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**Unocal Corp**

**Ratio** There is a two-prong test for determining the appropriateness of directors’ defensive maneuvers:

1. The directors must believe [subjective] on ***reasonable grounds*** [objective] that a danger to corporate policy and effectiveness existed due to another person’s stock ownership. This burden can be satisfied by showing a ***good faith and reasonable investigation***. [This prong very similar to ***Teck Corp v Millar***]

2. Proportionality is required: to be protected by the BJR, the decision must be reasonable in relation to the threat posed.

# Sole Proprietorship

### Advantages: Tax Benefit, Easy to Manage, can use loss as tax reduction

### Disadvantages: Personally liable for damages, Profit counts towards personal income – higher tax

# The Law of Agency

### Definition: principal manifest to agent to act on behalf and under certain principal control

## Formation of Agency:

### Requirements: consent, action by agent on behalf of principal, control by principal

* Consent by the principal and the agent
	+ Consent can be express, implied, oral, written, by conduct
* Action by the agent on behalf of the principal
* Control by the principal
	+ Independent contractor vs Employee

### Basile v HR Block Inc 2012 Penn US: 3 tests talked about, duty of loyalty as agent

**F:** HR provides electronic filing tax returns nationwide faster than paper filing. They got program known as “Rapid Refund” is electronic filing of tax returns quicker than paper return. HR gets Mellon bank to finance a loan (Refund anticipation loan) equal to anticipated tax return less a charge. Basile applied and received such loan in 1993. At trial basile said HR deceived their nature of loans. But trial judge said HR not their agent.

RAL – electronic filing used by customer, if approved, Mellon bank advance tax return loan to customer bank acct less the electronic filing fee and loan fee. Once tax return came – within weeks, used it to pay loan. Bank loan charge is 29 or 35$ not as a percentage. HR did not disclose that they receive payment from mellon bank for each loan advanced.

- Talks about 3 basic principles and uttermost good – Duty of loyalty, if a finding of agent = owes duty of loyalty

**I:** is HR an agent for Basile

**H:** No agency relationship established in loan with Mellon Bank. Missing consent – no authority to bind, no action on behalf of Basile. Agent owes uttermost good faith

**Dissent:** signing is just under test 3- control, does not signal consent or action.

**R:** talks about the 3 tests for agent/principal relationship 1) consent, 2) action, 3) control. Once found out, duty of loyalty applies.

## Duty of Loyalty

### Food Lion: 3 ways to breach of duty of loyalty, compete, misappropriate, breach confidence

Food Lion v Capital City

**Basic Facts**: The ABC television show Primetime Live aired a critical program about the food handling practices of the grocery store chain Food Lion based on the undercover reporting of two of its investigative reporters, Lynne Dale and Susan Barnett. Food Lion sued, not on the grounds of defamation, but on the basis of unfair trade practices, fraud, breach of contract, etc., because the reporters gained access by getting jobs at Food Lion stores based on false resumes, which most importantly did not mention that Dale and Barnett were also employed by ABC. At the district court level, Food Lion won and was given a minimal amount of money in damages, only $1,402 total, from the two defendants. ABC, on the other hand, was fined over $5 million, though the eventual amount was reduced to a little over $300,000 in post-trial proceedings. However, the court ruled that Food Lion could not recover publication damages—revenue or loss of stock value directly attributable to the publication of the story—because those damages could not be directly attributed to the fraud committed by the defendants. Both sides appealed the decision; ABC argued that they had not committed fraud at all, and Food Lion claimed that they should be awarded publication damages as well. The case eventually made its way to the U.S. 4th Circuit Court of Appeals.

**Questions**: Did the two employees breach their loyalty as to their fiduciary duty owed to FOOD LION.

**Decision**: 1) Reverse judgment that ABC committed fraud and unfair trade practices 2) affirm judgment that Dale and Barnett breached their duty of loyalty and committed trespass, 3) affirm, refusal to allow publication damages.

**Analysis**: “as a matter of agency law, an employee owes a duty of loyalty to her employer”

3 ways disloyalty arise

1. When the employee directly competes with employer
2. When the employee misappropriates the employer’s profits, property or business opportunities. Corporate misappropriation – when directors misappropriate company interest
3. Employees breach employer’s confidence – stealing trade secrets

**Ratio:**

1. When Would Principal be liable to torts committed by agent?
* Does agent has actual or apparent authority given by principal

## Liability of Principals for acts of agents in Tort

### Fisher v Townsends Inc: principal is vicariously liable in tort for employee, not IC, control test

**F:** motor accident, F injured, F was passenger, Reid was truck driver, F argue T should be vicariously liable for R’s negligence driving. Trial awarded 7 million. T hired R as chicken processing weighmasters to assemble chicken catching crews. R performed for T exclusively for 5 years, each chicken catching crew was transported to and from work sites in vehicles ownedby Reid. No seatbelts Neg for sure. F = C5 quadriplegic

**I:** Is Reid an agent of Townsend that allows for the principal of agent vicarious liability doctrine?

**A:** one type of agent/principal = employer/employee. All agents not employees = independent contractors. Also all non-agents who contract to do work for another are also independent contract.

If employer/employee= vicariously liable to superior

-If principal assumes right to control **time, manner and method of executing the work,** as distinguished from right to require **certain definite results in conformity to the contract**, then it is employer/employee.

-if only general control, and direction by contractee = independent contractor.

**H:** Terms in agreement not matter, record reflects T supplied R with daily movement sheets, identified the farm where the day’s work was to be done, total number of birds to remove or caged, which crew assigned job, time the crew to report. T owned truck, tool, cage, stools, paper masks, gloves, Manager visited and supervised the weighmasters, radios to report- supplied radios, used radio to control worksite. Exclusivity of task – only to one principal is not the factor – totality of the factors.

Therefore – all evidence suggests T exercised great control and therefore it is an employer/employee relationship.

**R:** considerations for IC or Employee

**Whether IC or employee consider**

* Extent of control
* Employee engaged in distinct occupation or business
* Under direction of employer or specialist without supervision
* Skill required in the occupation
* Employer or workman supplies instrumentalities tools, place of work
* Length of time of employment
* Method of payment, time or job
* Work is regular business of employer
* Do the parties believe they are creating relation of employer/employee
* Whether principal is business or not

## Liability of Principal in Contract

* The principal will be liable on a K b/t agent and third party when the agent acts with actual authority or apparent authority. This must be manifested and consented.

**Actual authority** includes express or implied.

* Express = oral or writing, Implied – power to do those things necessary to fulfill agency.
* Express authority of running restaurant = implied hiring employee, binding contract with supplier.

**Apparent Authority:** reasonable third party would infer from actions or statement from principal. Apparent principal makes a manifestation, somehow reaches a third party and third party believes the apparent agent is indeed authorized to act for the apparent principal

### CSX Transport: **actual/apparent authority can lead principal liable in k entered by agent**

CSX Transp. Inc. v. Recovery Express, Inc.

**F:** IDEC partner email to CSX want to buy rail cars scrap. Partner – Arillotta, represent self as from Recovery Express. alberta@recoveryexpress.com. Railcars delivered to location said by A and A went himself, the location was infact CSX railyard. Don’t know where scrap railcar is. After this CSX send invoice to IDEC address. IDEC called CSX, but no pick up because A told CSX not to speak to them. Not until check from A bounced did CSX call. Recovery claimed A never worked for them, How A got their email domain is not known, but they did share domain names and same office resources with IDEC. Other than these, no evidence that IDEC shared with Recovery any other assets, funds, books, Insurance…. IDEC is now Defunct made no appearances.

**I:** Can CSX shift consequences of its own gullibility and fraud dealing to someone else. Can an email domain by itself cloaks a purported agent with authority sufficient as matter of law to be called apparent.

**A:** the primary vehicle it seeks to do so is apparent authority – the power held by an agent or other actor to affect a principal’s legal relations with 3rd party when a third party reasonably believes the actor has authority to act on behalf of principal and that belief is traceable to the principal’s manifestations.

Granting an email domain name by itself does not cloak the recipient with carte blanche authority to act on behalf of grantee, (plus bad grammar) if this were true it would mean – every employee with a company down to night watchman could bind a company to the same contracts as president.

Analogous to giving someone a business card, company name, company car, stationary sufficient for manifestation of apparent authority

Could be more suspicious of an unsolicited, poorly written email that arrived late one Friday afternoon.

**Ruling:** No, CSX were unreasonable to rely solely on an email domain name as manifestation of apparent authority.

**R:** the test for apparent authority is: would a reasonable person believe the agent has authority to act on behalf of principal and that belief is traceable to the principal’s manifestation(显示).

## When Is Agent liable?

* Whether agent is liable depends on whether principal is disclosed. If fully disclosed, then principal is liable, agents are almost always liable for contract
* If no disclosure, the 3rd party rely solely on the trustworthiness of agent.
* If principal fails to perform contract made by agent. If agent had authority -> agent is not liable, because agent is not party to contract. Even if agent doesn't have authority, agent still wouldn’t be liable under contract.
* Agent would be bound if principal is not bound because of **Warranty of authority:** a promise that agent actually has such authority

**Steps to Take (Review)**

1. Does agency exist (principal and agent)
* If so what are the duties
1. Liability in Contract
* Does agent have actual or apparent authority, if not – agent breach warranty of authority. If yes – principal liable.
1. Liability in Tort
* Employee or IC? – degree of control
* If IC – then no vicarious liability for principal, but IC liable
* If employee – within scope of employment? If yes = liable. Agent is liable in itself

## Agency in Economics

Agency problem: because the agent commonly has better information than does the principal about the relevant facts, the principal cannot easily assure himself that the agent’s performance is precisely what was promised. As a consequence, the agent has an incentive to act opportunistically, skimping on the quality of his performance, or even diverting to himself some of what was promised to the principal. This means, in turn, that the value of the agent’s performance to the principal will be reduced, either directly or because, to assure the quality of the agent’s performance, the principal must engage in costly monitoring of the agent, in turn increasing the ‘agency costs’.

**Agency Problems**

* Conflict of Interest – Principal wants lowest cost – Agent wants highest remuneration at lowest effort.
* Information asymmetry allows agent to get away to their fiduciary duty.

**Agency costs 2types**

1. Agent misuse principal resource – steals from bank acct who gave access to agent.
2. Monitoring agent cost – installs monitor to supervise.

**How to mitigate agency cost**

* Align agent and principal – gives share to profit.
* Deal with information asymmetry – disclose information.

**Why Agency as the Building Block**

Partnership: each partner is an agent of the other

Corporation: each director is agent to the shareholders.

# Partnership

## Requirements of Partnership

### BCPA (2): relationship subsists b/t persons 1) carrying on buz 2) in common view of profit

* “Partnership is the relation which subsists between persons carrying on business in common with a view of profit”
* Persons: corporations and other entities
* Business: every trade, occupation and profession
* In common: together
* View of profit: purpose

Partnership is a contractual relation: formal or informal, express or implicit agreement.

* Does not matter if you label partnership or not. It can exist without partners themselves knowing.
* No special formalities, as long as business relationship has the key characteristics, then it is a partnership.

### BCPA (s. 4a) – On itself - no partnership for JT, TIC nor 4b) sharing of gross return alone

 In determining whether a partnership does or does not exist, regard must be had to the following rules:

* (a) joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to any property that is so held or owned, whether the tenants or owners do or do not share any profits made by the use of the property;
* (b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing the returns have or have not a joint or common right or interest in property from which or from the use of which the returns are derived;

### BCPA s.7(1) A partner is agent of firm & other partners for purpose of business of partnership.

### AE LePage: profit sharing for JT is not itself partnership (s.4), must carry on buz together

***A.E. LePage Ltd v Kamex Development Ltd 1977 OR***

Facts: apt. building, co-owners have invested; individual co-owner signed K with real estate agent, who is now trying to sue “partnership” not just individual, if co-owner not partner then the individual co-owner wouldn’t have the power to sign contract of sale, if co-owner is partnership – then he has the power

Issue: whether co-owners are partnership

Held: not partners, even though they shared profits and transfer was restricted - each co-owner had a “right of first refusal”

* co-owners intention to keep their property separate was confirmed by their individual treatment of their respective interests for tax purposes
* right of 1st refusal not inconsistent with the co-owners’ right to deal with their own interest
* No substantial participation in management of property (i.e., beyond co-own & sharing of profits)
* So the K not binding on the co-owners, just on the individual

Analysis: s.2 of PA: between persons carrying on business in a common with view of profit – mere fact that property is owned in common and that profits are derived does not of itself constitute the co-woners as partners. S4 of PA: JT, TIC, CP, does not itself create a partnership as to anything so held or owned whether share any profits made by the use thereof. Must carry on a business

**Evidence for partnership**: profit sharing, restrictions of transferability(right of first refusal) – allow others to make first bid , held out as partners, majority vote on disagreement.

**Evidence against partnership**: Separate income tax purpose, intention – in document says no partnership, owners can sale their respect property without consent by the other party, not inconsistent with right of first refusal: does not preclude sales.

* You can sue breach of warranty of authority – if can’t bind principal, you sue the agent. No apparent or actual authority.

**R:** mere fact that property is owned in common and that profits are derived does not of itself constitute the co-woners as partners (s.4) Must carry on a business!!

### Lansing Building: can deal indep with their realty interest, intent is not definitive (co-manage)

**Lansing Building Supply ON Ltd v Ierullo 1989**

**F:** TIC by both, profit sharing, co-management, restriction on transfer, shotgun provision, unanimous approval to transfer, co-management (business) instead of waiting for profit.

* Facts distinguishing this case from *LePage*: shotgun provision – can be forced to sell (inconsistent with a separate ownership interest) and carrying on business (developing real estate), not just (as in *LePage*) holding property & passively receiving rent.

**I**: Are the two defendants partners or joint tenants

* Existence of partnership is an objective inquiry
* Intention can be inferred from facts (rights & obligations in the agreement, nature of enterprise (passive?), their conduct, etc.)

**H**: Partners

Analysis: Shotgun provision – carried on business like indicated by the cheque, Mr. Barnett refered as partnership

**R:** 1) Intend no partnership is not definitive, 2) whether each can deal independently with their realty, 3) shotgun provision, active co-management = deemed partnership

**Note:** partnership or co-owner in property = whether each could deal separately with their independent interest in the real estate. Partnership – property is held by all partners and no right ot deal with it separately.

* Lansing demonstrates the fine line between co-ownerhsip and partnership: if the enterprise is ongoing, and there are restrictions on the right to deal with interest independently, it may be a partnership notwithstanding the express desire of the parties to avoid partnership.

Liability in Contract or Tort

* Contract: does agent have actual or apparent authority. Yes he has authority to purchase building supply, implied authority to take steps to facilitate purchase and agreement. If partner had authority in dealing with the ordinary daily business, the other partners are bound.

### Volzke Construc: alberta case: don’t need control to show partnership in ALTA

***Volzke Construction v Westlock Foods 1986 Alta***

Facts: co-owners of a shopping center; found to be partners, one didn’t pay building cost, sued the other as partners. Evidence shows Dave Shefsky of Westlock paid 32000 for 20% of interest.

Ratio: need not have any control over management in order to be found a partner (Partnership Act Alta – s.1d – between persons carrying on a business in common with a view to profit – nothing said about control, but how much activity is required?

* Use of common bank account, agreement to share the costs of developing the business, and common participating in financing the business & dealing with tenants concerns were all held to be indicative of a partnership here
* S.4c: the receipt by a person of a share of the profits of a business is prima facie proof that that person is a partner in business.

## Creditor v Partner

### BCPA s.4c-profit sharing is not partner if: debt, remuneration for employee, deceased family, creditor

(c) the receipt by a person of a share of the profits of a business is proof in the absence of evidence to the contrary that he or she is a partner in the business, but the receipt of a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him or her a partner in the business, and in particular

(i) the receipt by a person of a debt or other liquidated amount by installments or otherwise out of the accruing profits of a business does not of itself …,

(ii) a contract for the remuneration of an employee or agent of a person engaged in a business by a share of the profits of the business does not of itself ….,

(iii) the spouse or child of a deceased partner who receives by way of annuity a portion of the profits made in the business in which the deceased person was a partner….,

(iv) the advance of money by way of loan to a person engaged or about to engage in a business, on a contract between that person and the lender under which the lender is to receive a rate of interest varying with the profits or is to receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person carrying on the business or liable as a partner, as long as the contract is in writing and signed by or on behalf of all the parties to it, and

(v) a person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him or her of the goodwill of the business is not, merely because of the receipt, a partner in the business or liable as a partner.

### Cox & Wheatcroft: if once debt is paid no longer shares profit, then it's a creditor not partner

***Cox & Wheatcroft v Hickman 1860, 8 HL Cas 268***

**F:** C & W were creditors of an ironworks business; while the business was being operated by the trustees, it became indebted to Hickman; Hickman sued them, alleging that they were partners

**H:** not partners, not liable to pay the invoice.

**A: To be a partner is to have a business carried on for your benefit**.

While receipt of profit is evidence of a partnership, the presumption isrebuttable.

* Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners, and all are therefore liable for the ordinary trade contracts of the others.
* **Mere occurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtors to continue his trade, apply profits in discharge of their demands, does not make them partners with their debtors, or trustees.**
* The trade **is not carried on by or on account of the creditors** –
* 100 lists of creditors – one company Midland Railway Company – only 39 dollars – it is absurd to say they are a partner.

Notes: before partnership act, confirms that **dormant partners**: partners not involved in the management of the business are nevertheless liable for the acts of other partners in carrying on the partnership business.

**R:** if trade is not carried on by or on account of the creditors, purpose of profit sharing is to pay off fixed amount of debt and once debt paid off, no longer shares profit then its creditor not partner.

### Pooley v Driver: Dormant lenders are partners, unlimited profit sharing & terminate on bankrupt

Pooley v Driver(1876):

**F**: Partners in manure business agreed to split profits with “Lenders” in accordance with their capital interests. Pooley holder of several bills of exchange drawn by Charles Borrett Co. Charles goes bankrupt, Pooley sues Driver because apparently Charles and Driver both lends to Borrett and Hagen. Arguing they were partners. Driver argues he merely lends money.

**H**: In looking at the whole relationship between the Lenders and the partnership as described in the partnership & loan agreements, court concluded the Lenders were partners (had interest in capital, had a degree of participation & control unusual for Lenders, etc.)

**A:** This case, he is a dormant partner, its not debt, his share of profit is ongoing not fixed amount. Must be real lenders, whether they are real creditors/debtors. If documents seen to have given the contributors whole benefits of a partner, then he is a partner

* Whether a man is a dormant partner does not matter – only saying he is not active in business but still share the liability as long as share profit

Bovill’s Act: the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person, that the lender shall receive a rate of interest varying the profits or shall receive a share of the profits arising from carrying onsuch trade shall not constitute the lender a partner with people carrying on the business. BUT: must be by way of loan – not

***Definition of partnership in Civil Code of New York:*** association of two or more persons for the prupose of carrying on business together and dividing its profits between them.

**R:** unlimited entitlement to profit sharing, termination of bankruptcy, these all shows he is partner, not just a lender, can’t mask a partner into something like a creditor. Purpose of the loan is to carry on business.

## Legal Status of Partnership

### 1) Liability: Partners’ personal liability for the partnership’s debts (s.7 & 11,12,14 BCPA)

**S.7**  (1) A partner is an agent of the firm and the other partners for the purpose of the business of the partnership.

(2) The acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member bind the firm and his or her partners, unless

(a) the partner so acting has in fact no authority to act for the firm in the particular matter, and

(b) the person with whom he or she is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.

**S.11**  A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner, and after his or her death his or her estate is also severally liable in a due course of administration for those debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts.

### 2) Property held by all partners& applied exclusively for purpose of partnership BCPA s.23(2)

* **23**  (1) Subject to subsection (2), all partnership property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

### 3) Dissolution: If a partner dies, resigns or a new partner joins - S.36 BCPA

Dissolution by bankruptcy, death, dissolution of partner or charging order

**36**  (1) On the death, bankruptcy or dissolution of a partner,

(a) a partnership of 2 partners is dissolved, and

(b) subject to agreement among the partners, a partnership of more than 2 partners is dissolved as between the bankrupt, dead or dissolved partner and the other partners.

(2) If the share in the partnership property of a partner is charged under [section 26](http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-348/latest/#sec26_smooth) for the separate debt of the partner, the other partners may by notice in writing to the partner whose share is charged,

(a) dissolve the partnership, or

(b) if there are 3 or more partners, dissolve the partnership as between the partner whose share is charged and the other partners.

(3) A notice under subsection (2) takes effect at the time specified in the notice or immediately if no time is specified.

### 4) Tax: Only partners pay tax, not partnership

### 5) Partners cannot be employees of the partnership (*Throne)*

* can’t form contract with self, can’t sue yourself

### 6) Partners cannot be creditors of the partnership – cannot be creditor of itself

## Relationship B/T Partners

### S.27(a) BCPA: Equal sharing in profits and losses (s.27: absent contrary agreements)

**27**  Subject to any agreement express or implied between the partners, the interests of partners in the partnership property and their rights and duties in relation to the partnership must be determined by the following rules:

(a) all the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm;

### s.27(g) BCP: No new partner unless unanimous consent

(g) A person may not be introduced as a partner without the consent of all existing partners;

### S. 27(e) Every partner may take part in Management right

(e) Every partner may take part in the management of the partnership business;

### s.27(h) Majority vote for ordinary matters; unanimous consent for fundamental change

(h) any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners;

### S.28 BCPA Majority cannot expel partner unless express agreement & applied good faith

**28**  A majority of the partners can not expel any partner unless a power to do so has been conferred by express agreement between the partners and the power is exercised in good faith.

### S.21 BCPA: Default rules can be altered by unanimous consent.

- S.21 The mutual rights and duties of partners, whether ascertained by agreement or defined by this Part, may be varied by the consent of all the partners and the consent may be either express or inferred from a course of dealing.”

## Fiduciary Duties

s.22: Act with the utmost fairness and good faith

**22**  (1) A partner must act with the utmost fairness and good faith towards the other members of the firm in the business of the firm.

(2) The duties imposed by this section are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of partners.

### S.31 BCPA: Duty of full disclosure – Partners must render accounts

Partners must render accounts

**31**  Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representatives.

### S.32: Duty to must account for unconsented benefits

Partner must account for benefits

**32**  (1) A partner must account to the firm for any benefit derived by the partner without the consent of the other partners from any transaction concerning the partnership, or from any use by the partner of the partnership property, name or business connection.

(2) This section applies also to transactions undertaken, after a partnership has been dissolved by the death of a partner and before the affairs of the partnership have been completely wound up, by any surviving partner or by the representatives of the deceased partner.

### S.33:if carry on similar business & compete without consent must disgorge (duty not compete)

Profits of partner carrying on similar business

**33**  If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits made by him or her in that business.

## Dissolution

### S.36 BCPA: On death, bankruptcy, dissociation of a partner

**36**  (1) On the death, bankruptcy or dissolution of a partner,

(a) a partnership of 2 partners is dissolved, and

(b) subject to agreement among the partners, a partnership of more than 2 partners is dissolved as between the bankrupt, dead or dissolved partner and the other partners.

(2) If the share in the partnership property of a partner is charged under [section 26](http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-348/latest/#sec26_smooth) for the separate debt of the partner, the other partners may by notice in writing to the partner whose share is charged,

(a) dissolve the partnership, or

(b) if there are 3 or more partners, dissolve the partnership as between the partner whose share is charged and the other partners.

(3) A notice under subsection (2) takes effect at the time specified in the notice or immediately if no time is specified.

## Liability in Contract

* + Partners are personally liable to all partnership debts

### s.7: partner’s act in ordinary buz bind unless: no auth, knows has no auth/doesn’t believe him

Liability of partners

s.7 (1) A partner is an agent of the firm and the other partners for the purpose of the business of the partnership.

(2) The acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member bind the firm and his or her partners, unless

(a) the partner so acting has in fact no authority to act for the firm in the particular matter, and

(b) the person with whom he or she is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.

### S.8: if acts done in firm name showing intent to bind = bind whether or not is partner

Acts or instruments in firm name

**8**  (1) An act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm, by any person authorized to do so, whether a partner or not, is binding on the firm and all the partners.

(2) This section does not affect any general rule of law relating to the execution of deeds or negotiable instruments.

### S.9: if partner pledges credit of firm for purposes not connected to firm’s ord buz not bind

No pledge of credit for non-firm business

**9**  (1) If one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound unless the partner is in fact specially authorized by the other partners.

(2) This section does not affect any personal liability incurred by an individual partner.

Notice of restriction of power of partner

### S.10: if person have notice that a person has no authority then k is not binding

**10**  If it has been agreed between the partners that a restriction is to be placed on the power of any one or more of them to bind the firm, an act done in contravention of the agreement is not binding on the firm with respect to persons having **notice** of the agreement.

### S. 11,14: Partners are jointly & severally liable for partnership debts arising from partner misconduct and misallocation, and merely jointly liable for all other partnership debts.

Liability of partners for firm debts

**11**  A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner, and after his or her death his or her estate is also severally liable in a due course of administration for those debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts.

Liability under 2 preceding sections

**14**  A partner is jointly and severally liable with his or her partners for everything for which the firm, while he or she is a partner in it, becomes liable under either [section 12](http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-348/latest/#sec12_smooth) or [13](http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-348/latest/#sec13_smooth).

## Defence in K – The partner had no apparent or actual authority

Potential Defenses to Liability in Contract

### 1) No apparent authority

E.g. out of the scope of ordinary business matters

### 2) No actual auth *&* the 3rd party knew partner had no auth or did not know partner was partner

E.g. narrow a partner’s authority to carry out ordinary business matters and the third party knows the authority constraint

## Liability in Tort

### S.12: liability in Tort – firm is liable for loss, injury to same extent as partner (ord course of buz)

**12**  If, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his or her partners, loss or injury is caused to any person who is not a partner in the firm or any penalty is incurred, the firm is liable for that loss, injury or penalty to the same extent as the partner so acting or omitting to act.

# Limited Partnership

## Formation: GP: no formality, no need register/LP: file with registrar & must have > 1 GP & 1 LP

GP: No formalities, factually determination, Registration is not prerequisite for finding of partnership

LP: Need to file with registrar a **Certificate** signed by each GP, must have at least 1 GP & 1 LP

## Personal Liability: GP: personal liable for debts of partnership, LP: only to amount they contribute

GP: each partner is personally liable for the debts of the partnership

LP: Only the GPs are personally liable, LP not personally liable and limited to the amount of their capital contribution.

* Exceptions: Limited partners would become personally liable:
	+ defective formation
	+ take part in management (64)
	+ last name appears in the firm name (53)
	+ False statement in certificate (74)

### S.64: LP can be liable if they take part in management of the partnership

### s.74: if false statement in certificate, LP can be liable personally just like GP

**74**  If a certificate contains a false statement, a person suffering loss as a result may hold liable as a general partner every party to the certificate who

(a) knew when he or she signed the certificate that the statement relied on was false, or

(b) became aware, subsequent to the time when he or she signed the certificate, but within a sufficient time before the false statement was relied on to enable him or her to have the certificate cancelled or amended and failed to promptly have the certificate cancelled or amended.

### S. 53(4) BCPA: a LP whose last name appears in the firm name is liable like a GP

A limited partner whose surname or corporate name appears in the firm name contrary to subsection (2) or (3) is liable as a general partner to any creditor of the limited partnership who has extended the credit without actual knowledge that the limited partner is not a general partner.

## Management: GP: absent k, each partner can take part in manage/LP: cannot or lose limited liability

GP: absent a contrary agreement, each partner may take part in management & have power to bind the partnership for ordinary business matters.

LP: day to day managements and power to bind are reserved to GP only, under s.64 if LP takes part in management, then they risk losing limited liability.

### S.64: BCPA: limited partner is not liable as general partner unless manage buz

* A limited partner is not liable as a general partner unless he or she takes part in the management of the business.

S.63: Alberta Partnership Act: control of buz

* + A limited partner does not become liable as a general partner unless, in addition to exercising the limited partner’s rights and powers as a limited partner, the limited partner takes part in the control of the business.

S.63 Manitoba Partnership Act: active part of buz

* + Where a limited partner takes an active part in the business of the partnership, he is liable as if he were a general partner, to any person with whom he deals on behalf of the partnership and who does not know that he is a limited partner for all debts of the partnership.

### Haughton Graphic: LP can’t take active control in Partnership or lose limited liability protect (APA)

Haughton Graphic Ltd v. Zivot (1986)

**F:** P wants debt for printing services supplied to LP called Printcast. Debt is 128251.79. P sues limited partners each had control over business of LP.

Partnership is called Printcast, the corporation is called (Lifestyle) to be the sole general partner. Lifestyle controlled by Zivot and used as a media development business. Marshall is another LP.

* 1982 – Zivot is president of Printcast. Business cards, magazine masthead showed zivot as president and marshall as executive vice-president. Nash dealt with Zivot impression was president, and Marshall as administrator. Nash prints first 5 issues, then Printcast went bankrupt
* Nash knew of the LLP. Publishing venture had capital worth between 2-3million. Held in certificates of deposit due to mature on July 1st and Nov 1st 1982.

**A**: LP took active control as defined in s.63 of APA: used business card, letter head as president of printcast, held out, took control in dealing. He claimed he was acting in the capacity of the Corporation, but he addressed himself as president of princast, not Lifestyle.

**s.63**: APA – a limited partner does not become liable as general partner unless, exercising his rights and powers as a limited parter, he takes part in the control of business.

**What is the degree of control required?**

* **It does not permit the transaction of business by a limited partner on behalf of the Limited Partnership.**
* **A person who is an officer or director of the corporate general partner in a limited partnership would always be fixed with unlimited liability for the debts of the limited partnership**.

**D:** Judgment for P for 128251.79$.

**R:** LP cannot transact on behalf of Limited partnership, cannot be officer or director of LP

### Nordile Holding: LP acting in capacity of director or manager of corporation which is a GP = ok

Nordile Holdings Ltd. v. Breckenridge (1992)

**F:** N vendor, Arman Rental LLP went into default; Arman Rental LLp owes first mortgage to CMHC and foreclosed. N then sues Arbutus Management Ltd and won, but judgment not satisfied.

N then sues Breckenridge and Hubert Rebiffe, trial – lost, because s.64 of BCPA – LP is not liable as a general partner unless takes part in management of business.

* B and R LP in arman LP. Minority shareholders in general partner Arbutus. They were officer and directors of Arbutus.

**I:** did B and R take control in the management of LP

**A:** No, B & R are directors of the corporation Arbutus which is a general partnership, they are not directors or manager of the LP.

**R:** In this case, B&R not liable because they are not acting in the capacity of GP in the limited partnership, but rather thay are acting as director and manager of the general partnership which is a corporation.

## Fiduciary Duties: GP-each p owes each fiduciary duty/LP does not usually owe fiduciary to GP.

GP: Each partner has fiduciary duties to all other partners

LP: GP have fiduciary duties to general & limited partners, but LP is not LP does not owe fiduciary duties to GP

## Profit Sharing: GP shares equally absent k/LP share in proportion of their contribution

GP: share equally absent K

LP: share profits in proportion to their respective capital contribution

## Rights of Limited Partner

### S.58: LP has same right as GP to 1) insp/copy book 2) full info,3) dissolute by court order

**Rights of limited partner**

* **58**  (1) Subject to subsection (2), a limited partner has the same right as a general partner to do any of the following:
* (a) **to inspect** and make copies of or take extracts from the limited partnership **books** at all times;
* (b) to be given, on demand, true and **full information** of all things affecting the limited partnership and to be given a formal account of partnership affairs whenever circumstances render it just and reasonable;
* (c) to obtain dissolution and winding up of the limited partnership by court order.
* (2) The executive director may, in whole or in part, exempt a limited partnership from the rights granted under subsection (1) (a) or (b) or both if the executive director considers that it is in the public interest to do so.

### S.55(1) – LP may contribute money &property but not services

### S.56: GP can’t act impossible to carry on buz /consent judgment on LP/dispose LP property/etc

a general partner has no authority to do any of the following:

(a) to do an act which makes it impossible to carry on the business of the limited partnership;

(b) to consent to a judgment against the limited partnership;

(c) to possess limited partnership property, or to dispose of any rights in limited partnership property, for other than a partnership purpose;

(d) to admit a person as a general partner or to admit a person as a limited partner, unless the right to do so is given in the certificate;

(e) to continue the business of the limited partnership on the bankruptcy, death, retirement, mental incompetence or dissolution of a general partner, unless the right to do so is given in the certificate.

### S.66:LP must not assign his interest unless 1) all part consent, 2) assign made with consent

**66**  (1) A limited partner **must not assign** his or her interest, in whole or in part, in the limited partnership unless

(a) all the limited partners and all the general partners consent or the partnership agreement permits it, and

(b) the assignment is made in accordance with the terms of the consent or partnership agreement.

(2) An assignee of the interest, in whole or in part, of a limited partner does not become a limited partner in the limited partnership until his or her ownership of the assigned interest is entered in the register referred to in section 54 (2) (a), and until so entered he or she has none of the rights of a limited partner exercisable against the partnership or against any of the partners other than the assignor. – no LP unless registered

### S.67: In bankrupt, retirement, death or dissolute dissolves LP unless buz carried on by other GP

**67**  The bankruptcy, retirement, death, mental incompetence or dissolution of a general partner dissolves a limited partnership unless the business is continued by the remaining general partners

(a) under a right specified in the certificate, or

(b) with the consent of all the remaining partners.

Rules of GP applies to LP unless statutes explicitly states rules regarding LP.

# Limited Liability Partnership (LLP)

## Formation

### S.96: File a registration statement

Application for registration

**96**  (1) Subject to this Part, the partners of a partnership, including, without limitation, the partners of a limited partnership, may apply to register the partnership as a limited liability partnership.

(2) In order for a partnership to be registered as a limited liability partnership, there must be filed with the registrar, on behalf of the partnership, a registration statement in the form established by the registrar.

(3) A registration statement may be filed on behalf of the partnership under subsection (2) by

(a) a person who has received the approval of all of the partners to do so, or

(b) if the partnership agreement authorizes the filing of a registration statement for the partnership under subsection (2), any person.

(4) A registration statement referred to in subsection (2) must

(a) set out

(i)  the business name of the partnership, and

(ii)  the name that is to be the business name of the partnership after it is registered as a limited liability partnership,

(b) set out the mailing address and delivery address of the office that is to be the registered office of the partnership after it is registered as a limited liability partnership,

(c) if the partnership is a professional partnership,

(i)  indicate that fact, and

(ii)  confirm that the partnership is authorized, within the meaning of [section 97](http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-348/latest/#sec97_smooth), to register as a limited liability partnership,

(d) if the partnership is a limited partnership or a registered general partnership, indicate that fact,

(e) contain a statement that

(i)  the person submitting the registration statement for filing has received the approval of all of the partners to file that registration statement, or

(ii)  the partnership agreement authorizes the filing of a registration statement for the partnership under subsection (2), and

(f) set out any other information required by the regulations.

(5) The allegations contained in a registration statement filed under this section are evidence of the information contained in those allegations.

## Liability

### S.104: not personally liable except 1) neg 2) neg those under supervisize 3) knew but omit

Limited liability for partners

**104**  (1) Except as provided in this Part, in another Act or in a partnership agreement, a partner in a limited liability partnership

(a) is not personally liable for a partnership obligation merely because that person is a partner,

(b) is not personally liable for an obligation under an agreement between the partnership and another person, and

(c) is not personally liable to the partnership or another partner for an obligation to which paragraph (a) or (b) applies.

(2) Subsection (1) does not relieve a partner in a limited liability partnership from personal liability

(a) for the partner's own negligent or wrongful act or omission, or

(b) for the negligent or wrongful act or omission of another partner or an employee of the partnership if the partner seeking relief

(i)  knew of the act or omission, and

(ii)  did not take the actions that a reasonable person would take to prevent it.

(3) Subsection (1) does not protect a partner's interest in the partnership property from claims against the partnership respecting a partnership obligation.

**Each partner is not personally liable for the debts of the partnership, except**

* **for negligence or misconduct by himself**
* **for negligence or misconduct by those under the partner’s direct supervision**
* **for negligence or misconduct by another partner/employee not under direct supervision if the partner seeking relief knew of the act *and* did not take any actions that a reasonable person would take to prevent it**

### McCormick v Fasken 2014: LL partners, not employee if has genuine control

**F:** McCormick worked at Fasken for his entire legal career since 1970, becoming an equity partner in 1979. He was a party to the Partnership Agreement (Agreement) governing the relationship between all of Fasken’s partners.

Fasken had about 650 lawyers globally, including 260 equity partners, 60 of them in Vancouver.

A vote of the equity partners as a whole is required for matters such as an amendment to the Partnership Agreement, the admission of a new equity partner, the expulsion of an equity partner, the dissolution of the firm, the removal of the managing partner, the opening of a new office, as well as the approval of certain significant expenses or debts.

The law firm had an executive committee made of 13 partners, who were elected by other partners, responsible for the daily-management of the firm.

 The executive committee determined each partner’s compensation and also promulgated many rules concerning management of the firm such as written opinions being reviewed by other partners, policies on client acceptance, billing procedures, time recording and collections, the requirement that each partner devote all of his or her working time to the firm, intellectual property generated being firm property, restrictions on partners who withdraw from the firm and set up a competing practice.

The Partnership Agreement provides that “Each equity partner should retire as an Equity Partner at the end of the Year in which the Partner reaches the age of 65.” McCormick was required to retire on Jan. 31, 2011. At 62, McCormick was required to prepare a practice transition plan, a provision he had voted for as a partner. Agreements for working past 65 were at the discretion of the firm managing partner and were the “exception rather than the rule.”

In December 2009, McCormick, who previously sat on the firm’s executive committee, complained to the B.C. Human Rights Tribunal that the partnership agreement constituted age **discrimination in employment under s. 13 of the Code.**

**I:** is partnership agreement employment?

**A:** B.C. Supreme Court

* “Mr. McCormick was an equity partner with very little control over his work life, his remuneration, and his work product. . . . An individual partner is always subject to the wishes of the majority and the control exercised by the managing partners and the executive board.”

Court of Appeal

* “..[T]he principles of interpretation of the Human Rights Code ... do not extend to override the fundamental and well-established principle of law that a partnership is not, in law, a separate entity from, but is a collective of, **its partners, and as such, cannot, in law, be an employer of a partner.”**

**Supreme Court of Canada: “genuine control”**

* Right to participate in the management
	+ Right to vote on important matters including the mandatory retirement policy
	+ Right to select the board members
* Other partners owed Mr. McCormick a duty to render accounts
* Right not to be subject to discipline or dismissal
* Right to his share of the firm's capital account when he left the firm
* Protection thahe could not be expelled from the Partnership without a special resolution passed by a meeting of all the equity partners
* Run for the economic benefit of the partners, including Mr. McCormick;
* His income from the profits of the Partnership and was liable for its debts and losses; and
* Entitled to share in the Partnership's assets if the Partnership was dissolved.

**H:** held that he is not an employee – he had genuine control.

**R:** limited liability partners in a law firm – is not employee if he has right to participate in management, protection from dismissal, shares capital account, entitled share in partnership’s asset if partnership was dissolved.

# Other Forms of Partnership

## Limited Liability Limited Partnership/LLLP – Not in Canada

Origin and Availability:

* Began in 1993, Texas USA
* Some states of USA
* Not in Canada

Creation:

* File a certificate

Feature:

* Limited liability is extended to general partners of a limited partnership in the same manner as it is to partners in an LLP.
* In all other respects, an LLLP is just like a regular LP.

## Limited Liability Company/LLC – not in Canada

**Origin and Availability:**

* Began in 1977, Wyoming, USA
* All 50 states in USA
* Tax-Driven
* Not in Canada

**Creation:**

* File a certificate

**Feature:**

* Coexistence of partnership tax status

Frode Jensen & Pillsbury Winthrop LLP.

If managing partner – their contract is binding on the firm because of actual authority, if they are not managing partner, their k probably not binding because (not in ordinary course of business to argue apparent authority). If in tort – then the LLP still liable, personally liable

# Intro to Corporation

* Has both financial capital and human capital
* If liability > asset = negative equity – shareholders have nothing left
* If liability < asset = positive equity – shareholders and employees have gains
* Corporate law is to solve the conflict between human capital and shareholder’s interest.

Characteristics:

## 1) Operated for Profit

### Milton Friedman: profit maximization as single exclusive goal/CBCA only governs profit corps

 “There is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”

* The word corporation is itself doesn’t mean for profit. It could be for profit or non profit (churches, schools, charity).
* Canada Business Corporation Act – these statutes are to govern for profit acts – they are for profits.

## 2) Separate legal entity

### Salomon v Salomon – Hallmark case: even one man corporation is separate legal entity

**F:** 20007 Shares established for incorporating a boot manufacture business- Salomon held 20001 shares, wife and other sons held the rest 6 shares – did this because legislation requires 7 shareholders. Salon paid 6000$ and 10000$ in debenture, secured against company asset, in satisfaction of the balance of the purchase price. The business failed and if debenture applied, nothing left to pay ordinary creditors. (He paid 38000$? And only held 20001 share? So they pay him back 6000$ as well as $10000 in debenture)

* Winding up his business in transfer, 20000 pounds paid towards 20000 shares, 1000 pounds from cash, 10000 pounds in debentures.
* Business was good, but shortly great depression in the boot and shoe trade, strike
* Both wife and husband did wht they could – lend money, get more loans, attract new businesses to invest. Issued 5000 pounds of debenture and transfer to Mr.Broderip.
* They paid 5000 to Broderip, but not enough to pay other creditors on debenture.

Liquidator Claim Company was a mere alias or agent of salomon – therefore salomon personally liable to indemnify.

**R:** as long as the set up was according to statutes, even one man corporation is valid and a separate legal entity is formed.

**Debenture**: debt instrument – backed by corporate asset. Creditors can ask for personal guarantees, diversify investments, investigate company, sell debts

## 3) Limited liability

### Benefits: 1) reduce monitor 2) makes shares fungible 3) diversify 4) shift costs to creditor

* Reduces need to monitor agents (managers)
* Reduces need to monitor other shareholders
* Makes shares fungible (which also facilitates takeovers)
* Facilitates diversification (without LL, minimize exposure by holding only one company)
* Enlists creditors in monitoring managers (because creditors bear some downside risk)

### S.45 SH immunity: the SH of corp not liable for any liability, act, default of corp

* **45.** (1) The shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation except under subsection 38(4), 118(4) or (5), 146(5) or 226(4) or (5).
	+ Because corporation is separate legal entity – when shareholders go bankrupt, personal creditors of shareholders cannot go after the corporate shares.

## 4) Perpetual existence

### Benefits – allows for long term plans, continues even corporate changes constituents

* Continues even changes in corporate constituents
* Allows long-term plan

Lifespan

* What’s the average lifespan of a corporation?
	+ 50 yrs
* What’s the oldest company in North America?
	+ Hudbay - 1670

## 5) Transferability of share interests

### Benefits: permits takeover to discipline, facilitates active market, exit without disrupt buz

* + Allows shareholders to exit without disrupting business
	+ Permits takeovers => disciplines management
	+ Facilitates active stock markets, increasing liquidity

## 6) Centralized Management

**Common Law**

* Shareholders were not allowed to fetter the management discretion of directors.

**Canada Business Corporations Act (CBCA)**

### s.102(1): Subj to unanimous SH agree, directors shall manage, supervise Corp Buz affair

* Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation. [102(1)]

### S.146(1): the management power of director may be restricted by written unanimous sh agree

* The management powers of directors may be restricted, in whole or in part, by a written unanimous shareholder agreement. [146(1)]

## Corporation & Charter Rights:

* Everyone
	+ Section 2 (freedoms of religion, expression, assembly and association)
	+ Section 8 (right to be protected against unreasonable search and seizure)
* Every citizen
	+ Section 3(vote)
* Any person
	+ Section 11 (rights on being charged), e.g. to trail within a reasonable time; right against self-discrimination
* Every individual
	+ Section 15 (equality right)
* Anyone
	+ Section 24 (right to seek a remedy if rights infringed)

Everyone, Every Citizen – not corporation

Any person, anyone – can interpret to include corporation

### S.15(1) CBCA: Corp has capacity the rights, powers and privileges of a natural person

A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

Sum up

* Limited liability
* Perpetual existence
* Can contract (including with shareholders)
* Corporate assets owned by the company, not its shareholders or creditors
* Capacity to sue
* Separate tax entity
* But what about constitutional rights such as freedom of speech, religion? (s.15.1 CBCA)

## Corporate Characteristics and Corporate Types

Private Corporation:

* Closely held – held internally by family members e.g.: alternative name
* Small number of shareholders – less than 50 by CBCA
* Unusually restricted share transferability,
* Shareholders take part in manage
* More likely to pierce limited liability
* Less problematic to operate for profit + something else
* Sometimes cannot sell shares unless offer to sell to other shareholder first

Public Corporation:

* Publicly traded
* Distributing company – alternative name, listed on stock exchange, sold to public(tim Horton)
* No restriction on share transferability
* Separation of ownership and control (board of directors)
* More controversial than just for profit
* Unlikely to be pierced by limited liability

Most of the company – the biggest (with most revenue) are closely held companies, with a parent company who is a listed company.

## Summary

* Separate legal personality – GP: NO, LP: NO, CORP: YES
* Perpetual existence – GP: NO, LP: NO, CORP: YES
* Limited Liability – GP: NO, LP: PARTIAL, CORP: YES
* Free Transferability of Interest – GP:NO, LP:NO, CORP: YES
* Centralized Management under the board – GP: NO, LP: NO, CORP: YES
* Shareholders are not agents – no power to bind the corporation, in partnership, partners are agents and can bind

### Citizen United v Federal Election Commission(2010): US election case

**F:** Citizens United, a non-profit corporation, wants to release on broadcast and cable TV “Hillary: The Movie”, within 30 days of a presidential primary.

The federal law prohibits “corporations and unions” from using general treasury funds to advocate the election or defeat of a candidate within 30 days of a primary election.

Citizens United brings suit against the Federal Election Commission for declaratory and injunctive relief to prevent enforcement of the law.

**A:**

* Anti-corruption rationale:
	+ To prevent corruption or the appearance of corruption
* Anti-shareholder rationale:
	+ To protect shareholders from being forced to spend money on political speech that they do not agree
* Anti-distortion rationale:
	+ To prevent the “distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

# Corporate Personality & Piercing Corporate Veil

### Moral Hazard**- reap reward without bearing risk**

* An economic actor shielded from risk may behave differently from how it would if it was fully exposed to it
* the opportunity for an economic actor to reap rewards of risky behavior without bearing associated costs

## Definition of Piercing Corporate Veil

### Typical: disregard corp as a separate legal entity & hold SH liable for corp’s debt

* Disregard the corporation as a separate legal entity and hold its shareholders liable for the corporation’s debt

### Variant: SH seek beneficial rights that would be denied if corp entity were respected

* Shareholders seek benefits or rights that would be denied if the corporate entity were respected

Incorrect: Directors/officers responsible for their act in the course of business of the corporation

* It does *not* dissolve the corporation.
* It does *not* make the shareholders liable for *all* the corporation’s debts, only liable for the specific claim at issue.

**Reverse Piercing**: When personal creditors want to claim SH’s company asset

**Forward Piercing**: happens when corporation’s creditor ask for Shareholder’s personal asset.

**Book Value Per Share**: asset divide by share, e.g. 5000 asset/100shares = $50 per share

**Market Value per share**: takes into account future possible growth of company

## When to Pierce

### Fraud, sham/alter ego, merely agent, inadequate cap, Tort (invol creditor), enterprise, justice

* Fraud or improper purpose/conduct
* Sham or alter ego of the shareholder
* Merely agent of the shareholder
* Inadequate capitalization
* Tort claims (involuntary creditors)
* Single economic unit / enterprise liability
* Equity or the interests of justice are better served

## Sham or alter ego

### Lee v Lee’s Air Farming: No Sham for being an employee & director of company at same time

**Lee v. Lee’s Air Farming Ltd. (1961 JCPC) (NZ)**

**F:** Widow seeking compensation from insurance. Insurance seeking to set aside corporate entity, Lee was not working for the corporation, he was working for himself. No way to enter contract with company if the company not separate entity.

**A:** **Reason:** a person can act in multiple capacity, at the particular time he can act as director, at another time he can be acting as employee. Not sham – salary, working regularly, detailed contract, if he sold the corporation he can still be the employee.

* No sham that mere fact that someone is a director of a company had no impediment to his entering into a contract to serve the company.

**Ratio:** not a sham for merely acting as employee even though he is also the director.

### Macaura v Northern Assurance **: Insurance in own name cannot be used in Corp**

Mr Macaura owned the Killymoon estate in [County Tyrone](http://en.wikipedia.org/wiki/County_Tyrone), [Northern Ireland](http://en.wikipedia.org/wiki/Northern_Ireland). He sold the timber there to Irish Canadian Sawmills Ltd for 42,000 fully paid up £1 shares, making him the whole owner (with nominees). Mr Macaura was also an unsecured creditor for £19,000. He got [insurance](http://en.wikipedia.org/wiki/Insurance) policies - but in his own name, not the company's - with Northern Assurance covering for [fire](http://en.wikipedia.org/wiki/Fire). Two weeks later, there was a fire. Northern Assurance refused to pay up because the timber was owned by the company, and that because the company was a separate legal entity, it did not need to pay Mr Macaura any money.

**Reason:** shareholders have no interest in corporate asset, therefore they have no insurable interest in the corporate asset.

**R:** There is no insurance interest in the shareholders, A corporation owns its own property, and neither a shareholder nor a creditor has any legal interest in it.

### *Kosmopoulos:*SH has an insurable interest in corp’s asset but does not own assets of company.

***Kosmopoulos v Constitution Insurance Co. 1987 SCR***

**R:** It was held that the veil can only be lifted where it would be "just and equitable", specifically to third parties. The sh has an insurable interest in the corporation’s asset but does not own the assets of the company. Should not lift corporate veil because it would allow benefit but avoid liability.

### *Zhelka:* No reason to suspect sham when the k made the corp was solvent

***Clarkson Co v Zhelka 1967 ONHC***

**F:** D incorporated several companies. These companies never had any money in its treasury. One had only asset was a parcel of 85 acres of land. No funds whatsoever. The two company st.george and langstaff advanced money in order to enable industrial to pay for asset. Industrial one advances 40 acres to Zhelka who is Selkirk’s sister

**A:** Steps the court take

1. Void the transfer of land and give land to Selkirk: Zhelka was merely agent – no consideration given – therefore this transfer only to defraud the creditor- therefore the land transfer back.
2. Set aside corporate entity, did not set aside corporate veil, no link from his own pocket to the corporate.
	1. When he incorporated, Selkirk was solvent, no reason to suspect sham
	2. No evidence Selkirk transferred personal money form company to company, even if advanced from company to Industrial, industrial paid back.
	3. Even if used other company’s asset not industrial’s asset to pay for clothing.

**H**: therefore no pierce of corporate veil

## When to Pierce: Fraud or Improper Purpose/Conduct

### Big Bend Hotel: when considering pierce corp veil in fraud in Insurance case: material fact.

**Big Bend Hotel Ltd v Security Mutual Casualty Co 1980**

**F:** Kumar filed to Red Shaw for insurance, the insurance form required disclose of previous fire damages, Kumar had another company called K&S Enterprise Limited which did suffer fire damage previous but he did not put on file, he also did not mention of previous cancellation of insurance. In 1977 fire broke out he applied for insurance, but Red shaw refused.

* P claims although KS and BB both controlled personally by P, they were two separate identities. P not expected to put previous fire suffer by KS when filing on behalf of BB. Therefore not proper case to lift corporate veil.
* D claimed – if known previous loss at BB would not have taken the insurance.

**A:** S.14 of Insurance Act: no contract is rendered void or voidable by reason of any misrepresentation, or any failure to disclose on the part of the insured in the application or proposal for the insurance or otherwise, unless the misrepreseantion or failure to disclose is material to the contract.

* **Good faith is all-important; the assured must not only be honest and straightforward but make full disclosure of all material facts.**
* **The test is not what material to P is but what a reasonable insurer would have done or how a reasonable insurer would have react to the true fact.**
* Kumar knew info of prior fire loss had to be disclosed.
* Examination shows: he knew disclosing previous fire would lead to hard to get insurance.
	+ Therefore failure to disclose was due to his fear not getting insurance.
	+ **This is fraudulent omit**

D claims the application was made on behalfof BB, and company had not previously sustained a fire loss and thus, even if there was wickedness of mind on part of D that should make little difference as KS is a separate legal entity. The corporate veil should not be lifted and reliance was placd on the reliance of Salomon.

* Exceptions to the above: clearly omitted to disclose a fact which he knew was material to insurers and such failure to disclose is fraudulent. It is appropriate to lift the corporate veil, equity will nto allow an individual to use a company as a shielf for improper conduct or fraud.

**D:** P’s action dismissed with costs.

**Ratio:** when considering fraud in Insurance case: material fact, would the insurer reacted to the fact, Kumar was director of the previous company – he knew, but he omitted

## Inadequate Capitalization

### Rockwell Develop Ltd: Undercapitalization is not itself sufficient

**Rockwell Development Ltd v Newton Brook PlazaLtd 1972 ONCA**

**Facts** A real estate deal in which R agreed to buy a plot of land from N fell through because R would not complete the agreement according to its terms. R sued N for specific performance at an abated price and lost, with costs awarded to N. R failed to pay the costs award, and N made a motion for a judgment that Kelner, a solicitor and the shareholder/director of R, ***personally*** pay the costs. Evidence was heard that Kelner and his partner kept sloppy records; that they constantly made payments due by R with their personal monies instead of through R\*; and that R had only $31.85 in its bank account against the $4,800 costs due. The trial judge held Kelner personally liable for the costs and R appealed.

\*: They described these transactions as “shareholders loans”

**Issue** Can Kelner be held personally liable for the judgment debt owed by Rockwell by “lifting the veil”?

**Analysis** Court underscored *Salomon*: a “one-man” company, like any company, has property distinct from its members and its transactions create legal rights and obligations vested in the company itself.

Moreover, Kelner and the owner of Newtonbrook both pursued the same course of action: “they were quite content to enter into contracts made by the companies which they respectively controlled”. i.e. **N took the risk** **by dealing with a limited liability corporation** (RD).

Court implies shoddy recordkeeping is a wrong against shareholders of R (i.e. Kelner), not against N.

**Held** Kelner is not personally liable. Only Rockwell is liable to pay the judgment debt.

**Ratio** Even if the principal shareholder behind a one-man company uses shoddy record-keeping and fails to separate his personal and corporate dealings, the [judgment] creditors of his corporation have no recourse

* Personal debt only had 31.85$ so they want to pierce veil and hold corporation liable, but court did not do it.
* R was not personal liable – he wasn’t the one made the contractual agreement. **Undercapitalization is not itself sufficient.**

## Justice Better Served

### 642947 Ont: tender *undertaking they know worthless* the veil can be pierced to hold them liable.

**642947 Ont. Ltd. v. Fleischer (2001)**

**Facts** Halasi and Krauss controlled Sweet Dreams Delights Inc. In the course of a real estate deal dispute, they obtained an injunction barring Burnac Corp from buying some land. They gave “the usual” undertaking to the court that Sweet Dreams would pay any damages caused by the injunction. However, H&K knew Sweet Dreams had no assets with which to pay damages. While ultimately H&K were found not to have caused any damages, the question arose whether they would be personally liable if they had caused damages.

**Issue** Should the “corporate veil” be pierced to make H&K personally liable to perform Sweet Dreams’ undertaking to pay damages, since they knew when giving it that Sweet Dreams could not possibly perform it?

**Analysis**  The separate legal personality of a corporation (from *Salomon*) cannot lightly be set aside. Only in exceptional cases when the separate personality yields a result “too flagrantly opposed to justice, convenience, or the interests of the revenue” can it be disregarded.

BUT if people tender ***an undertaking*** to a court that ***they know to be worthless*** and then ***try to hide behind a shell company*** that they control to escape liability, the veil can be pierced to hold them liable.

**Held** H&K ***would be*** personally liable if their causal connection to the damages suffered had been proved. Despite a favourable result, H&K do not get their costs.

**Ratio** If the directors of a corporation give an undertaking to a court which they know their corporation cannot perform, then they may be held personally liable to perform the undertaking.

## Single Economic Unit/Enterprise Liability

### De Salaberry Realties: if Sub comp are **instruments** of their parent comp then likely pierce

***De Salaberry Realities Ltd v Minister of National Revenue***

**Facts** RD: “There was a tax issue”. Basically, if land owned by De Salaberry Realties Ltd (D) was treated as merely owned by the corporation, there would be a lower overall tax liability, whereas, if it was treated as owned by the ***enterprise*** as a whole, there would have been a higher overall tax liability.

The court noted that the sub-companies are “***instruments***” of their parent companies, which:

 caused them to be incorporated;

 determined their thin capitalization;

 **financed them via loans** (RD);

 dictated their policy; and

 did the bulk of the work relating to their business (e.g. employing architects)

**Issue** Should D be treated as being an independent legal entity, or as belonging to a group of companies, for tax purposes?

**Analysis**  Such “pyramiding” of corporations, in each group, demonstrates the extent of the need not to restrict the scrutiny of the course of conduct to D, which is only an instrument in the hands of the groups.

 It isn’t possible to determine the business of D without taking into account the business of the whole groups.

 ***Courts are more willing to treat a company as agent of its controlling shareholder where the shares are held by another company***.

Thin capitalization: only has 1000 capital, divided into 100 shares with value of 10$ each. But made purchase of 2 million dollars. Shows nothing but instruments of their grandparent companies of the two families.

Dictate Policy: sister companies had no free will. Revenue paid to parent company

**D:** I find that the appellant, being a member of a horizontal group of sister companies incorporated for the same object and a member of a vertical group, there being a parent and a grandparent company for the Bronfman family and for the Steinberg family, must have its course of conduct determined by the one of its sister companies, parent companies and its grandparent company because the A only instrument in carrying on the business of its parent companies and its grandparent company

* Because thin capitalization, direct control, profit goes to parent company.

**Ratio** When a corporation is merely an “instrument” of some parent company(ies), it is necessary to look at the conduct of the whole group of companies to determine the business of that corporation.

### \*Smith, Stone/Knight: 6 req for sub pierce: own profit or parent’s, employee /constant control/ etc

Smith, stone & Knight Ltd v Birmingham Corporation

**R: test for finding of sub company instruments of their parent company**

* Were the profits treated as profits of the parent company?
* Were the persons conducting the business appointed by the parent company?
* Was the parent company the head and brain of the trading venture?
* Did the parent company govern the trading venture, decide what should be done, and what capital should be embarked on the venture?
* Did the parent company make profits by its skill and direction?
* Was the parent company in effectual and constant control?

### Alberta Gas Ethylene: even if met 6 req in Smith & Stone, still have to look at purpose/context

**Alberta Gas Ethylene Co. v. M.N.R. (1990)**

**Facts** To obtain a lower rate of interest from US lenders, AGEC incorporated ASCO, a Delaware corporation. ASCO then borrowed from US lenders on AGEC’s behalf, and AGEC borrowed from ASCO. The tax collector assessed AGEC for taxes on interest payments made to ASCO as a non-resident of Canada. AGEC argued for “veil piercing”, saying the court should look at the substance of the transaction, to save itself from the tax liability.

**Issue** 1. Is ASCO just a “sham” or “shell company” that is no more than a borrowing arm of AGEC?

2. Is ASCO just the agent of AGEC according to the six tests from *Smith, Stone and Knight*? (see text p 194) **Analysis** You can’t just consider the 6 criteria (from *Smith*) and when they are all met (as they are in this case) ignore the separate legal existence of the subsidiary. You must ask for what ***purpose*** & in what ***context*** it is being ignored.

**Held** AGEC has to pay taxes as if ASCO had a separate legal existence.

**Note** It would appear that “***purpose***” and “***context***” includes whether the separate legal existence of the subsidiary helps or hinders the government’s tax collection. Tax man gets to have it both ways—see

You have to look at the purpose and context – there is nothing illegal to get lower interest rate, therefore even if the 6 factors from smith and knight is met, still have to consider the separate legal entity.

### Gregorio: usually sub wholly owned not pierce unless complete control& used to avoid liabili

**Gregorio v. Intrans-Corp. (1984)**

**Facts** Gregorio bought a Peterbilt truck from Intrans-Corp. Intrans bought it from Paccar Canada Ltd. Paccar Canada is the Canadian subsidiary of Paccar Inc, the US-based manufacturer of the truck. Gregorio sued Intrans-Corp for breach of warranty and also claimed against Paccar Canada for negligent manufacture of the truck.

**Issue** Can the “corporate veil” be pierced to make Paccar Canada responsible for the negligent manufacture of the truck given that the truck was really manufactured by its parent company, Paccar Inc?

**Analysis** Laskin JA (textbook p 195). The emphasis in the last sentence comes from the textbook.

*Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability.* ***The alter ego principle is applied to******prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights****.*

**Held** Gregorio can’t sue Paccar Canada Ltd for negligent manufacture of the truck (no veil pierce).

**R:** *Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability*

## Tort claims (involuntary creditors)/mere agent of shareholder

### Walkovsky: to claim corp is agent of sh, must show subj to SH control/thinly cap not enough

**Walkovsky v Carlton 1966**

**F:** Carlton owned 10 corporations, including Seon Cab Corporation, each of which owned only two taxis. The corporations carried only the statutory minimum liability insurance and were extremely thinly capitalized. Each corporation’s main property, the taxis, were mortgaged, resulting in few net assets. Carlton also took as much money out of them as possible to ensure they never had much that could be taken in a tort judgment. Plaintiff was hit by one of Seon’s cabs and sued Carlton.

* All cars were leased and had secured creditors and claimant sued all 10 cap companies

**Issue** Does plaintiff have a cause of action against Carlton personally because Carlton deliberately kept Seon too thinly capitalized to pay a significant tort judgment?

**A:** It is one thing to assert that a corporation is a fragment of a larger combine which actually conducts the business. It is quite another to claim that the corporation is a “dummy” for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends. [In other words, ***plaintiff is asking for personal liability of shareholder, not enterprise liability***]

Carrying the statutory minimum insurance is not a crime. If you want it changed, change the statute.

Plaintiff failed to prove that whether the corporation was for the shareholders benefit subject to shareholder’s control. Only showed these 10 cabs are like an enterprise – you have to prove the corporations are agents of the shareholders for their own personal benefits.

**H:** not pierced

**R:** to claim corporation was for shareholders benefit and subject to shareholder’s control, you have to prove the corporations are agents of the shareholder.

Shareholders can’t be made individually liable for a tort judgment just because they keep the corporation too thinly capitalized to pay a judgment debt from some tort action that might occur in the future.

**Choc v Hudbay Minerals Inc:** wanted to strike out claim, but court didn’t do it-a real chance of success

* 3 circumstances to pierce corporate veil
	+ Corporation is completely dominated and controlled and being used as a shield for fraudulent or improper conduct
	+ Corporation has acted as authorized agent of its controllers
	+ Statute or contract requires it

1) You have to show that Hudbay made subsidiary specifically for purpose to shell for wrongful conduct

2) Court found a real chance of agent of parent company – did not strike out cause of action

## What is not pierce corporate veil (Said v Butt)

### ADGA System Intl: Directors/officers are personally liable for their tort actions

**ADGA Systems Intl v Valcom Ltd 1999**

**F:** P & D competitors for correctional services Canada for tech support and maintenance of security systems in federal prisons. P had 45 senior tech to tender for renewal of contract, D had none. D convinced 44/45 of the senior staff to sign on for Valcom and so he succeeded.

* P sues D for inducing breach of fiduciary duty

**I:** Was there Inducing breach of fiduciary duty, and if so would directors and staff that participated in the act be personally liable.

**A:** In Lewis v Boutilier 1919 – director held liable for putting boy to work in dangerous sawmill.

* In London Drugs Limited v Kuehne & Nagel Internationl Ltd 1992- employee held personally liable for his tort. These cases suggest – Canada confirms clearly that employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or nuisance even when their actions are pursuant to their duties to the corporation.

**R:** the consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of a corporation are responsible for their tortious conduct even though that conduct was directed in bona fide manner to the best interest of the company, always subject to the Said v butt exception.

Said v Butt exception: this protection only applies to contract, not Tort – applies to contract because director acting in capacity of company. If director committed tort – he is himself a tortfeasor.

### SAID V Butt Exception: protects directors & officers if breach of k was in good faith for company’s interest not individual interest, rather pay damage than perform K. Not apply to tort

The Court of Appeal reaffirmed that the only immunity from tort claims to be enjoyed by directors and officers is the one established in an English case decided in the 1920s called Said v. Butt. This immunity protects directors and officers in certain circumstances from a claim of inducing their companies to breach a contract with a third party. The exception only applies where the contract, breached by the company on the direction of a director or officer, was breached in good faith for the company’s interests and not for the personal benefit of the director or officer. This exception enables directors and officers to direct that a contract be terminated on the basis that the company’s best interest is to pay damages rather than to perform the contract.

# Incorporation

## Why Incorporate

### Benefit: Limited Liability, Perpetual exist, share transfer, sh can’t bind corp/ sh can k, tax benefit

* Limited liability
* Perpetual existence
* Share transferability
* Shareholders alone cannot bind the corporation
* Shareholders can contract with the corporation
* Tax Benefits

Tax: 13.5% for incorporation, 0-43.5% for proprietorship

## Where to Incorporate

* Federal or Provincial
* Place of Incorporation ≠ Place of Headquarters
* Why Location Matters?
	+ Internal affairs doctrine
	+ Jurisdiction shopping



* Corporate statute competition in Canada?
	+ Harmonization rather than competition
* Types of Canadian Corporate Statutes
	+ Memorandum and Articles of Association (BC & Nova Scotia)
		- with name with number of shares and subscriber name – the first shareholders
	+ Letters Patent (P.E.I.)
	+ Articles of Incorporation (CBCA and other provinces)
* The Nature of Corporate Statues
	+ Mandatory – sh and directors cannot contract out of rule
	+ Enabling – sh and directors can contract out

### Federal Statute: articles of Incorp, requires 25% Canadian resident

### Delaware Phenomenon – jurisdictional shopping – the corporate law in Delaware give comprehensive management power & limited liabilities

## Who Can Incorporate

### CBCA s.5(1): 1) >18, 2) sound mind, 3) not bankrupt can incorp, 5(2) – a corp can incorp

(1) **Incorporators** -- One or more individuals not one of whom

 (a) is less than eighteen years of age,

 (b) is of unsound mind and has been so found by a court in Canada or elsewhere, or

 (c) has the status of bankrupt,

 May incorporate a corporation by signing articles of incorporation and complying with section 7.

(2) **Bodies corporate** -- One or more bodies corporate may incorporate a corporation by signing articles of incorporation and complying with section 7.

## Process of Incorporation

### 1) file articles of incorp 2) file notice registered office 3) file notice of directors 4) pay fees

1. File the articles of incorporation;
2. File a notice of the registered office of the corporation;
3. File a notice of directors; and
4. Paying the prescribed fees.

# Pre-incorporation contracts

Common Law Position:

* 1) both parties know no corporation yet (Kelner)
* 2) At least one (usually both) party mistaken to whether corporation formed or exist (NewBorne, Black, Wickberg)

Questions

* Is the promoter personally liable?
* Can corporation ratify contract once corporation comes into existence?

## Both parties knew no corporation yet = personally bound (Common Law)

### Kelner: if both parties knew no corporation and sign k, then promoters are themselves liable

**Kelner v. Baxtar (1866)**

**Facts** Kelner made a written contract to sell wine to the individual Ds “on behalf of the ***proposed*** Gravesend Royal Alexandra Hotel Company, Limited”. In additional to the clear reference to the proposed company, the contract was signed by all the individual Ds “***on behalf of*** the Gravesend Royal Alexandra Hotel Company, Limited”.

* All parties knew the company was not yet in existence at time of contracting. ***Kelner performed*** his obligations by delivering the wine to the Ds, who consumed it. The company was subsequently incorporated, and quickly failed before paying. Kelner sued the individual Ds for breach.

**Issue** Are the individual defendants liable on the pre-incorporation contract?

**Analysis:** Erle CJ applies law of agency and holds that agents purporting to contract on behalf of a non-existent principal are themselves bound by their contract.

* Willes J considers the intention of the parties, but says the words “on behalf of” are irrelevant. He says the parties clearly contemplated that the people signing it would be personally liable…
* When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before

**Held** Individual defendants are personally liable on the contract.

* Agency doesn’t work because no existence of principle before
* Also cannot ratify because when contracted, company not there
* Intention: they wanted the contract at time of contract, so if no principle they must be personally bound.
* Also promoter knew at the time of contract, the corporation exist or not.

**Ratio** A company cannot ratify a contract, or purported contract, entered into on its behalf if the company was not in existence at the time the contract was made (textbook’s analysis p 267).

## At least one (usually both) party mistaken to whether corporation formed or exist (Common Law)

### Newborne: a person merely sign on behalf of a pre-incorp did not intent personally bound

**Newborne v. Sensolid (1953)**

**Facts** P went into the provision trade. He incorporated a company, Leopold Newborne (London) Ltd. P sold goods on contract to D ***before the company was registered***. The contract was on the ***company stationery*** and signed “Yours faithfully, Leopold Newborne (London) Ltd” (i.e. ***the company name***) with P’s signature underneath.

* D refused to take delivery of the goods. Realizing that the company was not in existence at the time of the K, ***P attempted in his*** ***personal capacity*** to sue D.

**Issue** Was there a valid pre-incorporation contract between P in his personal capacity and D?

**Analysis: *Kelner v Baxter*** (p 105) does not stand for a general proposition that every time a prospective company, not yet in existence, purports to contract, everybody who signs for the company makes himself personally liable.

Distinguishing *Kelner*:

*The only person who has any contract here is the company, and Mr Newborne’s signature is*

*merely confirming the company’s signature. The document is signed: “Yours faithfully, Leopold*

*Newborne (London) Ltd” and the signature underneath is that of the person authorised to sign*

*on behalf of the company.*

* The company was not in existence when the K was signed and there was never a K.

**Held** P loses. The contract is not binding as between him and D.

**Ratio** If a company (which doesn’t exist) purports to be a party to a contract, then someone merely signing on behalf of the company did not ***intend*** to be personally bound and is not (narrows *Kelner* and makes intention paramount).

Difference b/t kelner & Baxter: in Baxter – both knew no corp yet, so they must have intended to be personally bound, here one person didn’t know.

### Black et al: whether k of pre incorp should bind is “intent” of both parties (both mistaken)

**Black et al v Small wood & Cooper**

**Facts** Ps contracted to sell land to Western Suburbs Holdings Pty Limited whose directors were supposedly Smallwood and Cooper. The company had ***not been incorporated*** at the time the K was executed, but ***everyone (Ps and Ds) believed*** ***that it had been***. Ds didn’t close the sale and P sued Ds for specific performance, alleging that the Ds contracted as agents on behalf of a non-existent principal, as described by Erle CJ in ***Kelner v Baxter*** (p 105).

**Issue** Are Ds personally liable under a contract purportedly between Ps and a company which did not exist yet?

**Analysis** Majority distinguished ***Kelner v Baxter*** on the facts:

o The fact that the *Kelner* signers had no principal was obvious to both parties but this wasn’t enough.

o The *Kelner* court also examined the written instrument and found that the parties intended the defendants to be bound personally.

o Finally, in *Kelner*, the plaintiff had fully performed and defendants took the benefit.

The court firmly dismissed the proposition that *Kelner* stands for a general rule that “agents” contracting on behalf of a non-existent company are automatically personally liable under the contract.

In this case, it is clear that the defendants ***did not intend to personally contract***.

**Held** *Newborne* is directly on point and should be followed. Ds are not personally liable.

**Ratio** “The fundamental question in every case must be what the parties intended or must be fairly understood to have intended. If they have expressed themselves in writing, the writing must be considered by the court.”

### Wickberg: look at whether intended to be personally bound (1 person knew, other didn’t)

**Wickberg v Shatsky 1969**

**Facts** Wickberg contracted to manage the Shatsky business. The contract was on the letterhead of Rapid Data (Western) Ltd and signed by Shatsky (D) as president. However, the company had never been incorporated and ***D knew this***, but Wickberg did not. When the business failed, Wickberg was fired. He sued for breach of his employment contract.

**Issue** 1. Is D personally liable on the employment contract?

2. Is D liable for breach of warranty of authority, for having warranted the existence of Rapid Data (Western) Ltd and his authority to contract on its behalf?

**Analysis** Although it looks like the difference between *Black* and this case is that in *Black* both parties believed the company to exist and here Shatsky knew it did not, the court refused to accept this distinction.

Moreover, the distinction between ***Kelner v Baxter*** and *Black* is that in *Kelner* ***all*** parties knew there was no corporation and the circumstances and written instrument disclosed an intention to bind the defendants.

Even though here the parties did not have the same view of the facts, *Black* applies.

**Held** 1. D is not personally liable because the ***intention of the parties*** was not that D would be personally bound.

2. D is liable for breach of warranty of authority but due to lack of causation, P gets only nominal damages. Because company not existent and so no funds, it would hardly be possible to prove its loss arising from lack of authority. Effective liability would have to be in deceit or possibly negligence.

**Ratio** If a contract is purportedly between a corporation and some other party, and the corporation did not actually exist at time of contracting, then the persons signing on behalf of the corporation are only personally liable if that was the intention of the parties when the contract was signed.

## Statute

### s.14 (1) personally bound if written k in name of or behalf of corp before it exist

(1) Subject to this section, a person who enters into, or purports to enter into, a written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to its benefits.

### s.14(2) Corp can ratify within reasonable time after exist, (b) the person cease to bound

(2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt a written contract made before it came into existence in its name or on its behalf, and on such adoption

* + (a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and
	+ (b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.

### Sherwood Design: merest act to adopt k on behalf of a corp will result in adopt (auth shown)

**Sherwood Design Services Inc v 872935 ON Ltd 1998**

**Facts** Sherwood (P) contracted to sell its business assets to the individual Ds “in trust for a Corporation ***to be*** incorporated”. Individual Ds retained Miller Thomson (MT) to represent them in closing the deal. MT gave them ashelf corporation (872935) whose sole director was Robert J Fuller, a MT partner. MT wrote a letter to P saying“872935 had been assigned by MT as the corporation that will complete the asset purchase”.

The letter included acopy of an ***unsigned*** resolution of the 872935 board, ***apparently consisting of the individual Ds***, purporting to adoptthe pre-incorporation contract on behalf of 872935 (as well as being unsigned it was dated Jan 12 and sent to P onJan 11).

The individual Ds backed out of the sale: ***before*** they had been appointed directors of 872935; ***before*** Fuller resigned as sole director; and thus ***before*** the directors’ resolution was approved. MT returned 872935 to the shelf. They assigned it to new and completely unrelated clients later, and P swooped in to sue 872935 because it now had assets.

The ***Ontario*** *Business Corporations Act* (*OBCA*) s 21(2) states:

*A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf . . .*

Pre-Incorporation Contracts (p 24)

**Issue** Is 872935 liable under the *OBCA* s 21(2) for adopting the pre-incorporation contract “by ***any*** action or conduct signifying its ***intention*** to be bound thereby”?

**Majority**: Abella JA says that MT solicitors were the directors of 872935 and had the authority from their clients to convey an intention to be bound.

* She stressed that the *OBCA* allows “any” action and held that **the letter MT sent was action** enough.

**Dissent** Borins JA said “Sherwood cannot presume in its own favour that the letter of Jan 11 was an act of the corporation signifying its intention to be bound by the pre-incorporation contract” and pointed out that the unsigned draft documents included with the letter “made it obvious that the corporation had not had the opportunity to directs its mind to whether it would adopt, or reject, the pre-incorporation contract.”

**Held** 872935 is liable.

**Ratio** Under the *OBCA* statutory regime, which is nearly the same as the *CBCA*, the merest act by people with authority to adopt a contract on behalf of a corporation will be construed as an intention to adopt it and result in its adoption.

### s.14 (3) go to court if not sure adopt or not (4) if expressly provided in written k, then not bound

3) Subject to subsection (4), whether or not a written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order respecting the nature and extent of the obligations and liability under the contract of the corporation and the person who entered into, or purported to enter into, the contract in the name of or on behalf of the corporation. On the application, the court may make any order it thinks fit.

(4) If expressly so provided in the written contract, a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof.

## *BCBCA: Pre*-incorporation contracts s.20 (not exam)

**20**  (1) In this section:

 (2) Subject to subsections (4) (b) and (8), if, before a company is incorporated, a person purports to enter into a contract in the name of or on behalf of the company,

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

(i)   come into existence within a reasonable time, and

(ii)   adopt, under subsection (3), the purported contract within a reasonable time after the company comes into existence,

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

(c) the measure of damages for that breach of warranty is the same as if

(i)   the company existed when the purported contract was entered into,

(ii)   the person who entered into the purported contract in the name of or on behalf of the company had no authority to do so, and

(iii)   the company refused to ratify the purported contract.

(3) If, after a pre-incorporation contract is entered into, the company in the name of which or on behalf of which the pre-incorporation contract was purportedly entered into by the facilitator is incorporated, the new company may, within a reasonable time after its incorporation, adopt that pre-incorporation contract by any act or conduct signifying its intention to be bound by it.

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

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

(b) the facilitator ceases, except as provided in subsections (6) and (7), to be liable under subsection (2) in respect of the pre-incorporation contract.

(5) If the new company does not adopt the pre-incorporation contract under subsection (3) within a reasonable time after the new company is incorporated, the facilitator or any party to that pre-incorporation contract may apply to the court for an order directing the new company to restore to the applicant any benefit received by the new company under the pre-incorporation contract.

## Post-Incorporation Steps

* Make bylaws
	+ First board meeting held, and directors will make bylaws
* Adopt forms of security certificates and corporate records
* Authorize the issuance of shares
* Appoint officers
* Appoint an auditor to hold office until the first meeting of shareholders
* Transact any other business

# Equity Financing (Issue Shares of Stock)

## Definition of a share

### United Fuel Invest: share is right to liquidated remains of corp/ proportionate share in equity

United Fuel Investment v union Gas Co:

**R:** Share is defined as a right to the liquidated remains of the corporation proportionate to their share number after all debts are paid; a propriety interest in the assets of the corporation… a proportionate share in the equity; when the company is dissolved, creditors are satisfied first, shareholders divide what is left proportionately

### Sparling v QB: shares are bundle of interrelated rights & liabilities can’t parcel into pieces

Sparling v Quebec 1988:

**Facts** The Caisse was a Crown agency created by Quebec statute. It owned 22.7% of the shares in Domtar Inc, a company incorporated under the *CBCA*. This made the Caisse an “insider” under the *CBCA*, but the Caisse refused to submit the insider report prescribed by the act, claiming Crown immunity.

* Over 10% of share you become insider of corporation s.121 & 122

**Issue** The real issue is whether the Crown can claim immunity with respect to certain burdens prescribed in the *CBCA*, but the textbook wants us to look at La Forest J’s analysis of the nature of a share and share ownership.

**Analysis** La Forest J… at textbook pp 309–10:

*Upon purchasing the shares certain rights, e.g., the right to vote the shares and the right to receive dividends, accrue immediately to the purchaser. . . . [T]he aggregate of these rights and their attendant obligations are definitive of the notion of a share.*

At textbook p 310:

*A share is not an isolated piece of property. It is rather, in the well-known phrase,* ***a “bundle” of interrelated rights and liabilities****. A share is not an entity independent of the statutory provisions that govern its possession and exchange. Those provisions make up its constituent elements. . . .*

*Nothing in the statute, common sense or the common law indicates that this bundle can be* ***parceled piecemeal at the whim of the Crown.***

**Held** Crown loses. It cannot claim immunity without receiving a larger right than the statute actually conferred.

## Basic Rights Attached to Shares

### s.24(3) 1) right to vote at sh meeting, 2) right to receive dividend, 3) right to residual property

* Rights to vote at any shareholders’ meeting (voting rights)
	+ Right to elect directors
	+ Right to approve fundamental changes
	+ Right to submit shareholder proposals
	+ Right to make the bylaws and the articles of incorporation
* Right to receive dividend declared by the corporation (dividend right)
* Right to receive the remaining property of the corporation on dissolution (right to residual property)

## Other Rights Commonly Attached to Shares

### S.28(1) – (Preemptive rights) right to acquire shares when corporations issues new shares

(1) If the articles so provide, no shares of a class shall be issued unless the shares have first been offered to the shareholders holding shares of that class, and those shareholders have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others.

(2) Notwithstanding that the articles provide the pre-emptive right referred to in subsection (1), shareholders have no pre-emptive right in respect of shares to be issued

* + for a consideration other than money;
	+ as a share dividend; or
	+ pursuant to the exercise of conversion privileges, options or rights previously granted by the corporation.

### Redemption rights: an option to force the corporation to repurchase the shares

### S.29 – Conversion Rights: an option to convert shares into another security of corp

## Classes of Shares

### S.24(3) At least 1 class of shares and must include the 3 rights

* + the rights to vote;
	+ the rights to declared dividends; and
	+ the rights to residual property.

### S.24(4) If more than 1 class: must list out the rights, privileges in the articles of incorporation (3 rights must be attached to at least 1 class of shares, but not all 3 rights are required to attached to one class)

* + the rights, privileges and restrictions must be in the articles of incorporation
	+ the 3 basic rights must be attached to at least 1 class of shares but not all the 3 rights are required to attached to one class.

### Re Bowater Canadian Ltd v RL Crain Inc: shares of the same class must be treated equally

**Facts** Crain, a *CBCA* company, had defined a class of special common shares in its articles of incorporation. The special common shares had a step-down provision: they were entitled to 10 votes per share in the hands of the first person they were issued to, but only 1 vote per share as soon as they changed hands. Bowater bought some special common stock from its initial owner and sued to be entitled to the 10 votes per share instead of 1.

**Issue** Can the rights on a class of *CBCA* shares change when they are held by different people?

**Analysis** The step-down provision is severable and severing accords best with the intention of the parties.

**Held** The special common shares retain their right to 10 votes in the hands of *any* owner because the step-down provision was severable according to the evidence on the intention of the parties at the time the special common was issued.

### s.27 you can have several series in same class – diff dividend rates, chara, but same basic rights

**27.** (1) The articles may authorize, subject to any limitations set out in them, the issue of any class of shares in one or more series and may do either or both of the following:

* (*a*) fix the number of shares in, and determine the designation, rights, privileges, restrictions and conditions attaching to the shares of, each series; or
* (*b*) Authorize the directors to fix the number of shares in, and determine the designation, rights, privileges, restrictions and conditions attaching to the shares of, each series.

### s.27(3): no priority in dividend for the series in the same class

(3) No rights, privileges, restrictions or conditions attached to a series of shares authorized under this section shall confer on a series a **priority** in respect of dividends or return of capital over any other series of shares of the same class that are then outstanding.

### s.6: director has power to 1) name corp, 2) set office loca 3) set class /max # shares & rights

(1) Articles of incorporation shall follow the form that the Director fixes and shall set out, in respect of the proposed corporation,

(a) the name of the corporation;

(b) the province in Canada where the registered office is to be situated;

(c) the classes and any maximum number of shares that the corporation is authorized to issue, and

 (i) if there will be two or more classes of shares, the rights, privileges, restrictions and conditions attaching to each class of shares, and

 (ii) if a class of shares may be issued in series, the authority given to the directors to fix the number of shares in, and to determine the designation of, and the rights, privileges, restrictions and conditions attaching to, the shares of each series;

## Preferred Shares vs Common Shares

### Preferred Shares: dividend preference & Liquidation preference over Common Shares

### Voting vs Non-voting: preferred shares generally no vote, Common shares can vote

Voting vs Non-voting: preferred shares have no voting rights – but able to vote directors if in adverse financial status- e.g. fail to pay dividend for years. Preferred shares also have rights to vote in certain scenarios, but generally no rights to vote.

### Cumulative or not: preferred shares – dividend carried forward if no pay, CS not cumulative

common – shares dividends up to the board to decide, but sometimes, preferred shareholders have carry forward right to receive dividends, if company or directors does not give them in a particular year – e.g. 5 years must give dividend.

* Cumulative: if company fails to pay a dividend in a given year – the company must make up for it for a later time. E.g. if 10$ preferred and in year 1: the company does not declare dividend (directors have right to declare no dividend for years 1– 10$ in a rear, year 2 - $ 10, and year 3 dividend = in year 3 if declare they receive 30 dollars before common share holders.

### Convertible vs Non: Preferred shares can convert to Common shares – esp if strong earning

**Convertible v Non-convertible:** converting to common share desireable when company have strong earnings. E.g. $500 profit to dividend to shareholders. Preferred and common shares all 10 shares. Preferred share = 10$ per share. So 100$ payout to preferred shareholders. 400$ will go to the common shares – each receives 40$ dividend per share. In this scenario, the option to convert to common share will make more profit for shareholder when company makes big profit.

### Redeemable or not: repurchase obligations: liable to be bought back by issuing company

**Redeemable v non-redeemable:** repurchase obligations, A type of [equity](http://www.businessdictionary.com/definition/equity.html) [share](http://www.businessdictionary.com/definition/share.html) that is [liable](http://www.businessdictionary.com/definition/liable.html) to be [bought](http://www.businessdictionary.com/definition/bought.html) back by the [issuing](http://www.businessdictionary.com/definition/issuer.html) [company](http://www.businessdictionary.com/definition/company.html) on a specified date or after a specified [period](http://www.businessdictionary.com/definition/period.html) of [notice](http://www.businessdictionary.com/definition/notice.html). [Corporate legislation](http://www.businessdictionary.com/definition/corporate-legislation.html) in some [jurisdictions](http://www.businessdictionary.com/definition/jurisdiction.html) [prohibits](http://www.businessdictionary.com/definition/prohibit.html) the [redemption](http://www.businessdictionary.com/definition/redemption.html) if it jeopardizes the [financial health](http://www.businessdictionary.com/definition/financial-health.html) of the issuer.

### Participating or not: non part PS in liquidation receives invest + dividend, part=double dip

**Participating v Non-participating:** non-participating preferred shares in liquidation: receive amount initial investment + dividend, if anything left goes to common shares, if participating: it allows the preferred shares to double dip, P-shares are allowed to participate in getting residuals.

## Hybrid Nature of Preferred Shares

**Equity-like characteristics**

* Permanent capital; no fixed maturity date
* Dividends subject to board discretion
* Cannot throw the corporation into bankruptcy for dividend arrearage
* May have voting rights
* Treated as equity for accounting and tax purposes

**Debt like characteristics**

* Fixed dividend payments
* Liquidation preference over common stockholders
* Rights are contract based

## Equity Financing/How to Issue Shares

### s.25: Issuing share power is to the directors (subject to articles, by-laws or unanimous sh k)

Subject to the articles, the by-laws and any unanimous shareholder agreement and to section 28, shares may be issued at such times and to such persons and for such consideration as the directors may determine.

* How many shares depend on articles of incorporation

### Process: 3 steps: subscription, allotment and issuance

1) Subscription: purchase shares at price specified in prescription agreement – investor may issue subscription form,

2) if company accepts subscription, the share price paid, the company can allocate and issue shares to the investor.

**Par Value**: useless, totally arbitrary number, face value of the shares – the normal value of the shares.

face value of share – the normal value of share, currently CBCA won’t allow par value. But in other jurisdictions you can issue par value shares. E.g. facebook par value = $.00000006 per share. Market value = 70$. In practice par value is useless. But how did fb come up with the par value – they are totally arbitrary.

### s.25(3): shares not issued until consideration paid full - past service/property of equal value

(3) A share shall not be issued until the consideration for the share is fully paid in money or in property or past services that are not less in value than the fair equivalent of the money that the corporation would have received if the share had been issued for money.

(4) In determining whether property or past services are the fair equivalent of a money consideration, the directors may take into account reasonable charges and expenses of organization and reorganization and payments for property and past services reasonably expected to benefit the corporation.

(5) For the purposes of this section, “property” does not include a promissory note, or a promise to pay, that is made by a person to whom a share is issued, or a person who does not deal at arm’s length, within the meaning of that expression in the *Income Tax Act*, with a person to whom a share is issued.

## How to distribute Profits (capital gain- sale shares/Dividend – income)

1. Capital gains: sell shares at a higher price than bought
2. Dividend: distribution of profit to shareholders

### BoD in board resolution decide dividend or not & how much (record date for entitlement)

Board resolution: if passed by boards – they will specify the amount of dividend to be paid. The record date – is to determine which shareholders are eligible to pay. Look at record date.

### S.43(1): dividend can be cash or property (stock- share dividend)

**43.** (1) A corporation may pay a dividend by issuing fully paid shares of the corporation and, subject to [section 42](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec42_smooth), a corporation may pay a dividend in money or property.

### \*s.42(a): corp shall not dividend: if after payment unable to pay liabilities when due

A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that

(*a*) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or (“solvency test”)

### \*S.42(b): the realizable value of Corp asset < aggregate of liabilities& stated Cap of all class

(*b*) the realizable value of the corporation’s assets would thereby be less than the aggregate of its liabilities and stated capital of all classes. (“capital impairment test”)

* **Stated capital:** historical total of the amount paid into the corporation for issuance of shares – book keeping records, once money initially put in maybe spent, but the book keeping value remains.

### S.26: (1) maintain separate stated Cap acct (2) add amount received for shares in acct

(1) A corporation shall maintain a separate stated capital account for each class and series of shares it issues.

(2) A corporation shall add to the appropriate stated capital account the full amount of any consideration it receives for any shares it issues

## Other Ways to Distribute Money to SH

### s.34 Repurchase: buy back outstand share – reduce # of shares outstand boost earnings/share

**34.** (1) Subject to subsection (2) and to its articles, a corporation may purchase or otherwise acquire shares issued by it.

Limitation

(2) A corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable grounds for believing that

* (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
* (b) the realizable value of the corporation’s assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

### s.36 Redemption: forced sale initiated by corp, in accordance with articles of incorporation

**36.** (1) Notwithstanding [subsection 34(2)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec34subsec2_smooth) or [35(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec35subsec3_smooth), but subject to subsection (2) and to its articles, a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price thereof stated in the articles or calculated according to a formula stated in the articles.

Limitation

(2) A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that

* (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
* (b) the realizable value of the corporation’s assets would after the payment be less than the aggregate of
	+ (i) its liabilities, and
	+ (ii) the amount that would be required to pay the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateably with or before the holders of the shares to be purchased or redeemed, to the extent that the amount has not been included in its liabilities.

### s.34/36(2): can’t repur/redeem if can’t pay liability & realizable value of corp asset < liability

### S.39(6): repurchase, redeem shares can be cancelled

(6) Shares or fractions thereof of any class or series of shares issued by a corporation and purchased, redeemed or otherwise acquired by it **shall be cancelled** or, if the articles limit the number of authorized shares, may be restored to the status of authorized but unissued shares of the class.

# Debt Financing

### Making a loan or Selling debt securities

### Debt security: right to receive interest payment & return of principal at specific dates (K)

* + “a right to receive periodic payments of interest and a return of principal on specified dates and in accordance with other terms of their issue”
	+ Mainly reliance on contracting to protect interests

## Leverage

### When company is higher leveraged, they are thinly capitalized: e.g debt ratio: 4:1

**Low leveraged**

Debt (10% interest) = $50k Earning: 2k/10/20k

Equity = 50k Interest 5k/5k/5k

Total Invest: 100k Net = -3k/5k/15k

Debt:equity ratio = 1:1 return on equity: -6%/10%/30%

**High Leveraged**

Debt (10% interest) = $80k Earning: 2k/10/20k

Equity = 20k Interest 8k/8k/8k

Total Invest: 100k Net = -6k/2k/12k

Debt:equity ratio = 4:1 return on equity: -30%/10%/60%

# Corporate Governance

## Definition

### Corp Governance is system by which companies are directed & controlled/Cadbury report UK

### Specifies the distrib of rights & responsi among participant in organization – OECD Glossary

“[It] specifies the distribution of rights and responsibilities among the different participants in the organisation – such as the board, managers, shareholders and other stakeholders – and lays down the rules and procedures for decision-making.” OECD Glossary 2005

### A system that governs the relationships among the various stakeholders of the corporation

**Collapse of Enron study:**

Enron had an experienced, independent board

* Lay, Skilling, and one retired executive were the only insiders among 17 directors
* Median tenure was 7 years
* Audit committee was headed by an accounting professor at Stanford University.

## Theories

### 1) Shareholder Wealth Maximization: agent theory: manager agents, sh principals (problems)

* **Agency Theory**: managers as agents, shareholder as principal
	+ **Problems**:info insymmetry, manager will maximize their own interest rather than best interest of shareholders. Agency cost – to minimize agency cost: manager must act in best interest of business.
	+ **Problem**: public companies have huge amount of shareholders, how do you expect all these shareholders be principals when they hold stock for 1 day and sell. Also agent and principal theory: is agent subject to principal control. But in this case, agents are not. Directors can declare dividend or not. Another problem: no contracts signed behalf of shareholders

### 2) Contractarian: Nexus of K – a web of interrelated contracts among various stakeholders

* **Shareholders** are not owners; they are just one type of investors. They put money in and then in return to receive profit.
* **Employees** are another type of investors – they put in labour for salaries.
* **Suppliers:** contributes materials for payments
* **Communities:** provides material for employments.
* Corporate law is just contract – each contract has its own terms, no need for statutes and regulations.
* Maximize joint surplus of the stakeholders rather than shareholder wealth: however – proponent reached opposite conclusion: according to Contractarian theory is still max shareholders wealth – the corporate exist to max societal wealth, but its hard to measure societal wealth – the proxy for shareholder wealth is the same as stakeholder wealth.
* **Shareholders:** are residual claimants – if company doing well, they will invest, if company not doing well, all stakeholders will lose, because their fixed claims won't be paid. Therefore if shareholders doing well, society doing well.

### 3) Stakeholder Wealth Max: Team Production Theory: directors act mediators allocating rents

* The assumption that participants: all of them hope to benefit from the involvement of the corporate enterprise.
* Hope to create a governance system that profits all the participants.
* The board of directors’ act as mediators allocating the rents among the participants, the directors have to allocate the rents in a fair way in order to keep the corporate coalition as a whole. If not fairly, that coalition will leave.
* The purpose to max stakeholder wealth.

### 4) Corporate Social Responsibility 1) do more than required by law, 2) not just consider SH

* **Beyond compliance with the law**
	+ Should do more than required by the law to the society, companies should pay more than minimal wages.
* **Beyond shareholder wealth maximization**
	+ Should consider not just shareholder

## Arguments for and against CSR:

**1) Improving SH’s wealth also improves Stakeholder’s wealth**

**Against:** improving shareholder’s wealth also improves stakeholder’s wealth. Employees better off, more jobs,

**For:** can increase shareholder wealth without increasing stakeholder wealth

2) **No one can serve 2 masters:**

**Against:** no one can serve 2 masters. If corp is serve shareholders they can’t serve all stakeholders. You lose accountability.

**For:** 1st and 2nd argument in conflict, 1st is stakeholder and shareholder wealth = the same, 2nd = no one can serve two masters, maybe incentive are similar.

3) **Managers ill-qualified to make public policy decisions**

**Against:** managers ill-qualified to make public policy decisions

**For:** managers know their corporation the best, they can make better decisions

4) **Stakeholders can seek protection through k with companies or other laws outside corporate law**

**Against:** stakeholders can seek protection through contracting with companies or other laws outside corporate law. E.g. employments protects – no need corp to step in.

**For:** unequal balance of power, less power compared to corporation

**5) Managers have no right to spend SH money for stakeholder’s benefits**

**Against:** managers have no right to spend shareholders’ money for stakeholder’s benefit.

**For:** maybe

### 5) emerging third way – enlightened shareholder value: maximize long-term sh value

UK company Act: require company to take a long term view.

* Open ended idea: the practical use is closer to stakeholder maximization: gives greater discretion to directors in considering stakeholder maximizations instead of shareholders only.

### Dodge v Ford Motor: corp should max stockholder profit. But Michigan not representative

“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.”

### Pennsylvania (PCBL § 1715(a)): Best Interest of Corp is stakeholder wealth

General Rule. -- In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate:

(1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.

(2) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.

(3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.

(4) All other pertinent factors.

### s.122(1): director duty to act in the best interest of corporation

Every director and officer of a corporation in exercising their powers and discharging their duties shall

* + (a) act honestly and in good faith with a view to the best interests of the corporation;

### Peoples Depart: the best int of corp: includes sh, employees, suppliers, creditors, consumers etc.

**Peoples Department Stores v Wise 2004**

“in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment”

### BCE Inc: best int is sh, employees, credit, consumers, gov’t, environ, “good corp citizen”

BCE Inc v 1976 Debentureholders SCC 2008

“In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions.”

Further, “[w]here the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”

### Delaware General Corp Act §362(a): public benefit balanced with SH money interest

A "public benefit corporation" is a for-profit corporation … that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.

### Community Contribution Company in BC

Features

* Community purpose [s. 51.19]
* Dividends permitted subject to restrictions [s.51.94]
* Asset lock when dissolution [s.51.95(3)]
* Community contribution report [s.51.96]
* Taxed like regular for-profit business, not as not-for-profit org.

**BCBCA s. 51.91**

"community purpose" means a purpose beneficial to

 (a) Society at large, or

 (b) a segment of society that is broader than the group of persons who are related to the community contribution company,

and includes, without limitation, a purpose of providing health, social, environmental, cultural, educational or other services, but does not include any prescribed purpose;

**BCBCA s. 51.92** Community purposes

“One or more of the primary purposes of a community contribution company must be community purposes and those community purposes must be set out in its articles.”

**BCBCA 51.921** Corporate name

(1) A community contribution company must have the words "Community Contribution Company" or the abbreviation "CCC" as part of its name.

(2) For all purposes, the words "Community Contribution Company" are interchangeable with the abbreviation "CCC".

(3) A person must not use in British Columbia any name of which "Community Contribution Company" or "CCC" is a part unless the person is

(a) a community contribution company,

(b) a federal corporation entitled or required to use those words or that abbreviation, or

(c) a prescribed person or class of persons.

**BCBCA s. 51.93** Directors and officers

(1) Despite section 120, a community contribution company must have at least 3 directors.

(2) Without limiting section 142 (1), a director or officer of a community contribution company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must act with a view to the community purposes of the company set out in its articles.

(3) Section 137 does not apply to a community contribution company.

**BCBCA s. 51.94** Restrictions on dividends and interest

(1) A community contribution company must not declare a dividend unless

(a) the declaration is in accordance with the regulations, and

(b) the company first obtains approval of the dividend by ordinary resolution.

(2) Without limiting subsection (1), a community contribution company may in its articles further constrain the declaration of dividends.

(3) A community contribution company must not pay, in relation to a debenture issued by it or any of its other debts, a rate of interest that is related to the company's profits unless

(a) the regulations authorize payments of that type, and

(b) the payment is in accordance with the regulations.

**CCC Regulation s. 4**

1. A community contribution company must not, in any financial year, declare a dividend in relation to shares of the company unless the total amount of all dividends declared in relation to the shares of the company in that financial year is not greater than the total of
	1. 40% of the community contribution company's profit for that financial year as determined in accordance with generally accepted accounting principles, and
	2. any unused dividend amount for any previous financial year.

**BCBCA 51.95**

(2) Despite section 330 (m), before a community contribution company is dissolved, the liquidator of the company must

(a) comply with the prescribed requirements, if any, and

(b) subject to subsection (3), transfer to one or more qualified entities all or the prescribed percentage of the company's distributable assets.

(3) If, when a community contribution company dissolves, the articles or a resolution of the company specify one or more qualified entities for the purposes of this section, the liquidator must transfer all or the prescribed percentage of the company's distributable assets referred to in subsection (2) (b) to those qualified entities in accordance with the directions, if any, respecting distribution set out in the articles or resolution.

**BCBCA 51.96** Community contribution report

(2) The directors of a community contribution company must annually produce and publish, at or before the date in each year by which the annual general meeting is required to be held under section 182 (1), a report that discloses, in the prescribed manner, the following in relation to the company's most recently completed financial year:

1. a fair and accurate description of the manner in which the company's activities during that financial year benefited society;
2. the assets, including the amounts of money, that were transferred during that financial year in furtherance of the company's community purposes;
3. the purposes for which the transfers referred to in paragraph (b) were made
4. the amounts of the dividends that were declared during that financial year;
5. the assets, including the amounts of money, that were transferred during that financial year for redemptions or purchases of shares or other reductions of capital;

……

(g) any other information required by the regulations.

# Powers of Directors and Officers

## Who can be directors?

### S.105(1): individual > 18 yrs old/sound mind/not bankrupt

### S.105(2): unless article requires, a director not required to hold shares by the corporation

### s.105(3): at least 25% of directors of a corp must be resident Canadians. If <4, at least 1

BC: none, AB: at least 50%, MB >51%, ON >51% - if only 2 = at least 1, PEI/QB = 0

## How to elect and remove directors?

### **s. 6(3) k trumps CBCA:** unanimous sh agreement/articles prevails over this act

Subject to subsection (4), if the articles or a unanimous shareholder agreement require a greater number of votes of directors or shareholders than that required by this Act to effect any action, the provisions of the articles or of the unanimous shareholder agreement prevail.

### s.106(1,2): initial director gets notice after article of incorp & hold office until first AGM

(1) At the time of sending articles of incorporation, the incorporators shall send to the Director a notice of directors in the form that the Director fixes, and the Director shall file the notice.

 (2) Each director named in the notice referred to in subsection (1) holds office from the issue of the certificate of incorporation until the first meeting of shareholders.

### **S.106(3):Election** Ordinary reso at 1st AGM & at each succeeding, **max term:** 3 yrs

(3) Subject to [paragraph 107](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec107_smooth)(b), shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

### s.106(4): staggered terms: not necessary all BoD elected at SH meet hold office for same terms

### S.106(5): if without stated term ceases to hold office at close of 1st AGM following election

(5) A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following the director’s election.

### S.106(6) – if BoD not elected at SH meeting, incumbent BoD continue until successors elected

(6) Notwithstanding subsections (2), (3) and (5), if directors are not elected at a meeting of shareholders the incumbent directors continue in office until their successors are elected.

### s.106(9): not director unless (a) present at meeting/not refuse (b) consented/acted as director

An individual who is elected or appointed to hold office as a director is not a director and is deemed not to have been elected or appointed to hold office as a director unless

(a) he or she was present at the meeting when the election or appointment took place and he or she did not refuse to hold office as a director; or

(b) he or she was not present at the meeting when the election or appointment took place and

 (i) he or she consented to hold office as a director in writing before the election or appointment or within ten days after it, or

 (ii) he or she has acted as a director pursuant to the election or appointment.

### \*S.111(1): quorum of BoD may **fill vacancy** among BoD unless lead increase min/ max article

**111.** (1) Despite [subsection 114(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec114subsec3_smooth), but subject to subsections (3) and (4), a quorum of directors may fill a vacancy among the directors, except a vacancy resulting from an increase in the number or the minimum or maximum number of directors or a failure to elect the number or minimum number of directors provided for in the articles.

### S.111(2): if no quorum – the BoD shall call special meeting & fill vacancy, inaction = sh call

2) If there is not a quorum of directors or if there has been a failure to elect the number or minimum number of directors provided for in the articles, the directors then in office shall without delay call a special meeting of shareholders to fill the vacancy and, if they fail to call a meeting or if there are no directors then in office, the meeting may be called by any shareholder.

### s.111(4): article can say vacancy only filled by vote by SH

(4) The articles may provide that a vacancy among the directors shall only be filled by a vote of the shareholders, or by a vote of the holders of any class or series of shares having an exclusive right to elect one or more directors if the vacancy occurs among the directors elected by that class or series.

### S.111(5): BoD appointed/elected to fill vacancy holds office for unexpired term of predecessor

### S.106(7)**Filling Vacancy**: if sh meeting fails to elect min # of directors, elected directors exercise powers if quorum met

(7) If a meeting of shareholders fails to elect the number or the minimum number of directors required by the articles by reason of the lack of consent, disqualification, incapacity or death of any candidates, the directors elected at that meeting may exercise all the powers of the directors if the number of directors so elected constitutes a quorum.

### S.108 (1) **cease to hold office** when 1) dies/resign 2) removed 3) disqualified (2) effective written resignation

**108.** (1) A director of a corporation ceases to hold office when the director

(a) dies or resigns;

(b) is removed in accordance with [section 109](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec109_smooth); or

(c) becomes disqualified under [subsection 105(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec105subsec1_smooth).

Effective date of resignation

(2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

### s.109(1) **Removal:**sh at special meeting remove (2) if class director, only remove by sh of the class(both ordinary reso)

**109.** (1) Subject to [paragraph 107](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec107_smooth)(g), the shareholders of a corporation may by **ordinary resolution** at a special meeting remove any director or directors from office.

Exception

(2) Where the holders of any class or series of shares of a corporation have an exclusive right to elect one or more directors, a director so elected may only be removed by **an ordinary resolution** at a meeting of the shareholders of that class or series.

### s.6(4): articles may not require greater number of votes to remove director than required by s.109

**“ordinary resolution**” means a resolution passed by a majority of the votes cast by the shareholders who voted in respect of that resolution

**“special resolution**” means a resolution passed by a majority of not less than **two-thirds** of the votes cast by the shareholders who voted in respect of that resolution or signed by all the shareholders entitled to vote on that resolution;

### Bushell: Bushell clause is valid for private comp, but not public listed in UK/s.6(4)

Bushell v. Faith [1970] AC 1099 (HL)

**F:** A property company called Bush Court (Southgate) Ltd owned a block of flats. There was £300 capital, 100 shares held by Mr Faith and the other 200 by his two sisters, Mrs Bushell and Dr Bayne. Article 9 of the company constitution said that under a resolution to remove a director, that directors’ shares would carry three votes each. When the two sisters tried to remove him, Mr Faith recorded 300 votes and the other two, 200 votes together.

**H:** the provision is valid for private & non-listed company

## What’s the structure of the board?

### \*s.102(2)Private Corp: 1/ Distributing: at least 3 directors & at least 2 indep directors

S.102(2): A corporation shall have one or more directors but a distributing corporation, any of the issued securities of which remain outstanding and are held by more than one person, shall have not fewer than three directors, at least two of whom are not officers or employees of the corporation or its affiliates.

### Indep Directors: TSX: not manage, no bus interest materially interfere, <10% of shares

**Toronto Stock Exchange Listing Requirements:**

An independent director is a person who meets the following criteria:

* is not a member of management, and is free from any business interest or other relationship that could reasonably be perceived to interfere materially with his or her ability to act in the best interest of your company; and
* is a beneficial holder, directly or indirectly, collectively of 10% or less of the votes of all issued and outstanding securities of your company

**DEFINITION of 'Outside Director'**

* Any member of a company's board of directors who is not an employee or stakeholder in the company. Outside directors are paid an annual retainer fee in the form of cash, benefits and/or stock options. Corporate governance standards require public companies to have a certain number or percentage of outside directors on their boards as they are more likley to provide unbiased opinions.

### \*s.171 **audit committee:** a public comp shall have & not less 3 BoD, majority indep BoD

(1) Subject to subsection (2), a corporation described in subsection 102(2) shall, and any other corporation may, have an audit committee composed of not less than three directors of the corporation, a majority of whom are not officers or employees of the corporation or any of its affiliates.

### s.171(3) audit commit shall review finan statement before approved (6) report errors to BoD

(3) An audit committee shall review the financial statements of the corporation before such financial statements are approved under section 158.

(6) A director or an officer of a corporation shall forthwith notify the audit committee and the auditor of any error or mis-statement of which the director or officer becomes aware in a financial statement that the auditor or a former auditor has reported on.

(7) An auditor or former auditor of a corporation who is notified or becomes aware of an error or mis-statement in a financial statement on which they have reported, if in their opinion the error or mis-statement is material, shall inform each director accordingly.

### S.171(8): once notified error, directors shall revise financial state (9) if no revise – liable for **< 5k & summary offense**

(8) When under subsection (7) the auditor or former auditor informs the directors of an error or mis-statement in a financial statement, the directors shall

 (a) prepare and issue revised financial statements; or

 (b) otherwise inform the shareholders and, if the corporation is one that is required to comply with section 160, it shall inform the Director of the error or mis-statement in the same manner as it informs the shareholders.

(9) Every director or officer of a corporation who knowingly fails to comply with subsection (6) or (8) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both.

## What are the powers of directors?

### s.102(1): **General managerial authorities:** directors manage, supervise bus & Corp affair

“Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.”

### s.103: **power to amend/repel by-laws by resolution.**

(1) Unless the articles, by-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any by-laws that regulate the business or affairs of the corporation.

Shareholder approval

(2) The directors shall submit a by-law, or an amendment or a repeal of a by-law, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal.

Effective date

(3) A by-law, or an amendment or a repeal of a by-law, is effective from the date of the resolution of the directors under subsection (1) until it is confirmed, confirmed as amended or rejected by the shareholders under subsection (2) or until it ceases to be effective under subsection (4) and, where the by-law is confirmed or confirmed as amended, it continues in effect in the form in which it was so confirmed.

Idem

(4) If a by-law, an amendment or a repeal is rejected by the shareholders, or if the directors do not submit a by-law, an amendment or a repeal to the shareholders as required under subsection (2), the by-law, amendment or repeal ceases to be effective and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until it is confirmed or confirmed as amended by the shareholders.

Shareholder proposal

(5) A shareholder entitled to vote at an annual meeting of shareholders may, in accordance with [section 137](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec137_smooth), make a proposal to make, amend or repeal a by-law.

### \*s.115(3)(d):**Power to declare dividends**

### s.25: **Power to Issue Securities (shares**)

**25.** (1) Subject to the articles, the by-laws and any unanimous shareholder agreement and to [section 28](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec28_smooth), shares may be issued at such times and to such persons and for such consideration as the directors may determine.

### s.121: **Power to appoint & remove officers**

**121.** Subject to the articles, the by-laws or any unanimous shareholder agreement,

(a) the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in [subsection 115(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec115subsec3_smooth);

(b) a director may be appointed to any office of the corporation; and

(c) two or more offices of the corporation may be held by the same person.

### s.125**: Power to fix remuneration**s of directors, officers& employees of corp

**125.** Subject to the articles, the by-laws or any unanimous shareholder agreement, the directors of a corporation may fix the remuneration of the directors, officers and employees of the corporation.

### \*S.115 Limits of delegation:1) declare dividend 2) approve takeover bid 3)amend bylaw 4) issue shares 5) redeem etc…

Delegation

**115.** (1) Directors of a corporation may appoint from their number a managing director who is a resident Canadian or a committee of directors and delegate to such managing director or committee any of the powers of the directors.

Limits on authority

(3) Notwithstanding subsection (1), no managing director and no committee of directors has authority to

(a) submit to the shareholders any question or matter requiring the approval of the shareholders;

(b) fill a vacancy among the directors or in the office of auditor, or appoint additional directors;

(c) issue securities except as authorized by the directors;

(c.1) issue shares of a series under [section 27](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec27_smooth) except as authorized by the directors;

(d) declare dividends;

(e) purchase, redeem or otherwise acquire shares issued by the corporation;

(f) pay a commission referred to in [section 41](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec41_smooth) except as authorized by the directors;

(g) approve a management proxy circular referred to in Part XIII;

(h) approve a take-over bid circular or directors’ circular referred to in Part XVII;

(i) approve any financial statements referred to in [section 155](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec155_smooth); or

(j) adopt, amend or repeal by-laws.

## How do directors exercise their powers?

Generally Collectively

Mechanics of board meetings: 1) place & notice 2) means of parti 3) quorum 4) resol 5) dissent

### S.114 (1) **Place &notice**: may meet at any place and on such notice as by-law requires

**114.** (1) Unless the articles or by-laws otherwise provide, the directors may meet at any place and on such notice as the by-laws require.

### S.114(9):**Means of Participation:** by phone, electronics as long as consent

Participation

(9) Subject to the by-laws, a director may, in accordance with the regulations, if any, and if all the directors of the corporation consent, participate in a meeting of directors or of a committee of directors by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting. A director participating in such a meeting by such means is deemed for the purposes of this Act to be present at that meeting.

### S.114(2) **Quorum**: majority of directors/min # set out by articles=quorum/have all power

(2) Subject to the articles or by-laws, a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors, and, notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.

### s.117 **by resolution**

### S.123**: presumed consent** a) dissent in minutes b) written dissent c)by registered mail

**123.** (1) A director who is present at a meeting of directors or committee of directors is deemed to have consented to any resolution passed or action taken at the meeting unless

(a) the director requests a **dissent to be entered in the minutes of the meeting**, or the dissent has been entered in the minutes;

(b) the director sends a **written dissent to the secretary of the meeting** before the meeting is adjourned; or

(c) the director sends **a dissent by registered mail or delivers** it to the registered office of the corporation immediately after the meeting is adjourned.

Loss of right to dissent

(2) A director who votes for or consents to a resolution is not entitled to dissent under subsection (1).

Dissent of absent director

(3) A director who was not present at a meeting at which a resolution was passed or action taken is deemed to have consented thereto unless within **seven days after becoming aware of the resolution**, the director aware or the resolution, the director

(a) **causes a dissent to be placed with the minutes of the meeting**; or

(b) **sends a dissent by registered mail or delivers it to the registered office** of the corporation.

Defence — reasonable diligence

(4) A director is not liable under [section 118](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec118_smooth) or [119](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec119_smooth), and has complied with his or her duties under [subsection 122(2)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec122subsec2_smooth), if the director exercised the care**, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on**

(a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or

(b) a report of a person whose profession lends credibility to a statement made by the professional person.

Defence — **good faith**

(5) A director has complied with his or her duties under [subsection 122(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec122subsec1_smooth) if the director relied in good faith on

(a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or

(b) a report of a person whose profession lends credibility to a statement made by the professional person.

### s.117**: Alternative to board meetings—unanimous written resolutions**: resolution in writing signed by all bod- valid

**117.** (1) A resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors, is as valid as if it had been passed at a meeting of directors or committee of directors.

Filing resolution

(2) A copy of every resolution referred to in subsection (1) shall be kept with the minutes of the proceedings of the directors or committee of directors.

Evidence

(3) Unless a ballot is demanded, an entry in the minutes of a meeting to the effect that the chairperson of the meeting declared a resolution to be carried or defeated is, in the absence of evidence to the contrary, proof of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

## Beyond the powers

### **Ultra vires doctrine:** if director acts outside scope set out in article of incorp then ultra vires

* Article of Incorp must specific object of incorporation: describes legal scope of company – if outside objects or purpose, the company has no legal capacity to act. If ultra vires, even shareholders cannot ratify it by votes.
* This doctrine diminished in recent years. Since corporation has right and privilege of actual person. No need to specify object and purpose in article of incorp, but articles of incorp may place restrictions

### s.116**defective appointment**: an act of BoD/offi valid even if irregul in elect/appoint/qualif

**116.** An act of a director or officer is valid notwithstanding an irregularity in their election or appointment or a defect in their qualification.

### Royal British Bank **indoor management rule**: outsider transac with corp is valid on face, no need to inquire inside law

Royal British Bank v Turquand

**Facts** Plaintiff bank sued to collect debt owed by defendant corporation and procured by two if its directors. D’s articles allowed its directors to borrow if authorized by a general resolution of the company and no such resolution had been given to borrow from P.

**Issue** Is the corporation bound by the actions of its agents who had apparent, but not actual, authority for their actions?

**Held** Defendant corporation is bound to repay the debts.

**Ratio Indoor management rule:** Where an outsider dealing with a corporation satisfies himself that the transaction is ***valid on its face*** to bind the corporation, he need not inquire as to whether all of the preconditions to validity that thecorporation’s ***internal*** law might call for have in fact been satisfied.

### s.16 (3**) no act of corp is invalid by reasons that act or transfer is contrary to its articles**

(1) It is not necessary for a by-law to be passed in order to confer any particular power on the corporation or its directors.

(2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles.

(3) No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act.

### s.17: director filed notice available in inspection at office is not notice to person

No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed by the Director or is available for inspection at an office of the corporation.

### **s.18:** corp has no right to assert against person from the following- (apparent auth)

(1) No corporation and no guarantor of an obligation of a corporation may assert against a person dealing with the corporation or against a person who acquired rights from the corporation that

1. the articles, by-laws and any unanimous shareholder agreement have not been complied with;
2. the persons named in the most recent notice sent to the Director under section 106 or 113 are not the directors of the corporation;
3. the place named in the most recent notice sent to the Director under section 19 is not the registered office of the corporation;
4. a person held out by a corporation as a director, officer, agent or mandatary of the corporation has not been duly appointed or has no authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for a director, officer, agent or mandatary;

e)a document issued by any director, officer, agent or mandatary of a corporation with actual or usual authority to issue the document is not valid or genuine; or

1. a sale, lease or exchange of property referred to in subsection 189(3) was not authorized.

### s.18(2): if the person knew, or ought to have known the person don’t have auth (apparent auth)

(2) Subsection (1) does not apply in respect of a person who has, or ought to have, knowledge of a situation described in that subsection by virtue of their relationship to the corporation.

Third party argue agent has actual and apparent authority: statute provide at what ground the company cannot deny authority of agents – set out in s. 17 and s.18 and 116

S.18(2) says: unless the third party known or should have known the lack of capacity with company.

# Shareholders’ Voting Rights

## Rights of SH

### Economic rights: right to sell/dividend/right to residual property on dissolution

Voting rights

Information rights: access to certain corporate records

### Litigation rights: 1) direct suit 2) derivative action 3) oppression remedy

## Purpose of Shareholder Voting

### Protect Shareholder Interest: sell/sue/vote

* Sell shares, sue director for breach of fiduciary duty (only if cause of action), vote: express opinions on how corporation should be directed.

# On what matters can shareholders vote?

**1) Anglo-Saxon Model: CA,UK,US**: only SH can vote for directors

**2) Continental European Model**: employees, shareholders vote for supervisory board, and supervisory board votes for management board.

* The right to elect directors: whether directors can obtain seat depend on shareholder decisions. Only shareholders have right to vote
* Problems: Make directors’ side with shareholders at the detriment of interest of corporation.
* Basis for shareholder voting rights: employees are subordinates,
* Efficiency reasons, if you include constituents on the board, you would turn board into parliament. The board decision will run into deadlock.

## Elect Directors

### s.106(3) **When to vote**: at annual general meeting/by Orindary Resolution

### s.106(4): stagger terms: don’t have to vote for all directors, stagger terms give different terms

**Straight voting**, is one of two stockholder voting procedures and the more common option. In statutory voting, if you owned 50 shares and were voting on six board positions, you could cast 50 votes for each board member, for a total of 300 votes. You could not cast 20 votes for each of five board members and 200 for the sixth.

### S. 107- **Cumulative Voting**: can cast # of votes multiplied by # of directors to be elected/can cast all to one nominee

Where the articles provide for cumulative voting,

1. the articles shall require a fixed number and not a minimum and maximum number of directors;
2. each shareholder entitled to vote at an election of directors has the right to cast a number of votes equal to the number of votes attached to the shares held by the shareholder multiplied by the number of directors to be elected, and may cast all of those votes in favour of one candidate or distribute them among the candidates in any manner;
3. if a shareholder has voted for more than one candidate without specifying the distribution of votes, the shareholder is deemed to have distributed the votes equally among those candidates;
4. if the number of candidates nominated for director exceeds the number of positions to be filled, the candidates who receive the least number of votes shall be eliminated until the number of candidates remaining equals the number of positions to be filled

### **Cumulative Voting Formula: D=X(N+1)/S**

Cumulative Voting Formulas

if X = Number of **Shares to Elect** a Specific Number of Directors

 S = Total Number of Shares Voted at Meeting

 N = Total Number of Directors to be Elected

 D = Number of Directors Want to (or Can) Elect

 **X > S x D \_**
 **N + 1**

  **D < X (N + 1)**

 **S**

Examples:

S = 100 shares voted at meeting

N = 5 directors to be elected

 If Jones owns **49 shares**, how many directors can he elect?

 D < 49 (5 +1)/100 = (49 x 6)/100 = 294/100 = 2.94

 D <2.94

### **s.107(g) removal of director:** removed in cumulative voting if > article # and those voted against

1. a director may be removed from office only if the number of votes cast in favour of the director’s removal is greater than the product of the number of directors required by the articles and the number of votes cast against the motion; and
2. the number of directors required by the articles may be decreased only if the votes cast in favour of the motion to decrease the number of directors is greater than the product of the number of directors required by the articles and the number of votes cast against the motion.

### s.109(1) **Removal:**sh at special meeting remove (2) if class director, only remove by sh of the class(both ordinary reso)

**109.** (1) Subject to [paragraph 107](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec107_smooth)(g), the shareholders of a corporation may by **ordinary resolution** at a special meeting remove any director or directors from office.

Exception

(2) Where the holders of any class or series of shares of a corporation have an exclusive right to elect one or more directors, a director so elected may only be removed by **an ordinary resolution** at a meeting of the shareholders of that class or series.

### s.6(4): articles not require a greater number of votes to remove director than required by s.109

## Amendment of Articles of Incorporation

### s.173: by **special resolution** on amendment of articles (name/province/restrict/buz/new class)

**173.** (1) Subject to [sections 176](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec176_smooth) and [177](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec177_smooth), the articles of a corporation may by special resolution be amended to

(a) change its name;

(b) change the province in which its registered office is situated;

(c) add, change or remove any restriction on the business or businesses that the corporation may carry on;

(d) change any maximum number of shares that the corporation is authorized to issue;

(e) create new classes of shares;

(f) reduce or increase its stated capital, if its stated capital is set out in the articles;

(g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

(i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(l) revoke, diminish or enlarge any authority conferred under paragraphs (j) and (k);

(m) increase or decrease the number of directors or the minimum or maximum number of directors, subject to [sections 107](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec107_smooth) and [112](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec112_smooth);

(n) add, change or remove restrictions on the issue, transfer or ownership of shares; or

(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

Termination

(2) The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment under this section, revoke the resolution before it is acted on without further approval of the shareholders.

Amendment of number name

(3) Notwithstanding subsection (1), where a corporation has a designating number as a name, the directors may amend its articles to change that name to a verbal name

Amendment of By-laws

## Amend By-Laws

### s.103: SH by ordinary reso amend by-laws unless article says otherwise

**103.** (1) Unless the articles, by-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any by-laws that regulate the business or affairs of the corporation.

Shareholder approval

(2) The directors shall submit a by-law, or an amendment or a repeal of a by-law, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal.

Effective date

(3) A by-law, or an amendment or a repeal of a by-law, is effective from the date of the resolution of the directors under subsection (1) until it is confirmed, confirmed as amended or rejected by the shareholders under subsection (2) or until it ceases to be effective under subsection (4) and, where the by-law is confirmed or confirmed as amended, it continues in effect in the form in which it was so confirmed.

Idem

(4) If a by-law, an amendment or a repeal is rejected by the shareholders, or if the directors do not submit a by-law, an amendment or a repeal to the shareholders as required under subsection (2), the by-law, amendment or repeal ceases to be effective and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until it is confirmed or confirmed as amended by the shareholders.

Shareholder proposal

### s.137 & s.103(5) entitle to vote on sh proposals

(5) A shareholder entitled to vote at an annual meeting of shareholders may, in accordance with [section 137](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec137_smooth), make a proposal to make, amend or repeal a by-law.

## Fundamental Changes

### S.183(5) **Amalgamation** with another company by special resolution

(5) Subject to subsection (4), an amalgamation agreement is adopted when the shareholders of each amalgamating corporation have approved of the amalgamation by special resolutions.

### S.189(3)(8) Sale or lease of all or substantially all of the company’s assets by special resolution

(8) A sale, lease or exchange referred to in subsection (3) is adopted when the holders of each class or series entitled to vote thereon have approved of the sale, lease or exchange by a special resolution.

### s.211: Liquidation or dissolution of the company by special resolution of holders of each class

(3) A corporation may liquidate and dissolve by special resolution of the shareholders or, where the corporation has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote.

### s.188: Continuance of the corporation under the laws of another jurisdiction by special resolution

 (5) An application for continuance becomes authorized when the shareholders voting thereon have approved of the continuance by a special resolution.

# What sort of shareholders can vote?

Voting shares vs Non-voting shares

## Fundamental Changes- Right to Vote Anyway

### s.183(3) for amalga: each share has right to vote whether/not it otherwise has right to vote

Right to vote

(3) Each share of an amalgamating corporation carries the right to vote in respect of an amalgamation agreement whether or not it otherwise carries the right to vote.

### S.189(6) sale all or substantial asset: each share carries right to vote irrespective otherwise

(6) Each share of the corporation carries the right to vote in respect of a sale, lease or exchange referred to in subsection (3) whether or not it otherwise carries the right to vote.

### S.188(4): Continuance in other jurisdiction same thing

(4) Each share of the corporation carries the right to vote in respect of a continuance whether or not it otherwise carries the right to vote.

### s.211(3): liquidation or dissolution same thing:

(3) A corporation may liquidate and dissolve by special resolution of the shareholders or, where the corporation has issued more than one class of shares, by special resolutions of the holders of each class whether or not they are otherwise entitled to vote.

## Separate Class Voting Rights

### s.176(1) separate class voting right if Changes in class structure and rights: in/decrease max shares, add/remove rights, reclass shares, constraint

**176.** (1) The holders of shares of a class or, subject to subsection (4), of a series are, unless the articles otherwise provide in the case of an amendment referred to in paragraphs (*a*), (*b*) and (*e*), entitled to vote separately as a class or series on a proposal to amend the articles to

* (*a*) increase or decrease any maximum number of authorized shares of such class, or increase any maximum number of authorized shares of a class having rights or privileges equal or superior to the shares of such class;
* (*b*) effect an exchange, reclassification or cancellation of all or part of the shares of such class;
* (*c*) add, change or remove the rights, privileges, restrictions or conditions attached to the shares of such class and, without limiting the generality of the foregoing,
	+ (i) remove or change prejudicially rights to accrued dividends or rights to cumulative dividends,
	+ (ii) add, remove or change prejudicially redemption rights,
	+ (iii) reduce or remove a dividend preference or a liquidation preference, or
	+ (iv) add, remove or change prejudicially conversion privileges, options, voting, transfer or pre-emptive rights, or rights to acquire securities of a corporation, or sinking fund provisions;
* (*d*) increase the rights or privileges of any class of shares having rights or privileges equal or superior to the shares of such class;
* (*e*) create a new class of shares equal or superior to the shares of such class;
* (*f*) make any class of shares having rights or privileges inferior to the shares of such class equal or superior to the shares of such class;
* (*g*) effect an exchange or create a right of exchange of all or part of the shares of another class into the shares of such class; or
* (*h*) constrain the issue, transfer or ownership of the shares of such class or change or remove such constraint.

### s.176(5): allows class voting whether or not the shares carry right to vote

Subsection (1) applies whether or not shares of a class or series otherwise carry the right to vote.

### s.189(7) class vote allowed if the class is affected by the sale or substantial sale.

(7) The holders of shares of a class or series of shares of the corporation are entitled to vote separately as a class or series in respect of a sale, lease or exchange referred to in subsection (3) only if such class or series is affected by the sale, lease or exchange in a manner different from the shares of another class or series.

### 183(4): class vote allowed if amalga contains terms if contained in proposed amen to articles

(4) The holders of shares of a class or series of shares of each amalgamating corporation are entitled to vote separately as a class or series in respect of an amalgamation agreement if the amalgamation agreement contains a provision that, if contained in a proposed amendment to the articles, would entitle such holders to vote as a class or series under [section 176](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec176_smooth).

## Equal Treatment and Voting Restrictions

### Facebook example: Super Voting rights, Class B shares = 1 share 10 votes

### Jacobsen: if only 1 class of share can’t cap the voting power. at least 1 class with right to vote

**Jacobsen v United Canso Oil& Gas Ltd**

**Facts** United Canso was continued under the *CBCA*. It had a single class of share and the Articles specified that the shareholders get ***one vote per common share*** they beneficially own ***up to a maximum of 1,000*** votes.

**Issue** May a *CBCA* corporation with a single class of shares cap the number of shares a shareholder may vote?

**Held** Restriction struck down as contravening the *CBCA*. Thus, shareholders may vote all their shares.

**Ratio** Textbook p 560:

*[R]eading s 24 as a whole, each shareholder has the right to vote at any meeting of the shareholders on the basis of the number of shares held* ***where the corporation has only one******class of shares*** *and . . . this presumption can only be upset where there are more [than] one class of shares established in which case the provisions of subs. (4) come into play.*

**Notes:** as Forsyth J states: different voting rights may be attached to different classes of shares.

**The Distribution of Voting Rights**

* There must be at least one class of shares with the right to vote. The holders of each class of shares are entitled to vote on fundamental structural changes.

**Development of the Use of Restricted Shares**

* Due to keeping voting power in the hands of Canadian while going public.
* Must be listed as restricted and not as common shares.
* Must be approved by majority of the votes of the minority shareholders.
* Cannot participate in take over bid

**Should restricted shares be prohibited?**

* Violates one share one vote.
* 45 Canadian List companies on S&P and TSX with share structures that do not have one share one vote.

**Voting Restriction**

* One person, one vote policies are also violated when special voting rights are attached to one group within a special class of shares.

### Auto Self-Clensing: if article says sh control by extraordin reso, then not by ordinary. S.102(1)

**Automatic Self-clensing Filter Syndicate Co v Cunninghame:** same as s.102(1)

**Facts** The Articles of a corporation, incorporated in 1896, vested management of the business and control of the company in the directors “subject . . . to such regulations . . . as may from time to time be made by extraordinary resolution”.

At a shareholder’s meeting, the shareholder’s purported to force the directors to sell the corporation’s assets by an “ordinary resolution” (i.e. a bare majority).

**Issue** Can the shareholder’s manage the business by an ordinary resolution?

**Ratio** At this time, under this statute: no, the shareholders need the extraordinary resolution required by the Articles.

**Note** Textbook (p 547) says this result is codified in section 102(1) of the ***CBCA***, but I can’t see any need to cite this case directly rather than the statute…

“the company may by special resolution remove any director before the expiration of his period of officer appoint another qualified person in his stead.

**Notes**

**P** a shareholder wanted to sell the company asset. He held a shareholder meeting and passed by vote. 1502 vs 1198. Directors felt not in the best interest.

* Held: the majority could not impose that obligation upon the directors. Unless memorandum were invoked by a special resolution. Impossible for a mere majority at a meeting override the views of directors.
* CBCA S.102(1) codifies the result in automatic self-clensing filter syndicate.

# Mechanics of Shareholder’s Meetings

## Type of SH Meetings

### AGM: Elect Direc/Appoint auditors/Receive finan state/ Approve other matters

### Special Meetings: Vote on specific matters not in the ordinary course of business, e.g. merger

## Who May Call Meetings

### Directors s.133(1)-AGM(no later than 18 m initial meeting & 15m for subsequent/S.133(2) –Special Meetings any time

Calling annual meetings

**133.** (1) The directors of a corporation shall call an annual meeting of shareholders

(a) not later than eighteen months after the corporation comes into existence; and

(b) subsequently, not later than fifteen months after holding the last preceding annual meeting but no later than six months after the end of the corporation’s preceding financial year.

Calling special meetings

(2) The directors of a corporation may at any time call a special meeting of shareholders.

### Shareholders s.143(1): if holding no less than 5% issued share with vote right at a meeting/may require director to call

**143.** (1) The holders of not less than five per cent of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition.

### s.143(4): if BoD not call within 21 days receiving requisition, SH can call the meeting itself

(4) If the directors do not within twenty-one days after receiving the requisition referred to in subsection (1) call a meeting, any shareholder who signed the requisition may call the meeting.

### Courts s.144(1): sh entitled to vote or director may petition to court(a) imprac(c) court thinks right

Meeting called by court

**144.** (1) A court, on the application of a director, a shareholder who is entitled to vote at a meeting of shareholders or the Director, may order a meeting of a corporation to be called, held and conducted in the manner that the court directs, if

(a) it is impracticable to call the meeting within the time or in the manner in which those meetings are to be called;

(b) it is impracticable to conduct the meeting in the manner required by this Act or the by-laws; or

(c) the court thinks that the meeting should be called, held and conducted within the time or in the manner it directs for any other reason.

Varying quorum

(2) Without restricting the generality of subsection (1), the court may order that the quorum required by the by-laws or this Act be varied or dispensed with at a meeting called, held and conducted pursuant to this section.

Valid meeting

(3) A meeting called, held and conducted pursuant to this section is for all purposes a meeting of shareholders of the corporation duly called, held and conducted.

### Other if provided by the articles of incorporation or bylaws

### **Re Morris -** board split into 2 rival fac, Court called meeting in accordance with articles

**Re Morris Funeral Services 1957**

* Board split in 2 rival factions: therefore no decision: court called meeting
* In accordance with charter and articles of incorp

### **Re CA Javeline (1976)** s 144(1): although court did not intervene but ordered meeting ASAP

**Facts** Two parallel boards of directors were purporting to act for the company. A shareholder attempted to requisition a special general meeting of the shareholders, but the company said it could not call the meeting because its financial statements were not ready. Moreover, it was clear that the company had no intention of calling a meeting in the near future and would soon be in default of the statutory requirement to have an annual meeting. The shareholder petitioned the court to intervene to protect the company from detriment due to the uncertainty of management.

**Analysis** The court pointed to *Re Routley’s* as an example of how, if it is unlikely that the business of a shareholder’s meeting will be properly conducted except under court order, the court could order how the meeting be conducted…

**Held** 1. Annual meeting must be called “as soon as possible” so the shareholders can decide on management.

2. A ***disinterested person*** named by the court is to chair the meeting.

**Note** RD **styles this case “protective intervention”**, in contrast with the “intervention on the basis of ***fault***” in *Re Routley’s*.

**NO LONGER GOOD LAW**

* + S.145C ALLOWS COURT TO MAKE ORDER IT THINKS FIT
	+ THEREFORE now court can order meeting until annual meeting

### **Charlesbois:** under s 145(2)(c), court authorized to order a new election, so the reasoning in Charlebois cannot apply.

**Charlesbois v. Bievneue (1986)**

**Facts** A shareholders meeting was called to elect directors of BIF, but after the meeting controversy arose as to who was actually elected. A trial was scheduled to determine who the valid directors were, but because the trial could not be expedited, a judge ordered a new shareholder’s meeting under s 310 of the old Ontario *Corporations Act* (analogous to current *CBCA* s 144) to elect new directors. This order was appealed.

**Issue** 1. Under s 310 of the *OCA*, can a judge order a shareholder’s meeting to achieve some purpose that the meeting would not otherwise be authorized to do?

2. Is electing new directors under the circumstances something the meeting would not otherwise be authorized to do?

**Analysis** Aylesworth JA acknowledged that the “***impracticable*** to call a meeting test” had been met. However, the problem is that under the *OCA*, directors serve for a year, and if an election is not held at the proper time, the existing directors continue to serve until a proper election is held. So if directors were ***validly elected*** at the contested election, the new election ordered by the judge would have no power to depose them. Thus the issue of whether the election was valid must first be determined. In other words, the trial must take place.

**Held** Appeal dismissed: the judge was not authorized by the *OCA* to order a shareholder’s meeting to elect new directors, since it might have the effect of contravening the statute.

**Note** RD asks in his slides **whether this decision is good law** given ss 144(3) and 145 of the ***CBCA***? It appears that it is not:

1. The language of *CBCA* s 144(3) was already integrated into s 310 *OCA*, so this is not a problem.

2. The trial which was slated to occur was for the purpose of determining who the directors were. In other

words, an application had been made under the *OCA* which was analogous to an application under *CBCA* s 145. The problem is that the trial hadn’t taken place yet! However, it appears that under s 145(2)(c), acourt is expressly authorized to order a new election, so the reasoning in Charlebois cannot apply.

### **S.145**(1)Corp apply to court determine controversy (2)© court has power to order new election & how manage till then

**145.** (1) A corporation or a shareholder or director may apply to a court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation.

Powers of court

(2) On an application under this section, the court may make any order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute;

(b) an order declaring the result of the disputed election or appointment;

(c) an order requiring a new election or appointment, and including in the order directions for the management of the business and affairs of the corporation until a new election is held or appointment made; and

(d) an order determining the voting rights of shareholders and of persons claiming to own shares.

# Notice of the Meeting

## Who should receive Notice

### s.135(1) **Notice Who?** (a) SH entitled to vote (b) each director (c) auditor of corp

**135.** (1) Notice of the time and place of a meeting of shareholders shall be sent within the prescribed period to

(*a*) each shareholder entitled to vote at the meeting;

(*b*) each director; and

(*c*) the auditor of the corporation.

### s.138: Corp shall prepare **alphabetical SH list** entitled to receive notice of meeting, show # of shares held by each

**138.** (1) A corporation shall prepare an alphabetical list of its shareholders entitled to receive notice of a meeting, showing the number of shares held by each shareholder,

(a) if a record date is fixed under [paragraph 134(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec134subsec1_smooth)(c), not later than ten days after that date; or

(b) if no record date is fixed, on the record date established under [paragraph 134(2)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec134subsec2_smooth)(a).

(3.1) A shareholder whose name appears on a list prepared under subsection (2) or (3) is entitled to vote the shares shown opposite their name at the meeting to which the list relates.

### S.134 **Record Date:** (1) director fix record date (2) if fix: the day before notice sent, if no notice, day meeting held

**134.** (1) The directors may, within the prescribed period, fix in advance a date as the record date for the purpose of determining shareholders

(a) entitled to receive payment of a dividend;

(b) entitled to participate in a liquidation distribution;

(c) entitled to receive notice of a meeting of shareholders;

(d) entitled to vote at a meeting of shareholders; or

(e) for any other purpose.

No record date fixed

(2) If no record date is fixed,

(a) the record date for the determination of shareholders entitled to receive notice of a meeting of shareholders shall be

(i) at the close of business on the day immediately preceding the day on which the notice is given, or

(ii) if no notice is given, the day on which the meeting is held; and

(b) the record date for the determination of shareholders for any purpose other than to establish a shareholder’s right to receive notice of a meeting or to vote shall be at the close of business on the day on which the directors pass the resolution relating thereto.

When record date fixed

(3) If a record date is fixed, unless notice of the record date is waived in writing by every holder of a share of the class or series affected whose name is set out in the securities register at the close of business on the day the directors fix the record date, notice of the record date must be given within the prescribed period

(a) by advertisement in a newspaper published or distributed in the place where the corporation has its registered office and in each place in Canada where it has a transfer agent or where a transfer of its shares may be recorded; and

(b) by written notice to each stock exchange in Canada on which the shares of the corporation are listed for trading.

### s.43(1) CBCR: for dividend, liquidation, other – record date <60/SH meeting 21-60 days/by newspaper ads >7days

**43.** (1) For the purpose of paragraphs 134(1)(*a*), (*b*) and (*e*) of the Act, the prescribed period for the directors to fix the record date is not more than 60 days before the day on which the particular action is to be taken.

(2) For the purposes of paragraphs 134(1)(*c*) and (*d*) of the Act, the prescribed period for the directors to fix the record date is not less than 21 days and not more than 60 days before the date of the meeting.

(3) For the purpose of subsection 134(3) of the Act, the prescribed period for the directors to provide notice of the record date is at least seven days before the date fixed.

## When to Send out

### s.44 CBCR: director provide notice of SH meeting not less 21days & no more than 60 days

**44.** For the purpose of subsection 135(1) of the Act, the prescribed period for the directors to provide notice of the time and place of a meeting of shareholders is not less than 21 days and not more than 60 days before the meeting.

## What information

### s.135(1) –Notice of the **time and place** of a meeting

### s.135(6) if special business – info required is (sufficient detail to permit sh make reasoned judg)

Notice of business

(6) Notice of a meeting of shareholders at which special business is to be transacted shall state

(a) the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon; and

(b) the text of any special resolution to be submitted to the meeting.

## At The Meeting

### s.139: **Quorum-**majority of sh present entitled to vote in person or by proxy/no quor = adjourn

**139.** (1) Unless the by-laws otherwise provide, a quorum of shareholders is present at a meeting of shareholders, irrespective of the number of persons actually present at the meeting, if the holders of a majority of the shares entitled to vote at the meeting are present in person or represented by proxy.

Opening quorum sufficient

(2) If a quorum is present at the opening of a meeting of shareholders, the shareholders present may, unless the by-laws otherwise provide, proceed with the business of the meeting, notwithstanding that a quorum is not present throughout the meeting.

Adjournment

(3) If a quorum is not present at the opening of a meeting of shareholders, the shareholders present may adjourn the meeting to a fixed time and place but may not transact any other business.

One shareholder meeting

(4) If a corporation has only one shareholder, or only one holder of any class or series of shares, the shareholder present in person or by proxy constitutes a meeting.

### **Rules of Conduct**: meeting chair can set rule of conduct- usually officer or shareholder

* How someone may speak, how long can speak at meeting, chair of meeting in charge – has duty to act in good faith, chair is usually large shareholder and officer – they have interest therefore they may influence the way meeting may go.

**Conduct of Meetings**

### ***Re Marshall:*** chairman no need investi whether shares cast in wishes of owners (not good law)

***Re Marshall (1981)***:

**Facts** The registered owner of a certain number of shares agreed in writing to vote the shares for the slate of directors desired by the beneficial owner, but at the shareholders’ meeting he voted them for the other slate in contravention of the agreement. The beneficial owner sued to have the votes tabulated as he had directed.

**Issue** Is the chairman of an annual shareholders’ meeting required to go behind the share register and, in case of dispute, accept written directions from beneficial owners as to the manner in which their vote shall be cast?

**Held** Application dismissed: the votes are to remain as tabulated by the meeting chairman.

**Ratio** A chairman at an AGM is entitled to rely on the votes as cast by the registered owner of the shares. Even if the shares are voted against the wishes of the beneficial owner(s), a court will not vary the result of the vote. “no duty to inquiry into the minds of the beneficial owners of the shares”

* **NO LONGER GOOD LAW**. Because you don’t buy shares directly from the company, but through a intermediate securities company – fidelity.
	+ Intermediary cannot cast vote without consent of beneficiary owners.

### **Blair**: presume good faith in conduct of SH meeting, the challenger bears onus to proof bad faith

***Blair v. Consolidated Enfield Corp. (1993)***

**Facts** Blair was president and a director of Enfield, an *OBCA* corporation. The ***company bylaw decreed that the president would chair the AGM***. At the AGM, Canadian Express, a major shareholder, assembled a slight majority of votesavailable at the meeting in order to oust Blair from his directorship. However, the proxies held by the CanEx blocfailed to name Price, the director CanEx wanted to elect instead of Blair.At the meeting, Blair sought advice from Enfield’s counsel, Osler, saying: “***You know the law. I will take my direction from you. What should I do?***” Osler said Blair had a duty as chairman to rule, and that legally the proxies held by theCanEx bloc could not be used to vote other than for management’s slate of directors including Blair. Readingverbatim a legal opinion prepared by Osler, Blair ruled that CanEx failed and he was re-elected.In a later legal action, CanEx succeeded in having the proxies ruled valid and ousting Blair as director. As Enfield was now controlled by hostiles, it refused to indemnify Blair for his costs in the action. *OBCA* had a permissive indemnification provision identical to *CBCA* s 124(1) and the ***Enfield bylaws provided mandatory indemnification*** of directors as long as they complied with terms identical to *CBCA* s 124(3). Blair sued for indemnification.

**Issue** Did Blair act honestly and in good faith with a view to the best interests of the corporation, so as to be (1) not disqualified under equivalent to *CBCA* s 124(3) and (2) entitled to indemnification under the Enfield bylaws?

**Analysis** [C]ourts, through hindsight, are reluctant to find chairmen in dereliction of their duties barring proof of bad faith. Blair’s reliance on Osler’s advice was reasonable and in good faith. Reliance on actuarial and legal advice would ***militate*** against a finding of misconduct. Iacobucci J also discussed policy reasons for director indemnification.

**Held** Enfield must indemnify Blair.

**Ratio** There is a ***presumption of good faith*** which the corporation must disprove.

Chairman acted on advice of lawyer, whether chairman acted honestly and in good faith, Osler’s advice was reasonable and good faith. Acting on legal advice is helpful in determining good fair. But it is not determinative.

# Voting Arrangements & Governance in Closely Held Corporations

**Close v public**

 Number of SH: Small vs Large

Management by shareholders: active vs limited

Share transferability: restricted vs free

Market for shares: no vs yes

## Distributing Company

### s.2(1) CBCR Def: corporation that is a reporting issuer/sell to public & subj to securities law

* **2.** (1) For the purpose of the definition *“distributing corporation”* in subsection 2(1) of the Act and subject to subsection (2), *“distributing corporation”* means
	+ (*a*) a corporation that is a “reporting issuer” under any legislation that is set out in column 2 of an item of Schedule 1; or
	+ (*b*) in the case of a corporation that is not a “reporting issuer” referred to in paragraph (*a*), a corporation
		- (i) that has filed a prospectus or registration statement under provincial legislation or under the laws of a jurisdiction outside Canada,
		- (ii) any of the securities of which are listed and posted for trading on a stock exchange in or outside Canada, or
		- (iii) that is involved in, formed for, resulting from or continued after an amalgamation, a reorganization, an arrangement or a statutory procedure, if one of the participating bodies corporate is a corporation to which subparagraph (i) or (ii) applies.
* (2) A corporation that is subject to an exemption under provincial securities legislation, or to an order of the relevant provincial securities regulator that provides that the corporation is not a “reporting issuer” for the purposes of the applicable legislation, is not a *“distributing corporation”* for the purpose of the definition of that expression in subsection (1).

###  s.102(2) – at least 3 directors on board

### s.162(1) auditor appointment: at first AGM appoint auditor to hold office until next AGM

**162.** (1) Subject to [section 163](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec163_smooth), shareholders of a corporation shall, by ordinary resolution, at the first annual meeting of shareholders and at each succeeding annual meeting, appoint an auditor to hold office until the close of the next annual meeting.

### s.171 Audit Committee: no less than 3 directors, majority not officer/employee of corp

**171.** (1) Subject to subsection (2), a corporation described in [subsection 102(2)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec102subsec2_smooth) shall, and any other corporation may, have an audit committee composed of not less than three directors of the corporation, a majority of whom are not officers or employees of the corporation or any of its affiliates.

### s.160: public filing of financial statements:

**160.** (1) A distributing corporation, any of the issued securities of which remain outstanding and are held by more than one person, shall send a copy of the documents referred to in [section 155](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec155_smooth) to the Director

* (a) not less than twenty-one days before each annual meeting of shareholders, or without delay after a resolution referred to in [paragraph 142(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec142subsec1_smooth)(b) is signed; and
* (b) in any event within fifteen months after the last preceding annual meeting should have been held or a resolution in lieu of the meeting should have been signed, but no later than six months after the end of the corporation’s preceding financial year.

### s.21(1): access to corporate records: SH & creditor of corp can examine during usual hours for free/other ppl for fee

**21.** (1) Subject to subsection (1.1), shareholders and creditors of a corporation, their personal representatives and the Director may examine the records described in [subsection 20(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec20subsec1_smooth) during the usual business hours of the corporation, and may take extracts from the records, free of charge, and, if the corporation is a distributing corporation, any other person may do so on payment of a reasonable fee.

### s.149(2) mandatory Proxy Solicitation

Mandatory solicitation

**149.** (1) Subject to subsection (2), the management of a corporation shall, concurrently with giving notice of a meeting of shareholders, send a form of proxy in prescribed form to each shareholder who is entitled to receive notice of the meeting.

## Closely Held Corp

### Re Barsh: if closely held corp article says quorum of 3 SH, court won’t vary (tight control)

Re Barsh v Feldman

**Facts** Feldbar Construction company was incorporated by Feldman and Benjamin Barsh under the *OBCA*. There were three shares, with Feldman owning one, Benjamin another, and Benjamin’s son Harvey the third. Benjamin died leaving his share to Harvey. The bylaws of the company required a quorum of three shareholders at meetings of shareholders and directors and provided for winding up the company if unanimous consent could not be achieved.

Desiring to get effective control of the company, Harvey requisitioned a shareholders’ meeting under Ontario equivalent of *CBCA* s 143, but Feldman didn’t show up (as Harvey could outvote him) so no quorum. Harvey applied court to have the quorum reduced under Ontario equivalent of *CBCA* s 144(2).

**Issue** Can a court vary the quorum of shareholders’ meeting of a closely held company that was “carefully structured so that no shareholder could control it”?

**Held** Application dismissed: if shareholders can’t agree, then answer is winding up the corporation.

**Ratio** “The answer to disagreement among shareholders is not to compel a meeting where two of the three equal shareholders may outvote the third”.

**Note RD did not actually mention this case in class**. The textbook uses this case as an illustration of the proposition that “[t]he courts have long been reluctant to interfere with closely held companies and the arrangements made among shareholders to protect their interests.” (see p 610 textbook).

### Control Devices: 1) super majority 2) SH agreement 3) voting trusts 4) class voting 5) share transfer restriction

Supermajority: 2/3 of quorum, but Barsh says all must be present

## SH agreements

* Shareholder agreements
* Contract to regulate, designed to contain provisions to protect minority shareholders or equal shares.
* Desirable – even you are a largest shareholder you may be vulnerable by abuse by majority. E.g. A = 45, B = 35, C = 20. B+C they have majority, they can vote together and oust A.

### s.146(1)- Unanimous SH Agreement: written agreement among all SH restricts power of director to manage is valid

**146.** (1) An otherwise lawful written agreement among all the shareholders of a corporation, or among all the shareholders and one or more persons who are not shareholders, that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation is valid.

### s.145.1: Vote-Pooling Agreement: 2 or more SH provide how to exercise voting rights according to arrangement

**145.1** A written agreement between two or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as provided in the agreement.

**Note:** they only bind SH capacity

### **Ringuet:** non-unanimous k among SH is binding as b/t parties to K (the K only binds SH capacity, not director)

Ringuet v. Bergeron [1960] SRC 672, 24 DLR (2d)499

**Facts** Ringuet, Pagé, and Bergeron were shareholders in St Maurice Knitting Mills Limited, a ***closely held*** corporation governed by the Québec *Companies Act.* The three were aiming for a controlling interest in the company. They agreed among themselves that each party would:

ensure appointment of Bergeron as secretary-treasurer and assistant general manager of the company;

vote the party’s shares unanimously with the other two; and

cede the party’s shares free of charge to the other two in equal parts if he violated the agreement.

This contract was not a unanimous shareholders’ agreement because a fourth shareholder, Gerard Jean, was not a party.

Ringuet and Pagé began to take steps to oust Bergeron from management. They held a shareholders’ meeting that Bergeron had no notice of and voted themselves directors. As directors, they then ousted Bergeron from his secretary-treasurer/general manager post. Bergeron sued to enforce the penalty clause of the contract.

**Issue** Is a non-unanimous shareholders’ agreement providing for direction and control of a company void as contrary to public order?

**Held** Bergeron wins: the contract is enforced, as it is not contrary to the *Companies Act* or public order.

**Ratio** A non-unanimous contract among shareholders is binding as between the parties to the contract.

**Dissent:** The agreement contrary to their duty as directors to act fiduciary relationship towards a company. You shouldn’t be able to kick a director.

“The requirement of the agreement to vote unanimously applied to directors meetings as well as to shareholders' meetings. Such binding of the parties in their capacities as directors was contrary to their duties as directors. It was contrary to the fiduciary relationship which directors have towards a company and which requires them to give their entire ability to the best interests of the company and its shareholders. This abdication of duties rendered the agreement invalid, and since the clause requiring the unanimous vote was not severable, the penalty was not enforceable. “

### Common matters of SH agreement

* Nomination and election of directors
	+ Vote Pooling Agreement
* Voting threshold/veto rights
* Dividend payments
	+ In Private company: what percentage salary/dividend paid each yr
* Preemptive rights
	+ Right to purchase new shares to maintain voting position, Unanimous Shareholder Agreement
* Departure of a shareholder due to death etc.
* Restrictions of share transfer
	+ Don’t want stranger to participate in company, create liquidity of share optiions
* Non-competition and confidentiality undertakings
* Deadlock: clause provides for what happens on dead-lock

### s.146: transferee of USA is deemed to be party, unless no notice, <30 days rescind transaction

(3) A purchaser or transferee of shares subject to a unanimous shareholder agreement is deemed to be a party to the agreement.

(4) If notice is not given to a purchaser or transferee of the existence of a unanimous shareholder agreement, in the manner referred to in subsection 49(8) or otherwise, the purchaser or transferee may, no later than 30 days after they become aware of the existence of the unanimous shareholder agreement, rescind the transaction by which they acquired the shares.

## Voting Trust – give equitable title but not legal title

* SH transfers legal title to trustee, the trustee for a defined period according to specific instructions has exclusive voting power over which they preside.
* Permit transferability without giving up control. E.g. a parent give financial benefit but not control. E.g. act as trustee, but beneficiary with child

## Class Voting- 10 vote per share

* Allocate voting powers disportionately to others. E.g. Class A = 1 vote per share, class B = 10 vote per share.
* Share transfer restrictions: each class entitled to elect certain numbers

## Share Transfer Restriction

### 1) Absolute Restrictions

### 2) Prior Approval

### First option: First offer to shareholders price set by agreement

### First refusal: First offer to shareholders price set by outsider purchase price

### Mandatory repurchase: Company and shareholders must buy back shareholders if wants to sell

### Repurchase on certain events: Such as death, must sell to company.

### s.49(9: Public Company default free to transfer except by s.174

A distributing corporation, any of the issued shares of which remain outstanding and are held by more than one person, shall not have a restriction on the transfer or ownership of its shares of any class or series except by way of a constraint permitted under section 174.

s.174(1): (a) constraint transfer of shares if not Canadian resident (b)….. by special resolution

Subject to sections 176 and 177, a distributing corporation, any of the issued shares of which remain outstanding and are held by more than one person, may by special resolution amend its articles in accordance with the regulations to constrain

1. the issue or transfer of shares of any class or series to persons who are not resident Canadians;

(b) the issue or transfer of shares of any class or series to enable the corporation or any of its affiliates or associates to qualify under any prescribed law of Canada or a province

 (i) to obtain a licence to carry on any business,

 (ii) to become a publisher of a Canadian newspaper or periodical, or

 (iii) to acquire shares of a financial intermediary as defined in the regulations;……..

# Proxy Solicitation

## What is Proxy Solicitation

### s.147: ”Proxy” sh appoints a proxyholder to attend and act on SH’s behalf at SH meeting

“proxy” means a completed and executed or, in Quebec, signed form of proxy by means of which a shareholder appoints a proxyholder to attend and act on the shareholder’s behalf at a meeting of shareholders;

### S.147: “Solicita”: (a) request for proxy/send proxy form (b) not admin act, not public announce

“solicit” or “solicitation”

* (a) includes
	+ (i) a request for a proxy whether or not accompanied by or included in a form of proxy,
	+ (ii) a request to execute or not to execute or, in Quebec, to sign or not to sign a form of proxy or to revoke a proxy,
	+ (iii) the sending of a form of proxy or other communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy, and
	+ (iv) the sending of a form of proxy to a shareholder under [section 149](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec149_smooth); but
* (b) does not include
	+ (i) the sending of a form of proxy in response to an unsolicited request made by or on behalf of a shareholder,
	+ (ii) the performance of administrative acts or professional services on behalf of a person soliciting a proxy,
	+ (iii) the sending by an intermediary of the documents referred to in [section 153](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec153_smooth),
	+ (iv) a solicitation by a person in respect of shares of which the person is the beneficial owner,
	+ (v) a public announcement, as prescribed, by a shareholder of how the shareholder intends to vote and the reasons for that decision,
	+ (vi) a communication for the purposes of obtaining the number of shares required for a shareholder proposal under [subsection 137(1.1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec137subsec1.1_smooth), or
	+ (vii) a communication, other than a solicitation by or on behalf of the management of the corporation, that is made to shareholders, in any circumstances that may be prescribed;

## Who is the Solicitor

### s.149(1): **Mandatory for Management**: along giving notice of SH meeting send form of proxy to SH entitled to notice

**149.** (1) Subject to subsection (2), the management of a corporation shall, concurrently with giving notice of a meeting of shareholders, send a form of proxy in prescribed form to each shareholder who is entitled to receive notice of the meeting.

### s.149(3): if failed to comply: liable for summary conviction not exceeding 5k fine

(3) If the management of a corporation fails to comply, without reasonable cause, with subsection (1), the corporation is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars.

### s.149(2): **Exception:** not required to send proxy form if (a) not distributing comp, (b) <50 SH entitled to vote at meet

The management of the corporation is not required to send a form of proxy under subsection (1) if it

 (a) is not a distributing corporation; and

 (b) has fifty or fewer shareholders entitled to vote at a meeting, two or more joint holders being counted as one shareholder.

### s.150(1.1)**Dissident SH:** may solicit without proxy circular if <15 SH solicited

1.1) Despite subsection (1), a person may solicit proxies, other than by or on behalf of the management of the corporation, without sending a dissident’s proxy circular, if the total number of shareholders whose proxies are solicited is fifteen or fewer, two or more joint holders being counted as one shareholder.

### s.150(1.2): if **dissent SH** solicit by **public broadcast, speech/publication** no need proxy circular

(1.2) Despite subsection (1), a person may solicit proxies, other than by or on behalf of the management of the corporation, without sending a dissident’s proxy circular if the solicitation is, in the prescribed circumstances, conveyed by public broadcast, speech or publication.

s.151(1) Director may exempt the person from requirements of s.149 & 150(1)

On the application of an interested person, the Director may exempt the person, on any terms that the Director thinks fit, from any of the requirements of section 149 or subsection 150(1), which exemption may have retrospective effect.

## Use of Proxy Circular

### s.150(1): shall not solicit proxies unless 1) corp sends proxy circular 2) dissident proxy circular in prescribed form

Soliciting proxies

**150.** (1) A person shall not solicit proxies unless

(a) in the case of solicitation by or on behalf of the management of a corporation, a management proxy circular in prescribed form, either as an appendix to or as a separate document accompanying the notice of the meeting, or

(b) in the case of any other solicitation, a dissident’s proxy circular in prescribed form stating the purposes of the solicitation

is sent to the auditor of the corporation, to each shareholder whose proxy is solicited, to each director and, if paragraph (b) applies, to the corporation.

### CBCR part 7 (Form 51-102F5 sets the form of proxy circular)

Issuing Company 1) sends proxy solicitation and proxy circular to a) service provider to registered owner & sends to vote tabulator. 2) Sends to Canadian Depository for Securities (CDS) to omnibus proxy to securities intermediaries(fidelity) then sends to service provider sends to individual beneficial owner or institutional beneficial owners, then sends to proxy advisory agent, then sends to service provider, then to vote tabulator

## Adequacy of Proxy Disclosure

### s.135(6): **special buz:** the proxy circular must state nature of buz in sufficient detail to permit sh for reasoned judgment

Statutory Requirements [s.135(6)]

Notice of a meeting of shareholders at which special business is to be transacted shall state

(a) the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon; and

(b) the text of any special resolution to be submitted to the meeting.

* + E.g. Telus. Nature: directors, received financial reports, these are ordinary matter. Vote on pay = special matter: the proxy circular need to set out text to allow them to make reasoned judgment

### s.154(1): if proxy states untrue/omit material fact required to make statement, person can apply to court to make order

If a form of proxy, management proxy circular or dissident’s proxy circular contains an untrue statement of a **material** fact or omits to state a **material** fact required therein or necessary to make a statement contained therein not misleading in the light of the circumstances in which it was made, an interested person or the Director may apply to a court and the court may make any order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the solicitation, the holding of the meeting, or any person from implementing or acting on any resolution passed at the meeting to which the form of proxy, management proxy circular or dissident’s proxy circular relates;

(b) an order requiring correction of any form of proxy or proxy circular and a further solicitation; and

(c) an order adjourning the meeting.

### **Wotherspoon**: circular is adequate = price is fair & appraisal reports too voluminous to send

Wotherspoon v Canadian Pacific Ltd (1982)

F: the P was the minority sh of O & Q railway corp. CP owns 80% of O & Q, and O & Q sales asset to Marathon a wholly owned subsidiary of CP. O&Q required to state info on sell of assets. The marathon’s appraisal report much higher than O & Q’s stated.

**A:** Disclosure was adequate on the basis that price had been found to be fair and that appraisal reports were too voluminous to be sent.

### **Harris v Universal**: **material fact** = substantial likelihood SH would consider it important in deciding how to vote.

Harris v Universal Explorations Ltd 1982

**F:** A meeting of the shareholders of a corporation (Petrol) was held to approve amalgamation with another company, Universal. A management information circular in support of the amalgamation indicated that a consultant, Colt, had done an “evaluation” of one of Universal’s key assets. The circular was structured to imply that Colt was an independent expert that had determined the asset’s market value. However, Colt had merely done an operational analysis of the asset. Shareholders who dissented from the decision to amalgamate sued to have the amalgamation set aside due to inadequate disclosure.

* Colt’s report was done for another purpose: the issue was is there sufficient disclosure.

P.666: **Ratio** 1. The test for “***sufficient detail***” is whether no ***material facts*** were omitted(s.135(6)). A ***material fact*** is one for which there is a substantial likelihood that a shareholder would consider it important in deciding how to vote. 2. If a circular implies that a report is an independent and expert valuation of a property, then the fact that it is not a ***material fact*** the omission of which is a failure to provide ***sufficient detail***.

**Proxy Contest**

Increase in proxy contest over the years.

* Not clear why.

Win rates

* If director elections = 87 contests
* If transaction – related contests = 14 contests.
* Why high win rates for dissident high win rates?
	+ Because unless dissident is sure they will win, they won’t go through the proxy solicitation process because they have to pay.

Settlement Rate

* Only 18% settled out of 87 contest
* Usually dissident sh negotiate before action, therefore trial is just aftermath of failed negotiation.

# Access to Management’s Proxy Circular: Shareholder Proposals

* SH proposal included in proxy circular paid by company money
* However dissident sh soliciting proxy = out of their own pocket.

### SH Proposal: Put together by group of sh for consideration at meeting. (e.g. amend by-law)

* E.g. change by-law, amend article, or request board to set up HR committee like Google AGM.

### Is SH Proposal Binding? Depends on what kind of proposal

1) Proposal for dividend or decreased pay = not binding because within discretion of board

## Who can Submit SH proposal

### s.137(1.1) [Regs. S.46]: Regi/B Owner, lessor of 1% /$2000 of shares, > 6m before submit

* Registered or B owners, individually or collectively own,
* The lessor of 1% of total outstanding voting shares or $2000 worth of shares
* For at least 6 months immediately before the day of submission

### **s.137(4):** may propose nominate election of directors if aggregated >5% entitled to vote

* A proposal may include nominations for the election of directors if the proposal is signed by one or more holders of shares representing in the aggregate not less than five per cent of the shares or five per cent of the shares of a class of shares of the corporation entitled to vote at the meeting to which the proposal is to be presented, but this subsection does not preclude nominations made at a meeting of shareholders.
* The requirements = used to prevent frivolous proposals and opportunitism

### S.137(1.4): if required by corp, person must provide proof required in s137(1.1) within 21days

(1.4) If requested by the corporation within the prescribed period, a person who submits a proposal must provide proof, within the prescribed period, that the person meets the requirements of subsection (1.1).

### s.47 CBCR: corp < 14 days after receiving proposal send notice, SH has 21 days to respond

**47.** For the purpose of subsection 137(1.4) of the Act,

(*a*) a corporation may request that a shareholder provide the proof referred to in that subsection within 14 days after the corporation receives the shareholder’s proposal; and

(*b*) the shareholder shall provide the proof within 21 days after the day on which the shareholder receives the corporation’s request or, if the request was mailed to the shareholder, within 21 days after the postmark date stamped on the envelope containing the request.

## How does an eligible SH submit a SH proposal

### s. 137 (1.2): submit with name & address of person and his supporters, the # of shares owned by them

A proposal submitted under paragraph (1)(a) must be accompanied by the following information:

the name and address of the person and of the person’s supporters, if applicable; and

the number of shares held or owned by the person and the person’s supporters, if applicable, and the date the shares were acquired.

### s. 137(3) : the corp shall include proposal in management proxy circular <500 words

If so requested by the person who submits a proposal, the corporation shall include in the management proxy circular or attach to it a statement in support of the proposal by the person and the name and address of the person. The statement and the proposal must together not exceed the prescribed maximum number of words.

## Under what circumstances can management exclude a SH proposal from proxy circular

### s.137(5): exclude if (a) not submit atleast 90 days before the anniversary day of notice of meeting

**CBCA s. 137 (5)** A corporation is not required to comply with subsections (2) and (3) if

1. the proposal is not submitted to the corporation at least the prescribed number of days before the anniversary date of the notice of meeting that was sent to shareholders in connection with the previous annual meeting of shareholders; prescribed day is 90days

### s.137(5)(b): exclude if primary purpose enforce personal claim/redress of personal grievance

1. it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders;

### s.137(5)(b.1): proposal does not relate in significant way to business or affairs of corp

(b.1) it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation;

### *Varity (1987):* abolish apartheid in Africa. It is hard to imagine someone can argue not relate at all

131(5)(b) (before 2001) “it clearly appears that the proposal is submitted by the shareholder primarily for the purpose of promoting general economic, political, religious, social or similar causes;”

- the new provision: harder for corp to exclude because the corp cannot exclude proposal relating social and environmental issue because you can’t say the issue raised does not relate to the corp in any way.

### s.137(5)c: 2 yr penalty for SH who didn’t even vote his own proposal in the past

1. not more than the prescribed period before the receipt of a proposal, a person failed to present, in person or by proxy, at a meeting of shareholders, a proposal that at the person’s request, had been included in a management proxy circular relating to the meeting;

### s.137(5)(d): if proposal substantial the same as last year, & last year did not receive 3% vote

1. substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident’s proxy circular relating to a meeting of shareholders held not more than the prescribed period before the receipt of the proposal and did not receive the prescribed minimum amount of support at the meeting; or

### Greenpeace: failed becuz 1) not sh of record date (90days) 2) substantially same 3) promote politic

Greenpeace v. Inco 1984

1) G was not a shareholder of record 90 days before date scheduled for meeting, 2) the proposal was substantially the same as one submitted by G the preceding year which had been defeated, 3) the proposal had been submitted by G primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes.

### s.137(5)e: proposal is to abuse and secure publicity

1. the rights conferred by this section are being abused to secure publicity.
* Abuse = misuse – perversion, or embarrass directors, not all media attraction is abuse.

### CBCR: check the prescribed periods and requirements from the regulation

**48.** For the purpose of subsection 137(3) of the Act, a proposal and a statement in support of it shall together consist of not more than 500 words.

**49.** For the purpose of paragraph 137(5)(*a*) of the Act, the prescribed number of days for submitting a proposal to the corporation is at least 90 days before the anniversary date.

**50.** For the purpose of paragraph 137(5)(*c*) of the Act, the prescribed period before the receipt of a proposal is two years.

**51.** (1) For the purpose of paragraph 137(5)(*d*) of the Act, the prescribed minimum amount of support for a shareholder’s proposal is

* (*a*) 3% of the total number of shares voted, if the proposal was introduced at an annual meeting of shareholders;
* (*b*) 6% of the total number of shares voted at its last submission to shareholders, if the proposal was introduced at two annual meetings of shareholders; and
* (*c*) 10% of the total number of shares voted at its last submission to shareholders, if the proposal was introduced at three or more annual meetings of shareholders.

(2) For the purpose of paragraph 137(5)(*d*) of the Act, the prescribed period is five years.

## What if Management refuses to include the Proposal

### s.137(8) seek court order to make it included & court has power to make further order it thinks fit

(8) On the application of a person submitting a proposal who claims to be aggrieved by a corporation’s refusal under subsection (7), a court may restrain the holding of the meeting to which the proposal is sought to be presented and make any further order it thinks fit.

### s.137(9): the corp can also seek court order to permit omission from management proxy circular

(9) The corporation or any person claiming to be aggrieved by a proposal may apply to a court for an order permitting the corporation to omit the proposal from the management proxy circular, and the court, if it is satisfied that subsection (5) applies, may make such order as it thinks fit.

SH wants change of board of D

Capital Restructure

Sale of Company asset

Direction of business strategies

Negotiation/threaten

Request Board Representataion

Proxy Fight/requisition a meeting

Proxy Fight – wait for AGM

Propose Change from floor at AGM

# Information Rights

## Access to Corporate Records

### s.21(3): shareholder lists must be listed

Shareholder lists

(3) Shareholders and creditors of a corporation, their personal representatives, the Director and, if the corporation is a distributing corporation, any other person, on payment of a reasonable fee and on sending to a corporation or its agent or mandatary the affidavit referred to in subsection (7), may on application require the corporation or its agent or mandatary to provide within 10 days after the receipt of the affidavit a list (in this section referred to as the “basic list”) made up to a date not more than 10 days before the date of receipt of the affidavit setting out the names of the shareholders of the corporation, the number of shares owned by each shareholder and the address of each shareholder as shown on the records of the corporation.

### s.20(1): contains (a) articles, bylaws, amendments, (b) minutes of meetings & sh resolutions, (c) all notices in s106

**20.** (1) A corporation shall prepare and maintain, at its registered office or at any other place in Canada designated by the directors, records containing

(a) the articles and the by-laws, and all amendments thereto, and a copy of any unanimous shareholder agreement;

(b) minutes of meetings and resolutions of shareholders;

(c) copies of all notices required by [section 106](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec106_smooth) or [113](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec113_smooth); and

(d) a securities register that complies with [section 50](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec50_smooth).

SH only have access to director meeting minutes relating to matters of conflict of interest

###  s.21: sh/creditor/personal rep/directors can examine records during usual bus hour for free/others for fee if distributing

* + (1) Subject to subsection (1.1), shareholders and creditors of a corporation, their personal representatives and the Director may examine the records described in subsection 20(1) during the usual business hours of the corporation, and may take extracts from the records, free of charge, and, if the corporation is a distributing corporation, any other person may do so on payment of a reasonable fee.

## Financial Disclosure

### s.155(1): disclose finan statement period of corp annual yr/auditor report/w.e req by article

 **155.** (1) Subject to section 156, the directors of a corporation shall place before the shareholders at every annual meeting

* + (a) comparative financial statements as prescribed relating separately to
		- (i) the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting, and
		- (ii) the immediately preceding financial year;
	+ (b) the report of the auditor, if any; and
	+ (c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

### s.159(1): corp shall not less than 21 days before AGM send a copy or statements said in s.155

* **159.** (1) A corporation shall, not less than twenty-one days before each annual meeting of shareholders or before the signing of a resolution under paragraph 142(1)(b) in lieu of the annual meeting, send a copy of the documents referred to in section 155 to each shareholder, except to a shareholder who has informed the corporation in writing that he or she does not want a copy of those documents.

### s.161(1): auditor disqualified if not independent/ or affiliates (2)(a) independent or not is question of fact (2)(b)(i) business partner (ii) beneficially owns material interest of corp (iii) receiver or liquidator or trustee in bankruptcy

* **161.** (1) Subject to subsection (5), a person is disqualified from being an auditor of a corporation if the person is not independent of the corporation, any of its affiliates, or the directors or officers of any such corporation or its affiliates.

###### Marginal note:Independence

(2) For the purposes of this section,

* + (a) independence is a question of fact; and
	+ (b) a person is deemed not to be independent if he or his business partner
		- (i) is a business partner, a director, an officer or an employee of the corporation or any of its affiliates, or a business partner of any director, officer or employee of any such corporation or any of its affiliates,
		- (ii) beneficially owns or controls, directly or indirectly, a material interest in the securities of the corporation or any of its affiliates, or
		- (iii) has been a receiver, receiver-manager, sequestrator, liquidator or trustee in bankruptcy of the corporation or any of its affiliates within two years of the person’s proposed appointment as auditor of the corporation.
* Independence is a question of fact – if auditor publish adverse opinions = they get fired. So auditors please directors – conflict of interest – to prevent this – reduce threat to auditor. Non-audit must be approved by committee of auditor, the fees must be disclosed. If cannot maintain independent = must resign.

## Beyond Financial Disclosure

### Global Responsible Index: NGO developed standard for social & environment info

- global responsible index – NGO developed standard – for social and environment info. E.g. each heading involves a category – HR, Labour practices, Indigenous rights, Security practices

- securities practices: percentage personnel trained in the organization’s hr policies or procedures that are relevant to operations.

Indigenous rights: Hudbay cases – they may be subject to indigenous law suits.

### CA Securities Administrators’ National Instrument (NI) 51-1025: disclose social/environ policies

Item 5.1(4) Social or Environmental Policies – If your company has implemented social or environmental policies that are fundamental to your operations, such as policies regarding your company’s relationship with the environment or with the communities in which it does business, or human rights policies, describe them and the steps your company has taken to implement them.

* Also requires social and environmental policies – that are fundamental to your operations, such as policies regading your company’s relationship with ythe environment or with the communities in which it does business, or human rights policies, describe them and the steps your company has taken to implement them.
* CSR- corporate social responsibility report
* **Canada 81% company disclose these by 100 largest company.**

# Duty of Care & Business Judgment Rule

## What are directors’ duties?

### s.122(1): **(a) duty of loyalty (b) duty of care** (In US they are together called fiduciary duty)

* CBCA 122(1): Every director and officer of a corporation in exercising their powers and discharging their duties shall
	+ (a) act honestly and in good faith with a view to the best interests of the corporation; (duty of loyalty; statutory fiduciary duty)
	+ (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. (duty of care)

Duty of care: when D fail to get acquainted with info of company. Rarely considered breach by court as contrast to duty of loyalty. To reduce monitoring cost – separate management from directors – to give managements discretion – directors get lazy – shirking.

## Why to impose such duties?

### Legal Foundation: agency law: agent owe duty of loyalty and care to principle

### Principle for Court’s deference: decision making directors are experts

* In normal decision making – judicial absent (directors are experts)
* In normal management over reaching– judicial intervention (e.g stealing shirking etc) (judges are experts)

## To whom do directors owe the duties? (duty of care to creditors)/duty of loyalty to company

### s.121(1): before People’s Department Stores: duties owed to corporation itself

* CBCA 122(1): Every director and officer of a corporation in exercising their powers and discharging their duties shall
	+ (a) act honestly and in good faith with a view to the best interests of the corporation; (duty of loyalty; statutory fiduciary duty)
	+ (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. (duty of care)

### Peoples Department Store: duty of care is open ended: includes creditor and other constituents

Peoples Department Store 2004 SCC

“Indeed, unlike the statement of the fiduciary duty in s. 122(1) (a) of the CBCA , which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1) (b) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that “[e]very director and officer of a corporation in exercising their powers and discharging their duties shall . . . exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.” Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors. “

**Note:** Prof thinks the court conflated Tort and Corporate Law – Tort already protects creditors

* “the SCC totally conflated duty of care under tort and corporate law. Question: Tort already protect anyone director directly in contact, now adds another layer of protection to any constituents through statute – doesn’t make sense.”

### OBCA 134(1): OBCA specifically says to corporation. (duty of loyalty to corporation only)

* **OBCA** 134 (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties *to the corporation* shall,
	+ (a) act honestly and in good faith with a view to the best interests of the corporation; and
	+ (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

**Nielsen Estate v Epton: duty of care cover 3rd parties within neighbourhood of directors**

## Standard of Duty of Care

### Re City Equitable Fire Insur 1925: **Traditional CL**: the skill/knowledge/exp of person (not expert)

1. “A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected form a person of his knowledge and experience
* Objective
1. Judged based on experience of that particular director – no need to be experts
2. Doesn’t have to equip itself with knowledge of finance or acquire relevant knowledge
3. Just reasonable person without knowledge of finance – you learn more you are more liable.
4. Directors not bound to give continuous attention to affair in company. Their duty is only intermittent nature. (now in CBCA = they have to make informed basis)
5. Directors can rely on officials to delegate their duty without incurring liabilities.
* “A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.”
* “A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed.”
* “In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.”

### s.122(1)(b): **Now:** care/diligence/skill of a reasonably prudent person in comparable circumstances

## Defenses to Breach of duty of care

### CL Defense: Business Judgment Rule: act prudently on reasonably informed basis

COMMON LAW DEFENCE: Business Judgment Rule: developed by Delaware court: no matter how stupid the decision the is retrospetrotic, the decision as long as informed basis then the court should defer to business decision. Why – expertise. Cannot use hindsight to judge business judgment – if decision against decisions retrospectively, directors will become excessively adverse.

* + BJR: in Canada not sure who bares burden of proof
	+ In US: P has the burden to rebut the presumption expertise of directors.
		- In CA: courts did not give presumption that decision was made in informed manner.

(1) in [good faith](http://en.wikipedia.org/wiki/Good_faith); (2) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the directors reasonably believe to be in the best interests of the corporation

### s.123(4) **exercised care/diligence/skill** reasonably prudent person in comparable situation

A director is not liable under section 118 or 119, and has complied with his or her duties under subsection 122(2), if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on

1. financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
2. a report of a person whose profession lends credibility to a statement made by the professional person.

### s.123(5): (a) **in good faith rely** on officer & auditor fairly (b) professional with credibility

A director has complied with his or her duties under subsection 122(1) if the director relied in good faith on

1. financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
2. a report of a person whose profession lends credibility to a statement made by the professional person.

### s.123(1-3): how to dissent (a) enter into minutes (b) written dissent (c) send by reg mail

(1) A director who is present at a meeting of directors or committee of directors is deemed to have consented to any resolution passed or action taken at the meeting unless

(a) the director requests a dissent to be entered in the minutes of the meeting, or the dissent has been entered in the minutes;

(b) the director sends a written dissent to the secretary of the meeting before the meeting is adjourned; or

© the director sends a dissent by registered mail or delivers it to the registered office of the corporation immediately after the meeting is adjourned.

(2) A director who votes for or consents to a resolution is not entitled to dissent under subsection (1).

(3) A director who was not present at a meeting at which a resolution was passed or action taken is deemed to have consented thereto unless within seven days after becoming aware of the resolution, the director aware or the resolution, the director

(a) Causes a dissent to be placed with the minutes of the meeting; or

(b) Sends a dissent by registered mail or delivers it to the registered office of the corporation.

### Barnes: DoC 1) not breach from 1 fail to meet 2) caused damage 3) good faith not blind faith

**Barnes v Andrews USDC 1924:**

**Facts** D (Andrews) was a director of a company organized to manufacture starters for Ford motors and aeroplanes. He also made a substantial investment in the company. When D took office, the employees and officers were already hired and the factory was built. During his tenure, D attended only one of two directors’ meetings and contented himself to receive general assurances from the president that this business looked promising and all was well. Production delays caused by employee discord depleted the company’s capital. D resigned, and the company failed some months later. P sued D for breach of his duty of care. The court found D was negligent.

**Issue** Although D was negligent in his duty, did his negligence ***cause*** the company to fail?

**Analysis** P has the burden of showing that performance of D’s duties would have avoided loss, and what loss it would have avoided. In sum, P must show that D’s performance of his duties could have saved the company.

**Held** D wins because P failed to show that his negligence ***caused*** the company to fail.

**Ratio** It is not enough to show a breach of the directors’ duty of care to trigger liability: it must be shown that this breach ***caused*** actual damage.

1) no breach for failure to attend one of board meeting.

2) Directors should ask for more details and keep themselves informed. Should rely on officers on good faith, not blind faith.

3) Not liable because the breach did not cause breach.

### Peoples Department Store: **BJR**: acted prudently and on reasonably informed basis in light of all circumstances(no hindsight)

**Ratio:**

Defense argument 1) s123(5)(b) – relied on a person with bachelor’s degree in commerce with 15 yrs of experience. However he is not an accountant subject to regulatory overview of a professionalorganization and had no negligence insurance. Therefore this reliance not work

Defense argument 2) s.123(4)(b) the title of vice-president of finance should not automatically lead to a conclusion that Clement was a person whose profession lends credibility to a statement made by him. The word profession not position, therefore s.123(4)(b) fails.

**Argument 3) Business Judgment Rule: successful**

“The implementation of the procurement policy that allegedly resulted in the bankruptcy was a reasonable business decision.”

* Directors and officers will not be held in breach of the duty of care under s 122(1)(b) if they act prudently and on a reasonably informed basis. They must make reasonable business decisions in light of all the circumstances about which they knew or ought to have known.
* The BJR is supposed to avoid ***hindsight bias*** and relieve the directors of an impossible standard of perfection. The courts will assess the appropriate amount of prudence and diligence in the circumstances, but will not attempt to supplement or question the business expertise of the directors. A number of cases in which the courts have refused to apply the BJR, including *Van Gorkum*, *UPM*, and *Ford Canada v OMERS*, involve situations where the directors failed to reasonably inform themselves or failed to exercise any business judgment at all.

### Joint Stock Discount: director dissent must in minutes/mailed/whistle blowing- send circular

Joint Stock Discount v Brown 1869

* The director must have dissent must have in minutes, or mailed to registrar, also required the dissent director to undertake whistle blowing question – include a circular to all sh what the directors are doing, or go to court to prohibit the directors from doing what they were doing.
	+ But harder in practice. The exercise to dissent – expensive and hard. The independent directors = might be marginalized, they are weak by themselves, the ID may run the risk of not getting elected. Given the price they pay, under what circumstances would directors would exercise their right to dissent.
	+ Empirical study, ID more likely to dissent when the chair the person who appointed ID had left, more likely to dissent when they are close to their tenure they just lashing out all their grievance they sustained before they leave, no fear.

### UPM Corp: BJR failed becuz decision not on **informed basis/**breached loyalty –self interest

***UPM-KYMMENE CORP v UPM-Kymmene Miramichi Inc 2002***

**Facts** Procedural History: TD Asset Management (TDAM) owned 13.4% of Repap Paper, a *CBCA* corporation. It sued Repap under the ***oppression remedy*** (s 241) for alleging that Berg, the chairman of the Board of Directors breached his fiduciary duty to the company and that the other directors breached their duty of care [to the corporation?]. UPM later acquired all common shares of Repap and TDAM assigned its rights under the action to UPM. Subsequently, Repap became UPM Miramichi by amalgamation.

Subject Matter: Berg was to become Senior Executive Officer of Repap. His employment K was ***unduly*** generous. The contract was proposed at two Board meetings. At the ***first meeting***, where K was contentious and not approved. The matter was referred to the Compensation Committee. After the meeting, two directors resigned including the Chairman of the Compensation Committee. At the ***second meeting***, K was approved by differently constituted Board and Compensation Committee [Berg and allies had used their *CBCA* s 111(1) powers to appoint friendly directors to fill resignation vacancies]. They relied in part on a report “of limited scope” prepared by independent consultant who was not advised that management had questioned K’s propriety and directors had resigned in protest of it.

– 25 million shares, stock option granting 75 million shares. Bonus, pension credit. Signing K = CEO + chairman.

**Issue**

1. Did the Compensation Committee and Board of Directors fail in their obligations to establish a prudent or reasonable process that led to a contract that is not fair and reasonable?

2. Does the Business Judgment Rule shield the contract from scrutiny?

**Analysis**

Prudent or Reasonable Process:

 A Board is entitled and encouraged to retain advisors but this does not relieve directors of the obligation to exercise reasonable diligence.

 Compensation Committee failed to exercise oversight over the consultant; failed to inform itself of the prior deliberations of the Compensation Committee; failed to inform itself about the agreement before recommending it to the Board; and allowed remainder of Board to assume it had fully reviewed the agreement.

 Other members of the Board failed to do any kind of analysis of the agreement’s terms.

Business Judgment Rule:

Textbook p 719:

*The principle of* ***deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions****. Courts are entitled to consider the**content of their decision and the extent of the information on which it was based and to measure**it against the facts as they existed at the time the impugned decision was made.* ***Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination****.*

 BJR does not apply where Board acts on advice of a committee that makes an uninformed recommendation.

 Each director was required to consider the terms and meaning of the Agreement and to consider it carefully against the circumstances of Repap at the time.

**Held** The directors breached their duty of care:

1. They failed to establish a prudent or reasonable process and were not entitled to rely on independent consultant in the circumstances.

2. They are not entitled to rely on business judgment rule in the circumstances.

**R:** to rely on BJR: must show the decision is reached diligently on informed basis

### Smith v Gorkom: BJR failed becuz BoD neg accepted presentation without informed basis

**Smith v Van Gorkom Del SC 1985**

**Facts** TransUnion management believed an LBO would create value by enabling the company to use some of its stockpile of tax credits. The trading range for TU stock was $29.50–$38.25 and the CFO calculated that TU could handle the debt needed for an LBO at $50, but not at $60. Van Gorkom, the CEO and chairman of the board, wanted more for his shares, so he asked Pritzker, the head of another company, to conduct an LBO of TU at $55. Van Gorkom made a ***20-minute*** oral presentation to the board during a meeting in which they had no prior knowledge that they would be considering a cash-out merger. Van Gorkom had not read the proposed agreement, so presented only based on his “***understanding***” of it. The directors ***did not inquire*** into Van Gorkom’s role in the sale or establishing the price; were ***uninformed about the intrinsic value*** of the company; and approved the sale upon ***two hours*** consideration without prior notice and without the exigency of any emergency or crisis.

* **Control premium not the same as market price**

**Issue** Did the board reach an informed business judgment on the decision to accept Pritzker’s $55/share offer, or did it breach its duty of care?

**Analysis**  A premium over market value is not enough to determine that a buyout offer is fair.

 In this deal, in all respects, the directors failed to inform themselves.

**Held** Directors were grossly negligent and cannot rely on the BJR to cover a decision in which they failed to inform themselves.

**Ratio** A business judgment is not informed unless the directors informed themselves prior to making it.

**Note** Although this case is about the duty of care, RD points out that **the court also found that VG breached his duty of loyalty in soliciting the bid, fixing the price himself, and not disclosing his interest**.

Arguments from Gorkom

1. Capability to accept better offers
* They didn’t get better offers – so it's the best offer
* But no solicitation clause – when they announced, did not say: they accept further bids.
1. Board of D = all experts
* We know the company like the back of our hands, no need systematic investments of our company.
* Could not rely on collective experience no matter how good you are.
1. Relied on Legal advice on legal counsel
* Even with The legal advice still had obligation investigate the intrinsic value. The directors breached duty of care.

## Exculpation

### Delaware General Corp Law: s.102(b)(7) permits exculpation (无罪) as long as not in bad faith

* Delaware General Corporation Law s. 102(b)(7)
	+ A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit.

### s.122(3): no exculpation in CA:

CBCA s.122(3)

Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.

## Mandatory Indemnification

### s.124(3): cannot indemnify unless acted honestly in good faith with view of best interest of corp

(3) A corporation may not indemnify an individual under subsection (1) unless the individual

* (*a*) acted honestly and in good faith with a view to the best interests of the corporation, or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation’s request; and
* (*b*) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual’s conduct was lawful.

- no indemnification if director breached duty of loyalty or knowing violated law

### s.124(5): mandatory indemn: (a) no fault/omission (b) fulfills good faith/best int of corp (124(3)

(5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual’s association with the corporation or other entity as described in subsection (1), if the individual seeking indemnity

* (a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and
* (b) fulfils the conditions set out in subsection (3).
* Director must wait until decision rendered, cannot be found with fault

## Permissive Indemnification

### s.124(1): permissive indemnification for third party actions(if honest/bona fide/best int

A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation’s request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

### s.124(2): can advance director/officer for 3rd party actions, but repay if no good faith/best int

A corporation may advance money to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).

- only applies if 3rd party broguth action

### s.124(4): Action by or on behalf of corp – must by court order if satisfies good faith/best int

A corporation may with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour, to which the individual is made a party because of the individual’s association with the corporation or other entity as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).

* However if the DA is brought by company against Director, only with approval of court

## Director & Officers liability Insurance

### **s.124(6):** corp may purchase & maintain insurance for director/officer against any liability

**CBCA s.124(6)**

A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual

1. in the individual’s capacity as a director or officer of the corporation; or
2. in the individual’s capacity as a director or officer, or similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation’s request.

### Types of insurance: 1) covers director personally 2) covers company completely

1. covers directors personally
2. covers company completely, so if directors loss and the company indemnify, the insurance pays company, company pays directors

# Duty of Loyalty & Conflict of Interest Transactions

### s.122(1): (a) act honestly and in good faith with a view to the best interest of corporation

Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; (duty of loyalty; statutory fiduciary duty)

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. (duty of care)

## 1) Interest Director Contracts COMMON LAW

### Interest Director K: BoD wants to sell his product at highest price, Comp want to buy at lowest

Directors’ interest to sell product at highest price, but the company has the interest to buy product at lowest price. This conflict = interest director contract

### Aberdeen Railway: Interest Director K: Traditional CL: a corp can void any k which an interested director participated

**Aberdeen Railway v Blaikie Brothers 1854**

**Facts** Blaikie was Chairman of the Board of Directors of Aberdeen and a partner in Blaikie Brothers. The company contracted with Blaikie Brothers to buy certain railway “chairs” and then breached the contract. BB sued for specific performance.

**Issue** Is a director precluded from dealing on behalf of the company with himself or a firm in which he is a partner?

**Analysis** Blaikie’s duty as a director to get the lowest possible price for the “chairs” conflicted with his personal interest to get the highest possible price for Blaikie Brothers.

**Held** Aberdeen wins and can avoid the contract.

**Ratio** At common law, a corporation can avoid any contract which an interested director participated in making, subject to the rule in ***North-West Transportation Co v Beatty*** (p 112).

### **NW Transportation:** at CL, if interested director k is ratified by majority sh then it cannot be avoided(unless bad faith)

**NW Transportation v Beatty 1887**

**Facts** Beatty, a director of North-West, owned a steamer which North-West needed. He acquired a majority of the shares in North-West. A directors’ resolution passed a bylaw approving purchase of the steamer from him. The bylaw was then ratified by a slight majority of the shareholders owing to Beatty’s large block of shares.

**Issue** Should the sale be set aside as an interested directors’ contract under the rule in ***Aberdeen Ry Co v Blaikie Brothers*** (p 86)?

**Held** The contract cannot be avoided because it was ratified by a majority of the shareholders.

**Ratio** At common law, if an interested directors’ contract is ratified by a majority of the shareholders, it is valid as long as the ratification wasn’t procured by “improper means”.

**Note** The reason Beatty had to transfer shares to Rose and Laird is because in order to put a bylaw to shareholder vote, he first needed to be sure to have a majority of the directors onside to carry his proposed bylaw. Under the rules at the time, they needed to own stock to be directors.

* The difference between this and the last case = the by-law was ratified by shareholders.
* No question was raised on whether simple majority can ratify the by-law.
* According to SCC – only disinterested sh can vote, the privy counsel disagree.
* The vote most be allowed – unless the vote is brought unfair or unjust. Or else you offer opportunity for minority to oppress the majority.
* The only possible unfairness in this case in tersm of property – Beatty owned majority voting power, before meeting = no majority share, but at meeting he had majority voting power –t he court said: nothing wrong with purchasing more shares to have majority powers.
* Therefore beatty was entitled to vote.
* Therefore conflict of interest can be ratified by sh vote = something new in Canada.

**Common law Tradition**

* Interest director contract can be voidable initially, doesn’t matter if good or bad deal, or good or bad faith, honest or not
* But later in NW Transp = can be ratified by majority sh vote.

### Corporate Opportunity: when directors used corporate opportunities and usurp it.

When director use corporate opportunities and usurp it. e.g. Buys the land which offered to company for himself.

# Interested Director Contract – Statute

## Disclosure requirement

### s.120(1): BoD/officer disclose by writing/minutes any int he has in material k or transac

A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of any interest that he or she has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer

(a) is a party to the contract or transaction;

(b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or

© has a material interest in a party to the contract or transaction.

### s.120(2) Disclose (a) at meeting of proposed k (b) at first meeting he became interested etc…

The disclosure required by subsection (1) shall be made, in the case of a director,

(a) at the meeting at which a proposed contract or transaction is first considered;

(b) if the director was not, at the time of the meeting referred to in paragraph (a), interested in a proposed contract or transaction, at the first meeting after he or she becomes so interested;

©if the director becomes interested after a contract or transaction is made, at the first meeting after he or she becomes so interested; or

(d) if an individual who is interested in a contract or transaction later becomes a director, at the first meeting after he or she becomes a director.

### s.120(3) must disclose immediately (a) becomes aware k is being considered (b) he becomes int (c) becomes officer/director

The disclosure required by subsection (1) shall be made, in the case of an officer who is not a director,

1. immediately after he or she becomes aware that the contract, transaction, proposed contract or proposed transaction is to be considered or has been considered at a meeting;
2. if the officer becomes interested after a contract or transaction is made, immediately after he or she becomes so interested; or
3. if an individual who is interested in a contract later becomes an officer, immediately after he or she becomes an officer.

### s.120(4): if k is ordinary course of buz & not need sh approval/must enter int in minutes

If a material contract or material transaction, whether entered into or proposed, is one that, in the ordinary course of the corporation’s business, would not require approval by the directors or shareholders, a director or officer shall disclose, in writing to the corporation or request to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of his or her interest immediately after he or she becomes aware of the contract or transaction.

- As long as director interest at stake – doesn’t matter if k is subject to board approval

### s.120(6): a general notice to directors declaring that interested in k is sufficient declaration

(6) For the purposes of this section, a general notice to the directors declaring that a director or an officer is to be regarded as interested, for any of the following reasons, in a contract or transaction made with a party, is a sufficient declaration of interest in relation to the contract or transaction:

1. the director or officer is a director or officer, or acting in a similar capacity, of a party referred to in paragraph (1)(b) or (c);
2. the director or officer has a material interest in the party; or
3. there has been a material change in the nature of the director’s or the officer’s interest in the party.

## What needs to be disclosed

### Interest in Material Contract and material transaction. Including material facts

## Abstention from voting

### s.120(5): if director required to make disclose shall not vote on any resolution to approve k or transaction unless k is (a) primarily his or her remuneration (b) indemnity or insurance (c) with an affiliate(附属企业)

(5) A director required to make a disclosure under subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction

* (a) relates primarily to his or her remuneration as a director, officer, employee, agent or mandatary of the corporation or an affiliate;
* (b) is for indemnity or insurance under [section 124](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec124_smooth); or
* (c) is with an affiliate.

## Substantive fairness

### s.122(1) – even if s.120(5) allows voting on the 3 exceptions, still for best interest of corp

Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; (duty of loyalty; statutory fiduciary duty)

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. (duty of care)

### s.120(7): k is not void & director is not account if (a) disclosure (b) directors approve k (c) k was reasonable fair to corp

(7) A contract or transaction for which disclosure is required under subsection (1) is not invalid, and the director or officer is not accountable to the corporation or its shareholders for any profit realized from the contract or transaction, because of the director’s or officer’s interest in the contract or transaction or because the director was present or was counted to determine whether a quorum existed at the meeting of directors or committee of directors that considered the contract or transaction, if

* (*a*) disclosure of the interest was made in accordance with subsections (1) to (6);
* (*b*) the directors approved the contract or transaction; and
* (*c*) the contract or transaction was reasonable and fair to the corporation when it was approved.

## Shareholder’s Confirmation Process s.120-7.1

### s.120(7.1): director acted honestly & good faith not accountable to corp or sh if (a) approved by special reso (b) disclosure sufficiently clear to sh before voted (C) k is reasonably fair when approved

(7.1) Even if the conditions of subsection (7) are not met, a director or officer, acting honestly and in good faith, is not accountable to the corporation or to its shareholders for any profit realized from a contract or transaction for which disclosure is required under subsection (1), and the contract or transaction is not invalid by reason only of the interest of the director or officer in the contract or transaction, if

* (a) the contract or transaction is approved or confirmed by special resolution at a meeting of the shareholders;
* (b) disclosure of the interest was made to the shareholders in a manner sufficient to indicate its nature before the contract or transaction was approved or confirmed; and
* (c) the contract or transaction was reasonable and fair to the corporation when it was approved or confirmed.

# Corporate Opportunities

* Corporate expansion v. Manager entrepreneurialism
* What is a corporate opportunity?
	+ Directors should not usurp any “corporate opportunity” -- any business opportunity that comes to the director in his role as a director of the company *[Regal]*
* When does an opportunity cease to belong to the corporation?
	+ In Personal capacity
	+ Corporate rejection
	+ Corporate impossibility
	+ Resignation ….

## Common Law

### Regal Hasting: even if corp can’t acquire opportunity, BoD can’t purchase personally (strict rule)

Regal Hastings v Gulliver 1942

**Facts** The directors of Regal were working on a business deal involving an acquisition and sale. The acquisition involved: floating a subsidiary corporation, Amalgamated, to acquire two cinema leases. Amalgamated would have a capitalization of 5,000 shares at 1£, which Regal would acquire for £2,000 cash and the remainder for past services. The directors would be required to guarantee the rent on the leased properties until Amalgamated’s subscribed capital reached £5,000.

The proposed sale involved Amalgamated turning around and selling the leases at a profit. However, the directors balked at guaranteeing the rent payments personally and ultimately decided to buy the remaining £3,000 in outstanding Amalgamated shares themselves, which would have deprived Regal of 3/5 of the sale profit. Although the lease sale fell through, the buyers made a new offer: to buy all the shares of Amalgamated at a 280% premium to the original share price. If the directors had not initially bought Amalgamated’s shares for themselves, their part in the profit would have accrued to Regal instead of them. Later, Regal’s controlling interest changed hands and the new management sued the old directors.

**Issue** Did the directors breach their duty of loyalty by appropriating the opportunity to buy Amalgamated stock?

**Held** Directors held liable to disgorge all profits under a strict application of *Keech v Sandford*.

**Note** The directors bought the shares themselves ostensibly because Regal did not have the £3,000 cash itself and thus this was the only way to be rid of the need to personally guarantee. This made no different at all to the outcome. To avoid liability, they would have had to either drop the deal altogether or ensure Regal still got all the shares.

* Under Regal – even if corporation does not have enough money to purchase the shares – the directors still cannot purchase the shares for themselves. Any opportunities that directors get through corporate operaitons = corporate opportunities.

### Zwicker: directors can’t appropriate opportunity even if corp is unable to purchase

***Zwicker v Stanbury 1953***

**Facts** Defendants were directors of LNH Ltd, the corporation that owned the Lord Nelson Hotel. CP Rail owned 50% of the shares in LNH, as well as a second mortgage on the hotel. CP told the directors it had written off its investment as a loss. The directors then promised to refinance the first mortgage bonds if CP would turn over the shares to them *gratis*. CP turned the shares over to the directors personally. Subsequently, the refinancing succeeded, LNH prospered, and the share price climbed significantly. In a separate transaction, defendants purchased the second mortgage from CP at a 50% discount to face value.

**Analysis** Refinancing/Shares: Since the directors were acting for the corporation in their dealings with CP, any consideration that CP was willing to part with should have gone to the corporation, not the directors personally.

Second Mortgage: The fact that LNH didn’t have the money to buy the mortgage is irrelevant. The defendants learned of the value that CP placed on it in their capacity as directors of LNH Ltd.

**Held** 1. Shares: Directors breached fiduciary duty to LNH and hold the shares obtained from CP upon trust for LNH Ltd.

2. Second Mortgage: Directors breached fiduciary duty to LNH, which is entitled to cancel the mortgage at the same 50% discount to face that the defendants obtained it for.

**Note** This is the first case in which the Supreme Court of Canada adopted the judgment in ***Regal (Hastings) Ltd v Gulliver*** (p 120).

* Shares should have been turned to corporation instead of for themselves personally.
* Mortgage – D only found out such low price mortgage through their role as directors
* This case reaffirms he rule in Regal. Any opportunity you get through corporate business = corporate opportunity.
	+ This was restriction relaxed in Peso

### Peso:If BoD *bona fide* rejects corporate opportu, then BoD may pursue without breach loyalty

***Peso Silver Mines v Cropper 1966***

**Facts** Cropper was a director of Peso. A prospector offered a large block of **speculative** mining claims to Peso, but the board rejected the offer because (a) it didn’t have the cash; and (b) it got 2–3 such offers per week. The trial judge found as a fact that the rejection was an ***“honest and considered decision” of the whole board*** done solely in the interests of Peso. The prospector then offered the claims to Cropper, who bought a share in them personally.

**Issue** Is Cropper in breach of his fiduciary duty to Peso such that he must turn over his interest in the claims to Peso?

**Analysis** Cartwright J at textbook p 769:

*On the facts . . . I find it impossible to say that the respondent obtained the interests he holds . . . by reason of the fact that he was a director of the appellant in the course of that office.*

Distinguishing *Regal (Hastings)* allows Cartwright J to avoid applying the strict rule in that case. Cartwright J also

approves of Bull JA’s remarks that this case matches Lord Greene MR’s hypothetical in *Regal (Hastings)*...i.e. where a

board *bona fide* considers and turns down an opportunity and a director subsequently invests in it himself.

**Held** Cropper wins: he is not in breach of his fiduciary duty.

**Ratio** If the board of directors *bona fide* rejects a corporate opportunity, then it no longer belongs to the corporation in equity and a director may pursue it without breaching his fiduciary duty.

**Note** RD says this case is **“unfortunate for Canada”** and his view **is it is the speculative nature of the claims that distinguishes the case from *Canaero***.

* Peso didn’t have enough money, rejected bona fide

**Why differ from last two case**

* 1) offer approached Cropper in his personal capacity
* 2) board’s decision rejected offer in good faith – the rejection must be made in good faith and informed matter
* 3) the company received 2-3 offers like this every week: the value in this offer highly speculative, the investment could be a loss. Also the Cropper didn’t use any info he got from company. How risky and how frequent the opportunity now taken into consideration
	+ The Regal case: the opportunity wasn’t risky and quite beneficial.

### Irving Trust: if company deem opportunity important, even without funds, director can’t usurp

***Irving Trust v Deutsche 1934***

**Facts** Acoustic agreed to buy a controlling block of shares in a company which owned valuable patent rights related to Acoustic’s business. Acoustic deemed it ***essential*** to obtain the patent rights. At the last moment, Deutch, Acoustic’s president, announced that he was unable to obtain the financing for Acoustic to buy the stock. He then bought the stock himself as part of a group including two other Acoustic directors.

**Analysis** If directors are allowed to justify taking an opportunity on the basis that their principal lacks the necessary funds, they will be tempted to refrain from exerting their best efforts on behalf of the corporation since, if it does not obtain the money, an opportunity to profit will be available to them personal.

**Held** Defendants breached their fiduciary duty and liable to account to Acoustic for their profits.

* patent was essential to corporation: board has best interest to pursue for company.

### Abbey Glen Prop: even if other party refuse to deal with corp, a BoD can’t usurp opportunity

***Abbey Glen Property v Stumborg 1978***

**Facts** The Stumborg Brothers were officers and directors of Terra. On behalf of Terra, the Stumborgs approached Traders Financial Corp to attempt a joint venture to develop certain parcels of land. Traders refused to deal with Terra because Terra was publicly held and joint ventures with public companies contravened Traders’ policies. As a result, the Stumborgs and Traders formed a new corporation, Green Glenn, to develop the parcels and the venture was a great success. Terra later became Abbey Glen, which sued the Stumborgs for breach of fiduciary duty.

**Analysis** The impossibility stemming from Traders’ refusal to enter into a joint venture with Terra is irrelevant. (RD surmises that **the deal could have been structured in a way that gave Terra the proceeds of the deal, such as a debt** **financing instead of giving Terra equity in the joint venture**).

**Held** The Stumborgs breached their fiduciary duty to Terra and are accountable to it for their profit.

### \*Can Aero: SCC case – a list of factors that should be considered to find misapp opport

***Canadian Aero Services Ltd v Omalley 1974 – SCC***

**Facts** Zarzycki, O’Malley, and Wells had been directors of Canaero. O and Z had also been senior officers in charge of winning a certain contract in Guyana. W left Canaero in February 1965 and suggested that O and Z form their own company. More than a year later, in August 1966, O and Z incorporated Terra Surveys Limited and resigned from Canaero a few days later. Terra won the contract. Canaero sued all three for breach of fiduciary and an accounting.

**Issue** 1. Are Zarzycki and O’Malley liable for breach of their fiduciary duty to Canaero?

2. Is Wells liable for breach of fiduciary duty to Canaero?

**Analysis** Laskin J: the fiduciary duty of a director or officer does not end on resignation and cannot be renounced at will by termination of employment (text p 779). Also (at p 777):

*The reaping of a profit by a person at a company’s expense while a director thereof is . . . an*

*adequate ground upon which to hold the director accountable.* ***Yet there may be situations***

***where a profit must be disgorged, although not gained at the expense of the company****, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction.*

**Held** 1. O and Z are liable.

2. Wells is not liable.

**Ratio** Standards of loyalty, good faith and avoidance of a conflict of duty and self-interest for officers and directors must be tested in each case by many factors, which include but are ***not limited to***:

(a) ***position*** or office held; (b) ***nature*** of the corporate opportunity;

(c) ***ripeness*** of the opportunity; (d) ***specificness*** of the opportunity;

(e) director or officer’s ***relation*** to the opportunity; (f) ***amount of knowledge*** possessed;

(g) ***circumstances*** in which it was obtained; (h) whether it was ***special*** or even ***private***;

(i) factor of ***time*** in the continuation of the fiduciary duty;

(j) circumstances of ***relationship termination*** (retirement, resignation, or discharge).

**Considerations:**

* ***1) relationship between person and corporation***
	+ ***Employee or director/officers***
	+ ***Greater fiduciary duty from directors, employees don’t owe fiduciary duty***
	+ ***If nothing in employment contract prohibiting employee from pursuing opportunity then they are free to pursue it***
* ***2) Does duty end after resignation.***
	+ ***Officer/director survives after termination of employment relationship. Esp when they want to acquire opportunity for himself.***
	+ ***If D left before opportunity present = not liable, not newly initiated.***
* ***3) Whether duty is breached***
	+ ***Consider the factors***
	+ ***1) positions or office held: is the position high enough with power.***
	+ ***2) nature of opportunity: ripeness, specificness, director or officer’s relation to it. How easy it comes and how profitable***
* ***4) knowledge***
	+ ***Amount of knowledge possessed, circumstances in which it was obtained, whether special or private.***
	+ ***Was it acquired in their capacity as officer of corporation.***
* ***5) alleged breach after employment termination***
	+ ***Time in the continuation of fiduciary duty***
	+ ***Circumstances under which the employment was terminated (retirement, resignation or discharge).***
	+ ***Resigned to acquire opportunity or way before. They got the contract soon after resignation.***
* ***The list is not exhaustive.***

# Director’s Personal Liability

### s.122(1)(a): Breach duty of loyalty: strict liability no proof of damage required/disgorge/

- Proof of damage not required, it is strict liability, accountable for the profits he got – disgorge

* **Courts more likely to find liable for breach of duty of loyalty for sake of self dealing, bad faith**

### s.122(1)(b): breach of DoC harder to find than loyalty – becuz BJR& expertise in management

* **Probably for finding duty of care is lower than breach of loyalty.**
	1. **BECAUSE OF BJR.**
	2. **It is about decision making process.**

## Other liabilities in corporate statutes

### s.119: unpaid wages and vacation pay not exceeding 6 months wage pay

**119.** (1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

(2) A director is not liable under subsection (1) unless

the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;

the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or

the corporation has made an assignment or a bankruptcy order has been made against it under the Bankruptcy and Insolvency Act and a claim for the debt has been proved within six months after the date of the assignment or bankruptcy order.

### s.118(2) various illegal payments, e.g. pay dividend when insolvent

**118.** (1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under [section 25](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec25_smooth) for a consideration other than money are jointly and severally, or solidarily, liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

Further directors’ liabilities

(2) Directors of a corporation who vote for or consent to a resolution authorizing any of the following are jointly and severally, or solidarily, liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation:

(a) a purchase, redemption or other acquisition of shares contrary to [section 34](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec34_smooth), [35](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec35_smooth) or [36](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec36_smooth);

(b) a commission contrary to [section 41](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec41_smooth);

(c) a payment of a dividend contrary to [section 42](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec42_smooth);

(d) a payment of an indemnity contrary to [section 124](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec124_smooth); or

(e) a payment to a shareholder contrary to [section 190](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec190_smooth) or [241](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec241_smooth).

### Environmental or tax law – can hold directors personally liable

## Tort law: principled in tortfeasor is tortfeasor: therefore can hold directors personally liable

### ADGA: although said v butt applies to relieve corporation, but director is personally liable

 **commit tort while performing best interest of corporation = the corp not liable, they are personally liable.**

# Derivative Action

* All compensation goes to company, why would any SH have incentive to sue.
* Most of the time, they wouldn’t sue. But court believes DA has some benefit for corporate governance, the courts award legal fees to SH.
	+ If court awards full legal fees, but while SH only get a portion of damage back. The plaintiff’s counsel has more incentive to initiate suit than SH.
	+ SH mostly care about sentimental value. Awarding counsel legal fee = strike suit – putting pressure on directors to settle. Therefore could be abused by SH or lawyer.

## Common Law Derivative Action

### Foss: if wrong is alleged to have done to company, the proper claimant is the comp itself

Foss v harbottle (1843)

is a leading English [precedent](http://en.wikipedia.org/wiki/Precedent) in [corporate law](http://en.wikipedia.org/wiki/Corporate_law). In any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. This is known as "the rule in *Foss v Harbottle*", and the several important exceptions that have been developed are often described as "exceptions to the rule in *Foss v Harbottle*". Amongst these is the 'derivative action', which allows a minority shareholder to bring a claim on behalf of the company. This applies in situations of 'wrongdoer control' and is, in reality, the only true exception to the rule. The rule in *Foss v Harbottle* is best seen as the starting point for minority shareholder remedies.

Rule:

1. A suit to redress a wrong done to the corporation may not be brought by SH therefo, and can be brought only by corp itself (only corporation can sue)
2. A suit to redress a wrong may not be brought in any case where the wrong may be ratified by an ordinary majority of SH in general meeting (internal management rule)

### Edwards v Halliwell: exceptions to Foss: 1) ultra vires transact 2) fraud on minority etc…

1. Ultra Vires Transactions (not within the power of corporations)
* If the transaction not within power of company, if wrong came from ultra virews transaction, then SH can bring lawsuit.- not really exception because before can be ratified through SH voting anyways.
1. Actions that could validly be taken only with the approval of a special majority of SH
* If bring special majority not really exception
1. Actions in contravention of the personal rights of sh
* Just tort not exception
1. Fraud on the minority: only exception

## Statutory Derivative Action

### s.238 Complainant means: (a) reg/B SH former of a security or any affiliates (c) directors

“Complainant” means

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

### People Depart Store: any creditors can when company near bankruptcy not sure if will follow

### s. 239 **steps**: apply to court if (a) notice >14 days to BoD (b) in good faith (c) in int of corp

(1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that

(a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant’s intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

Notice required

* Allow Board to decide whether to persue the action, allow Board to regulate internal, give time 14 days to respond and regulate.
* But if sue directors for breach – you wouldn’t sue yourself, delay.
* OBCA: changed law to remove requirement of 14 days of notice if sues all directors.

### OBCA changed law requiring notice >14 days if DA is suing all directors

### Re Northwest Forest: Notice req satisfied even if notice didn’t specify cause of action. Lang clear

Re Northwest Forest Products Ltd. (1975) BCSC

**Facts** NW sold its 51% stake in a subsidiary to Green River for $200K. The divestiture was approved by NW’s shareholders, but there was no evidence about how many shares were actually voted. Green River then turned around and pledge the subsidiary’s assets to a bank for $290K. The reason NW gave for this unexplained increase in asset value is that the subsidiary was insolvent, but certain shareholders were unhappy. They gave notice to NW that they wanted a DA against NW’s directors for apparently losing $90K of value but their notice didn’t state the specific cause of action. When NW refused to sue its directors, the disgruntled shareholders applied to court for leave.

* Directors did not respond to the complaint letter.

**Issue:** whether notice made

**A:** the language from letter and cause of action = similar enough.

* In what extend should court defer to BJR to initiate lawsuit, to initiate lawsuit is within management power.
	+ In Canada not sure but in US

### Primex invest: **DA test**: 1) Good faith 2) in int of comp – reasonable prospect of success?

Primex Investment Ltd. v. Northwest Sports Enterprise Ltd. (1995) BCCA

Primex was a minority shareholder in NW, a company under the BC *Company Act*. NW owned the Canucks NHL franchise and was building a new arena for it. Griffiths was majority shareholder and a director of NW. He got permission from the NW board to pursue an NBA franchise on behalf of a separate partnership he belonged to by ***misleading the board*** as to a key fact: G claimed the franchise would rent space from the new arena NW was building, whereas in reality G planned to snatch the arena for the partnership.

G’s partnership obtained the arena in the following way: it made a takeover bid for NW; it then made transfer of the arena by NW to the partnership for nominal consideration ($100) a condition of increasing the bid. The arena transfer was put to the shareholders and it was approved by a majority of the minority (see ***OSC Rule 61-501***).

**Issue** Does Primex have leave to pursue the derivative action in Northwest’s name:

1. against Griffiths for appropriating a ***corporate opportunity*** (the NBA franchise); and

2. against the directors for selling the arena other than in the ***best interests*** of Northwest?

**Analysis**

**1) Good Faith**: The good faith requirement [***CBCA*** equivalent is s 239(2)(b)] can be met even if complainant personally dislikes the target of the desired lawsuit, and even if complainant has a financial interest in the lawsuit, as long as this interest is aligned with that of the corporation.

**2) Best Interests of the Corporation:**

***Corporate opportunity*** claim has a reasonable prospect of success. G relies on ***Peso Silver Mines***

***Ltd v Cropper***, but the facts are different because here evidence suggests G was pursuing the NBA franchise before NW stopped pursuing it/gave permission, and of course, G also misled the board.

Arena sale claim has a reasonable prospect of success on evidence. Moreover, compliance with securities law (OSC Rule 61-501) doesn’t necessarily mean directors complied w all their duties as shareholders may have only been considering their own interests and not those of NW [see also ***CBCA*** s 242(1)].

**Held** Leave to appeal granted. Primex is acting in good faith and has a reasonable prospect of success.

**Ratio** The test for whether a DA “***appears to be in the interests***” of the corporation [***CBCA*** s 239(2)(c) is the equivalent provision] is whether the action discloses a ***reasonable prospect of success*** and whether the potential relief to the corporation is ***sufficient to justify the inconvenience*** to the company of being involved in the action.

**Note: Two breach of loyalty suit here**

1. Usurup corporate opportunity – for obtaining NBA franchise without disclose his own plan
2. Interest director transaction – self dealing, director stands on both ends of transaction.

**Test for bring DA: 1)** whether notice given 2) was it brought in good faith 3) in the interest of corporation

### s **242 (1)** won’t stay DA just because sh voted and passed by majority

An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of such body corporate, but evidence of approval by the shareholders may be taken into account by the court in making an order under section 214, 240 or 241.

### S,242 (2) DA not stayed/settled/dismissed without court approve. (don’t want D to pay off DA)

An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution or, in Quebec, failure to respect the agreement between the parties as to the conduct of the proceeding without the approval of the court given on any terms that the court thinks fit and, if the court determines that the interests of any complainant may be substantially affected by such stay, discontinuance, settlement, dismissal or failure, the court may order any party to the application or action to give notice to the complainant.

## Remedies of Statutory DA

### s. 240: court can make any order think fit (c. pay amount directly to SH instead of corp)

In connection with an action brought or intervened in under section 239, the court may at any time make any order it thinks fit including, without limiting the generality of the foregoing,

1. an order authorizing the complainant or any other person to control the conduct of the action;
2. an order giving directions for the conduct of the action;
3. an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; and
4. an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

## DA in US

In US – demand to act is used,

### Demand required = BoD decides the fate of claim, subject to review of BJR by the court

### Demand excused = court allows & board cannot dismiss the claim if all D is defendant

* Demand excused if all directors = Defendants. (if demand is futile – no notice required)
* In US – the P can go straight to court without notice to Directors by arguing demand is futile or they can first initiate demand and give notice and if not acted, bring action to court, and they can investigate on the sufficiency of BJR.
* BJR: were the Special investigation committee board truly independent and no problem with their decision making process, the court will set aside the DA.

### Auerbach –found ok by BJR: 1) prompt invest 2) reviewed work/transcript 3) asked counsel

***Auerbach v Bennett 1979 NYCA***

1. Whether board is independent issue with independent of the special committee – 3 Ds joined afterwards
2. BJR? Reasons to dismiss: 1) committee promptly engaged in eminent special counsel to guide its deliberations and to advise it. 2) reviewed prior work of audit committee, 3) testing its compelteleness accuracy, interview representatives, 4) reviewed transcripts of 10 corporate officers, 5) asked counsel.

### Zapata: demand excused, but found ok by BJR: 1) indep commit 2) BJR is fair 3) any merit

***Zapata v Maldonado 1981***

**Facts**: Maldonado brought the derivative suit against ten officers and directors of Defendant, asserting that they breached their fiduciary duties. Plaintiff did not demand that the Defendant officers bring the action because all the directors at the time were named in the suit. After the suit, Defendant corporation appointed an “Independent Investigation Committee” comprised of two directors who were not part of the initial suit. The Committee decided that the derivative suits would be harmful to the company and therefore moved to dismiss the litigation.

* No demand required, and excused because all directors = party to suit.

Two part inquiry from court

1. Independence of special committee
2. Whether proof BJR is fair, but **additional requirement-** court will analyze the merit of the case
* Just US case not Canadian Approach.

# Oppression

### Diff b/t OR & DA: 1) no need for leave of court 2) compensation go to complainant

1) No need to apply for leave for complaint in OR, but in DA must apply leave of court.

2) For OR the compensation goes to Complainant, but in DA goes to Corp

3) Usually for refusal to pay wages, or refusal to pay dividend. The minority shareholder wants to get out of company, but because closely held – they cannot get out – also no one wants to buy a share that gives no return.

## Who Can Initiate an Oppression Action?

### **s. 241** security holder, creditor, director or officer

(1) **Application to court re oppression** -- A complainant may apply to a court for an order under this section.

(2) **Grounds** -- If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

* (a) any act or omission of the corporation or any of its affiliates effects a result,
* (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
* (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

### s.238 complainant = a) reg/B SH (b) former/current director/officer (c) any court thinks fit

“complainant” means

1. a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
2. a director or an officer or a former director or officer of a corporation or any of its affiliates,
3. the Director, or
4. any other person who, in the discretion of a court, is a proper person to make an application under this Part.

## What constitutes Oppressive conduct

### **s. 241** act/omit/conduct that is oppressive/unfairly prejudicial/unfairly disregard int of claimant

(1) **Application to court re oppression** -- A complainant may apply to a court for an order under this section.

(2) **Grounds** -- If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

* (a) any act or omission of the corporation or any of its affiliates effects a result,
* (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
* (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

### **Clitheroe:** wrongful dismiss only OR if dismiss considered as part of overall pattern of oppress

**Clitheroe v Hydro One Inc 2002**

**Facts** The Ontario government passed a law directing Hydro One to negotiate new employment contracts with its officers and removing officers’ rights to compensation for termination of employment until the new contracts were in place. P was dismissed as CEO of Hydro One and sued, *inter alia*, under the *OBCA*’s oppression remedy.

**Issue** Can a claim for wrongful dismissal be included as part of an application for relief under the oppression remedy?

**Held** P did not allege any pattern of oppressive conduct, so the OR claim fails.

**Ratio** A claim for ***wrongful dismissal*** can only be included as part of an application for relief under the OR when the dismissal may properly be considered as part of an ***overall pattern of oppression***.

**Note:** basically the wrongful dismissal must be an overall pattern of the oppression.

### 1st Edmonton Place: to sue OR, must have been a creditor at time of conduct complained of

**First Edmonton Place v 315888 Alberta Ltd 1998**

**Facts** A numbered company controlled by three lawyers signed a 10-year lease with FEP, a landlord. As inducements to sign the lease, the landlord paid the numbered company $140K in cash and gave it an 18-month rent-free period. The evil lawyers immediately caused the corporation distribute the cash to them. They occupied the premises during the rent-free period plus 3 more months during which the numbered company paid its rent. They then vacated the premises and their numbered company, out of which they had transferred all the assets, stopped paying the rent.

**Issue** Is the landlord a “***proper person***” within meaning of *ABCA* equivalent to ***CBCA*** s 238 for the purposes of OR?

**Analysis** A creditor will be a “***proper person***” under the OR if the directors or corporation perpetrate fraud on the creditor OR if a breach of the creditors’ reasonable expectations occurs.

In considering whether ***reasonable expectations*** were breached, the extent to which acts complained of were ***unforeseeable***/creditor could not have protected himself, and detriment to creditors’ interests, are relevant.

There was no evidence that the landlord expected the numbered company to retain the incentive cash in its hands for any set period of time or any time at all.

**Held** The landlord can’t claim the oppression remedy since he wasn’t a creditor at the time of the acts complained of. However, since the lawyers took the incentive cash out of their corporation and didn’t use it for corporate purposes**, the landlord has standing to pursue a derivative action against them.**

**Ratio** In order to have a protected interest under the OR, a creditor must have been a creditor at the time of the conduct complained of. A lessor in respect of rent yet not owing is not such a creditor.

* At the time no rent due, at the time they were not creditors. The landlord could bring DA actions. DA – the director used the 140k for their own personal use – breach of loyalty. Directors appropriated company money.

### **Downtown Eatery:** P had a reasonable expect, D would leave a reserve to meet judgment

**Downtown Eatery v ON 2001 ONCA**

**Facts** P was employed as a manager in a nightclub owned by Ds. P received his paycheques from one corporation within Ds’ group of companies incorporated under the *OBCA*: Best Beaver Management Inc. When P was fired from his job, he began a successful wrongful dismissal claim against Best Beaver, but by the time he became entitled to his damage award, Ds had wound up Best Beaver and it had no assets. Ds claimed Best Beaver was wound up as a business decision because the “union threat” which was the reason for its separate existence had disappeared.

**Issue** Did the winding up of Best Beaver effect a result that was unfairly prejudicial to or that unfairly disregarded Ps’ interests as an involuntary [judgment] creditor of Best Beaver?

**Analysis** Intent to harm is unnecessary: OR contemplates “***effecting a result***” that is unfair, e.g. ***CBCA*** s 241(2)(c).

It was abundantly clear to Ds that Ps claim might result in a judgment and they should have taken steps to meet that contingency.

Thus P had a ***reasonable expectation*** that if Best Beaver was wound up, Ds would leave a reserve to meet the contingency that resulted.

**Held** P wins: the winding up of Best Beaver was unfairly prejudicial to or unfairly disregarded P’s interests as a person who stood to obtain a judgment against Best Beaver and there was nothing P could have done to prevent it.

**Note** How can this decision be distinguished from ***First Edmonton Place Ltd v 315888 Alberta Ltd*** (p 100)? RD says it is because here **you can imagine that the wrongful dismissal liability arose before the winding up**. Business was profitable in this case, but instead of leaving assets in company, the Ds transferred to other company – Complainants filed the OR suit before wounding up or reorganization. Here the complainant is just a potential creditor, but court satisfied this reasonable expectation. But for First Edmonton Place: the complainant was a voluntary creditor, the creditor had various means to protect itself. In this case, the complainant was involuntary creditor. Courts more likely to protect voluntary than involuntary.

**Note**

**-**Why OR? Because D’s company wound up already, no money.

- they say the union threat no longer exist, that is why company wound up, wasn’t oppression.

* Intent to harm is unnecessary, or contemplated, just that the effect is unfair.
	+ P had a **reasonable expectation** that if D wound up, Ds would leave a reserve to meet the contingency that resulted.

-you can also use pierce corporate veil remedy, but company not created as a sham or defraud creditor. Or argue the employee was hired by the company as a whole.

### Downtown Eatery: in this case involuntary creditor, in 1st Edmonton: p was voluntary

### BCE: test for OR: 1) any reasonable expectations (factors: commerce practice/relationship/past practice…) 2) If so, was the conduct ***unfair/prejudice/oppressive***?(factors: any damage/ causation)

BCE Inc. v. 1976 Debentureholders (2008 SCC)

**F:** BCE up for sale, got 3 offers, Bell Canada wholly owned by BCE, Bell had a lot of debt. The sale gave sh of BCE 40% premium, but the creditor’s debenture would fall by 20%. The creditors sued directors of BCE for unfairly prejudice and oppressive.

Court applied 2 prong inquiry

**A:**

**1) Was there reasonable expectation**

The following factors in the case law are relevant to reasonable expectations:

1. Commercial practice: Departure from normal business practice that undermines or frustrates exercise of his legal rights will usually give rise to a remedy e.g. ***Downtown Eatery (1993)*** ***Ltd v Ontario*** (p 99)
2. Size and nature of corporation: Courts may give more latitude to directors of smaller companies.
3. See e.g. ***First Edmonton Place Ltd v 315888 Alberta Ltd*** (p 100)
4. Relationships: See e.g. ***Ferguson v Imax*** (p 100) – close personal relationships (family type)
5. Past practice: May create reasonable expectations, especially in closely-held corporations – could diverge, but better justify
6. Preventive steps: Whether claimant could have taken steps to prevent himself can be relevant. See e.g. ***First Edmonton Place Ltd v 315888 Alberta Ltd***
7. Representations and agreements: [***Ford Motor Co of Canada v OMERS***] – past agreements give effect.
8. Fair resolution of conflicting interests: Best interests of the ***corporation*** must be considered ***Peoples Department Stores Inc (Trustee of) v Wise***). Business judgment of directors will be deferred to. This is important step – there is a conflict of interest in this transaction, when making decision BOD can consider interest of various stakeholders, can’t favour one over the other. As long as decision is within reasonable choices, the court will defer.

**2) Was there a Conduct that is oppressive, unfairly prejudicial, or unfairly disregarding of interests**

* Not every breach of a reasonable expectation qualifies.
* Also plaintiffs must show wrongful conduct, causation, and a compensable injury.

**Held *Debentureholders were not oppressed***. The evidence disclosed a reasonable expectation that directors would consider their interests, which they did (they considered their contractual terms, but nothing farther need to be made). However, maintenance of the trading value of their debentures was not a reasonable expectation. Had they wanted this, they could have bargained for it.

Such large buyout wasn’t expected anyways.

* Because they made fair resolution, courts will defer to decision.

**Ratio** There is a two-prong test for whether oppression occurred:

1. Were the ***reasonable expectations*** of the complainants breached?

2. If so, was this breach ***unfair***? (i.e. oppressive, unfairly disregarding, or unfairly prejudicial to interests)

* Remember this case, and People Department store, because all are SCC decisions

## Remedies

### **s.241 (3)** court can(a) restrain order (c)amend bylaw (f) order corp buy shares from P

In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

1. an order restraining the conduct complained of;
2. an order appointing a receiver or receiver-manager;
3. an order to regulate a corporation’s affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
4. an order directing an issue or exchange of securities;
5. an order appointing directors in place of or in addition to all or any of the directors then in office;
6. an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
7. an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;
8. an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
9. an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by [section 155](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec155_smooth) or an accounting in such other form as the court may determine;
10. an order compensating an aggrieved person;
11. an order directing rectification of the registers or other records of a corporation under [section 243](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec243_smooth);
12. an order liquidating and dissolving the corporation;
13. an order directing an investigation under Part XIX to be made; and
14. an order requiring the trial of any issue.

### Scottish Co-op: (breach of loyal only OR if harm to sh/if to corp no OR)

***Scottish Co-operative wholesale Soceity Ltd v Meyer 1959***

**Facts** Society needed Meyer & Lucas to help it start a rayon business, which was incorporated as a partly-owned subsidiary with Meyer & Lucas holding balance of shares. Subsidiary board was 5: Meyers, Lucas, and 3 nominees of Society. When Meyer & Lucas became dispensable, Society offered to buy them out at an inadequate price so they refused. Society then started a separate rayon business in-house to compete with its own subsidiary, seriously harming the subsidiary’s profits. The 3 Society nominees on the board of the subsidiary took no action to try to prevent this harm. Meyers & Lucas sued the Society under old ***UK*** *Companies Act* oppression remedy. Back then, one required state licensing and to get a license experienced managers were needed. In 1952, license not required,

**Analysis** Lord Denning (textbook p 872):

*[T]he affairs of a company can . . . be conducted oppressively by the directors doing nothing to defend its interests when they ought to do something.*

**Held** Affairs of subsidiary were conducted in a way oppressive to Meyer & Lucas. Remedy is that Society must buy Meyer & Lucas’ shares at a fair price, being the price the shares would have had at the petition date but for the oppression.

**Note** Denning’s reasoning is essentially: the 3 directors did nothing thus breaching their duty of good faith to the subsidiary. Since they were nominees of Society and executing Society’s corporate will, the harm was really done by Society. Textbook points out at pp 874–5 that liability would be more easily grounded under the ***CBCA*** since s 241(2)

* contemplates oppression by ***affiliates*** of the corporation, which the Society was to its subsidiary.
* They can bring DA against sub company, the directors put the parent interest ahead of the sub company.
* DA and OR =
* DA = no buy back
* Or = can give buy back = that is why they brought it under OR.
* The breach of loyalty give rise to oppression remedy, Does breach of fiduciary duty always give rise to OR. If harm to corp only there wil be no OR.
	+ In OR complainant suffered harm, not just harm to corp. majority sh profited from its competition against subsidiary, the subsidiary would be forced out of business.

**Denning:** Whereas their duty to the co-operative society was to obtain the new shares at the lowest possible price - at par, if they could. Again, when the co-operative society determined to set up its own rayon department, competing with the business of the textile company, the duty of the three directors to the textile company was to do their best to promote its business and to act with complete good faith towards it; and in consequence not to disclose their knowledge of its affairs to a competitor, and not even to work for a competitor, when to do so might operate to the disadvantage of the textile company

**They put their duty to the co-operative society above their duty to the textile company in this sense, at least, that they did nothing to defend the interests of the textile company against the conduct of the co-operative society.** They probably thought that "as nominees" of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interests of the textile company to those of the co-operative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders.

**Note:**

Directors could have protested/No wound up because: But such an order would unfairly prejudice Dr. Meyer and Mr. Lucas because they would only recover the break-up value of their shares. No wound up because the business of company reduced by competition, therefore shares worth reduced.

### **Ferguson:** (family venture) to find expectation & unfair prejudice (bar restruc 4ever)

**Ferguson v Imax 1983**

**Facts** Mr and Mrs Ferguson both held shares in the defendant corporation. Additionally, Mr Ferguson was an employee of the corporation, but Mrs Ferguson was not. When their marriage broke down, Mr Ferguson used his position of influence in the company to ensure that no dividends were paid, thus giving Mrs Ferguson no return on her shares. Mr Ferguson then caused the company to attempt to amend its articles to force Mrs Ferguson to redeem her class “B” non-voting preference shares. The purpose of this transaction was to force Mrs Ferguson out of the company so that dividends could be paid to the *other* shareholders (i.e. so they could participate in earnings but not her). Mrs Ferguson sought an injunction under the OR—i.e.. ***CBCA*** s 241(3)(a)—to restrain the company from putting the capital structure amendments to a shareholder vote.

**Issue** Is the attempted capital reorganization oppressive to Mrs Ferguson?

**Analysis** **When dealing with a close corporation, a court may consider the relationship among shareholders and not just the legal rights as such**.

Due to the intention of the group [of directors] to deny Mrs Ferguson any participation in the growth of the company, the capital reorganization is the culminating event in a lengthy course of oppressive and unfairly prejudicial conduct to Mrs Ferguson.

Due to the nature of the corporation as a ***family venture*** started by three couples, Mrs Ferguson can’t be considered to be in the same position as a minority shareholder who came to the company lately.

**Held** Attempt to push Mrs Ferguson out is oppressive in the circumstances. An order will go forever prohibiting the company from implementing the capital restructuring.

### Naneff: Remedy can’t gives p something he never could have reasonably expected.

***Naneff v Con-crete Holding Ltd 1993***

**Facts** Nick Naneff started a successful concrete company. He wanted his two sons Alex and Boris to co-own the business after he was gone, so he transferred 50% of the common to each of them, while retaining control through special voting preferred stock. Nick led the sons to believe that they would have complete ownership and control after he died.

When Nick and Boris took issue with Alex’s lifestyle, they caused the company to fire Alex without severance from his position as officer. They also declared dividends only on shares held by Nick and Boris and excluded Alex from day-to-day operations and management of the business as a shareholder and as a director.

**Issue** 1. Was Alex oppressed?

2. If so, what should the remedy be?

**Analysis** Given the family nature of the close corporation, the fact that Alex was led to believe he would co-own with Boris, and the fact that this is how they had all carried on the business, gave Alex a

***reasonable expectation***, as a shareholder, that he would co-own and control with Boris.

Conduct of Nick and Boris breached this expectation in a manner that was unfairly prejudicial to Alex’s interests.

**Held** Alex was oppressed. The remedy is that Nick and Boris have to purchase all of his shares at fair value without minority discount. Allowing Alex to acquire the business from Nick and Boris is beyond what he could have expected.

**Ratio** [Also cited in ***Ford Motor Co of Canada v OMERS*** (text p 929) in the context of past oppression]: *A remedy that rectifies cannot be a remedy which gives a shareholder something that . . . he never could have reasonably expected.*

* He could not believe he could control company while his dad is alive, and even after his dad died, the best he could have is shared control with Boris

# Friendly Mergers and Acquisitions

Merger – combine to form one company = friendly

Acquisition – one acquires another = friendly or hostile

### Acquiring Company: the company acquiring control of the target company

### Target Company: the company being controlled after merger

## Efficiency Motives

### Economies of scale: they get discount and save money from having 1 headquarter

When 2 companies combine, the bigger company can get discount and save cost by having 1 headquarters than 2

### Vertical integration: might get reduced costs if GM incorporate a tire company

### Replacing bad management: old management of acquired company might be replaced

### Diversification: diversify the risk of business

## Redistributive Motives

### Company shifting value from government, creditors, or consumers etc.

## Bad Motives

### hubris, overestimation of synergies, empire building etc.

## Why M&A need SH approval: Too big & Important/Investment Decision/Conflict of Interest

* Too big and too important
* More like investment decisions than management decisions
* Conflict-of-interest transactions

## Sale of Shares

### 1) A Corp purchase T Corp’s shares with either cash or stock acquire controlling stake

If Offer made to Individual there is no need to special resolution.

If exceed 20% of shares being bought, the offer is considered takeover bid – requires purchaser to make offer to all class that belong to that class and make circular.

* Can be purchased with Cash or Stock, either way you end up with controlling stake after merger.

## Sale of Assets

### 1) A Corp use share /cash to purchase T Corp’s Asset/2) T Corp usually go into liquidation

### 3) if buy with share, T’s SH and A SH jointly owns A Corp’s Assets including merged asset

### T Comp -sell subst all assets requires special resolu by all SH regardless of vote status s.189(3)

### A Comp no need special resolution – presumed to be management discretion/**No surviving liability** if just buy asset

## Amalgamation

### 1) A comp absorb T comp – T disappears 2) if stock amalgamation, use swap ratio

Each comp shares should be valued to get good swap ratio.

* The shares in T comp = cancelled.

### Both A & T Comp SH must approve by special resolu regardless of voting status s.183(5)

* All sh entitled to vote including preferred non-voting class

### Effect of amalgamation: The surviving corp owns all assets & liability of amalgamated corp

### To deal with the surviving liability – use triangular merger

## Triangular Merger

### 1) A Comp creates a subsidiary and use Subsidiary to acquire T comp

### 2) T Comp SH needs special resolution because s.183(5)

### 3) A Comp SH don’t need special resolution because it is management decision of BoD

### 4) also good because of corporate veil, address successive liability

## Short Form Merger

### s.184(1): **Vertical:** Wholly owned Sub Comp can merged with parent without special resolu

**184.** (1) A holding corporation and one or more of its subsidiary corporations may amalgamate and continue as one corporation without complying with [sections 182](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec182_smooth) and [183](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec183_smooth) if

* (a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation;
* ([*a.1*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec1_smooth)) all of the issued shares of each amalgamating subsidiary corporation are held by one or more of the other amalgamating corporations; and
* (b) the resolutions provide that
	+ (i) the shares of each amalgamating subsidiary corporation shall be cancelled without any repayment of capital in respect thereof,
	+ (ii) except as may be prescribed, the articles of amalgamation shall be the same as the articles of the amalgamating holding corporation, and
	+ (iii) no securities shall be issued by the amalgamated corporation in connection with the amalgamation and the stated capital of the amalgamated corporation shall be the same as the stated capital of the amalgamating holding corporation.

### s.184(2)**Horizontal:** no need special resolution if merged b/t 2 wholly owned sub

(2) Two or more wholly-owned subsidiary corporations of the same holding body corporate may amalgamate and continue as one corporation without complying with [sections 182](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec182_smooth) and [183](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec183_smooth) if

* (a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation; and
* (b) the resolutions provide that
	+ (i) the shares of all but one of the amalgamating subsidiary corporations shall be cancelled without any repayment of capital in respect thereof,
	+ (ii) except as may be prescribed, the articles of amalgamation shall be the same as the articles of the amalgamating subsidiary corporation whose shares are not cancelled, and
	+ (iii) the stated capital of the amalgamating subsidiary corporations whose shares are cancelled shall be added to the stated capital of the amalgamating subsidiary corporation whose shares are not cancelled.

### Reason: because both vertical & horizontal is one SH at work – the parent

# Plan of Arrangement

## What is a plan of arrangement

### s.192(1) arrangement = amend article/amalgamation/transfer all /liquidation/combination

192. (1) In this section, “arrangement” includes

* (a) an amendment to the articles of a corporation;
* (b) an amalgamation of two or more corporations;
* (c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act;
* (d) a division of the business carried on by a corporation;
* (e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate;
* (f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate;
* (f.1) a going-private transaction or a squeeze-out transaction in relation to a corporation;
* (g) a liquidation and dissolution of a corporation; and
* (h) any combination of the foregoing.

## When to Use It?

### s.192(3): use it when not pract for comp achieve above arrangement, apply to court for order

* (3) Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.
* If comps cannot achieve amalgamation, apply to court

## What is the court procedure

### s.192(4): the court has power to make order e.g(a) permit SH’s dissent) (b) permit arrangement

192.(4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

* (a) an order determining the notice to be given to any interested person or dispensing with notice to any person other than the Director;
* (b) an order appointing counsel, at the expense of the corporation, to represent the interests of the shareholders;
* (c) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs;
* (d) an order permitting a shareholder to dissent under [section 190](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec190_smooth); and
* (e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

## What are the advantages and disadvantages

### Disadv: delay in complete transac, court may not approve

### Adv: good for complex companies with sub classes

* Advantage: bond and debenture holders
	+ Useful when complex company and with sub classes
* Disadvantages: take longer time to complete transaction, not 100% share the court will approve the plan.

# Appraisal Remedy

## Who has dissent and appraisal rights?

### **a.190(1):** Reg SH may dissent if (a) amend art (c) amalgamation (d) sell all properties..

**190.** (1) Subject to [sections 191](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec191_smooth) and [241](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec241_smooth), a holder of shares of any class of a corporation may dissent if the corporation is subject to an order under [paragraph 192(4)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec192subsec4_smooth)(d) that affects the holder or if the corporation resolves to

* (a) amend its articles under [section 173](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec173_smooth) or [174](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec174_smooth) to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class;
* (b) amend its articles under [section 173](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec173_smooth) to add, change or remove any restriction on the business or businesses that the corporation may carry on;
* (c) amalgamate otherwise than under [section 184](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec184_smooth);
* (d) be continued under [section 188](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec188_smooth);
* (e) sell, lease or exchange all or substantially all its property under [subsection 189(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/#sec189subsec3_smooth); or
* (f) carry out a going-private transaction or a squeeze-out transaction.

### If arrangement approved, give dissent appraisal right to demand buyback shares at fair price

## What is the procedure for exercising appraisal rights?

### s.190(5) **Objection:** send written objection to resolution at or before sh meeting

(5) A dissenting shareholder shall send to the corporation, at or before any meeting of shareholders at which a resolution referred to in subsection (1) or (2) is to be voted on, a written objection to the resolution, unless the corporation did not give notice to the shareholder of the purpose of the meeting and of their right to dissent.

### S.190(6): Corp < **10 days** after SH adopt resolu, **send** **notice** of adop to dissent sh

Notice of resolution

(6) The corporation shall, within ten days after the shareholders adopt the resolution, send to each shareholder who has filed the objection referred to in subsection (5) notice that the resolution has been adopted, but such notice is not required to be sent to any shareholder who voted for the resolution or who has withdrawn their objection.

### s.190(7): after the dissent SH learns of adopt within 21 days send to corp written notice (c) demand fair value payment

Demand for payment

(7) A dissenting shareholder shall, within twenty days after receiving a notice under subsection (6) or, if the shareholder does not receive such notice, within twenty days after learning that the resolution has been adopted, send to the corporation a written notice containing

(a) the shareholder’s name and address;

(b) the number and class of shares in respect of which the shareholder dissents; and

(c) a demand for payment of the fair value of such shares.

### s.190(8): dissent sh shall < 30 days after sending notice under (7) send certificate representing shares to corp or agent

Share certificate

(8) A dissenting shareholder shall, within thirty days after sending a notice under subsection (7), send the certificates representing the shares in respect of which the shareholder dissents to the corporation or its transfer agent.

### **Note:** SH has limited ability to amend merger agreement, its either take it or leave it

## How to determine “fair value”?

### Smith v Van Gorkom: BJR to determine what is fair price/fiduciary duty to fair price

**Facts** TransUnion management believed an LBO would create value by enabling the company to use some of its stockpile of tax credits. The trading range for TU stock was $29.50–$38.25 and the CFO calculated that TU could handle the debt needed for an LBO at $50, but not at $60. Van Gorkom, the CEO and chairman of the board, wanted more for his shares, so he asked Pritzker, the head of another company, to conduct an LBO of TU at $55.

Van Gorkom made a ***20-minute*** oral presentation to the board during a meeting in which they had no prior knowledge that they would be considering a cash-out merger. Van Gorkom had not read the proposed agreement, so presented only based on his “***understanding***” of it. The directors ***did not inquire*** into Van Gorkom’s role in the sale or establishing the price; were ***uninformed about the intrinsic value*** of the company; and approved the sale upon ***two hours*** consideration without prior notice and without the exigency of any emergency or crisis.

**Issue** Did the board reach an informed business judgment on the decision to accept Pritzker’s $55/share offer, or did it breach its duty of care?

**Analysis**  A premium over market value is not enough to determine that a buyout offer is fair.

 In this deal, in all respects, the directors failed to inform themselves.

**Held** Directors were grossly negligent and cannot rely on the BJR to cover a decision in which they failed to inform themselves.

**Ratio** A business judgment is not informed unless the directors informed themselves prior to making it.

**Note** Although this case is about the duty of care, RD points out that **the court also found that VG breached his duty of loyalty in soliciting the bid, fixing the price himself, and not disclosing his interest**.

# Mergers and Acquisition: Hostile

## Definitions

### A Comp bypass T Comp management & purchase directly from SH to get control.

There is a conflict of interest here. SH wants the high price of shares from hostile takeover, Directors want to fend off takeover for their job.

### Board will fend off takeover: whether fending off is best interest of comp or self-interest

All comes down to – is the fending off take over motivated by best interest of company or self-interested.

### **Takeover Premium:** the estimated value & actual price paid. ~20-60% higher than market price

The est value of share and the actual price paid. 20-60% above prebid market price for take over bid. However If the bid turned over to bidding board = even higher. E.g if fair market value is $100, you pay 120-160$.

## Hostile Take Over Choices

### 1) proxy contest: solicit proxy from SH to vote their directors/once BoD elected, k for merger

* Solicit proxy from other SH to vote for their directors – promise SH to be better off under their management board. Once installed their board, they can enter into merger acquisition

### 2) Takeover Bid: OSA s.89(1): if you acquire 20% = give >35 days, adeq info, equal treat

* “an offer to acquire outstanding voting securities or equity securities of a class made to one or more persons or companies,…. where the securities subject to the offer to acquire, together with the offeror’s securities, constitute in the aggregate 20 per cent or more of the outstanding securities of that class of securities at the date of the offer to acquire” [OSA89(1)]
* **Requires adequate time, adequate info and equal treatment**
* Every formal takeover bid must remain open for 35 days. The bidder must produce disclosure – takeover circular to SHs. The management of company of target company has to send their own proxy circular recommending to accept or reject.
	+ Target company’s own circular – because Target Company has better info, and must provide to sh to facilitate best knowledge.

### If more sh wants to sale than purchase: A comp can accept it pro rata, if less sh wants to sale = no obligation to purchas

# Defense Arsenal

## Shark Repellent: set up ahead of time

### 1) Stagger term: 3 classes of directors, only 1 class is up for elect a yr. Takes 3 yrs to replace

### 2) Supermajority Vote: amend article to have merger approved at 90% or unanimously

### 3) Fair Price: In article requires: bidder must pay equal price to buy further share after merger

## Revise Capital Structure (poison pill/repurchase)

### 1) Repurchase shares: consume corporate asset to repurchase own shares reduce attractive

### 2) Poison Pills: gives Sh the right to purchase new shares at great discount price

### 3) Flip over pills: triggers at specific % of shares, the T’s SH entitled to purchase A’s shares

* + Flip over pills – triggered when the bidder acquires specific percentage of shares – e.g. 20% and the target company is merged into the acquired company. If event is triggered, the sh of target company, entitled to purchase the acquired company shares – this would dilute the original sh of acquired company. (shareholder rise plan agreement – it is an agreement)
		- The rights plan can be included in the bylaws of the company, meaning that it must be permitted by an acquiring company.

### 4) Flip-in Pills: allow Sh of T buy T’s shares at great discount won’t allow A’s sh buy any

* Flip-in Pills – triggered when takeover bid, allow sh of the target company purchase shares at great discount. Won’t allow takeover sh purchase any.
* A flip-in poison pill takeover defense dilutes the value of the shares purchased by the acquiring company by flooding the market with new shares, while also allowing investors who purchase the new shares to profit instantaneously from the difference between the discounted purchase price and the market price.

## Alter SH mix (white squire)

### White squire: issue shares to investors friendly to fend off takeover (no control stake)

Issue shares to investors friendly to management or to an employee stock ownership plan/pension plan (white squire) – don’t give controlling shares (c.f. white knight)

A **white squire** which is similar to a white knight, except it only exercises a significant minority stake, as opposed to a majority stake. A white squire doesn't have the intention, but rather serves as a figurehead in defense of a hostile takeover. The white squire may often also get special voting rights for their equity stake.

## Find a palatable buyer (white knight)

### White knight: selling control amount of shares to friendly investor

A **white knight** is a friendly investor that acquires a [corporation](http://en.wikipedia.org/wiki/Corporation) at a fair consideration with the support from the corporation's [board of directors](http://en.wikipedia.org/wiki/Board_of_directors) and management.

### Management LBO: leveraged buyout – the management use high debt buy corp themselves

In an MBO, the incumbent management team (that usually has no or close to no shares in the company) acquires a sizeable portion of the shares of the company. Similar to an MBO is an MBI (Management Buy In) in which an external management team acquires the shares. An MBO can occur for a number of reasons; e.g.,

### Buy new business or sell crown jewels: buy undesirable new bus/ sell most desirable asset

## Accelerate or increase management’s employment benefits

### Golden Parachutes: give high compensation for termination of service – high cost to A Comp

## Buy out the bidder

### Greenmail: demand buy back or else take over

**Greenmail** or **greenmailing** is the practice of purchasing enough shares in a firm to threaten a [takeover](http://en.wikipedia.org/wiki/Takeover), thereby forcing the target firm to buy those shares back at a premium in order to suspend the takeover.

## Attack the bidder

### Misleading info in the bidder’s circular

### Violation of regulations.

## Are Hostile Takeovers Good or Bad?

### Disadv: market myopia/hubris/unjust wealth redistribution

* Market myopia: stock market undervalue long term prospect of company, because it focuses on short term price other than long term price
* Hubris: the bidder is hubris, they are overconfident of the combined company,
* Unjust wealth redistribution – most worrisome fact – SH gets a lot, but the premium is at expenses of other people’ interest – e.g. employees – laid off, creditors are forced to shoulder more risks.
* Billions of costs to banks, accounting, legal services. Good business for law firms

### Adv: discipline inefficient management/create synergy

### Only 80 hostile takeover from 2006-2013 and thousands of friendly mergers (costs more)

1) cost

2) why would board approve takeover:

1. Golden parachute
2. Target board = acquire board member
3. Gave up

## Is the defense breached duty of loyalty?

### **Hogg:** White squire invalid becuz BoD can’t use power to fend takeover, only raise capital

**Hogg v. Cramphorn Ltd. (1967)**

**Facts**

Mr Baxter approached the board of directors of Cramphorn Ltd. to make a takeover offer for the company. The directors (including Colonel Cramphorn who was managing director and chairman) believed that the takeover would be bad for the company. So they issued 5707 shares with ten votes each to the trustees of the employee’s welfare scheme (Cramphorn, an employee and the auditor). This meant they could outvote Baxter's bid for majority control. A shareholder, Mr Hogg, sued, alleging the issue of the shares was *ultra vires*. Cramphorn argued that the directors' actions were all in good faith. It was feared that Mr Baxter would sack many of the workers.

**Judgment**

Buckley J, writing for the Court, held that the new shares issued by the directors are invalid. The directors violated their duties as directors by issuing shares for the purpose of preventing the takeover. The power to issue shares creates a fiduciary duty and must only be exercised in order to raise capital and not for any other purposes such as to prevent a takeover. The act could not be justified on the basis that the directors honestly believed that it would be in the best interest of the company. The improper issuance of shares can only be made valid if the decision is [ratified](http://en.wikipedia.org/wiki/Ratified) by the shareholders at a [general meeting](http://en.wikipedia.org/wiki/General_meeting), with no votes allowed to the newly issued shares.

**R: defense** must only be exercised in order to raise capital and not for any other purposes such as to prevent a takeover. But can be ratified by sh approval

### Teck Corp: defense valid if the board ***believes***, on ***reasonable grounds***, defeat the bid is the ***best interests*** of the crop

**Teck Corp. v. Millar (BCSC 1972)**

**Facts** Teck was trying to take over Afton Mines Ltd so that it could cause Afton to enter into a particular kind of mining contract with it. Afton’s management thought Afton would be better off making the contract with Placer Development Ltd. Millar, an Afton director, approached Placer asking it to help defend Afton so they could make a deal. Placer demanded enough shares to give it 40% equity in Afton. ***Millar held out*** and Afton eventually issued enough shares to Placer to give it 30% equity and prevent Teck from acquiring a majority. Teck, though it conceded Afton’s directors may have believed they were acting in Afton’s best interests, sued to have the Placer contract declared null and void on grounds Afton’s director’s use of the ***white squire*** defense breached their fiduciary duty.

**Issue** May directors selectively issue shares to defeat a takeover bid?

**Analysis** The directors must have considered the consequences of a transfer of control and acted on reasonable grounds.

Millar wanted if possible to contract with Placer, not Teck, while the directors still had the power to do this. Millar’s purpose was to defeat Teck, but ***not at any price***. The fact that he held out for a better deal (30%, not 40%) is proof of this.

**Held** Afton directors’ issue of shares was not for an improper purpose and Teck’s suit fails.

**Ratio** Shares may be issued to defeat a takeover bid if the board ***believes***, on ***reasonable grounds***, that defeat of the bid is in the ***best interests*** of the corporation.

**Note: Teck after this white squire defense** required a sh holder meeting from Afton – Teck acquired majority sh from market, the purpose from sh meeting to replace board, the teck then could have control over board to enter into agreement. Issuing new shares no longer made Teck majority sh.

* Teck relied on Hogg – to retain control for themselves, which was inproper purpose.
* Reasonable ground – if face potential control change – best interest of corporation, not a duty to sale company at highest price for SH. Duty for best interest of company, not duty to sell to highest bidder.
* The court also said: it is easy for SH to conjure up reasons to fend off.
* Reputation, experience of any company trying to takeover that can damage their company after take over – if so decides can defend takeover.
	+ Place had better reputation/experience.

### Unocal Corp: 2 prong test for justifying defense strategies

Unocal Corp v Mesa Petroleum Co **1985 DE/SC**

**Facts** Mesa, a notorious greenmailer, launched a two-step takeover bid for Unocal that Unocal’s directors believed was both ***coercive*** and ***undervalued***. The coercion came from the fact that the “front end” step would acquire 37% of the shares for $54 cash, while the “back end” would acquire the remainder outstanding for ***junk bonds*** purportedly worth $54. This was designed to stampede shareholders into selling on the front end for fear of getting stuck with low quality securities on the back end. Unocal’s ***outside directors, acting independently*** recommended that Unocal should defend against the inadequate offer by making a counteroffer, effective if Mesa got its 37% front end, to repurchase 49% of its own shares at $72 by exchanging for them senior debt securities. Mesa sued to enjoin this defensive maneuver.

**Issue** 1. Do the directors have the power and duty to oppose a takeover threat reasonably perceived to be harmful to the corporate enterprise?

2. If so, are their actions protected by the business judgment rule?

**Held** Unocal’s directors win: they had the power to oppose Mesa’s tender offer and to undertake a selective stock exchange made in good faith upon reasonable investigation pursuant to a clear duty to protect the corporation. Their action was reasonable in relation to the threat posed by the grossly inadequate coercive two-tier offer.

**Ratio** There is a two-prong test for determining the appropriateness of directors’ defensive maneuvers:

1. The directors must believe [subjective] on ***reasonable grounds*** [objective] that a danger to corporate policy and effectiveness existed due to another person’s stock ownership. This burden can be satisfied by showing a ***good faith and reasonable investigation***. [This prong very similar to ***Teck Corp v Millar***]

2. Proportionality is required: to be protected by the BJR, the decision must be reasonable in relation to the threat posed.