive director must not refuse to issue a receipt for a prospectus without giving the person who filed the prospectus an opportunity to be heard
140.1 - Core Document
(a) a prospectus, takeover bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a takeover bid circular, issuer bid circular, or directors' circular, a rights offering circular, MD&A, AIF, an information circular, annual financial statements, and an an interim financial report of the responsible issuer, where used in relation to
    (i) a director of a responsible issuer who is not also an officer of the responsible issuer,
    (ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or
    (iii) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager
(b) a prospectus, a take over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a takeover bid circular, issuer bid circular, or directors' circular, a rights offering circular, MD&A, AIF, an information circular, annual financial statements, an interim financial report, and disclosure required under 85(b) where used in relation to
    (i) a responsible issuer or an officer of the responsible issuer,
    (ii)an investment fund manager, where the responsible issuer is an investment fund, or
    (iii) an officer of an investment fund manager, where the responsible issuer is an investment fund, or
(c) any other document that is within a class of document prescribed for the purpose of this definition
140.3 - Liability for Misrepresentations in Secondary Market Disclosure
(1) Where a responsible issuer or a person with actual, implied, or apparent authority to act on behalf of a responsible issuer, releases a document that contains a misrepresentation, a person who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person relied on the misrepresentation, a right of action for damages against
    (a) the responsible issuer
    (b) each director of the responsible issuer at the time the document was released,
    (c) each officer of the responsible issuer who authorized, permitted, or acquiesced in the release of the document,
    (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
        (i) the responsible issuer or any person acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit, or acquiesce in the release of the document, and

(e) each expert where

(i) the misrepresentation is also contained in a report, statement, or opinion made by the expert,

(ii) the document includes summarizes, or quotes from the report, statement, or opinion of the expert, and

(iii) if the document was released by a person other than the expert, the expert consented in writing to the use of the report, statement, or opinion in the document

(2) If a person with actual, implied, or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person relied on the misrepresentation, a right of action for damages against

(a) the responsible issuer,

(b) the person who made the public oral statement,

(c) each director and officer of the responsible issuer who authorized, permitted, or acquiesced in the making of the public oral statement,

(d) each influential person, and each director and officer of the influential person, who knowingly influenced

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize permit, or acquiesce in the making of the public oral statement, and

(e) each expert where

(i)the misrepresentation is also contained in a report, statement, or opinion made by the expert,

(ii) the person making the public oral statement includes, summarizes, or quotes from the report, statement or opinion of the expert, and

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement, or opinion in the public oral statement

(3) If an influential person, or a person with actual, implied, or apparent authority to act or speak on behalf of the influential person, releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person who acquires or disposes of the issuer's security during the period between he time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person relied on the misrepresentation, a right of action for damages against

(a) the responsible issuer if a director or officer of the responsible issuer authorized, permitted or acquiesced in the release of the document or the making of the public oral statement

(b) there person who made the public oral statement,

(c) each director and officer of the responsible issuer who authorized, permitted, or acquiesced in the release of the document or the making of the public oral statement,

(d) the influential person,

(e) each director and officer of the influential person who authorized, permitted, or acquiesced in the release of the document or the making of the public oral statement, and

(f) each expert where

(i) the misrepresentation is also contained in a report, statement, or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes, or quotes from the report, statement, or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement, or opinion in the document or public oral statement

(4) Where a responsible issuer fails to make a timely disclosure, a person who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act and the subsequent disclosure of the material change has, without regard to whether the person relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against

(a) the responsible issuer,

(b) each director and officer of the responsible issuer who authorized, permitted, or acquiesced in the failure to make timely disclosure, and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced

(i) the responsible issuer or any person acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit, or acquiesce in the failure to make timely disclosure

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation, and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure

(7) In an action under sub (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation

140.4 Burden of Proof and Defences

(1) In an action under 140.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person is not liable, subject to sub (2), unless the plaintiff proves that the person

(a) knew, at the time that the document was release or public oral statement was made, that the document or public oral statement contained the misrepresentation

(b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation, or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation

(2) a plaintiff is not required to prove any of the matters set out in sub (1) in an action under 140.3 in relation to an expert [Relates to sub e]

(3) In an action under 140.3 in relation to **a failure to make timely disclosure**, a person is not liable, subject to sub (4), unless the plaintiff proves that the person

(a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change,

(b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the changes was a material change, or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure

(4) A plaintiff is not required to prove a matter set out in sub 3 in an action under 140.3 in relation to

(a) a responsible issuer,

(b) an officer of a responsible issuer,

(5) A person is not liable in an action under 140.3 in relation to a **misrepresentation or a failure to make timely disclosure** if that person proves that the plaintiff acquired or disposed of the issuer's security

(a) with knowledge that the document or public oral statement contained a misrepresentation, or

(b) with knowledge of the material change

(6) A person is not liable in an action under section 140.3 in relation to

(a) **a misrepresentation** if that person proves that

(i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person conducted or caused to be conducted a reasonable investigation, and

(ii) at the time of the release of the document or the making of the public oral statement, the person had no reasonable grounds to believe that the document or public oral statement continued the misrepresentation, or

(b) a failure to make **timely disclosure** if that person proves that

(i) before the failure to make timely disclosure first occurred, the person conducted or caused to be conducted a reasonable investigation, and

(ii) the person had no reasonable grounds to believe that the failure to make timely disclosure would occur

-2 schools of thought on building DD defences:

1) Build a massive file of paperwork - problem was that defence council got their hands on it and started asking questions about certain drafts, etc.

2) That lead to the skinny file approach - where they just give final drafts so that there isn't questions about drafts

-In canada we are still using the massive file approach

(7) In determining whether an investigation was reasonable under sub 6, or whether any person is **guilty of gross misconduct** under sub 1 or 3, the **court must consider all relevant circumstances,** including

(a) the nature of the responsible issuer,
(b) the knowledge, experience, and function of the person,
(c) the office held, if the person was an officer,
(d) the presence or absence of another relationship with the responsible issuer, if the person was a director
(e) the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations,
(f) the reasonableness of reliance by the person on the responsible issuer's disclosure compliance system and on the responsive issuer's officers, employees, and others whose duties would in the ordinary course have given them knowledge of the relevant facts,
(g) the period within which disclosure was required to be made under the applicable law,
(h) in respect of a report, statement, or opinion of an expert, any professional standards applicable to the expert,
(i) the extend to which the person knew, or should reasonable have known, the content and medium of dissemination of the document or public oral statement,
(j) in the case of misrepresentation, the role and responsibility of the person in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement, and
(k) in the case of a failure to make timely disclosure, the role and responsibility of the person involved in a decision not to disclosure the material change

(8) A person is not liable in an action under 140.3 in respect of a **failure to make timely disclosure** if

(a) the person proves that the material changes was disclosed by the responsible issuer in a report filed on a confidential basis with the commission under 85(b)
(b) the responsible issuer had a reasonable basis fort making the disclosure on a confidential basis
(c) in the case where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist,
(d) the person or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation, and
(e) where the material change became publicly known in a manner other than the manner required under this Act, the responsible issuer promptly disclosed the material change in the manner required under this Act

(9) A person is not liable in an action under 140.3 for a misrepresentation in **forward-looking information** if the person proves that

(a) the document or public oral statement containing the forward looking information contained, proximate to that information,
    (i) reasonable cautionary language identifying the forward looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast, or projection in the forward-looking information, and
    (ii) a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information, and
(b) the person had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information

(10) The person is deemed to have satisfied the requirements of sub 9(a) with respect to a **public oral statement containing forward looking information** if the person who made the public oral statement

(a) has made a cautionary statement that the oral statement contains forward-looking information,
(b) stated that
    (i) the actual results could differ materially from a conclusion, forecast, or projection in the forward-looking information, and
    (ii) certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information, and
(c) stated that additional information about
    (i) the material factors that could cause actual results to differ materially from the conclusion, forecast, or projection in the forward-looking information, and
    (ii) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information, is contained in a readily available document or in a portion of such a document and has identified that document or that portion of the document

(12) Sub 9 does not relieve a person of liability respect **forward-looking information** in a financial statement required to be filed or forward looking information in a document released connection with an initial public offering

(13) A person, other than an expert, is not liable in an action under section 140.3 with respect to any part of a document or public oral statement that includes, summarizes, or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement, or opinion, if the consent had not been withdrawn in writing before the document was released of the public oral statement was made, if the person proves that

(a) the person did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert, and

(b) the part of the document or oral public statement fairly represented the report, statement, or opinion made by the expert

(14) An expert is not liable in an action under 140.3 with respect to any part of a document or public oral statement that includes, summarizes, or quotes from a report, statement, or opinion made by the expert, if the expert proves that the written consent previously provided was withdrawn in writing before the document was released or the public oral statement was made

(15) A person is not liable in an action under 140.3 in respect of a misrepresentation in a document, other than a document required to be filed, if the person proves that, at the time of release of the document, the person did not know and had nor reasonable grounds to believe that the document would be released

(16) A person is not liable in an action under 140.3 for **a misrepresentation in a document or a public oral statement**, if the person proves that

(a) the misrepresentation was also contained in a document filed by or on behalf of another person, other than the responsible issuer, with the commission or any other securities regulatory authority or an exchange and was not corrected in another document filed by or on behalf of that other person with the commission or that other securities regulatory authority or exchange before the release of the document or the public oral statement made by or on behalf of the responsible issuer,

(b) the document or public oral statement contained a reference identifying the document that was the source of the misrepresentation, and

(c) when the document was released or the public oral statement was made, the person did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation

(17) A person other than the responsible issuer, is not liable in an action under 140.3 if the misrepresentation or failure to make timely disclosure was made without the knowledge or consent of the person and if, after the person became aware of the misrepresentation before it was corrected, or the failure to make timely disclosure before it was disclosed in the manner required under this Act,

(a) the person promptly notified the BoD of the responsible issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure, and

(b) no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this act was made by the responsible issuer within 2 business days after the notification under paragraph (a), the person, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the commission of the misrepresentation or failure to make timely disclosure

Kerr v Danier Leather

Facts

-D finisher their IPO - in prospectus had forward looking information in their IPO that projected sales

*there was an unusually warm winter - didn't meet their sales targets

Issue

-Did they have a duty to disclose not meeting projected sales target as result of weather

Ratio

-There is a policy difference between material fact and material change, relieving reporting issuers of the obligation to continually interpret external political, economic, and social developments as they affect the affairs of the issuer, unless the external change will result in a change in the business, operations, or capital of the issuer

-Where a prospectus contains no misrepresentation on the date the document is filed, material facts that arise subsequently cannot support an action, only material changes

-The poor quarterly results could represent a material change - but because they were caused by the winter it was external to the business, so they did not have to disclose

*different from Pezim, where there was a material change - here, the intra quarterly results in themselves are not a change in the business, operations, or capital of the issuer, and therefore do not automatically signal that a material change has occurred

-no evidence that Danier made a change in its business operations or capital

**Note on Forward looking information - carries an implied obligation of reasonableness which endured until the receipt of the prospectus but not further - was just a snapshot of the company's prospects (no promise was made that the forces would endure)
NOTE - BJR cannot alleviate disclosure requirements, even if you think you can rectify the adverse change*
**Note on remedy - Purchaser has no remedy of recision against the issuer for misrepresentations based on the issuer's financial forecasts

-this is because in a bought deal the seller is the underwriter, not the issuer through the underwriter as an agent, and the right of recision is only against the seller

KEY in this case is that material facts that effect everyone in the industry doesn't have to be disclosed, but if it specifically effects you then it has to be disclosed

Take-Over Bid Response

Theory Behind Take Over Bid Regulation

-Hostile takeover bids are an effective check on the agency costs of corporate managers - create a market for corporate control where non-productive resources are moved to their most productive uses
*bad management = price falling = bidder launches takeover recognizing that they are getting a good price on the company = replacement of bad management with good management = price increase = happy shareholders
-The regulation of take-over bids stems from the fact that not all takeovers are motivated by the market theory, so there must be some limitation on how takeovers are commenced - and are done irregardless of the effect on shareholders
-Law of hostile bids centres upon the legal duties and obligations of the directors and managers of target companies

Structure of Hostile Bids + Making a Hostile Bid

<u>Structure of Bids and How to Know They are Coming</u>

Signs that a ToB is coming
1) Where share price doesn't reflect the full long term value of the company
2) If a competitor or some other company sees a good strategic fit (*Time Warner, Maple Leaf*)
3) Bad relations w/ institutional investors (hedge funds, investment co's, etc.) which cause them to shop for new buyer or management as an exit for their investment
4) Turmoil within the board room between directors
5) No takeover defences or bars (i.e. not S/h rights plans in place, or no change of control agreement within the credit agreement)
6) Early Warning Report has been issued (see below for 62-104)
*People who are planning a takeover often acquire only 9.9% (or 4.9 in the states) so they don't have to issue EWR and then make takeover after that (helps keep price down)

<u>62-104 Early Warning Report</u>

5.2 (1) Every acquirer who acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer or securities convertible into voting or equity securities of any class of a reporting issuer that together with the acquirer's securities of that class, would constitute 10% or more of the outstanding securities of that class, must

(a) promptly issue and file a news release containing the information required by the Early Warning System
(b) within 2 business days from the day of the acquisition file a report containing the information required by the Early Warning System

(2) An acquirer must issue an additional news release and file a report in accordance with sub 1 each time any of the following events occur

(a) acquirer or any person acting jointly or in concert with the acquirer acquires beneficial ownership of, or control or direction over,
    (i) an additional 2% or more of the outstanding securities of the class of securities that was the subject of the most recent report required to be filed by the acquirer under this section, or
    (ii) securities convertible into an additional 2% or more of the outstanding securities referred to in sub I
(b) there is a change in a material fact contained in the report required under sub 1 or para a of this subsection

62-104 Making a Takeover Bid

Takeover Bid = Offer to acquire, the outstanding voting or equity securities of an actor in Canada, where the securities subject to the offer, together with the securities of the same class held by the offeror, constitute 20% or more of the outstanding securities

1.8 - Deemed Beneficial Ownership

(1) in determining the beneficial ownership of securities of an offeror or of any person acting jointly or in concert with the offeror, at any given date, the offeror or the person is deemed to have acquired and to be the beneficial owner of a security, including an unissued security if the offeror or the person

(a) is the beneficial owner of a security convertible into the security within 60 days following that date, or

(b) has a right or obligation permitting or requiring the offeror or the person, whether or not on conditions, to acquire beneficial ownership of the security within 60 days by a single transaction or a series of linked transactions

(4) In this section, an offeror is not a beneficial owner of securities solely because there is an agreement, commitment or understanding that a security holder will tender the securities under a take-over bid or an issuer bid, made by the offeror, that is not exempt from pt 2

1.9 - Acting Jointly or in Concert

(1) It is a question of fact whether people are acting jointly or in concert

(a) the following are deemed to be acting jointly or in concert with one another

(i) a person that, as a result of any agreement, commitment, or understanding with the offeror or with any person AJOIC with the offeror, acquires or offers to acquire securities of the same class as those subject to the offer to acquire

(ii)an affiliate of the offeror

(b) the following are presumed to be AJOIC with the offeror

(i) a person that, as a result of any agreement, commitment, or understanding with the offeror or with any other person AJOIC with the offeror, intends to exercise jointly or in concert with the offeror or with any person AJOIC with the offeror any voting rights attaching to any securities of the offeree issuer

(ii) an associate of the offeror

(2) Doesn't apply to a dealer who is acting in the normal course as an agent for a client

(3)For the purposes of this section, a person is not acting jointly or in concert with an offeror solely because there is an agreement, commitment, or understanding that the person will tender securities under a take-over bid or an issuer bid, made by the offeror, that is not exempt from Pt 2

2.4 - Restrictions on acquisitions before take-over bid

(1) If the offeror acquires beneficial ownership of securities of the class subject to the bid within 90 days of the bid, and the terms are not generally available on identical terms to holders of that class of securities

(a) offeror must offer

(i) consideration for securities deposited under the bid at least equal to and in the same form as the highest consideration that was paid for the pre-bid transfer, or

(ii) at least the cash equivalent of that consideration, and

(b) offeror must offer to acquire that percentage of the securities of the class subject to the bid that is at least equal to the highest percentage that the number of securities acquired from a seller in the prior transaction was of the total number of securities of that class beneficially owned by that seller at the time of that prior transaction

(2) 1 does not apply if either of the following is satisfied

(a) the transaction is a trade in a security of the issuer that has not been previously issued

(b) transaction is a trade by or on behalf of the issuer in a previously issued security of that issuer that had been redeemed or purchased by, or donated to, that issuer

2.8 - Duty to make bid to all security holders

An offeror must make a take-over bid or issuer bid to all holders of the class of securities, in the local jurisdiction, by sending the bid to their address in the books of the corp if they're in the local jurisdiction

2.23 - Consideration

(1) If a take-over bid or issuer bid is made, all holders of the same class of securities must be offered identical consideration; (2) Can offer an identical choice of consideration to all holders of the same class of securities

(3) If a variation in the terms of the bid before the expiry of the bid increases the value of the consideration offered for securities under the bid, offeror must pay that increased consideration to each person whose securities are taken up under the bid, whether or not the securities were taken up by the offeror before the variation of the bid

2.24 - Prohibition against collateral agreements

If a person makes or intends to make a bid, the person or any person AJOIC with that person must not enter into any collateral agreement, commitment, or understanding that has the effect, directly or indirectly, of providing a security holder of the offeree issuer with consideration of greater value than that offered to the other security holders of that class

2.9 - Commencement of Bid

(1) Offeror commences bid by

(a) publishing an advertisement containing brief summary of the bid in at least one major daily newspaper of general and paid circulation in the local jurisdiction in english (or in quebec French and english), or

(b) comply with 2.8

2.10 - Offeror's circular

(2) Offeror commencing a take-over bid under para 2.9(1)(a) must,

(a) on or before the date of the first publication of the advertisement

(i) deliver the bid and the bid circular to the offeree issuer's principal office

(ii) file the bid, the bid circular, and the advertisement

(iii) request from the offeree issuer, a list of security holders for the purpose of 2.8, and

(b)not later than 2 business days after the receipt of the list of security holders, send the bid and the bid circular to these holders

If a bid includes shares - you must also contain a prospectus in the offer/circular

2.17 - Duty to prepare and send director's circular

(1) If a take-over bid has been made, the BoD of the offeree must prepare and send, not later than 15 days after the date of the bid, a director's circular to every person to whom the bid was required to be sent under 2.8

(2) The BoD must evaluate the terms of the take-over bid and, in the director's circular

(a) must recommend to security holders that they accept or reject the bid and state the reasons for recommendation

(b) must advise security holders that the board is unable to make, or is not making, a recommendation and state the reasons, or

(c) must advise security holder that the board is considering whether to make a recommendation to accept or reject the bid, must state the reasons for not making a recommendation at that time, and may advise security holders that they should not deposit their securities under the bid until they receive further communication from the BoD in accordance with para a or b

(3) If para 2(c) applies, BoD must communicate to security holders a recommendation/ non-recommendation + reasons at least 7 days before the scheduled expiry of the period during which securities may be deposited under the bid

2.28 - Minimum Deposit Period **= 35 days**

2.29 - Prohibition on take up - Offeror must not take up securities deposited under the bid until the expiration of 35 days from the date of the bid

2.30 - Withdrawal of Securities

(1) A security holder may withdraw securities deposited under a bid

(a) at any time before the securities have been taken up by the offeror

(c) if the securities have not been paid for by the offeror within 3 business days after the securities have been taken up

(3) Withdrawal of securities under sub 1 is made by sending written notice to the depository designated in the bid circular

2.26 - Proportionate take up and payment

(1) If a bid is made for less than all of the class of securities subject to the bid, and a greater number of securities is deposited under the bid than the offeror is bound or willing to acquire under the bid, the offeror must take up and pay for the securities proportionately, according to the number of securities deposited by each security holder

(4) For the purposes of sub 1, any securities acquired in a pre-bid transaction falling under sub 2.4(1) are deemed to have been deposited under the take-over bid by the person who was the seller in the pre-bid transaction

2.5 - Restrictions on acquisitions after a bid

For 20 business days after the bid, regardless whether the bid was successful, an offeror must not acquire or offer to acquire beneficial ownership of securities of the class that was subject to the bid unless on terms that are generally available to holders of that security

Sears Canada Inc. (Collateral Benefit)

Facts

-Sears Holdings wants to take Sears Canada private

*launches insider bid at a price of 16$/share - subject to getting majority of outstanding shares
-It was decided that a second transaction would be undergone which would merge Sears Canada with another subsidiary of Sears Holdings
-Sears enters into a lockup agreement with NatCan (9.1% shareholder)
*don't disclose that they enter into a price protection agreement which says that if they offer a higher price in the next 3 months then they get the difference between the prices
    -shouldn't really be allowed to do this because they didn't offer this to every shareholder
-SearCan sets up speccom to review offer from Sears Holdings
*Speccom recommends bid be rejected because it fell below the independent valuation
-Sears gets pissed: say that they are not going to issue dividends on shares anymore (ostensibly to force shareholders hands into tending)
*enters into support agreements with Banks - using structures that would allow the tax benefits for banks
    -this is a second example of a collateral benefit because the nature of the deals was not to benefit everyone but to benefit the banks
*also enters into an agreement with Vornado - didn't disclose that this deal came with deal protection too
-This left sears with a majority of the minority
-Minority shareholders come forward and say that this is a collateral arrangement that favoured some shareholders over others
Ratio
Sears Canada Alleges:
1) That Sears was a Joint Actor with Scotia Bank
-Sears Can is saying that the relationship between Scotia and Sears was such that they should be seen to be joint actors and Scotia banks' shares in Sears should not be counted in the majority of the minority consideration
-Ct: not going to go on circumstantial evidence that people are acting in concert - there is going to have to be more than a motive - would have had to show in this scenario that a party to a transaction intervened or attempted to manipulate the outcome of a bid or similar transaction
*support agreements that Scotia would vote their shares in favour of the offering was not enough, nor was the importance of the business relationship between Scotia and Sears
-Provision by a dealer of financial advice in respect of an offer is not sufficient to lead to a presumption of joint actor status
*this safe harbour may not apply where the dealer's activities include playing an integral role in presenting proposals to management, and actively promoting the successful offer where such activities exceed what is customary for a dealer
2)The circular contained a misrepresentation arising from the failure to disclose the substantial holding secured by Sears through support agreements with large Canadian Banks (which they say weren't legit)
-Basically Hawk says that Sears failed to disclose material information regarding the financing agreements with the Banks, or did not disclose this information at all
-You are required to fully, accurately, and in a timely manner disclose material information if there is a substantial likelihood that a reasonable shareholder would consider it important when deciding whether to accept or reject the bid
*a deal with an individual shareholder to support a bid in the midst of a bid that otherwise appeared to be failing is unusual, and, thus, the identity of this bidder should be disclosed as it is material information
    -this is different from the usual policy which is that individual shareholders don't have to be disclosed in the context of a takeover bid
-Court says that when Sears released its circulars that said it did not have any other agreements with shareholders - this was a misrepresentation in a disclosure because they had support agreements with the banks that they were not disclosing
*say that the argument that the agreements were in Escrow based on certain conditions did not make these agreements "non-existent" and they should be disclosed
Had to disclose it's agreements - did not cease trade the offer
3) The support agreements violate the collateral benefits provisions
-Next argument is that the support agreements between Scotia and Sears violated the collateral agreement provisions of the Act in their provision of tremendous tax benefits that were not available to other shareholders
-Ct says that provision does not expressly require consideration of a greater value to emanate from the offeror, requires a determination of whether a collateral agreement, commitment, or understanding has the effect of providing a shareholder greater value than that offered to other shareholders
-While offerors are not required to ensure the same tax benefits accrue to everyone at the end of the day the effect of the agreements was to induce the Banks to support the bid when they otherwise wouldn't have - which is precisely what the collateral benefit provision seeks to avoid

*court seems to think it is important that the agreements were specifically negotiated with the Banks in mind, that the Banks were able to use the agreements to alter the terms of the Offer, and that all of this consideration and extra effort was helping them realize a massive tax savings which was not available to other shareholders

-Consideration does not have to be monetary - can be actions that are worth value

-where there is a conflict of whether the agreement was of value - commission will take the fact that they entered into the agreement as an indication that the agreement was of value, and leave it to the issuer to prove it was not of value

*note - collateral benefit rule cannot be interpreted to require that all shareholders be given the same after tax considerations - just that you can't make structural changes to the bid to get them on board

62-104 ToB Exceptions

4.1 - Normal Course Purchase Exemption

(a) bid is not for more than 5% of the outstanding securities of a class of securities of the offeree issuer

(b) the aggregate number of securities acquired in reliance on this exemption by the offeror and any person acting jointly or in concert with the offeror within any period of 12 months, when aggregated with other acquisition made by the offeror and any person AJOIC with the offeror within the same 12 month period, does not exceed 5% of the securities

(c) there is a published market for the class of securities that are subject to the bid

(d) the value of the consideration paid for any of the securities acquired is not in excess of the market price at the date of acquisition, as determined in accordance with section 1.11 (20 day simple avg of closing price)

4.2 - Private Agreement Exemption

(1)(a)purchases are made from not more than 5 persons in the aggregate, including persons located outside the local jurisdiction

(b) the bid is not made generally to security holders of the class of securities that is the subject of the bid, so long as there are more than 5 security holders of the class

(c) if there is a published market for the securities acquired, the value of the consideration paid for any of the securities including brokerage fees or commissions, is not greater than 115% of the market price of the securities in accordance with s. 1.11

(d) if there is no published market for the securities acquired, there is a reasonable basis for determining that the value of the consideration paid for any of the securities is not greater than 115% of the value of the securities

(2) In sub 1, if an offeror makes an offer to acquire securities from a person and the offeror knows or ought to know after reasonable enquiry that

(a) the person acquired the securities in order that the offeror might make use of the exemption under sub 1, then each person from whom those securities were acquired must be included in the determination of the number of persons to whom an offer to acquire has been made, or

(b) the person from whom the acquisitions being made is acting as a nominee, agent, trustee, executor, administrator or other legal representative for one or more other persons having a direct beneficial interest in those securities, then each of those other persons must be included in the determination of the number of persons to whom an offer to acquire has been made

4.3 - Non-reporting issuer exemption

(a) the offeree issuer is not a reporting issuer

(b) there is no published market for the securities that are the subject of the bid

(c) the number of security holders of that class of securities at the commencement of the bid is not more than 50, exclusive of holders who

(i) are in the employment of the offeree issuer or an affiliate of the offeree issuer, or

(ii) were formerly in the employment of the offeree issuer or in the employment of an entity that was an affiliate of the offeree issuer at the time of that employment, and who while in that employment were, and have continued after that employment to be, security holders of the offeree issuer

4.4 - Foreign take over bid exemption

(a) security holders whose last address in the books of the offeree is in Canada hold less than 10% of the outstanding securities of the class subject to the bid at the commencement of the bid

(b)the offeror reasonably believes that security holders in Canada beneficially own less than 10% of the outstanding securities of the class at the commencement of the bid

(c)the published market on which the greatest volume of trading in securities of that class occurred during the 12 months immediately preceding the commencement of the bid was not in Canada

(d) security holders in the local jurisdiction are entitled to participate in the bid on terms at least as favourable as the terms that apply to the general body of security holders of the same class
4.5 - De minimis exemption
(a) the number of beneficial owners of securities of the class subject to the bid in the local jurisdiction is fewer than 50
(b) the securities held by the beneficial owners referred to in para (a) constitute, in aggregate, less than 2% of the outstanding securities of that class
(c) security holders in the local jurisdiction are entitled to participate in the bid on terms at least as favourable as the terms that apply to the general body of security holders of the same class
(d) at the same time as material relating to the bid is sent by or on behalf of the offeror to security holders of the class that is subject to the bid, the material is filed and sent to security holders whose last address as shown on the books of the offeree issuer is in the local jurisdiction

Responding to Hostile Bids

Theory
-Once bid is made, triggers a whole bunch of statutory requirements on the part of the target directors
*ex. have to produce a director's circular - providing a recommendation on the bid, or setting out the reasons that they have not provided a recommendation (individual officer's or director's can also provide their own circular if they do not take the same view as the majority of management - dissident circular)
-The target director's actions are always subject to their fiduciary duties to the company to act honestly and in good faith with a view to the best interests of the corporation - this is what triggers involvement by the securities commission
*duty to act "honestly and in good faith with a view to the best interests of the corporation" creates a conflict with the knowledge of the directors that if the bid is successful they will likely be replaced
-3 competing views of the appropriate role of the directors in a hostile takeover bid:
1) Managerial passivity - Only shareholders should be concerned about how to respond to hostile takeover bids. Directors and officers have no valuable or valid role to play
2) Managerialist View - Shareholders principle right is to elect the BoD. Once elected, the directors and managers who report to them make decisions. While takeover bids require shareholder approval, they cannot be effected without the support of the BoD. Accordingly, directors should be given the power to block hostile bids that they have determined are not in the best interests of the corporation;
3) Shareholder Choice View - Significant role of the directors of the target in attempting to secure the greatest value for their shareholders, but with a clear recognition that it is the shareholder, and not the directors, who must ultimately decide whether a takeover bid should succeed or fail
*reject managerial passivity because it ignores the fact that managers may have information that can assist shareholder in fairly assessing the value of a company, and managers are in a better position to that dispersed shareholders to press the bidder for a better price
*also questions the logic of the managerialist argument - question is not "why do the motives of otherwise trusted managers become suspect once a bidder has undertaken to purchase the company's shares?"; the real question is "who should control the company?"
-It seems to be acknowledged in Canadian law that while directors are able to defend against a takeover bid - they have no positive duty to do so
*however, it is not definitely recognized that the shareholder choice view is the optimal theory under which directors should participate in takeover bids

Types of Defences
1) White Knight
2) Deal Protections measures - often used in combo with WK - lock-up, break fees, no-shop
3) Crown Jewel/ Scorched Earth - Scorched Earth = taking some action that would be potentially ruinous (committing the company to make lots of dividends payments, or restructured debt payments), or otherwise placing getters on business that would deprive a potential acquirer of opportunities to unlock or take advantage of operational flexibilities if the bid is successful
4) SRP
5) White Squire defence - ensuring a control block of shares is put in the hands of parties friendly to the target's management

6) Dual class voting structures - Potential bidders typically need to acquire special voting shares in order to obtain control; since the directors of the target are usually elected by the holders of the special voting shares, it would be unusual for a bid opposed by the directors to be accepted by the very shareholders who elected them
7) Legal action challenging some aspect of the bid
-3 purposes of defence tactics:
1) Provide the target with time to find a competing bidder and create an auction
2) Provide the target board with additional time to generate an alternative tot he hostile bid; or
3) to compel the hostile bidder to negotiate with the target board with a view tis securing a better price for the target's shareholders
*Sometimes people argue that a 4th reason is to just deny the bid entirely ("just say no defence") - but that doesn't seem to have been accepted into Canadian law

Icahn Partners v Lions Gate
Facts
-I wants to get 30% - accumulates 14% - asks for seats on the board, threatens proxy war to get what he wants
-L adopts a special committee to deal with I
*they say he can have 2 seats on the board so long as he signs an agreement that he will only buy the company if he offers for 100% and signs a no-shop
-I rejects - begins trying to buy up stock again - gets his holdings up to 18%
-I makes an offer at 6$/share
*special committee recommends not to tender to the offer and adopt a SRP - the board implements these options
-I reconstitutes his bid for all of the shares at $7
-I begins buying up stock to get his position up to 38%
-The 2 parties enter into a standstill to deal with a potential deal with another film studio
*one minute after the standstill elapsed Lions Gate converted old debt to new debt securities to deleverage - and then the institutional director sold the debt to a friendly board member of the company who converted it to shares
-diluted Icahn to 33.5%
-I went to ct - says that it had a reasonable expectation that is shareholding would not be diluted while it was trying to take control of the L board
*says that it constitutes oppression - still constitutes oppression even if the commission determines that L's actions were in the best interests of the company
Issue
-Were L's defensive measures a violation of their fiduciary duties?
Ratio
-L says that what it did was in the best interests of the company - it deleveraged the company and it protected the company from a part who the directors honestly believed couldn't run the company that well
1) I argues that Burns is the Board, and thus it cannot be seen as independent
*CT says that this isn't supported by fact here - board was independent, had a lot of experience, retained independent council, and formed a special committee that was completely independent from the board
2) Oppression remedy - Approach from BCE is 2 pronged: A) Look to the principles underlying the oppression remedy (in particular the concept of reasonable expectations); and B) If a breach of a reasonable expectation is established, then consider whether the conduct is oppressive or unfairly prejudicial
*Oppression should look at business realities, not narrow legalities
*Oppression is fact specific to the context and relationships at play
A) Reasonable expectations are objective and contextual - should be measured against the specific facts, the relationships at issue, and the entire context - oppression does not protect subjective wishes of shareholder
*shareholders enter into relationships with, and within, corporations, on the basis of understandings and expectations upon which they are entitled to rely
-however, this does not mean that directors owe duties, necessarily, to individual shareholders - there duties are to the corporation
*says that *Teck* has been accepted as standing for the proposition that directors acting in good faith with a reasonable basis for a belief that they are doing what is in the best interests of the company will be sheltered by the BJR
-it may be necessary to determine the primary purpose of the transaction before deciding whether the board was acting in the company's best interests
*there just have to be reasonable grounds for the directors' alleged belief - if the purpose is merely to freeze out a group that will not be reasonable - onus of proof is on the plaintiff

*complaint must be more than unhappiness with the decision of the majority of the shareholders or the management of the company, and must establish harm peculiar to his shareholder interest as distinct form the other shareholders' interests
-Here: I is saying that as the majority shareholder they had the reasonable expectation that L would not engage in conduct that had the prejudicial effect of diluting I's investment in L in circumstances in which I had publicly stated their intention to initiate a proxy contest at the 2010 AGM
*Were expectations reasonable?
-General commercial practice - within the reasonable expectation of the parties that the share issuance power could be exercised after the term of the standstill agreement and negotiations involving exercising the power could occur during its terms so long as it accorded with the terms of the standstill
*also important is that the dealings between the parties were adversarial
-The Nature of the Corporation - L is public company, was highly leveraged, deleveraging would benefit company - which it did when it deleveraged
-Relationship between the parties - Icahn had a reputation of buying companies, saddling them with debt, and then getting bought out when he takes them private, tried to force directors on the board that didn't fit the profile of the other managers
-Past Practice - L was trying to take steps pre-I to reduce their debt
-Steps the Icahn group should have taken to protect itself - Could have negotiated more effectively with L when they were talking (Ct says this factor is neutral)
-Fair Resolution of Conflicting Interests between Stakeholders - Impugned transactions benefitted L, they addressed an ill, which was the over leveraged nature of the company
*impugned transactions also had dilutive effect on I's holdings, however, I is still the majority shareholder in L and the overwhelming effect on L was the far deleveraged nature of the company
-Conclusion: Evidence does not suggest that the purpose of the transactions was to entrench the existing board to thwart I
*no evidence of communication with this motive, and evidence shows that the shareholders involved in the transaction could have taken alternative paths should they have wanted to (i.e. once the notes were converted and given to friendly shareholder, he could have done anything with them; or note holder could have given the notes to anyone, not just the friendly shareholder)
*Both the deleveraging and dilution of I were purposes because of I's reputation - but the liquidity concerns were more central
= L's view that their path was in the best interests of the company was reasonably held, both in terms of the dilution and the deleveraging effect = court should not second guess the BJ of L
*I is complaining of conduct which does not effect it as a shareholder but as a "bitter bidder" - and thus does not have standing to use the oppression remedy
-transactions did not affect the petitioner in any particularized way - they retained a significant percentage of the outstanding shares, retain right to have a say in the board proportionate to the size of shareholder, they retain right to launch a proxy battle
Seems to just be an example that if there is a legitimate business purpose at all - the court will allow it

<u>Revlon Duty in Canada?</u>
-While no concrete Revlon duty has emerged in Canada, it seems that there is a duty on the part of directors of a company to maximize shareholder value when the company is in play
*seems that Canadian directors began to take the initiation of a hostile bid as a sign that they were under a legal duty to maximize shareholder value
-First clear pronouncement on this was in *CW Shareholdings* - where a corporation is in play, the duty is to act in the best interests of the shareholders as a whole and to take active and reasonable steps to maximize shareholder value by conducting an auction -cites revlon
*this was later rejected in *Maple Leaf & Schneider* - although the rejection was confined only to the requirement that directors of a corporation in play <u>must</u> conduct an auction
-Textbook authors note that this was actually never a requirement of Revlon - and if you take the *Revlon* duty as not requiring an auction than the OCA seems actually to support the proposition that the duty is to maximize shareholder value - if that should be through an auction - then so be it, if not an auction is not required
-So the question becomes when is a company "in play"
*Fact specific inquiry depending on the specific transaction involves
-*CW* in play = where it is apparent there will be a sale of equity and/or voting control

*this is different than Revlon, where such a sale is *inevitable*

-*Falconbridge* - once another company acquired 19.8% to become the single largest shareholder, the company was in play despite no indication of an intention to acquire more shares

-*BCE* - company in play when shareholder filed a 13D report indicating a change from passive to active shareholding

*Remember, in Deleware, just because a Company is "in play" does not mean that Revlon duties arise - in order for revlon duties to arise it must be inevitable that the Company will be sold

*Company with controlling shareholder cannot be said to be in play if there is some legal bar that makes it impossible for a single shareholder to obtain control, or if the controlling shareholder is not prepared to sell its controlling interest

-conversely - a proposed transaction that will effect a change in board control but leave the target company a widely held corporation, with no controlling shareholder, may also not put the target in play

-Textbook proposes that the interesting question in Canadian law is whether there is actually a Revlon duty when the company is "in play"? because if there isn't then "in play" doesn't mean anything

*so assuming there is then what kinds of situations will trigger "in play" when a company doesn't have a controlling shareholder?

-it can't be every bid - a bid made at a price significantly below current market price must not trigger the BoD to go into revlon mode because it likely can't be said that this bid would create a situation were a "sale of equity and/or voting control" is "apparent" let alone "inevitable" = not in play

-Given the uncertainty surrounding when a company may be said to be "in play" the precise implications that flow from a determination that a company is "in play" are even more perplexing

*2 issues: 1) Does the fact that a company is in play necessarily imply that director's duties are materially affected in any particular way (are the director's subject to Revlon duties?; 2)If you assume directors duties are at least presumptively affected in some important way when the company is put "in play" how precisely are directors to interpret their duties at that point (i.e. must they just focus on shareholder value, or can they take into account other interests?)

-initially *Maple Leaf* said that courts should only judge the director's actions with financial considerations in mind, however this ran against the principles established in *Teck* that directors could properly consider the interests of the corporation's employees+community

-Then *Peoples* came along and the SCC said that when a court determines whether the BoD was acting with the best interests of the corporation in mind, it may be legitimate for the BoD to consider the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment

*problem was that Peoples did not involve a takeover

-Then *BCE* comes along - says that Revlon does not displace the fundamental rule that the duty of the directors cannot be confined to a particular priority of rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces

*SCC doesn't accept that directors of Canadian corporations would be required to focus on short-term shareholder wealth maximization, even when sale or change of control was inevitable

-instead, duty is to act honestly and in good faith with a view to the best interests of the corporation

*in discharging that duty, the directors could properly consider the interests of many different constituents, provided their decisions were within a range of reasonableness - if they are then they will be afforded protection under BJR

-Cannot maximize shareholder value by treating individual stakeholders unfairly

Teck Corporation Ltd v Millar et al (BCSC)

Facts

-A owned a mining property that was sought after by P, T, and C

-A needed funds and sold non-controlling block to P at $3/share, even though T had offered $4/share

-T began acquiring A shares in the market and accumulated a majority holding

-Once they were in control, they became aware that A's officers were in negotiations with P to develop the property

*T requisitioned a shareholders meeting - tried to get A not to issue any shares, or take any steps out of the ordinary course of business until the shareholder meeting

-A senior officers signed a deal with Pl to develop property anyways

*Deal was that if P elected to develop the property, A would issue P 30% of its issued and outstanding which would dilute T's controlling interest

Issue

-Did A's BoD breach their fiduciary duty to the shareholders (including T)?

Ratio

-BCSC - BoD is permitted to issue shares where it has the effect of defeating the controlling interest of the previous majority shareholder, provided that the directors were acting in good faith in what they believed to be the best interests of the company and provided that there were reasonable grounds for this belief

*have to provide objective evidence of their good faith and these reasonable grounds

-Court makes clear that there is nothing wrong with the directors of a corporation taking action when confronted by a potential take-over that they honestly believe is not in the corporation's best interests

*directors ought to be allowed to consider who is seeking control and why - if they believe that there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper

* can issue shares when it's in the business interest of the company to do so, so long as power is not exercised for an extraneous purpose

-What are proper considerations for rejecting a takeover?

*Can consider non-shareholder interests (stakeholders, community) [not relevant in this case]

*Company value = shareholder interest

-Here: A BoD honestly believed the takeover by T would not be in the interest of A, and that they had reasonable grounds for such belief - thus, they could issue the shares to defeat takeover

*A BoD was motivated entirely by a desire to secure the most profitable deal for A - believing that their share price would decline under T's control

**Directors of a target need not be passive bystanders when an unwelcome attempt is made to acquire coming control of that company - Directors are not bound to the will of the majority shareholder(s) [Managerial view] - they are entitled to inquire who is taking over any why and make judgments on whether it is a suitable bidder based on acquirer's experience, reputation, and policies

**Note - this is not a takeover defence case as the actions of the directors occurred after T had gained control, and were to prevent T from achieving a voting majority

-However, surely if directors are permitted to snatch control away from a shareholder who has actually acquired a majority voting stake, they must also be permitted to take actions to prevent an unwanted buyer from seeking such voting control int he first place**

<u>Special Committees</u>

-To address the potential conflict between director's duties to the corporation and their self interest, it is standard practice for directors of a target to appoint a special committee of independent directors to evaluate the bid, and manage the process in regards to making a recommendation to the board on how to proceed

*directors on such committees must be independent of management and majority shareholders - and will have the ability to appoint legal and financial advisors to ensure their independence

-*CW* including the CEO on the special committee was a fatal mistake

-*Schnieder* - included the CEO in the deal, but did not put him on the committee - which the court said could have caused a conflict, but that this potential must be balanced against the fact that reasonable benefits were obtained

*real question to be asked is whether the directors of the target company successfully took steps to avoid a conflict of interest

<u>*Maple Leaf Foods Inc. v Schneider Corp*</u>

Facts

-ML announced its intention to make an unsolicited bid for S at $19

-SBoD issued circular recommending that shareholders not tender to ML offer on basis that it did not reflect value of shares, and the Family had no intention of taking the offer

-S passed SRP that allowed both classes of shareholders to acquire shares if purchaser acquired 10% of shares

-ML increased offer to $22. SM got in at $23 and BC got in at $24.50

-Family said they had preference to sell their shares to SM

*had 3 factors: 1) Financial value; 2) Continuity on Schneider; 3) Effect bid would have on customers, suppliers, employees, and other stakeholders

-SM increased offer to $25 at the request of Family - also promised not to sell for 2 years and to allow the Family to appoint a representative on the BoD

*BoD released circular advising shareholders not to tender to ML offer

-SM enters into a lockup agreement with the family

-ML increased its offer to $29 conditional on obtaining 2/3 of each class
Issue
-Did the Board act in the best interest of the Corporation in favouring SM offer over ML offer? Was the SPECCOM independent?
Ratio
Note on SPECCOM - Was Speccom not independent because it allowed CEO to negotiate on the committees behalf with potential bidder; also, what about the Speccom taking into account the wishes of the family when they portrayed that there was going to be an auction?
-CT- rule is usually that no senior executive in a company should be permitted to have a significant role in the process of that company being sold
*Here: while the CEO was a major factor in negotiating with the bidders, he wasn't on the special committee and did not get a vote on potential takeover bids
*furthermore, the CEO acted properly in the negotiations, and it seemed that he had more to gain from the acceptance of the ML offer than of the Smith offer (he had a job either way)
Duty of Board - Borrows heavily from *Teck* - BoD aren't expected to act in the best interests of one group of shareholders, there may be conflicts of interest between individual groups of shareholders
*only if BoD have unfairly disregarded the rights of a group of shareholders will the directors be found not to have acted reasonably
-In determining this the court should look to see if the company made a reasonable decision - not a perfect decision - if it is a reasonable decision it should stand
-Even after MLs $29 offer, after tax considerations, the ML offer was as advantageous as SM offer, and when factoring in the Family's interest in management philosophy and ease of change of control - it was less advantageous
-Did the BoD acted improperly by not allowing ML to respond after the increased bid from SM was received
*Ct - you don't always have to have an auction, and that more than just the price dictates the proprietary of an offer
-where someone's set on selling, and they receive multiple offers, an auction is the best process
*here, the Family weren't set on selling, they had just received an unsolicited offer from ML and thought that they would test the market
-says that M knew the bidding process was heating up, knew it was close to the end, had the authority to authorize a higher share price and didn't, and it should be them that bears the consequences for that, not S
***Important part about this case was not the non-financial considerations, but that the Family wasn't sold on selling the company, so the sale wasn't inevitable and thus the Duty of the Directors still allowed the preservation of the company and not value maximization
-SPECCOM was entitled to make, and did make, business and negotiating judgment calls which, having regard to the interests of the non-Family shareholders, were reasonable in the intense and time-limit-driven context
Move away from revlon position that once you have a breakup or sale is imminent than you become auctioneers - here court says that is just one approach

CW v WIC
Facts
-C and S are battling for WIC - both held large positions in WIC
-C makes a bid for WIC
*Speccom rejects bid, institutes rights plan - which is shot down by the commission
-Speccom - found S as white knight, announced that it had agreed to make an offer for all of WIC class B shares
-offer included a break fee of 30 million in the event that it was unsuccessful, and an option to purchase WIC's radio assets
-C applied for relief under the oppression remedy provisions - said WIC directors had exercised their powers in a manner which was contrary to their statutory and fiduciary duties in takeover bid situations, and that this failure had resulted in prejudice to C as WIC shareholder
Issue
-Did WIC breach its fiduciary duty by using a break fee+ asset purchase option to secure a bid?
Ratio
-Says that where target corporation is in play - directors duty is to maximize shareholder value and conduct an auction
-Break fees/Asset Options are appropriate where they induce a competing bid to come forward, that bid represents a better bid, and the break fee represents a reasonable commercial balance between the potential negative effect as an auction inhibiter and its potential positive effect as an auction stimulant

*whether these mechanisms are appropriate is entirely dependant on the circumstances - in recognition that directors of target corporations be left with as much flexibility as possible to deal with the circumstances which face them in order to carry out their duties to maximize shareholder value
-Here: break fee and radio asset option were inducements to another competitive bid
*30 million represented just 2.6% of the total offer
-By securing the offer with a break fee and an option to purchase potentially attractive but under performing radio assets at a reasonable price, this benefitted shareholders including C
**Factors to consider when assessing whether bid was a reasonable balance:
1. If process directors followed in making decision (i.e. special committee, indp. Advice, etc.)
2. If overall commercial balance of auction inhibiting and stimulating
3. If price of optioned asset is within reasonable range of the asset or if its so low that it effs up the value of the company

Court and Securities Commission Involvement in Takeover Bids

Comparison Between Courts+Commissions
-Securities Commissions tend to want to allow the shareholders to decide what the best interests of the company are (see 62-202); courts have been more target director friendly, have deferred to BJR more
-Courts get involved in the bidding process in 2 ways:
1) Under provincial securities legislation that allows an interested person to apply to the court for an order where a person or company has not complied with the takeover bid rules; and
2) Bidders use corporate law provisions (oppression remedy) as a means of seeking the court's assistance in dismantling defensive tactics employed by the target directors or in otherwise facilitating the making of a bid
-Securities commissions get involved in different contexts:
1) Commission has authority to grant exemptions from takeover bid rules or to vary otherwise applicable time periods
2) Interested persons may apply to the commission for a remedy when it appears that someone is not complying with the takeover bid rules (includes hostile bidders, target directors, etc.)
*whereas court's often have a broad range of powers on application - the commission has more limited, albeit effective powers

> -Restrain the distribution of documents used in connection with the bid; require amendments or variations to such documents, and to have those amended documents distributed to the relevant parties; and require compliance with the takeover bid rules

3) To make orders in the public interest including the power to mandate a takeover-bid circular be provided, amended, or not provided to a specific party; prevent or restrain activities in the takeover bid context that were adjudged not to be in the public interest
**Canadian Tire* - affirmed that the Securities Commission can use its public interest power even when the technical provisions of the securities act or regulations have not been violated
**Asbestos* - Purpose of the Public interest power is neither remedial nor punitive; it is protective and preventative
*public interest power should always be used with a mind to the purpose of securities legislation - to foster fair and efficient capital markets and confidence in capital markets

62-202
This document demonstrates that the CSA seems to favour a Managerialist view toward hostile bid responses, but with the ultimate consideration being whether the Managerial action deprived the sh's with the right to decide
1. CSA realizes that take-over bids act as a discipline on corporate management, and as a means of reallocating economic resources to their best uses
2. Primary objective of take-over bid legislation is the protection of the bona fide interests of the shareholders of the target company. Secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even handed environment. The concern is that certain defensive measures taken by management may have the effect of denying the shareholder's the ability to make such a decision and of frustrating and open take-over bid process.
3. Don't want to determine a fixed code of conduct for directors of target company, but wish to advise participants in the capital markets that they are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights. Way to avoid examinations? Just get shareholder approval.
4. Without limiting the foregoing, defensive tactics that may come under scrutiny include:
a) Issuance, or the granting of an option on, or the purchase of, securities representing a significant percentage of the outstanding securities of the target company

b) The sale or acquisition, or granting of an option on, or agreeing to sell or acquire, assets of a material amount (crown jewel)
c) entering into a contract other than in the normal course of business or taking corporate action other than in the normal course of business
5. The administrators consider that unrestricted auctions produce the most desirable results in take-over bids and are reluctant to intervene in contested bids - but will take action where there are defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid.
6. Administrators appreciate that defensive tactics, including those that may consist of some of the actions listed in para 4, may be taken by a BoD in genuine search of a better offer - regulators will only intervene in those tactics that are likely to deny or severely limit the ability of the shareholders to respond to a take-over bid or competing bid
7. As a general rule, administrators will not advise parties as to the propriety of proposed action in a particular case except in the context of a meeting or proceeding of which interested parties have been given notice

Re Canadian Tire Corporation
Facts
-Upon Acquisition of the majority of CT, the B's re-organized the shares
*As a result of the reorganization, Class A shareholders were given coattail takeover protection which converted their common shares into voting shares in the event of a takeover bid
-B's need to sell some class A shares to finance the purchase of the company - avoid prospectus requirements by getting an exemption from the securities commission - exemption granted on the grounds that Class A shareholders as a separate group would vote on the sale as a result of the Coattail provisions
-B's enter into a lock-up agreement with the Dealers - in return the dealers agreed to deposit 15 million into the bid
-Dealers made an offer to purchase 49% of the common shares at $160/share
*coattail provision depended on a majority of the common shares being tendered and taken up - thus 49% didn't trigger the coattails
-Commission said that to allow the B's to sell their shares at a favourable price without engaging the take-over protection of the coattails would be to permit an abusive transaction
-B's are saying that they should not intervene here - no rule was broken and thus by intervening the commission is creating uncertainty in the market
Issue
-Whether it is in the public interest to impose a cease trading order?
Ratio
-Commission: legislature has given it a broad and unfettered power to move quickly to intervene in the capital markets where it deems actions to be contrary to public interest
*to confine this power to a specific breach of the legislation or of a policy statement would avoid the ability of the commission to perform its duty - reality is the legislature realizes it can't have regulations for each type of transaction, and allows the regulator the public interest power to stop novel transactions that are abusive despite not being prohibited
-Commission will be able to cease-trade in the public interest, where there is no breach legislation, where there is a clear demonstration that allowing such a transaction would be abusive to shareholders and the capital markets in general
*must go beyond unfairness - will have to show the broader effects of the transaction on the markets in general
-Here - conditions are met - CT is a dominant force in the Canadian marketplace
*CT drafted their own coattail, and then used their own contract to get out of it - if you can't expect CT to follow the rules, who will
TEST - if person has not breached statute: must be abusive of the public market in general, general public interest is involved

Sears Canada Inc.
See Case Brief earlier for facts
4) That the commission should exercise its public interest jurisdiction to prohibit the insider bid of Sears Holdings and its second step going private transaction on the grounds that the conduct of Sears has been coercive and abusive of shareholders generally
-Rejects argument that it is abusive because of no minimum tender condition - says that offers don't have to include a minimum tender, and while such a condition may exert pressure on shareholders to tender for fear of holding illiquid stock if they don't tender

-Rejects argument that it is abusive because the price was below an independent valuation - says that if shareholders have had the opportunity to view the minimum valuation, and have had a meaningful opportunity to accept or reject the bid, then it isn't unfair or abusive to offer below the independent valuation price
-However, say that the decision to threaten to stop issuing dividends - when taken into account the other tactics that exerted pressure on the shareholders - could not be considered a coincidence and was a pressure tactic designed to coerce shareholders
-As the court found that the support agreements violated the collateral benefit provision, it is unnecessary to find that the conduct was abusive, but engages in the discussion anyways
*say that the transaction was in certain aspects abusive of the market, as the use of derivative trading to get majority support would catch the market off-guard
*however, say that it was only abusive/coercive in certain aspects, but was on the whole not abusive enough to issue a cease trade
-Say that the appropriate remedy is to order Sears to comply with its obligations under the securities law, and to cease trade the offer subject to certain conditions (amending the takeover bid circular in regards to the support agreements - and exclude those in the support agreements from the majority)
-Michael - SEC seems to favourably overlook the minority shareholders collective actions to mount this defence, because they find Sears actions to be kind of egregious

Re ARC Equity Management (Fund 4) Ltd
Facts
-A is a private equity fund that invests in securities of energy companies
-P is a junior OnG exploration company - A owns 31% of P
-Prmnt is a trust that invests in energy companies
-P is struggling - approaches Prmnt and A to complete a strategic transaction
*Prmnt displays interest, enter into confidentiality agreement with P
    -Prmnt makes a non-binding proposal
    *P wants more compensation under the proposal, is also considering strategic alternatives to Prmnt
        -Forms a special committee with a broad mandate to handle this - identifies 18 candidates to acquire P
-Pmnt makes a second proposal with increased compensation for all of P shares
*SPECCOM meets a whole bunch and meets with A - accepts the second proposal, begins negotiating surrounding agreeements/DD
-A is asked to lock-up its shares in the arrangement, informed that if it didn't the acquisition would proceed followed by a private placement which would give Prmnt 19.9% of the outstanding P shares
*SPECCOM concludes that bid and concurrent private placement are in the best interests of P and recommends that the P board approve the bid+private placement
*announce that in addition to the bid Prmnt is going to buy special warrants that would convert into shares if Prmnt did not get at least 50.1% of P shares
-Then P announced the immediate implementation of an SRP, which would be ratified at the next meeting of the shareholders
*SRP would be triggered in the event of an acquisition of 20% or more of the Shares, unless it was a permitted bid (which the Prmnt bid would be)
-A asks the TSX not to accept the SRP and not to approve the issuance of the Special Warrants
*alternatively they ask for the TSX to require P shareholder approval of the Private Placement
-TSX approves the Private Placement, P issues the special warrants
-Prmnt formally launches its bid - conditional on 66% of outstanding P shares being tendered
*Prmnt doesn't hit the minimum tender, and extends the bid for 2 weeks
    -Prmnt gets +3%, still not at minimum tender, extends it another 2 weeks
    *2 days later they alter the minimum tender to 50.1% and extend the bid 2 more weeks
        -At the end of this, they announce that they had taken up the P shares which were 59% of the outstanding shares - they concurrently announced that they were converting the special warrants = 67%
-Later, Prmnt and P announce an amalgamation, whereby P would amalgamate with Prmnt, and P shareholders would be exchanged 1-1 for redeemable preference shares in the new corporation (which would be automatically redeemed under the bid)
*needed 66% to do this, and Paramount was going to vote all of its shares in favour = A is fucked
-A alleges that the conduct of Prmnt/P was abusive to the capital markets + contrary to the public interest

*private placement was mechanism designed to ensure that P could effect the merger - took decision away from sh's by lowering the required shareholders support of the merger below that subscribed by corporate law
*special warrants were a cost-free option that allowed return of Prmnt's subscription payment if it did not need the special options, and allowed the warrants to generate more shares if they needed it
-Principle of security law that an acquirer should not be entitled to influence or effect a merger through a subscription of shares
-Prmnt says that A shouldn't be able to challenge this transaction because its double jeopardy (as TSX already heard A)
*no breach of securities act - this is not a situation where regulator should use public interest power as it would essentially give A a veto
*gives the ol' Canadian Tire commercial certainty argument - allowing the challenge would displace a transaction that was the result of rigorous and fair process, would be second guessing the BJ of the P board
Issue
-Should the regulator use its public interest jurisdiction?
Ratio
1) Is ARC barred from bringing a challenge because it is already res judicata by the TSX
-Not clear that the issues before the TSX were the same as they are now - TSX did not know that the merger was going to actually happen + jurisdiction of securities commission is different than TSX = they can hear it
*where the TSX has considered the exact same question, with almost identical facts, and there are no "greater concerns" about the securities regulation at issue, same issues for market and securities realtor - the commission should show deference
2) Exercise of Public Interest Jurisdiction
-Commission notes that the jurisprudence instructs the commission to use its public interest power cautiously
*has to be abusive of the capital markets and investors - unfairness is not sufficient, but may be a factor
-"Principle" that A is relying on, that acquirer should no be entitled to influence or effect a merger through a subscription of shares, is worthy of consideration but not binding
-So then can commission use it's public interest power based on the fact that A did not get to vote on the Private Placement, which ended up allowing the merger to happen
*Looks at the financial metrics of the deal (which were good for P who needed cash), considered the SRP non-abusive, noted that the transaction was motivated in response to P's financial need, that the dilution was not out of the ordinary/ applied to all shareholders other than Prmnt and was disclosed, and that the Support Agreement signed by P to support Prmnt's bid allowed it to pull out in the event of a superior offer = Bid was not abusive
*Then turn and look at the motivations behind Prmntt in making the bid
-Prmnt wanted full ownership of profound, knew that if they had a significant block of shares a Merger with P was a possibility
*knew that they would need 66% to get the merger, and undertook the private placement as a tactical tool to acquire all of profound
-however, say that the Private placement was not solely a tactical acquisition tool, it was good for P as they got an influx of cash which they used, and it benefitted P as it offered a lifeline to the target while the overall acquisition plan progressed which was approved by the P Board acting properly
*Seem to think that it is important that the private placement did not guarantee Prmnt success in the Bid
*there was no deceit towards the shareholders, they were given enough information to figure out what Prmnt was doing, and how they were doing it
-had multiple opportunities to act in response to the transaction - could sell their shares in the secondary market, could not tender their shares to the bid (and were allowed plenty of time to do that), could exercise dissent rights or oppression rights, could have appealed the TSX decision to allow the private placement and the SRP (and still could after this proceeding - as far as dissent and oppression remedies)
*the law allows business combinations to affect different shareholders differently - this is the requirement for a 66% majority for mergers
-A and Prmnt are sophisticated parties, they have access to advisor - business hardball played legally is not abusive
*not compelling evidence of an abuse of A or other minority shareholder or the Capital Market's generally to warrant the use of the public interest jurisdiction to bar Prmnt from voting its Private Placement shares in favour of the Merger
-relief sought by A could actually be detrimental to investors or capital market integrity
3) Policy Response no Precluded - Private placements in the MnA context may require scrutiny - could have a different outcome in the future
*shouldn't be a blanket limitation on the exercise of voting power otherwise obtained through such a placement could "chill" the options available in the future to other companies facing financial stress

Shareholder Rights Plans

General

-2 ways in which a bid may be said to be coercive:
1) Structurally coercive - designed in such a way that shareholders of the target company feel pressured to tender their shares in spite of the fact that they genuinely and reasonable believe the bid price is too law (2 tier, front-end loaded; partial bids)
*widely recognized as unfair and coercive
2)Substantively coercive - 2 conditions must prevail: A) Price offered would have to undervalue the target shares; B) Target shareholders are not prepared to believe the view of the directors that the bid is undervalued
-SRP are often used to defend against coercive bids - typically plan takes the form of a rights agreement entered into between the corporation and a "rights agent" - rights are created and attached to all outstanding common shares
*entitled the holder to purchase one additional common share at a price which is originally set significantly above the market price for the common shares (so the rights have no intrinsic value at all)
*rights are not created until "separation time", cannot be exercised independently of the shares; once separation time occurs right entitles the holder to purchase the number of shares having a market price double to the exercise price
    -results in a massive dilution that make it nearly impossible for the acquiring person to complete a successful bid for the company - poison pill specifies that the acquiring person's rights become void
*include permitted bid provision - whereby a bid that complies with certain provisions won't trigger the plan
    -typically have to be left open for longer than the statutory minimum period, have to be made for all of the shares, and that the bidder will not take up and pay for shares unless more than 50% of the outstanding shares (excluding those held by the bidder/affiliates/associates/joint actors), and then leave the bid open for the deposit of the shares to ensure the shareholders have an opportunity to tender after learning that a majority of their fellow shareholders have accepted the bid
-Principle goals of SRP are: 1) to provide the directors of the target company with additional time to respond to a hostile bid; and 2) to encourage the hostile bidder to negotiate with the directors of the target company, with a view to arriving at better terms for target company shareholders.
-<u>TSX rules</u> express a view that a poison pill should be approved by shareholders within 6 months, except in the case of a tactical pill, in which case the TSX will normally defer to the securities regulators
-<u>62-202</u> sets out administrators approach to defensive policy (*see* other part of CAN for this)
*when the rights plan has served its purpose by facilitating an auction, encouraging competing bids, or otherwise maximizing shareholder value, a rights plan will be cease traded where it is unlikely to achieve any further benefits for shareholders [look to *Royal Host* for a list of factors]
**Cara Operations* - Paramount consideration in deciding whether a rights plan should be allowed to stand in the way of a takeover bid is the best interests of the shareholders generally
    -CT here said that 2 underlying principles emerge: 1) Procedural Fairness - rules of the game should be clear and consistently applied to encourage an open auction (game must be played in an acceptable timeframe - longest period a rights plan was permitted to operate was 108 days (*Ivanhoe*) = inordinate amount of time - *Falconbridge* allowed it to stay way longer, but this probably isn't the right approach)
    2) Fiduciary Duty of Directors, SPECCOM, and advisors - recommendations should be based on the best interest of the shareholders generally, and not those of any group of shareholders, bidders, potential bidder, others
-Then comes *Pulse, Neo + Canadian Hydro Developers*
**Re Pulse Data Inc* - appears to accept the argument that a SRP could remain in place to prevent a potentially abusive
    -shareholders had approved the SRP by a significant majority 6 days before the hearing with the benefit of complete disclosure - allowed it to stand because it was in the bona fide interests of the shareholders
**Neo* - SRP's may be adopted for broader purposes of protecting the long-term interests of the shareholders, where, in the directors' reasonable business judgment, the implementation of a rights plan would be in the best interests of the corporation
**Canadian Hydro Developers* - decided not to intervene - places particular emphasis on the fact that the rights plan had been approved by the shareholder well in advance of the bid's launch - didn't intervene, but said that a time was coming to intervene soon
-Then the commissions seemed to shift back to normal with *Icahn* and *Baffinland*
**Baffinland* - support agreement entered into with friendly bidder included a "no shop" - concluded that the target board was no longer at liberty to seek other offers; thus, SRP had served its purpose (helped to facilitate an auction) and it was time for the pill to go

*emphasized that *Neo* did not stand for the proposition that the commission will defer to the BJ of a BoD in considering whether to cease trade a rights plan, or that a BoD in the exercise of its fiduciary duties may just say not to a takeover bid - such an outcome would run contrary to 62-202

Re Canadian Jorex

Facts
-M makes bid - share exchange .85M for each J, minimum tender of 25% of outstanding shares of J not held by M
-J recommended to reject M bid - did not think it was valuable enough, not enough disclosure on the shares of the M that would be exchanged
*at this meeting board also adopted rights plan, hoped to buy some time to conduct an effective auction of J (not approved by shareholders)
-TA announced intention to make cash bid @ 2.70 for 55% of J
-J recommended that shareholders accept the bid, BoD also decided to waive 2 minor terms of the permitted bid provisions of the rights plan so that the TA bid could proceed
*this waiver was not granted to M - M complained that the plan was contrary to public interest
Issue
-Was the shareholder rights plan within the public interest?
Ratio
-Court said that the time for the rights plan to go had arrived for 3 reasons:
1) M bid could not proceed to J shareholders unless the rights plan was removed - M bid would be withdrawn if rights plan was not withdrawn
2) Maintenance of the rights plan against M bid was not going to result in anyone else joining the auction - rights plan had elicited another bid to come forward and no-one was going to further challenge the cash offering from TA
3) Keeping the rights plan in place was not likely to lead to any further enhancement of M's bid
*M's position had been that it would not consider an enrichment of its offer in the face of a rights plan
-So basically the rights plan had succeeded in getting another bid to come forward + facilitated an auction - but had failed in forcing M to sweeten its bid - so it should have been withdrawn to allow shareholders the chance to decide between the bids (62-202)
high water make of SH Choice

Re Lac Minerals Ltd.

Facts
-L has SRP - unanimously adopted by the BoD, approved by shareholders - intended to allow the BoD to explore and develop alternatives to maximize shareholder value
*triggered at announcement by a person or company of its intent to commence an offer to acquire 15%+ shares
-RO makes bid for all of L - mixed cash and shares, minimum tender condition - stated intention that if it does not acquire all shares of L, it will get them in second step squeeze out (will pay same consideration as under the bid)
*L says consideration was inadequate
-B than makes competing offer for all of L - mixed cash and shares, same minimum tender, same intention to acquire remaining shares in second step; again, L recommends that they reject
-RO then extends its offer - increases the consideration; L recommends to reject
-L was doing all the right things with regard to its fiduciary duties (at least on the surface) = special committee, stated intention to maximize shareholder value
*intention to keep L intact, get new management and try and develop assets owned by L - they are in negotiations with several other parties, entering into confidentiality agreements, etc.
    -estimated that there was a good possibility that there would be another transaction with greater value to the shareholders, and that this transaction would increase the value offered by RO and B
-RO and B bring application to cease trade the Lac plan
Issue
-Is it time for the poison pill to go?
Ratio
-Commission will only cease trade an SRP when it considers it in the public interest
-Shareholder approval of the SRP was considered, but it wasn't determinative b/c approved 3 years prior to sequence
-If SRP remained in place, neither RO or B would take up shares under their bids = substantially likelihood that these bidders would withdraw and shareholders would not have the opportunity to decide between all of the options available to them

*however, there is evidence that the L board would waive the SRP sooner if the minimum tender in either bid was met = L shareholders would not be deprived of their ability to respond to one of the takeover bids; however this was not made clear to L shareholders and should have been made clear b/c otherwise they would not tender
-OSC determines that L can get another transaction on the table that will create greater value to shareholders within a limited period of time = not the time for the plan to go
*Commission is hesitant to second guess the business judgment of the BoD - BoD understood its responsibilities in corporate law and under the rights plan - would cease trade the SRP if all of the conditions of the bud were met and the SRP stayed in place
Seems to be an acknowledgment that as both bids had a minimum tender condition, and L was willing to accept either of the bids at the minimum tender - the SRP really wasn't doing anything but hedge L's bet that the company would not alter the minimum tender condition = not much harm to keeping it around

Re Royal Host Real Estate Investment Trust

Facts
-RH made a bid for CHIP
*3 days later CHIP adopted an SRP, without approval
-RH mails out its circular, and the bid complied with all of the permitted bid criteria, except the requirement that the bid be open for 60 days
-CHIP recommends that shareholders reject RH's bid because it was inadequate for a bunch of reasons
-RH sought orders terminating the operation of the SRP
Issue
-Is it time for the pill to go?
Ratio
-List of factors that have been offered to determine whether an SRP should be cease traded:
1) Was Shareholder approval obtained - *Cara:* If a plan does not have shareholder approval it will be suspect; however, shareholder approval in and of itself will not establish that a plan is in the best interests of the shareholders
2) When was the plan adopted
3) Whether there is broad shareholder support for the continued operation of the plan;
4) Size and complexity of the target company;
5) Other defensive tactics?
6) Number of potential, viable offerors;
7) The steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
8) Likelihood that, if given further time, the target company will be able to find a better bid or transaction;
9) The nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
10) The length of time since the bid was announced and made; and
11) The likelihood that the bid will not be extended if the rights plan is not terminated
Overall: If there appears to be a real and substantial possibility that the board of the target can increase shareholder choice and maximize shareholder value, then absent a compelling reason requiring the termination of the plan in the interests of the shareholder, the commission should allow the plan to function for such further period

Re Neo Materials Technologies Inc.

Facts
-Neo adopted an SRP that would require any permitted bid to have an irrevocable minimum tender condition
-Partial bid made, for a maximum of 20% of the shares of the target company not already owned by the bidder
*later reduced to 9.5% - bidder just want's a control position b/c already had 20% of shares
-Neo adopts a new plan that would require any permitted bid to be made to all shareholder for all of their shares
*approved by significant majority of shareholders in circumstances that indicated the shareholders knew they were indirectly voting against the hostile offer
Ratio
-OSC - Rejected narrow proposition that the only legitimate use of an SRP was to provide the directors of the target company with adequate time to find alternative bidders
*SRP's may be adopted for broader purposes of protecting the long-term interests of the shareholders, where, in the directors' reasonable business judgment, the implementation of a rights plan would be in the best interests of the corporation
-Central issue in reviewing an SRP is whether or not the time had come for the pill to go

*in assessing whether it was that time - have to consider whether directors have been enabled to fulfill their fiduciary duties
Here plan was permitted to stay - despite not looking for alternative transactions
OSC explained its Neomaterials decision: did not stand for the proposition that the commission will defer to the BJ of target board in considering whether to CT an SRP, or that a board in the exercise of its fiduciary duty can just say no to a TOB, instead in Neomaterials, the commission deferred "to the wishes of the SH's" as expressed in their strong approval of the SRP in the face of the bid

Re Inco Ltd

Facts
-I had SRP that triggered at 20%
-T made unsolicited takeover bid that met all of the conditions of the SRP except 1
*I's BoD advised shareholders to reject the T bid
-T then announced that it would revise its bid to meet all of the requirements for a permitted bid
-I begins exploring other options - finds a proposed combination with PD subject to shareholder/court approval
*under the PD arrangement - I agreed not to solicit any more proposals relating to alternative transactions, subject to a few exceptions, and not to engage in any discussions or negotiations for alternative transactions
    -I's BOD recommended that shareholders vote in favour of PD
-T tries to get SRP cease traded
*I agree's to lift the SRP against T, but keep it in effect generally
Issue
-Whether lifting the rights plan should apply to all parties?
Ratio
-I doesn't want it to be lifted for all parties because the rights plan should still be maintained against future bidders because these bids may be coercive or otherwise to I's shareholders
-The commission disagrees - unrestricted auctions produce the most desirable results, and rights plans are tolerated only to the extent that they allow a board of directors of the target company to fulfil its fiduciary duty
*here, the commission deems that I was still at play and more bids could very well come forward
    -says that the shareholder rights plan privileges T and P+D to the detriment of other bidders who may be accepted by I shareholders
-Lifts the rights plan by saying that the commission can look after any abusive bids to the shareholders, should any come forward

Re Falconbridge Ltd

Facts
-Takeover contest for control of F between I (friendly) and X (hostile)
-F board adopted an SRP, without shareholder approval, to expire in 6 months unless it had received approval by that time
*6 months comes, and instead of seeking approval, F executed a Replacement Rights Plan w/o shareholder approval
-I's friendly offer was launched under the 1st rights plan, and the offer was extended 3 times with last expiration date falling under second plan
-Before expiration of I's bid, X made a bid - all cash, minimum tender @ 66% waivable at X's option (unusual)
*F and I are concerned that as X already had 19%, they could waive the condition after they had acquired just enough shares to effectively block I's bid
-X applies to OSC to have the replacement right plan cease traded
Ratio
-Looks at the Royal Host factors = Despite the fact that the plan was a tactical plan that had not been approved by the shareholders, and had been in place for over 9 months, commission held that it would be in the public interest for the plan to continue to operate for a month

Re Icahn Partners LP (affmd by BCCA)

Facts
-I launches takeover bid of LG
*in response to the bid, LG adopts SRP - took no alternative steps to seek an alternative transaction
-I applies to BCSC to cease trade the rights plan
Ratio

-Reluctance of regulators to interfere with target directors' exercise of their fiduciary duties was premised on the practice of target boards of making efforts to maximize shareholder value in discharging their fiduciary duty, as well as a recognition that the shareholders ultimately have the opportunity to decide whether or not to tender into the bid
-Here, directors of LG had not taken value-maximizing steps - in the absence of any attempts by the target to take any steps to increase shareholder value through an improvement of the bid or the presentation of alternative transactions, there is no basis for allowing an SRP to continue
*rejected proposition that *Pulse* and *Neo* could be interpreted as authority for the proposition that directors could "just say no" to a hostile bid - said that these 2 decisions did not represent any significant change to the regulator's public interest policy principles governing SRP's - allusions to "circumstances changing could lead to change in the decision" in these decisions without further illumination of what those circumstances were "limits the usefulness of the authorities"

    probably had to do with the shareholder support of the plan - says that too much weight was given to this factor in *Neo and Pulse* - even if majority of shareholders who vote approve the plan, there is often a significant deal who do not vote and are deprived of their right to decide between selling their shares or not

-SRP's can be allowed to stand if they provide BoD more time to discharge their obligations to shareholders, and there is real and substantial possibility that the board can get a better offer
-Cease traded the plan = SRP deprived shareholders of the opportunity to choose - said that not to do so where there was no expectation that the target company will seek alternatives would be a dramatic and, unwelcome change in the public interest policy principles governing the use of SRPs in takeover bids
the notion that in the case of an all shares, all cash bid, the only threat posed was one of inadequate value

Deal Protection Measures/Plans of Arrangement

Deal Protection Measures

-No-one wants to be a stocking horse of a deal, as they are expensive to participate in, and so they make target give them some kind of protection to guard against this
-Deal protection measures will be scrutinized by courts - found acceptable to the extent that they help facilitate an auction by inducing reticent bidders to make an offer; will not be tolerated if they inhibit an auction, or favour one bidder over others
-4 Common deal protection measures are:
1) No shop/non-solicitation - prohibits target from soliciting takeover proposals from a 3rd party or providing information to a 3rd party that they might use in their proposal
*will usually include a "fiduciary out" permitting directors to the extent required by their fiduciary obligations, to negotiate with a 3rd party offeror if the directors of the target determine that the 3rd party offer constitutes a supernal proposal (superior proposal being a defined term in the merger agreement). In the absence of such clause directors' fiduciary obligations will prevent them from blindly ignoring superior proposals

    -will sometimes come along with matching rights - original acquirer will be given opportunity to match superior proposal

*there are also "go-shop" provisions which allow a company to shop around for deals for a little while before the no-shop kicks in
2) Break fees - Substantial cash payment (lump-sum as a percentage of the deal) that the target company agrees to make to the acquirer in the event that the deal is not completed (in particular if the reason for not completing is that the target accepts a superior proposal from another party). They can also be between parties where it is unclear who is the target and who is the acquirer.
**CW* - 2.6% was a break fee "well within normal industry parameters"; text suggests anywhere from 2.5-5% is good

    -final word on fees is that they are acceptable to the extent that they entice a bidder to the table + create an auction, but not so high that they deter any other bidder from making a competing bid

*usually calculated on equity value, but can be calculated on enterprise value [(equity + debt - cash on hand)]
*<u>Reverse Break fees</u> - protect selling firms, acknowledge the fact that there will be repetitional effects on the target if the dealer pulls out

    -courts seem to treat reverse break fees as an option, so as not to allow the target to enforce specific performance, while having the break fee in their back pocket as well

3) Stock Options - target offers share purchase options as an inducement to bidder (form sort of a break fee - as if they lose to a rival, and the stocks increase in value, the offeror can cash in)
4) Lock Up/Support Agreements - bidder seeks an agreement from major shareholders to tender their bids
*has raised certain issues with regard to post-bid squeeze outs

Institutional Shareholders

-Institutional shareholders, when they hear a hostile bid announced, will purchase large blocks of shares in the target, and sell shares in the bidding company

*what this means is that the long-term investors sell their shares to short-term speculators, and these are the people who are asked to tender to the bid

-some people think that this effects the integrity of the ToB rules regarding SH support - others question the economic significance that ought to be attached to the presumed distinction between long-term investors and short-term investors

Plans of Arrangement

General + Process

-Can include an amalgamation, a transfer of all or substantially all of the property of a corporation, or a going-private or squeeze out transaction

-Useful because:

1) Flexibility - arrangements can make it possible for an acquisition to be completed in a single-step transaction rather than 2 transactions

2) Comprehensiveness - can deal simultaneously and comprehensively with both debt and equity of a target corporation, whereas other acquisition methods involve only the equity of the target

3) Certainty - involves court approval - so parties know that once the arrangement is complete it will be difficult if not impossible to impugn

4) Tax+Securities Advantages - allows corporate transaction to be completed in a way that solves timing and other things that could lead to adverse tax implications. If company has US shareholders, it also avoids the costly+time consuming requirement of filing a registration statement with US securities authorities

5) Other advantages in cross-border deals - where a US corporation is acquiring a Canadian corporation the plan of arrangement facilitates a one-step transaction in which Canadian shareholder may receive exchangeable shares, which avoids triggering capital gains tax on the Canadian shareholders if they just received shares of the American acquirer straight up. Where an exchangeable share structure is used, Canadian shareholder receive shares of a Canadian corporation that is essentially the mirror of the rights and attributes of shares in the American parent, but because they are Canadian shares they permit a "rollover" that amounts to a deferral of the capital gains tax that would otherwise be payable.

-Steps to completing a plan of arrangement:

1) Party seeking approval of the arrangement applies to the court for an interim order - this order sets out what procedure the applicant intends to follow in order to seek approval of the proposed arrangement from shareholders and other interested stakeholders (meetings/voting approval/ quorum thresholds/ dissent and appraisal rights/ notice and disclosure requirements) - textbook notes that while dissent and appraisal rights are not mandated, they should be granted

*SCC in BCE has said that there will be cases where those who are not shareholders but have legal rights should be considered in the arrangement - probably in situations of insolvency - the Director of the CBCA has also said that there will be some cases where rights holders should be entitled to vote (not sure how relevant that is)

2) Court approves proposal - will consider whether affected shareholders have recourse to dissent and appraisal rights

3) Applicant holds meetings, seeks approvals in accordance with the interim order, then goes back to the court to seek a final order approving the arrangement

4) 3 part test (*BCE*):

A)Have the statutory procedures been complied with?

B) Has the application been put forward in good faith?

C) Is the arrangement fair and reasonable? (2 step)

I) Whether the arrangement has a valid business purpose?

II) Whether it resolves the objections of those whose rights are being arranged in a fair and balanced way?

*a "fairness opinion" from a financial firm is valuable in this test - as that opinion will say whether the consideration received by security holders is "fair from a financial point of view"

5) Applicant files its articles of arrangement - may include amendments to the applicant corporation's articles of incorporation - attached to the articles of arrangement filed with the CBCA Director (or I guess in BC the registrar)

BCBCA 288-291

288 - Arrangement may be proposed

(1) A company may propose an arrangement with shareholders, creditors or other persons and may, in that arrangement, make any proposal it considers appropriate, including a proposal for one or more of the following:

(a) an alteration to the memorandum, notice of articles, or articles of the company;

(b) an alteration to any of the rights or special rights or restrictions attached to any of the shares of the company;

(c) an amalgamation of the company with one or more corporations;

(d) a division of the business carried on by the company;

(e) a transfer of all or any part of the money, securities or other property, rights and interests of the company to another corporation in exchange for money in exchange for money, securities or other property, rights and interests of the other corporation;

(f) a transfer of all or any part of the liabilities of the company to another corporation;

(g) an exchange of securities of the company held by security holders for money, securities or other property, rights and interests of the company or for money, securities or other property, rights and interests of another corporation;

(h) a dissolution without liquidation, or a liquidation and dissolution of the company;

(i) a compromise between the company and the persons holding its securities or any class of those persons

(2) Before an arrangement proposed under this section takes effect, the arrangement must be:

(a) adopted in accordance with section 289, and

(b) approved by the court under section 291.

289 - Adoption of arrangement

(1) An arrangement is adopted for the purposes of 288(2)(a) if

(a) in respect of an arrangement proposed with the shareholders of the company,

(i) the shareholders approve the arrangement by a special resolution, or

(ii) if any of the shares held by the shareholders who under subsection (2) are entitled to vote on the resolution to approve the arrangement do not otherwise carry the right to vote, the shareholders approve the arrangement by a resolution passed at a meeting by at least a special majority of votes cast by the shareholders, if at least the prescribed number of days' notice of the meeting and of the intention to propose the resolution has been sent to all of the shareholders,

(b) in respect of an arrangement proposed with the shareholders holding shares of a class or series of shares of the company, those shareholders approve the arrangement by a special separate resolution of those shareholders,

(c) in respect of an arrangement proposed with some of the shareholders holding shares of a class or series of shares of the company, those shareholders approve the arrangement by a resolution passed at a meeting by at least a special majority of the votes case by those shareholders, if at least the prescribed number of days' notice of the meeting and of the intention to propose the resolution has been sent to all of those shareholders

(d) in respect of an arrangement proposed with creditors of the company or a class of creditors of the company a majority in number and 3/4 in value of the creditors or class of creditors, as the case may be, present and voting, either in person or by proxy, approve the arrangement at a meeting if at least 21 days' notice of the meeting, and of the intention to propose the arrangement, has been sent to all of those creditors with whom the arrangement is proposed,

(e) in respect of an arrangement proposed with any other persons, those persons approve the arrangement in the manner and to the extent required by the court, or

(f) in respect of any arrangement, all of the persons who would be entitled to vote under this section in respect of the arrangement consent to the arrangement in writing

(2) Each share of a company carries the right to vote in respect of a resolution referred to in subsection (1)(a)(ii) whether or not that share otherwise carries the right to vote

(3) If the court orders, under section 291(2)(b)(i), that a meeting be held to adopt an arrangement in addition to or in substitution for a meeting contemplated by subsection (1) of this section, the arrangement must not be submitted to the court for approval until after

(a) the arrangement has been adopted at that court ordered meeting, or

(b) all of the persons who were entitled to vote at that meeting consent to the arrangement in writing

(3.1) If the court orders, under section 291(2)(b)(ii), that a separate vote of specified persons be held to adopt an arrangement in addition to or in substitution for a meeting contemplated by subsection (1) of this section, the arrangement must not be submitted to the court for approval until after

(a) the arrangement has been adopted by that vote, or

(b) all of the persons who were entitled to vote in that separate cote consent to the arrangement in writing

(4) If an arrangement is consented to under subsection (1)(f), (3)(b), or (3.1)(b).

(a) the meeting or vote that would otherwise have been necessary under subsection (1), (3) or (3.1) need not be held, and

(b) the consent is as valid and effective as if it had been expressed in a vote passed at a meeting.

290 - Information Regarding Arrangement

(1) If a meeting is called to adopt an arrangement, the company must, unless the court orders otherwise,

(a) include with any notice of the meeting that is sent to a person who is entitled to vote at the meeting, a statement

(i) explaining, in sufficient detail to permit the recipient to form a reasoned judgment concerning the matter, the effect of the arrangement, and

(ii) stating any material interest of each director and officer, whether as director, officer, shareholder, security holder or creditor of the company, or otherwise, and

(b) include in any advertisement of the meeting,

(i) the statement required by paragraph (a), or

(ii) a notification that the persons who are entitled to vote at the meeting may, on request, obtain copies of the statement before the meeting

(2) If the arrangement affects the rights of qualifying debentureholders, the statement referred to in subsection (1)(a) must, unless the court orders otherwise or unless the trustee for the qualifying debenture holders is a savings institution, include a statement regarding any material interest of the trustee for the qualifying debenture holders

(3) A company that has included in an advertisement referred to in subsection (1)(b) a notification that copies of the statement referred to in subsection (1)(a) may be obtained must, unless the court orders otherwise, send, promptly and without charge, a copy of the statement to each person entitled to vote at the meeting who requests a copy

291 - Role of Court in Arrangements

(1) If an arrangement is proposed, the court may make an order respecting that arrangement under subsection (2)

(a) on its own motion,

(b) on the application of the company, or

(c) on the application, made on notice to the company, of

(i) a shareholder of the company,

(ii) a creditor of the company, or

(iii) a person who is a member of the class of persons with whom the arrangement is proposed

(2) The court may, in respect of a proposed arrangement, make any order it considers appropriate, including any of the following orders

(a) an order determining the notice to be given to any interested person, or dispensing with notice to any person, in relation to any application to court under this Division;

(b) an order requiring the company to do one or both of the following in the manner and with the notice the court directs:

(i) call, hold the conduct one or more meetings of the persons the court considers appropriate;

(ii) hold a separate vote of the persons the court considers appropriate;

(c) an order permitting shareholders to dissent

(d) an order appointing a lawyer, at the expense of the company, to represent the interests of some or all of the shareholder;

(e) an order directing that an arrangement proposed with the creditors or a class of creditors of the company be referred to the shareholders of the company in the manner and for the approval the court considers appropriate

(3) As part of any order made in respect of a company under subsection (2)(c) of this section, the court may direct the company to provide, in the manner specified by the order, a copy of the entered order to all or specified shareholders.

(4) Without limiting subsections (1) to (3) but despite any other provision of this Act, on an application to court for approval of the arrangement,

(a) if the arrangement has been adopted under section 289 and, if required, approved by the shareholders in accordance with an order made under subsection (2)(e) of this section, the court may make an order approving the arrangement on the terms presented or substantially on those terms or may refuse to approve that arrangement,

(b) if, under the arrangement, money, securities or other property, rights or interests, or liabilities, of the company are to be transferred to another corporation, the court may make

(i) an order providing for the allotment or appropriation by the receiving corporation of any shares or other securities that, under the arrangement, are to be allotted or appropriated to or for any person,

(ii) an order providing for the continuation by or against the receiving corporation of any legal proceedings pending by or against the transferring company, or

(iii) an order providing for the dissolution of the transferring company, and

(c) the court may make any incidental, consequential and supplemental orders necessary to ensure that the arrangement is fully and effectively carried out

(5) If an order of the court made under this section provides for the transfer of money, securities or other property, rights or interests, or liabilities of the company,

(a) the money, securities or other property, rights or interests are deemed to be transferred to and to vest in the receiving corporation, or the liabilities are deemed to be transferred to and become the liabilities of the receiving corporation, when the applicable provisions of the order take effect, and

(b) any particular money, securities or other property, rights or interests that are, by the arrangement, to be freed from any charge are freed from that charge if the order so directs

McEwen v Goldcorp Inc. (2006)

Facts

- Gold and Glam enter into a transaction

*Gold agreed to acquire the shares of Glam in exchange for shares in Gold

-whole transaction involved a plan of arrangement from the perspective of Glam, Gold's role int eh transaction did not involve an arrangement (no approval of shareholders was needed)

-One of Golds shareholders appose the deal - argued that the proposed transaction constituted an arrangement, and therefore requires the approval of all of G's shareholders

Issue

-Can something that is not technically an arrangement be considered an arrangement because of the practical effects?

Ratio

-An arrangement must be proposed under the statute - to hold otherwise would be ridiculous because then anyone who is unsatisfied with a transaction can challenge it

*this would be contrary to legislative intent and would undermine the director's mandate to manage the business affairs of the corporation

Parties must explicitly propose a plan of arrangement under the relevant statutory provisions

Pacifica Papers Inc Estate

Facts

-P+N enter into an agreement whereby N would acquire P in a share exchange merger

*transaction was structure as a plan of arrangement under the CBCA (needed support of 2.3 of shareholders + had to be approved by the court as being "fair and reasonable"

*one of the elements of the merger agreement was an agreement by P to lock up 50% of shareholders before N would sign a definitive merger agreement

-P secured 10 significant shareholders, holding more than 50% of the shares to support the merger

*lock-up agreements were signed well before P distributed its procy circular relating to the shareholder's meeting

-C, P's largest shareholder (19%), does not support merger - suggests that P had not run an auction and had not obtained fair value for P's shareholders

-P holds shareholder meeting, gets approved by 74%

*P goes to BCSC for a final order, C opposes petition - says that plan should not be approved because the plan was not fair and reasonable

-central element of C's complaints related to support agreements - said that the agreements were obtained in contravention of the proxy solicitation rules because they were solicited before P's proxy circular was distributed - invalidated the plan of arrangement

-also said that P should have had an auction before agreeing to the transaction with N

Issue

-Was the plan fair and reasonable

Ratio

-BCSC - Plan of arrangement is approved - it is fair and reasonable

-With regard to fairness:

*73.6% shareholder support is a convincing majority

*while the process was a negotiation between these parties without an auction - the board voted 5-1 in favour of it after an arms length offer-counter offer-offer-counter offer process

*increased the liquidity in P's shares, affords P's shareholders the opportunity to continue their investment or cash out

*dissent rights were offered under the arrangement - and C was the only one who was in a position to exercise these rights after the plan was approved (and if C thinks its shares have higher value, they can use the dissent rights and have the court value them and force N to buy them)
*P has been looking to recognize on shareholder value for a while, but unsuccessfully until this combination
*variety of fairness opinions backed up board's inevitable decision
*market increased trading price of P after combination was announced = probably means market saw the value of the combination
Decision just demonstrates a whole bunch of factors that you can look at

Protiva Biotherapeutics Inc. v Inex Pharmaceuticals Corp.

Facts
-Through a plan of arrangement, I transferred all of its property, rights, interests and liabilities to T
*result of this was that I's contractual obligations with P were also transferred to T
-P appealed the approval of the plan of arrangement
*say that assignment of contracts with I required P's consent - which it was not willing to give because it felt T was going to go into direct competition with P, and that by assigning the contracts to T, I was no longer under the confidentiality provisions and would not be constrained from carrying in the business activity prohibited by the contracts
-I argued that the court had broad discretion under the Act to approve any plan of arrangement as long as the arrangement was fair and reasonable to all of those affected by the arrangement
Issue
-Whether the broad discretion of the court under the Act included the ability of the court to approve an arrangement that would essentially circumvent P's contractual rights
Ratio
-Because the reorganization was otherwise fair and reasonable from a business perspective, the court preferred to approve the plan of arrangement as long as it could find a way to address any prejudice that might be suffered by P as a result of not allowing it to withhold its consent to the assignment of the contracts
*no prejudice to P that could not be removed by means of court orders using 291(4)(c) - uses this section to make a whole bunch of orders mitigating the losses to protiva
Basically seems to show that if the court determines that the arrangement was fair and reasonable from a business perspective, then they will be hesitant to not allow the plan of arrangement to proceed on account of one 3rd parties rights being effected - and will use their power to make orders to enable this success
    -here - it also seems that there was a feeling that by allowing P to succeed, it would have been allowing P (a 3rd party) an effective veto over the whole transaction - which was unpalatable
As long as the prejudice to a 3rd party can be minimized or eliminated through the plan of arrangement or by way of a proposed court order in connection with he court approval of the plan of arrangement, such resistance will not be a bar to a company's access to the arrangement mechanism

Shareholders' Meetings/Proxy Fights

BCCA s 167, 169, 171-174, 182 - Meetings of SHs

167 - Requisitions for GMs
(1) Shareholders who, at the date on which the requisition is received by the company, hold in the aggregate 5% of voting shares can requisition meeting for the purpose of transacting any business that may be transacted at a general meeting.
(3) The requisition must state the business in less than 1000 words, be signed, and delivered to the registered office of company. Can be in more than one record (important date is the date the first record is received
(5) Regardless of articles, the directors must call GM within 4 months after receipt of the requisition and must
    (a) send notice of the meeting at least the prescribed # of days but not more than 4 months before the meeting to each SH and directors, and
    (b) send the 1000 word requisition.
(7) Dirs need not comply with (5) if
    (a) dirs have called GM after date the requisition is received and have sent notice in accordance with s169
    (b) substantially the same business was submitted to SHs to be transacted at GM that was held not more than the prescribed period before receipt of req
    (c) the business stated does not relate in s significant way to the business or affairs of the co

(d) primary purpose of the req is
(i) securing publicity, or
(ii) enforcing a personal claim
(e) the business stated has already been substantially implemented
(f) if implemented, the business would be committing an offence OR
(g) deals with matters beyond the company's power to implement.

(8) If dirs dont send notice of meeting within 21 days of receipt of requisition, the requisitioning SHs, or any one or more of them holding 2.5% of voting shares may send notice of GM.
(9) Must be called in accordance with (5), be held within 4 mos after receipt of req, be conducted as nearly as possible in the same manner as a GM called by directors.
(10) Unless SHs resolve otherwise by ordinary resolution, company must reimburse SHs for the expenses actually and reasonable incurred by them in requisitioning, calling and holding that meeting

169 - Notice of general Meeting
(1) A company must send notice of the date, time and location of a general meeting of the company at least the prescribed number of days but not more than 2 months before the meeting,
(a) to each shareholder entitled to attend the meeting, and
(b) to each director.
(2) The accidental omission to send notice of any general meeting to, or the non-receipt of any notice by, any of the persons entitled to notice does not invalidate any proceedings at that meeting.

171 - Setting Record Dates
(1) The dirs can set record dates for the purpose of determine number of SHs entitled to notice or to vote at a meeting.
(3) If no record date is set the record date for determining the shareholders who are entitled to notice of, or to vote at, a meeting of shareholders is
(i) 5 p.m. on the day immediately preceding the first date on which notice is sent, or
(ii) if no notice is sent, the beginning of the meeting.

172 - Quorum for SH meetings - Quorum is
(a) established by the memorandum of articles or
(b) 2 shareholders entitled to vote at the meeting whether present in person or by proxy, or
(c) if number of SHs entitled to vote is less than (a) or (b) than quorum is all of the SHs entitled to vote

173 - Voting
(1) A SH has one vote in respect of each share held by that SH and is entitled to vote in person or by proxy.
(5) A company must for at least 3 months keep at its records office each ballot cast on a poll and each proxy voted at the meeting.
(6) Any shareholder or proxy holder who was entitled to vote at a meeting referred to in subsection (5) may, without charge, inspect the ballots and proxies kept by the company under that subsection in respect of that meeting.
(8) Unless otherwise provided in the Act or Articles, any action requiring SH authorization requires an ordinary resolution

174 - Participation at meetings of SHs
(1) Unless articles say otherwise, SHs may participate by telephone or other communications medium if all shareholders and proxy holders participating in the meeting, whether by telephone, by other communications medium or in person, are able to communicate with each other
(2) Company not obligated to take any action or provide facility to permite the use of any communications
(3) If one or more SHs or proxy participate through telecommunication
(a) each SH is deemed to be present and
(b) the meeting is deemed to take place at location set in the notice

182 - Annual GMs
(1) Co must hold AGM
(a) for the 1st time, not more than 18 months after the date on which it was recognized and
(b) after the first, at least once in each calendar year and not more than 15 months after the annual reference date for the preceding calendar year.
(2) All SHs entitled to vote may
(a) by a unanimous resolution passed on or before the date by which that AGM is required to be held under this section, defer the holding of that annual general meeting to a later date
(b) by a unanimous resolution, consent to all of the business required to be transacted at that annual general meeting, or
(c) by a unanimous resolution, waive the holding of
(i) that AGM,

(ii)the previous AGM, or
(iii)any earlier AGM that the company had been obliged to hold.

(3) If they choose to waive AGM, SHs must select appropriate annual reference date
(4) Can ask the registrar to allow company to hold AGM on a later date

Proxy Contests

General

-**Meaning of "Proxy"** - originally referred to the person appointed by SH to act in the SH's place. Overtime proxy has come to used often to refer to the doc appointing the representative
-4 fundamentals of modern Canadian proxy rules are:
(1) Solicitation of proxies by management of public corps is MANDATORY
(2) Whenever proxies are solicited a proxy circular must be prepared and distributed to the SHs whose proxies are being solicited (Limited Exceptions- note broadcast exemption)
(3) The word soliciation is defined very broadly to ensure that the mandatory disclosure and other rules designed to protect SHs are not easily avoided
(4) Complex rules have been put in place to ensure that all beneficial owners of shares are able to vote their shares by proxy, even where the sera's are registered in the name of depositories, brokers, or others
-Following 3 ON cases illustrate extent to which the dirs of corp can manage the meeting process in the face of SH-requisitioned meeting:

(a) *RioCan:* RioCan seeking to acquire RealFund, they requisitioned RealFund to call meeting to considered RioCan's offer which was set to expire May 21, 1999. Real Fund set date for after expiry of the offer. RioCan applied to court and successfully argued that RealFund was under obligation to call meeting for date prior to the expiry of the offer.
(b) *Airline Industry Revitalization Co.*: Onex proposed to acquire Canadian Airlines and merge it with AirCanada. TOB of Air Canada was not possible because of federal statute. Onex requisitioned meeting of Air Canada to pass resolution to amend articles to make it possible for a bid to be launched pending Parliament's amendment to statute. Air Canad announced meeting but Onex wanted meeting earlier because Onex offer was set to expire, and special federal cabinet order was also set to expire. Court held that SHss were permitted to call meeting themselves, rejected dir's argument that they were not required to call a meeting when a notice had already been sent because that meeting couldn't deal with the business of the requisitioned meeting because the offer would be expired by then.
(c) Paulson: SH req'd meeting to remove directors and consider reorganization. Req'd on Nov 1 and requested that it be before Dec 31. On Nov 21st - Directors set it for March 22. Court denied the SH and said the directors had satisfied the statutory requirement of calling a meeting with 21 days - to call a meeting you don't have to send notice of the meeting. business judgement rule = within a range of reasonableness

-Timing can control surprise proxy attacks
**Ewart*: dissident SHs (using the 15 shareholders solicited rule) quietly garnered support for rival slate at AGM. When management realized this, they adjourned the meeting to provide SHs with addition time to deposit proxies on their own with full knowledge of the hotly contested election. Court held that the special circumstances in the instant situation warranted the unusual step of exercising judgment such as adjust the meeting.
-Use of quorum Requirement as tactic in Proxy Contest
*Wells v Melnyk (2008) ONT: PC btwn management of Bioval and major SH. Quorum was 51%. Day b4 meeting, major SH revoked proxies, which caused there to be loss of quorum. Morning of the meeting, directors amended the by-laws to reduce quorum requirement. They can do that but it has to get approved by SHs at the next meeting and at that point there was not enough notice. Court ordered that the meeting be reconvened at later date.
Definition of Proxy Solicitation
- *Brown v Duby*: letter that was sent to SHs that were resident in US that was strongly critical of management indicating that they did intend to solicit proxies but not at this time and requested the SHs not to sign the managements proxy - was considered solicitation

NI 51-102 - Continuous Disclosure Obligations - Part 9 (PROXY SOLICITATION AND INFO CIRCULARS)

** designed to protect minority SHs - make sure they get all the info to make informed decision
-CBCA reqs may apply to privately held corps, while NI 51-102 only applies to reporting issuers
-Soliciting = Solicit, in connection with a proxy, includes
(a) requesting a proxy whether or not the request is accompanied by or included in a form of proxy

(b) requesting a security holder to execute or not to execute a form of proxy or to revoke a proxy
(c) sending a form of proxy or other communication to a securityholder under circumstances that, to a reasonable person, will likely result in the giving, withholding, or revocation of a proxy; or
(d) sending a form of proxy to a security holder by management of a reporting issuer

9.1 Sending of Proxies and Information Circulars

(1) If management gives notice of meeting to SHs, management must at the same time or before giving notice, send to each registered voting SH a form of proxy for use at the meeting.
(2) Subject to 9.2 (exemptions), a person or CO that solicits proxies must (a) if on behalf of management, send an info circular with the notice of meeting or (b) any other solicitation, send an info circular concurrently with or before the solicitation

9.2 Exemptions from Sending Information Circular

specifies the circumstances under which an issuer is not required to send an information circular - (1) to beneficial owners where they exist
(2) a non management solicitation - doesn't have to send info circular if soliciting less than 15 security holders (if joint holders of one or more securities then considered to be one security holder
(3) non management solicition can solicit proxies without info circular if solicitation is made to the public by broadcast, speech or publication and the person has filed some of the information required under 51-102 - broadcast exemption does not apply if at the time of soliciation, a significant acquisition or restructuring transaction involving the reporting issuer and the person or company, under which securities of the person or company, or securities of an affiliate of the person or company, are to be changed, exchanged, issued or distributed UNLESS the solicitor has filed info circular or other document containing specified information on SEDAR
- broadcast exemption also doesn't apply to person or company nominating an individual for director unless certain info is contained in it

9.3 Filing of Information Circulars and Proxy-Related Material

Issuer must promptly file a copy of the information circular, form of proxy, and all other material required to be sent in connection with the meeting to which the information circular or form of proxy relates
*information must be current

9.3.1 Content of Info Circular

specifies what has to be in the info circular

9.4 Content of Form of Proxy

Indicates requirement of information and options that must be presented to a security holder through a proxy

9.5 Exemption

Proxy solicitation requirements in this part do not apply to a reporting issuer that complies with the requirements of the proxy solicitation laws of the jurisdiction in which it is incorporated, organized, or continues, if the requirements are substantially similar, and if the reporting issuer or other person/company files info circular and form of proxy, or other doc, promptly.

Pala Investments Holdings Limited v Bristol

Facts

-P is in a proxy battle C over the governance of R
*P owns 20% of R's issued and outstanding - wants to remove all of the directors from office and re-elect a P slate which excludes C
*C opposes P plan to reconstitute the board and favours the continuation of the BoD as it is
-P requests R BoD to convene shareholder's meeting, for the purpose of removing directors and electing new director
*R did not respond to the request and did not send a notice of meeting within 21 days as required = P exercised 167(8) right to call a special and general meeting of the shareholders
    -prior to this meeting P released a press release identifying its nominees for election, and mailed a circular + notice of meeting
-C manages to convince the BoD to pay for his circular, and mails his circular
-P runs to court - said that C lacked the statutory/company authority to circulate the form of proxy that they have compiled and thus they should be excluded from consideration at the meeting

Issue

-How can shareholders bring matters before meetings? what are the nature of the responses that other shareholders may make to such an initiative, the appropriate formulation and use of proxies, and the nature and extent of the court's authority to reject improperly formulated proxies or constrain their use?

Ratio

-Provided articles are not inconsistent with the BCBCA - the articles will govern the conduct of a general meeting of shareholders
*here the articles clearly contemplated the board giving 21 days notice of a meeting, and that a shareholder may ask the board to include a topic of discussion or a resolution in a notice of meeting (board may act or decline request)
-In the event that the board declines - shareholder has 2 options: 1) Wait for the meeting and then ask that the item of business be included; 2) Obtain the support of holders of 5% of shares and requisition the meeting
*if the board refuses the second option, than the shareholders are at liberty to circulate their own notice of meeting
-Any shareholder who is opposed to the resolution is likewise able to solicit provide in opposition - however if they have not gone through the process of requesting an item of business be on the agenda, then they have to live with the topics on the agenda
*however, proxy forms allow the proxy holder to vote on any new items that come up at a meeting so what the shareholder has to do is ask that the agenda be amended to add new business - upon which the chair of the meeting will decide based on the substance and complexity of the matter, extent of prior consideration by board of the matter, importance of the question, and any other factor the chair considers relevant
-Here: C did not take this course, and P did - it was not open to C to propose resolutions not contained in the circular by P, all they could do was solicit proxies to vote a certain way on the matter
-So then question is should the court exercise its discretion in 186 to provide directions regarding the use that may be made of any proxy tendered on C's form so that no shareholder will be inappropriately disenfranchised
*says that he needs to modify the proxy of C to line up with P in a variety of aspects and does so
**Rulings by a chair regarding proxies and their validity or use at a meeting of shareholders may be subject to a subsequent court challenge - at which point the court may exercise its discretion under 186 of the BCBCA to remedy any deficiency in the chair's actions or the conduct of the meeting
-Where a proxy was improperly formulated so as to render it invalid, the court may exercise discretion under 186 to provide directions regarding the use of those proxies in order to avoid the inappropriate disenfranchisement of shareholders**

Re Pacifica Papers Inc
Facts
-Company uses a lock up agreement to get a plan of arrangement through
-Majority shareholder says votes through lockups cannot be counted because they were secured in advance of a information circular = solicitation
Issue
-Is a lockup agreement prior to an information circular a solicitation
Ratio
TJ Judgement
-Support agreements were commitments to give proxies to vote in favour of the arrangement made prior to the completion of the agreement
*this technically violates 150(1) of the CBCA which prohibits the solicitation of any proxies before the information or proxy circular, and a notice of the shareholders meeting, were distributed to the shareholders
-Judge says that had they not entered the lockup agreement the result would have been the same - they would have given their proxies after the proxy circular had been distributed
*It was open to all shareholders to give or withhold their proxies regardless of whether they signed a support agreement - the lockup agreements were not binding/illegal - so then the lockup agreement cannot be seen as a solicitation because the shareholders could have voted their proxies any way upon the issuance of the information circular
CA
-Seems to suggest that s. 150(1) does not require the circular to pre-date the solicitation, but that the solicitation can be made so long as their is an information circular furnished
*BCSC imported a restriction on proxy solicitation into the CBCA that the language did not bear = no requirement to send a proxy circular to a shareholder prior to soliciting his/her proxy
-However, agreed with the BCSC conclusion that those shareholders who signed the support agreements could not be required to vote in favour of the merger b/c process are always revocable
-interesting conclusion based on the fact that the support agreements compelled the shareholders to deliver proxies to permit the shares they held to be voted in favour of the merger, and required the shareholders to "support the merger"

**Creates uncertainty as to whether you can lock-up votes in the context of plans of arrangement*

Blair v Consolidated Enfield Corp

Facts

-B is president of CE - fighting with another shareholder for control

-B is required by by-laws to be the chairman at the AGM - 11 candidates were proposed for 11 director positions

*B is one of nominated directors - 11 divide into 6-5 in favour of his camp over other shareholder's

-At the meeting other shareholder nominates 12th candidate from the floor

*12th candidate gets elected - B doesn't get elected

-Turns out later that B had been informed by council the night before that the other shareholder's proxies could be used to vote only in favour of the management slate b/c they had not specified anything else

*after surprise candidate is elected - consults with council again, and then rules that the proxy votes in favour of the surprise candidate were invalid + so he had received no votes

-then calls another shareholders meeting for the purpose of settling the outstanding voting issues

-Sued for breach of fiduciary duty

*TJ - B's ruling was wrong in law = breach of fiduciary duties - dismissed his application to be indemnified by the corporation for legal costs incurred in his corporate actions on the basis that his conduct had not been in the best interests of the company, and was therefore outside the scope of the indemnification provided for in the Act

*CA - upheld the TJ's ruling on the law, however, set aside decision on indemnification

Issue

-Can B be indemnified after being sued for breach of fiduciary duties?

Ratio

-3 conditions to be indemnified:

1) Person must have been made a party to the litigation by reason of being a director or an officer of the corporation;

2) the costs must have been reasonable incurred; and

3) the person must have acted honestly and in good faith with a view to promoting the best interests of the corporation

-Here:

1) Obviously yes - respondent is involved in the litigation in his capacity as director/chairman of the corporation, not in his personal capacity; respondent's participation in the impugned proceedings flows entirely from his roll as chairman of the meeting, not from his status as a shareholder

2) Yes - B added nothing to the costs of the litigation arising out of the shareholder's annual meeting; his conduct following the shareholders' meeting, in requisitioning another meeting was consistent with his protestations that he had no interest in leading the company if voted out by the majority of informed shareholders

3) Yes:

*persons are assumed to act in good faith unless proved otherwise

*best interests of the corporation in this appeal centre solely on the maintenance of the integrity and propriety of the voting procedure

*duty of chairman is one of honesty and fairness to all individual interests and is directed generally toward the best interests of the company

-fact that chairman had an interest in the outcome does not impugn the integrity of the process because of the mere appearance of bias - corporation's shareholders concluded that the president of the company should the the chairman = person who invariably is interest in every matter discussed at the shareholders' meetings

-duty of fairness is tempered with the need to control and organize a meeting so as to ensure that it proceeds effectively

*respondent - in closing the debate on the proxy issue - was fulfilling his responsibilities as he understood them from council; allowing meeting to devolve into a shouting match between rival camps would not enhance the validity and integrity of the voting procedure

-fact that he made the impugned ruling with the bona fide intent that the corporation have a lawfully elected BoD = evidence that he acted honestly and in good faith and with a view tot he best interests of the corporation (however, not that de facto reliance on legal advice will not guarantee indemnification - reliance has to be reasonable and in good faith)

-Overall: by following the instructions on the proxies and then requisitioning a new meeting, he gave all shareholders an opportunity to make a fully informed decision regarding the election of directors, thereby promoted the integrity of the corporation's voting procedures; other shareholders suffered no prejudice in respect of tis voting rights, it could re-nominate and support it's candidate at the new meeting

US Gold Corp v Atlanta Gold Corp

Facts

-Proxy contest between US and management of AG over whose nominees would constitute the BoD

*AG solicited proxies to elect its BoD, increase the authorized capital, and grant some options

*US opposed these proposals and sought to get its slate elected

-AG wins - US applies to have the voting results set aside

*had to do with proxies that were signed by an agent for the shareholder, but the document granting the agent authority had not been deposited with AG as required by the articles; also undated proxies

-TJ found in favour of US - put in US's slate, invalidated share and option authorization

*should have invalidated the votes where the agent's authority to act was not properly verified; should have invalidated the undated proxies

-AG appeals - said that the judge should use his powers under the (former company act) to validate otherwise invalid proxies where there were simple irregularities that resulted in the invalidation

Ratio

-TJ erred in not exercising his remedial powers - error stemmed from failing to consider the interests of the company and the shareholders

-TJ said that the court should not validate imprecise, unbusinesslike methods of business in public companies

*CA - says that this doesn't hold true for the agency proxies, as this conduct is completed by the agent and not by the company

-moreover, even if it did hold true for both grounds - sanctioning unbusinessmen like conduct is not grounds to deny a remedial order

-CA says that the remedial provision is the legislature recognizing that in a complex system of businesses there will be errors - thus, provided a simple method of correcting the mistakes and alleviating the consequences

*where a mistake is technical in nature, the court should not be hesitant to rectify it, and where the mistake deprives the rights of shareholders to have their proxies calculated they should be <u>really</u> hesitant not to rectify it

-here there is no doubt in both the agency and the date cases that the shareholder wished to express his/her wishes with regard to the vote - these irregularities represented 3 million shares - should be rectified as this is significant