Corporate Law Summary

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Forms of Business Enterprise

1. Sole Proprietorship
2. Partnership
3. Business Corporation

### Factors to consider

(1) the nature of the business and the concept of *limited liability*,

(2) the desirability of *perpetual existence*,

(3) the *number* and *relationship* of the proprietors,

(4) the degree of participation in and assumption of *financial risk* by each proprietor,

(5) the *financial requirements* of the business enterprise,

(6) the availability of *government grants*,

(7) *estate planning* considerations,

(8) the proprietor’s *other income*,

(9) the number and location of *business establishments*,

(10) *participation by employees* in the growth and profits of the business enterprise, and

(11) income tax.

# Sole Proprietorships

- owned and run by one person with no distinction between owner and business entity

- not a separate entity, a single equity owner

**Pros:** few formalities, simple, tax advantages (use losses against other income), least regulated

**Cons:**  unlimited liability (can be mitigated with insurance, but cannot insure against debt), taxes (certain advantages are only for corporations, IF sole proprietorship is successful, will put owner in higher tax bracket)

**Requirements:** If name of business is not owner’s own name, must be registered under Ontario Business Names Act RSO 1990, c.b.17 s.2(2) (ON p.392) (for transparency to public, should they need to sue)

# Partnerships

\*Are not separate legal entities\*

3 Types

1. (General) Partnership (P)
   * PROS: Simpler than corp, tax advantages similar to sole prop.
   * CONS: unlimited liability for partners
2. Limited Partnership (LP)
   * PROS: LP can invest and maintain limited liability, GP can start/run business without independent wealth
3. Limited Liability Partnership (LLP)

## General Partnerships

- All partnership law is provincial, under the property and civil law DoP (no federal partnership law)

S.2 Partnership = **a relationship between 2+ persons, carrying on business, with a view to profit**

* Partnership Act applies unless terms are contracted out in a partnership agreement
* Partners can expose one another to liability
* **can be formed deliberately, usually by written partnership agreement, or can be found to exist in fact, between people who never formally took steps to establish a business partnership**
* existence of a partnership is a question of *fact;* **KEY: intentions of the parties**
  + Tacit partnership = they have not directed their minds to forming a business relationship, but have in fact formed a partnership
* Partners are equal, unless explicitly otherwise agreed to
* All partners can engage in management of the business
  + Written partnership agreements- can override many provisions in the Partnership Act

### Definition: (General) Partnership

“…the relation which subsists between persons carrying on a business in common with view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under such Act, is not a partnership within the meaning of this Act. “ Partnerships Act, RSO 1990, c.P. 5, s.2 (ON p.767)

### 3 Essential Elements of a Partnership (ON p.767)

**(1)** *the carrying on of a business*. Subsection 1(1) of the Act defines “business” as including “every trade, occupation and profession.”

**(2)** *the enterprise must be carried on by persons in common*. This suggests that there must be two or more persons with the legal capacity to be partners.

**(3)** *the enterprise must be carried on with a view to profit*. This means that a joint operation for the sake of gain must exist. A religious society or some other association formed for charitable or nonprofit purposes is not a partnership.

### ON Partnership Provisions

ON Partnerships Act Sections:

* **Nature of Partnership** ss. 2-5 (p. 767-68)
* **Relation of Partners to Persons Dealing with Them** ss. 6-19 (p. 768-71)
* **Relation of Partners to One Another** ss. 20-31 (p. 771-774)
* **Dissolution of Partnership** ss. 32-44 (p. 774-77)
* **Limited Liability Partnerships** s. 44.1-5 (p. 777-79)
* Partners are agents for the partnership and every partner Partnerships Act, s. 6, 10, 11-13 (ON p. 768-770)
  + s. 6: partners’ power to bind the firm
  + s.10: partners are jointly & severally liable for all debts and obligations of the firm
  + s.11: the firm is liable for any wrongs committed by a partner (acting as partner)
  + s.12: Misapplication of money/property
  + s.13: Liability for wrongs joint and several
* Partners have a **fiduciary duty** to one another Partnerships Act, s.29-31 (p. 773)
  + s. 29: account for any private benefit/profit to the partnership
  + s. 30: duty to not compete
  + **\*duty to partners: BOTH integrity AND competence\***

- s.45: unless excluded under the Act, common law applies to general partnerships

* One **formal requirement** in Canada: registering partnership in a public register ON: Business Names Act 1990
  + s.7(1) (p.396): w/out registering, but carrying on business=“not capable of maintaining a proceeding in a court in ON in connection with that business except with leave of the court”

### CASE: Cox v Hickman (1860) \*inferring existence of partnership\*

* Existence of partnership is more than just sharing in profits (old common law rule)
* INTENT of parties is determinative

### CASE: Backman v Canada (2001 SCC)

**FACTS:** B claimed to have a partnership interest in US construction venture (apartments), immediately selling property back to owners (generating losses, to be deducted from their other income).

**HELD:** Partnership not formed (& losses not deductible). Intention to form a partnership present, but no intention to carry on business /w view to profit

**TAKEAWAY:** \*S. 2 Partnership Act\*Formal steps to form a partnership not enough to constitute the formation of an actual partnership (3 step test)

### CASE: Spire Freezers Ltd. v Canada (2001 SCC)

**FACTS:** S bought two US properties, reselling the expensive, unprofitable one (generating losses, to be deducted from other income) and retaining the small, but profitable low income housing project.

**HELD:** Partnership formed (& losses deductible); carrying on biz, in common, /w view to profit.

**TAKEAWAYS:**

* A partnership can be formed w a single transaction, provided it is not an empty shell.
* Tax motivation does not negate the formation of a partnership, given 3 elements of a partnership are present
* View to profit requirement: CAN be an ancillary purpose, so long as it is still present

## Limited Partnerships

* Rooted in statute; existence cannot be inferred
* Partnership as an LP cannot be gained through service provided; MUST contribute capital or property
* Require filing a Declaration to be formed (~210$)
* Typically used for tax reasons
* \*Interrelated: responsibility, liability and control\*

### Limited Partnerships Act (p.731-765)

* s.2: (1) May be formed to do anything a general partnership would do, subject to regulations in the Act
  + (2) At least one each general partner and one limited partner
* 3: formed by filing a declaration (expires after every 5 years, pay a fee ~ doesn’t dissolve partnership)
* s.4: GPs must keep records of current LPs
* s.6: restrictions on naming the LP
* s.7: limited partner can contribute money and property but not services
* s.8: management of the LP rests in the general partner(s)
* s.9: Limited partner only liable for their agreed upon contribution to firm’s capital
* s.12.2(b): Limited partners CAN be employed by LP as contractors
* s.13: limited partner liable as general partner if taking control of business
* s.15: withdrawal from limited partnership
* s.16: limited partner liable for difference between contributions and stated/promised contributions on record
* 18: right of limited partner to assign their interest to another: substituted limited partners and assignees
* s.21: Dissolution

### General Partners

* In general practice, the general partner will be a corporation
* CANNOT be employees
* Liability is unlimited
* Right to share in profits

### Limited Partners

* only liable for the obligations of the LP to the extent of the amount of property (cash, other property, NOT services) contributed or agreed to be contributed by the limited partner to the capital of the firm
* Can lose limited liability if taking part in control of the business
* CAN be employees (as contractors?)
* Right to share in profits

### CASE: Haughton Graphic Ltd. v Zivot (1986 ON)

**FACTS:** Z claiming limited liability in Printcast, a limited partnership which is the general partner of Lifestyle Magazine Inc. (of which Z was a LP); Z attended meetings, called himself ‘president’ of and took effective control of Printcast.

**HELD:** Z went beyond the role of LP in Printcast, was a GP, ~ liable

**TAKEAWAY:** A limited partner who takes part in controlling the business will be held liable as a general partner (unlimited liability)

### Nordile Holdings v Breckenridge (1992 BC)

**FACTS:** N, creditor to Arman LP suing B and R personally for debts of Arman LP.

* B and R=GPs of Arbutis Ltd, Arbutis = GP of Arman LP, B=LP of Arman LP
* B and R claim they are LPs, N claims they took control ~ are GPs

**HELD:**B and R were not liable; were acting as directors/officers of the GP (Arbutis), not as GPs of Arman LP.

**TAKEAWAY:** LP will not be held liable as GP unless exercising control WHILE acting as LP?

## Limited Liability Partnerships

* Professional partnerships only: doctors, lawyers and accountants
* members of the LLP are agents of the LLP and not of each other and in general not liable for the LLPs debts and obligations
* Designed to remove joint liability for negligence of another partner in a professional partnership; Each liable for his or her own negligence, debts
* All partners can make management decisions

# Business Corporations

## Pros & Cons

**PROS**: Why is incorporation the preferred method of doing business?

* + LIMITED LIABILITY for SHs for corporate debts
  + Specialization (entrepreneur, capital, management/admin capacities can be held by different people)
  + Capital lock-in? \*Stabilizes resources and carrying on of business (*Margaret Blair*)
  + Asset partition & Entity Shielding?: NOT about SH limited liability, but about the corporation not being liable for debts/obligations of SHs (*Hansman & Krackman*)

**CONS**: Complex~ requires filing/registration, and adoption of a corporate constitution, annual returns must usually be filed, in order to conduct business in more than one province, must either incorporate federally or obtain extra-provincial license

KEY CHARACTERISTICS

(1) a corporation is a separate legal entity – a distinct legal person, separate from its owners and managers;

(2) the shareholders of a business corporation enjoy limited liability; that is, a shareholder is not responsible for the debts or obligations issued by a corporation;

(3) a corporation has perpetual existence, so it does not die when its owners or operators die; and

(4) the “ownership” or “equity” interest in a corporation can usually be transferred.

(5) centralized management under a board of directors

* *Cannot be legally “owned”; ownership is of SHARES*
* *Business name must be registered*
* *Required to hold meetings, elect directors and provide SHs with information*

## History

* Evolved to solve the problem of what to do with property that is being used by a human who doesn’t own it
  + IE: The Church owns lots of property & real estate- priests, cardinals, etc. make decisions about its use, but don’t own it (owned by the collective ‘Church’ = separate entity
* Artificial entity /w assets that canoe used bu current office holders (Church, monarchy, charities)
* 16th century: Began being used by businesses (age of exploration~ Crown would bestow monopoly rights on corporations, rather than individuals, who would join corporations to enjoy monopoly right)
* 19th century: introduction of limited liability had democratizing effect: regular people could invest and engage in business without having their own wealth
* 2 ways to incorporate prior to 1862 (both mostly available to the elite):
  + 1) Special act passed for you by parliament
  + 2) Special grants from the Crown
* 3 Types of General Incorporation Statutes evolved:
  + 1) Memorandum
  + 2) Letters Patent
  + 3) Statutory Division of Powers

## Memorandum

Used in Nova Scotia and British Columbia

* underlying values: K law; registration
* Principle: You have a right to incorporate and the government must incorporate you if you register

## Letters Patent

Used in PEI

* underlying values: not a K, but a grant from the government; application
* Principle: Government (in theory) retains discretionary power to deny a grant request

## Statutory Division of Powers/New York Model/Articles of Incorporation

Used federally and in Ontario, Saskatchewan, Manitoba, New Brunswick, Newfoundland & Labrador, all Territories

* underlying values: not a K, but written under statute
* Principle: cannot be denied incorporation on gov’t discretion, but must follow statutory regulations

Corporations

* Division of Powers
* s. 92(11): provincial jurisdiction over provincial incorporation /w statutes (for companies with provincial objects)
* s.91 Federal government has residual general power over the incorporation of companies for objects other than provincial (*Parsons*)
* “with provincial objects”= territorial (not functional) limitation;
  + Province (of incorporation) cannot bestow the right to carry on business in other provinces, but capacity/power to carry on business can be (and is) conferred by the province in which the business is to be carried out

### Choosing Federal or Provincial Incorporation

**Federal**

* “Selling features”: location flexibility, “Recognition”/distinction (internationally), Use of name across Canada
* higher cost of incorporation
* Right to carry on business throughout Canada

**Provincial**

* Using name outside of province req’s
* Cheaper to incorporate if only operating within your province
* \*provinces do accord rights to one another’s incorporated entities reciprocally

# How to Incorporate

\*\***CBCA p. 626**: Guide to Incorporating> 5 steps\*\*

## Articles of Incorporation

* Form 1, submitted through Online Filing Centre
* establishes structure of corporation
* Must be signed by incorporators
* MUST INCLUDE:
  + Proposed name
  + Corp’s province/territory
  + Share Structure and and restrictions on share transfers (# of shares can be unlimited)
  + Number of directors (at time of filing>until at least the first SH meeting)
  + Any restrictions on business or its activities
  + Any other provisions

## > Naming

All Corporations’ names must have two elements:

1. Distinctive Element

2. Legal element (cautionary suffix: Ltd, Inc, etc.)

* Cannot use a name that is too similar or identical to one in use> use Newly Updated Automated Naming Service (NUANS) database to ensure uniqueness
  + CAN use a numbered company name to avoid any difficulty (And fill in the name with 9 blank spaces + Ontario Ltd.)

**Name Prohibition**

* CBCA: s.12 (p.9, regulations p. 155-158)
* OBCA: s.9 (p.14, regulations p. 155-160)
* ONTARIO Business Names Act: Registration, s.2 (p.406), Restrictions on Names (p.413-414)

## > Registered Office

* must be included in articles^
* Where corporate records are kept & any documents would be sent
* Would need to be in ON if incorporating under OBCA, otherwise any Canadian address

**Corporate Records** that must be kept (here or another Canadian location designated by directors): articles, by-laws, any USAs, SH meeting minutes, SH resolutions, docs on changes of directors, and a securities register

**Securities Register**: name and address of every security issued by the corp, date and particulars of the transfer of security

## > Capital

* classes, max # of shares (can be and normally is unlimited), any restrictions on transferability
* Only one share class, ~all SH’s rights are equal, all SH have voting rights at SH meetings

## > Directors

- include first board of directors in articles of incorporation

**Qualifications:**

* CBCA s.105 (p. 50) , OBCA s. 118, (p. 54-5): Canadian residency both req 25% be resident Canadians
* **Resident CDN definition:** CBCA p. 4/OBCA p.5 (CBCA penalizes living in Canada longer without a citizenship
* CBCA s.105, OBCA s. : qualifications of directors
* **Only SH can elect directors, and only directors can issue shares** so pre-incorporation, incorporators name first board of directors, which will issue shares at directors meeting

## > Business and Powers

Powers normally bestowed on a natural person are granted to the corporation under the CBCA/OBCA

- these powers can be restricted in the articles

## > Special Clauses

* making certain provisions part of the constitutional/articles of incorporation makes them harder to change later on
* Possible “entrenched articles” include: cumulative voting (C s. 107), pre-emptive rights (C s. 28), purchase of corp’s issued shares (C s.34-6, O s.), special powers (C s. 189)

# Limited Liability: Private Companies and SH Agreements

## Why allow limited liability? Chicago School; Milton Friedman

* X Encourage risk-taking in going into business? (\*entrepreneurs are not risk-averse)
* X necessary protection for capital investor? (\* limited liability can be simulated /w contracts)
* Reduce costs to investors in monitoring managers, and costs of monitoring other SHs
* Makes anonymous markets possible; ~ shares don’t vacillate in value based on who is holding them
* Disciplines corporate management: mismanagement resulting in share value decreasing ~ SHs can replace them
* Allows SHs to diversify their porfolios (w/out, every new investment increases SH liability)
* Allows corps to make optimal investing decisions; if just about risk v reward, some decisions would never be possible without limited liability

## Corporate Entity

* Separate legal entity
* SH elect directors, directors appoint officers
* **Five KEY Characteristics of a Corporation^**

### Salomon v Salomon & Co. (1897 HL)

**FACTS**: P began leather business as sole proprietor, built up business to a value of 10k. P’s sons worked in business and wanted to be partners; P incorporated as S&Co., took all formal steps & met all requirements and made sons SHs. (One req: 7 minimum subscribers of shares: 20,001 shares for him, 4 sons, wife and daughter, 1 share each)

* Valued company capital at 40K, 40k shares 1$ each (with SH knowledge, though really worth 10)
* Issue: was P personally liable for debts of S&Co?

**HELD**: P not liable.

**TAKEAWAY**: Company is a separate legal entity

- cannot truly find exceptions to the rule in Saloman, because all potential special circumstances that could distinguish were all present in P’s case

### Lee v Lee’s Air Farming Ltd. (1960 PC)

**FACTS**: P= Lee’s widow, seeking workers compensation, provided by legislation for “personal injury by accident arising out of and in the course of the employment”

P’s husband formed D company, in which he was director, controlling SH and employed /w salary as chief pilot. In course of work he crashed and was killed.

- Issue: was Lee an employee of LAF Ltd, capable of collecting workers compensation?

**HELD**: Yes, Lee was an employee, ~ widow can collect workers comp.

**TAKEAWAY**: A corporation can employee its sole SH/director

## Classification of Business Corporations

### Closely/Privately Held

* CBCA: non-distributing OBCA: non-offering

**Control Devices**

1. Classification of shares & share allocation amongst SHs
2. Class voting for directors
3. Constitutional provisions requiring unanimity or high percentage votes for share-holder and director action
4. Voting agreements & other SH agreements
5. Voting trusts

### Widely/Publicly Held

* CBCA:Distributing OBCA: Offering

## Common Law & Voting Agreements/Voting Trust Arrangements

Voting trust arrangements, allowed at common law, would allow SHs to know that others would not defect from agreed choice to vote for a certain director

* Exception: where SHs are **also** directors and the ‘agreement’ fettered their discretion AS director
* Exception: USAs must bind directors in some way

### Greenwell v Porter (1902)

**FACTS**: P brings action to enforce voting agreement

**TAKEAWAY**: SHs are held to their voting agreements;

- EXCEPTION: where a SH voting agreement would fetter a director’s discretion

### Ringuet v Bergeron (1960 SCC)

**TAKEAWAY**: SHs have the right to combine their interests and voting powers to rescue control of a company and ensure it will be managed by certain people in a certain way

* detriment to the minority SH does not make such a collective action immoral/invalid

## Unanimous SH Agreements

* Rooted in statute; CBCA s. 146, OBCA s.108
* **USA = 1) all SHs sign, 2) a provision therein restricts directors’ powers in some way, 3) amounts to a constitutional document**
* Technically available under statute to both publicly and privately held corporations, but in reality, near impossible for publicly held corporations
* Binding: it can be used to modify what would otherwise be the effects of certain statutory provisions and violation of USAs provisions can be the grounds for obtaining a restraining or compliance order under the corporate statute.

### Duha Printers Ltd. v The Queen (1998 SCC)

SCC: in a private or closely held corporation, it may generally be assumed that the dominant interests to be served by decision-making are the expectations and needs of the shareholders, as opposed to the corporation in the abstract.

Issue: Was the agreement a USA?

* On facts, first 2 criteria met (otherwise lawful agreement, unanimous),~ did it restrict director powers to manage the business and affairs of the corporation?

**HELD**: it affected directors’ powers, ~ USA

**TAKEAWAY**: the USA is to be considered a constating document for the purposes of determining *de jure* control of a corporation.

# Piercing the Corporate Veil

**CBCA s. 45, OBCA s.92**: SH should have limited liability

Disregarding the separate legal personality of the corporation CBCA s.15/OBCA, and looking at the reality

- NO statutory provisions on lifting the veil, ~ matter of common law

**Test for piercing the veil: in Transamerica >**

POSSIBLE CASES:

Corporation asks court to lift veil (EX: *DHN, Kosmopolous*)

OR

External plaintiff asks court to lift veil, to get at SH assets for the corporation (without adequate assets to remedy the wrong) (EX: *Chevron, Transamerica*)

## Judicial Disregard of the Corporate Entity

### D.H.N. Distributors Ltd. v Tower Hamlets London Borough Council (1976)

**FACTS**: DHN is parent company to 2 subsidiaries: Bronze and Transport; land expropriated from B by gov’t to build law-cost housing, and claimed to not have to compensate for lost business (that was being carried on by DHN) because DHN was carrying on affected business, NOT Bronze

**HELD**: DHN is entitled to claim compensation \*…when a parent company owns all the shares of the subsidiaries – so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.\*- Denning

**TAKEAWAY**: Ex of corp asking for veil to be lifted; lifting the veil where control is complete & companies should be treated as one.

### Adams v Cape Industries plc. (1991)

**FACTS**: Adams trying to enforce US judgement in UK, for Cape to pay for the judgement against its US subsidiary (which had no resources to pay)

Issue: Was Cape ever in the US/within US jurisdiction?

**HELD**: NOT free to disregard the principle of Salomon; presumption against finding agency of subsidiary in the parent company; Cape not liable.

-“ the court is NOT entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.”

**TAKEAWAY**: upholds Salomon, Cape was entitled to organize as it did,

### Kosmopolous v Constitution Insurance Co. (1987 SCC)

**FACTS**: K started business as a sole proprietor, leases building, later incorporated as sole director and shareholder, and the purchased insurance for the building remained in his name. (though CIC knew it was now home to an incorporated business). A fire broke out next door and caused significant damage to K’s store. K claimed under the insurance policy. CIC claimed K had no legal/equitable interest in the company’s assets as shareholder, ~ no insurable interest.

ISSUE: Did K have an insurable interest in the business assets owned by his corporation?

**HELD**: Yes. BUT as a matter of insurance expectancy test; VEIL NOT LIFTED

**TAKEAWAY**: EX of corporation asking for the veil to be lifted (not successful)

- Corporate veil can be lifted when it is **“just and equitable”** to do so.- *Kosmopolous*

### Transamerica Life Insurance v Canadian Life Assurance (1996 ON)

**FACTS**: T sued parent company of T’s co-contractor (which was without sufficient assets to pay its obligations to T.

ISSUE: Can parent company be liable for obligations of subsidiary?

**HELD**: No liability; subsidiary had its own office and was independently managed. They must act as a single entity to warrant lifting the veil.

**TAKEAWAY**:

**TEST to impose liability on a parent company/lift the veil:**

1) conduct akin to **fraud** and 2) subsidiary is in **complete control beyond ownership**/dominated by parent company \*puppet\*

Under the common law, the corporate veil can be pierced when:

* + Legislation allows it;
  + The corporation is a mere sham used to shield fraudulent or improper conduct;
    - * Courts will disregard that a separate legal personality of a corporate entity where it is completely dominated and controlled AND being used as a shield for fraudulent or improper conduct.
      * Not enough that the company is owned, it also needs to have more than that for complete control.
  + When the corporation is acting as an agent.

### Yaiguaje v Chevron Corporation (2018 ONCA)

**FACTS**: Chevron US committed environmental atrocities in South America. Suit in Canada against Chevron Canada, subsidiary many levels down. Y trying to reach into assets of Chevron.

**HELD**: Undecided; To win court would have to accept the argument that Chevron is a single entity.

## Statutory Disregard of the Corporate Entity

- Federal and Provincial legislatures have been more ready to lift corporate veil/limit corporate personality than the Courts

Ex: Federal Income Tax Act- corporation rules, provincial labour relations statutes

Directors’ Liability

- Under Federal statutes, personal liability is placed on directors of corporations in certain circumstances (they fail to meet their DOC in relation to the Act)

Environmental Acts

- impose duties on directors and officers of corps to take reasonable care to prevent the corp from causing pollution, ~ personally liable, regardless of the corporation being the source

# Corporate Contracting, Tortious and Criminal Liability of Corporations

## Contracts

Issues that can arise when a corporation enters a contract:

1. Did the company have the capacity to enter the contract?> ***UV, CN***
2. Did the company follow the internal procedure for entering the contract?> **Indoor Management Rule-** Mitigates the harshness of the doctrine of constructive notice
3. Did the person signing the contract have authority to do so?> **Agency**

### Ultra Vires Doctrine \*abolished

**Ultra Vires**: A corporation (particularly one in a memorandum jurisdiction) had no legal capacity to act in any way that was not specifically authorized by its incorporating documents/articles.

* **Doesn’t** cover directors going beyond their powers
* **Doesn’t** cover where the corp is allowed to act under its articles, but acted before administrative consent was procured
* **Doesn’t** cover corporation’s acts allowed under articles BUT not following proper constitutional or statutory procedure

Purpose: Idea that allowing a company to exceed its stated objects would constitute a wrong to the **shareholders** (who might be presumed to have based their investment decision on the wording of the company’s charter); to the company’s **creditors** (whose assessment of the company’s creditworthiness might, equally, have been based on a scrutiny of its charter); or to **the public** generally.

Issues:

* limits corporation’s legal capacity
* objects clauses would tend to mislead other parties as to activities of the business
* Difficult to confer adequate protection to BOTH SHs and creditors

UV Doctrine has been practically eliminated by the statutes: unless restricted, it is assumed that corporation has powers of a natural person. (& never applied to letters patent-formed corps)

* \*\*Most popular way to evade any UV issue was to include in their **objective clause**: “*to carry on any other trade or business whatsoever and which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to any of the above businesses or the general business of the company*” (object clauses are no longer required under statute, as UV and CN were abolished)

### Constructive Notice \*abolished

Under the constructive notice doctrine, anyone, whether a shareholder or outsider, who had dealings with a corporation was taken to have notice of the contents of the corp’s constitutional documents

- further entrenched ultra vires and led to more injustices /w shady corps entering into Ks they knew were UV

- Left unclear: Did a party entering into a contract with a corporation have to ensure that any requisite internal procedures had been complied with? Or, could they assume that the corporation had taken all necessary internal steps?

> SOLUTION: Indoor Management Rule> party can assume necc steps were taken

* abolished by statutory amendment to corporation statutes

### STATUTES: Abolishing UV and CN

BOTH s 15: Corporation has all the rights of a natural person

CBCA s.16 (p. 11), OBCA s. 17 (p. 16)> restriction of corporate powers must be in the articles of incorporation, otherwise all rights/powers of a natural person

CBCA S.17 (p.11), OBCA s. 18 (p. ) : **NO Constructive Notice**

* Seems to leave open that if you had actual knowledge/notice you are bound

**Indoor management rule**: an outsider is entitled to assume that a corporation has properly complied with all required internal procedures when entering into a contract

* Adopted from *Turquand (1856)* CBCA s. 18, OBCA s. 19

### Agency: Actual & Ostensible Authority

\*a principal will be bound by an act of its agent only so long as the agent acts with either the **express or ostensible authority** of the principal.

A natural principal is liable for the acts of an agent if the agent had actual, usual, or ostensible authority to commit the acts from the principal.

* "Usual" authority means the authority ascribed to the agent by common or trade understanding by virtue of the particular office held by him.
* "Apparent" or "Ostensible" authority means the authority with which the agent has been clothed as a result of the principal's express or implied representations. This representation may be implied from the principal's conduct or acquiescence as well as from his spoken or written words.

### Freeman and Lockyer (Firm) v Buckhurst Park Properties Ltd. (1964)

**FACTS**: D refused to pay invoices from P, claiming their director who entered into K with P had no authority to do so; D’s articles stipulated all 4 directors were required to enter into K.

**HELD**: D corporation was bound to pay; director had ostensible authority.

**TAKEAWAY**: Test for Ostensible Authority: 4 conditions must be shown:

1. that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
2. that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
3. that he (the contractor) was induced by such representation to enter into the contract, i.e., that he in fact relied on it; and
4. that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

## Tortious Liability

* a corporation will be held vicariously liable for certain torts committed by its agents
  + Vicarious Liability: A corporate employer can be held vicariously liable for employee’s tortious actions as long as they are within the course of their employment
* BUT in some cases, it is not possible to hold a corporation vicariously liable
  + it is then necessary to determine if the corporation itself committed the tort
  + The wrongful acts of a person found to constitute a “**directing mind and will**” will be treated as the fault of the company itself
* WHERE the individual tortfeasor is one of the principal SHs, imposition of personal tort liability will functionally ‘lift the veil’, imposing liability on the principal SH
* Otherwise, may need to actually have court lift the corporate veil in order to access SH assets

### Sullivan v Desrosiers (1986 NB)

**FACTS**: Sullivan carried on incorporated farming business, Desrosiers lived nearby, and brought action against him for nuisance (smell of pigs); TJ held a nuisance had been created;

ISSUE: Is S, as manager and principal employee of company that committed nuisance responsible personally?

**HELD**: Yes, S is liable.

**TAKEAWAY**: Ex of directing mind and will

### The “Rhone” v The “Peter A.B. Widener” (1993 SCC)

**FACTS**: The “Rhone”, a ship was struck and damaged by the Peter Widener barge (which was being pulled by tug boat captained by Mr. Kelch, owned by Great Lakes Towing) while moored. Owners of Rhone sued Great Lakes for Kelch’s negligence; GL claimed they were not liable (under Canada Shipping Act- shipowner enjoys limited liability for the acts of *Others*)

ISSUE: Was the captain a person “other” than/separate from Great Lakes at the time of the accident, or a “directing mind”?

**HELD**: Great Lakes not principally liable

- Kelch was a captain and was given other responsibilities (due to his extensive experience), BUT was ultimately a servant of Great Lakes & not a directing mind.

**TAKEAWAY**: Ex of corporation’s servant, NOT directing mind

## Criminal Liability

Vicarious liability does not apply to criminal actions; must find the corporation committed a crime itself (through act of a directing mind and will)

### Identification Doctrine

* the common law method of hiding corp liable for a criminal offence
* = **did the human being /w the guilty mind hold a position of a directing mind?** (full MR offences- *Canadian Dredge*)

- Act of a directing mind will NOT be attributable to corp where it is done only to benefit that individual

* ISSUE: What about cumulative criminal wrongdoing (not amounting to conspiracy), involving multiple defendants’ decision-making together adding up to a criminal wrong? (solution: bill c-45)

### Canadian Dredge & Dock Company v R. (1985 SCC)

**FACTS**: 4 corporate managers convicted of bid rigging;

ISSUE: could their actions be attributed to the corporation itself?

**HELD**: yes

**TAKEAWAY**: Corporate liability for full MR offences; **TEST: Identification Doctrine**>

1) Did the human being /w the guilty mind hold a position of a directing mind?

\*doctrine only operates where the Crown demonstrates that the action taken by the directing mind

(a) was within the field of operation assigned to him;

(b) was not totally in fraud of the corporation; and

(c) was by design or result partly for the benefit of the company.

### Bill c-45: 2004 Criminal Code Amendments

CC provisions, “senior officer” = statutory version of common law “directing mind”

**s. 22.1 Criminal negligence- organizations:** In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

**(a)** acting within the scope of their authority

**(i)** one of its representatives is a party to the offence, or

**(ii)** two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

**(b)** the senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

**s.22.2 Other offences (Full MR) — organizations:** In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

**(a)** acting within the scope of their authority, is a party to the offence;

**(b)** having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

**(c)** knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence

* + Act only mentions senior officers
* Two things:
  + Representative or two or more acting collectively (not conspiratorially) – not enough
  + Some nexus to the senior officer – when you read the def’n of senior officer you will see echos of the directing mind and will
    - Don’t want just a junior employee to be responsible, need to link it to the corporation
    - Junior employees are a necessary condition but not a sufficient condition
    - Junior employee make up the actus reus but not mens rea

Can’t put corporations in jail so you’re looking at a fine

Remaining Issue: where directing minds’ acts result in corporation being fined so much that it goes under, the people who primarily suffer are those lower down people who had nothing to do with the offence

# Pre-Incorporation Ks

*K Enforceability: Go to Statute first, if it doesn’t apply, go to case law*

> Common Law rule: was it the INTENTION of the parties to be personal bound?

- how did they sign it? Did each party know the corporation wasn’t formed? Etc.

Promoter= natural person who enters into K on behalf of a corporation

* Issue: law doesn’t recognize the existence of a corporation until certificate of incorporation is issued; how do we deal with promoters’ entering into Ks prior to incorporation?

## Common Law

* Rooted in Agency law- INTENTION\*\*

### Kelner v Baxter (1866) \*both parties knew corp wasn’t formed

**FACTS**: D opening a hotel signed K on behalf of proposed corporation, /w P wine merchant. Wine was delivered, corporation was formed and purported to ratify the pre-incorporation K, but went bankrupt before paying P. Even if P could sue corporation, no $, sued D promoter.

**HELD**: D held personally liable (INTENTION OF PARTIES was to create a binding agreement

**TAKEAWAY**:

* If you enter a contract on behalf of a corporation but it does not exist, you are liable.
  + INTENTION is key: Both parties KNEW contract did not exist as of yet.

- Corporation can’t be not bound prior to its existence, therefore individual/promoter must be liable (\*until corp is formed and ratifies the agreement)

### Newborne v Sensolid Ltd. (1953 QB) \*P knew corp wasn’t formed

**FACTS**: Mr. Newborne signed K with Sensolid to sell ham, prior to incorporation for his business; S refused delivery and repudiated the K (on basis that K was with an unformed/non-existent corporation; N sues for breach of K, claiming he was entitled to benefit under K.

**HELD**: S not liable for breach of K, K was nullified bc Newborne knew (entered into wth directing mind, NOT agent)

**TAKEAWAY**: technicality in drafting: - the pre-incorporation contract was made not with plaintiff whether as agent or as principal but with limited company that did not exist (it stated: ABC Company, By John Smithers as opposed to John Smithers for ABC Company to be incorporated.

### Black v Smallwood (1966 AUS) \*both parties thought corp was formed

ISSUE: Are individuals who signed on behalf of company they thought was formed, personally liable for K (given that it wasn’t formed)?

**HELD**: K is nullified, both parties incorrectly & innocently thought it was formed, ~

- Neither party INTENDED to sign personally (they thought they signed for an existing corporation

**TAKEAWAY**: Issue was of mistake, not fraud; parties were wrong, ~ K is a nullity

“…*the fundamental question in every case must be what the parties intended or must be fairly understood to have intended.*”

### Wickberg v Shatsky (1969 BCSC) \* breach of warranty?

**FACTS**: W obtained K of employment as manager of a non-existent company, signed by S (as president of the company). W was then terminated by S, and sued for damages (Claim: S should be personally liable bc he signed for a non-existent corp.)

**HELD**: S breached warranty that the corporation existed> W can recover nominal damages for breach of warranty

- BUT S is not liable for breach of K> as S did not INTEND to be personally bound.

**TAKEAWAY**: Where one party knows, and the other doesn’t, look to the **intention** of the parties. Since they did not intend to be personally bound, as is the case in this situation, then not liable on contract.

- W was terminated because the business did not succeed (would have happened whether the business was incorporated or not?

“His loss, as I see it, resulted from the fact that the business was not a success, not from the breach of warranty. ….The plaintiff would be entitled to recover against the defendants under this head only that which he had lost by reason of the breach of warranty.”

## Statutory Provisions \*judical interpretation\*

### STATUTES

**Pre-incorporation Ks**

CBCA s. 14 (p. 10), OBCA s. 21 (p. 17)

* A person who enters/purports to enter into a K in the name of or on behalf of a corporation before it comes into existence is personally **bound by the K & entitled to its benefits**.
* A corporation can **by act or conduct, signify its intention to be bound** by a pre-incorp K, thereby accepting the benefits and burdens of the K, relieving the original signer

**KEY DIFFERENCE**: OBCA includes oral contracts

### Sherwood Design Services Ltd. v 872935 Ontario Ltd. (1998 ON) *\*OBCA s.21(2) interpretation*

**FACTS**: 3 business associates signed agreement to buy S’s assets “in trust for a corporation to be incorporated” at 300k, as well as a promissory note for 45k payable to S if deal did not close (note made no mention of company).

* A lawyer was retained by 3 men to incorporate the numbered shell company for their firm’s use in the purchase of S’s assets, & sent a letter to S’s lawyer /w the numbered company names as the corporation that would complete the purchase.
* The purchasers did not attend to close the deal, S (having lost its clients after informing them they were to be sold) ended up selling for 125k, and the purchasers used the numbered company to purchase a commercial building (~ has assets).
* S suing numbered company for loss, purchasers claim the company never had intention to enter into the purchase agreement WHILE also claiming the promissory note was from the numbered company, and not them personally

**HELD**: The letter from lawyer listing the numbered company = signifying it intended to be bound, ~ numbered company liable for breach of K (S awarded 175k for breach and 44k in rent)\*175k=difference between what S had to sell for and what was promised by the lawyers, ~ numbered company

**TAKEAWAY**: no formal steps required to signify intention of corp to adopt the pre-incorp K

- Lawyer acted on behalf of corp, sent letter showing intention for corp to be bound

### Szecket v Huang (1998 ON) *\*OBCA s.21(1) & (4) interpretation*

**FACTS**: S & H enter into negotiations for S to develop his patents /w corporation to be incorproated, S requests H take on personal liability guaranteeing the benefits promised to S under the contract, H refused & in final agreement, H signed “on behalf of a company to be incorporated”

- S quit job and moved to Taiwan to perform K/technology development

- capital fell through and H and associated never formed the corporation

**ISSUE**: Was H liable for non-performance of the K?

**HELD**:YES, promoter is liable under 21(1), unless contracted out explicitly per 21(4)\*not done in this case

**TAKEAWAY**: Promoter can contract out of liability but must be done with explicit language

# Corporate Finance: Debt and Equity

\*CBCA ss. 24-45, p. 15-25

\*OBCA ss.22-44, p. 17-29

All business enterprises involve:

1. Risk of loss
2. Power of control
3. Participation in the profits of the enterprise while it is going, and in its assets on the dissolution of the enterprise

These are allocated through the **capital structure** of the corporation

## Debt Securities/Financing

Create a creditor-debtor contractual relationship between security holder and corporation

* Includes
  + Loans from a bank
  + Corp’s issuing debt securities in itself (bonds, notes, debentures)
    - All bonds/notes/debentures are essentially corporate IOUs
    - Notes usually more short term
* The security MUST detail:
  1. When repayment is due
  2. How much interest is owed
  3. When interest payments are to be made (ie, quarterly, annually)
* Authority to borrow> **directors** (CBCA 189 (p.101), OBCA 184 (p.94)
* A **debt security issued to public** is done through a **trust indenture**: a trustee is between the corporation and investors, allowing for multiple investors who aren’t otherwise connected to sue if the corp defaults
  + - Without trust indenture, individual investors would never sue for repayment because the cost of pursuing an action would overwhelm the loss incurred from the corporation not paying debt & interest owed
    - Rules about who can be a trustee: CBCA/OBCA, re conflict of interest, etc.
    - (CBCA s. 82-93. p. 44, OBCA s. 46-52, p. 31)

## Equity Securities/Shares

Create shareholder relationship (NOT contractual)

### Key Features

3 basic attributes of shares:

1. Right to attend SH meetings and vote
2. Right to a return of capital on a winding up \*after all debts of the corporation have been paid in full {CBCA s.24(3), OBCA s. 22(3)}
3. ‘Right’ to receive dividends \*if and when they are declared by the corporation (which is never *required*) (CBCA 24(3)b)

At common law, presumed that all shares are equal, unless otherwise stipulated in articles; rights associated with shares are equal, regardless of price paid

- IF the corporation has only **one class of shares**: that class must have those 3 elements

* OBCA doesn’t provide for a right to receive dividends (b/c there is no requirement that dividends be declared, ~ distributed

- With **more than one class of shares**, no single class need have all 3, but they must be accounted for across the classes

VOTING: on election of directors & other fundamental matters, as specified under statute

WINDING UP: voluntary dissolving of the corporation; assets are sold, resulting pool of money used to pay debts, anything left is distributed to SHs

### Authorized v Issued Capital

**Authorized Capital** = total # of shares corporation is permitted to issue under its articles (can be unlimited in Canada: as per CBCA s. 6, OBCA form 1 item 6

- WHY limit # shares? Some jurisdictions require a limit, usually where taxation is based on the #, ~ would not want to owe more taxes

**Issued Capital** = issued and outstanding shares; have been sold by corporation to investors and not repurchased

**“Par Value” Shares**: par value = $ amount paid at first purchase; was being used to trick gullible investors into buying shares by advertising them as “discounted” from par value

* no longer permitted under CBCA s.24 and OBCA s. 22

### Issuance of New Shares

**-** the purchaser “subscribes” offering to buy shares, corporation allots (accepts subscription) & issues (delivers) the shares\* corp may deliver a Share Certificate (not a a share, but evidence of it)

* $ price determined when issuing new shares can only be determined by directors (as per their **duties** as director, ~ not at any random or discounted rate, but reasonable/in interest of the corporation)
* SH names and addresses are recorded in the Share Register (CBCA s.24, OBCA s.22)
* Shares must be fully paid before they are issued (CBCA s.25(3), OBCA s. 23(3)

Most Canadian SHs purchase their shares on the stock market from other SHs (corporation receives no $ in these transactions)

### Repurchasing Shares

**Repurchasing Capital**: shares can be bought back by the corporation at their option (callable shares), unless restrictions

* shares are by default redeemable/callable
  + CBCA 34-36 p. 20-21, OBCA s. 30-32 p. 23-24
* restrictions on repurchasing shares can be put in the articles

*- in practice, corporations are usually repurchasing preferred shares (common shares are more often not callable)*

### Common Shares & Preferred/Special Shares

* **COMMON**: More risk, ~ more potential for gains (than preferred shares)
  + Right to participate in dividends not limited as in preferred shares
* **PREFERRED**: Less risk, more reliable but less gain (than common shares); Normally given a fixed dividend rate, usually expressed as a percentage of the share’s initial price
  + Chance of loss lesser than common SH but more than bond or debenture holder
  + Typically cost less than common shares & tax system favours dividends over interest (~ equity over debt)
  + Must have some (even slight) preference over other shares, will be noted in articles
  + Dividends are more typically cumulative in preferred shares
  + NO right to participate in further dividends while biz is ongoing, POSSIBLY a right to further participation in dividends upon winding up (*International Power v McMaster*)

- **Convertible Preferred Shares**: Corporations often issue preferred shares, or debt instruments that may be CONVERTED, at the option of the holder, into other types of shares, such as common shares

### Muljo v Sunwest Projects Ltd (1991 BC)

**FACTS**: Mr B owned all 200 issued common shares in Sunwest, each issued for 1$, Mr Muljo subsequently subscribed for 200 common shares for 375k (aprx 1900/share) and 125k preferred shares priced at 1$ each. M applied to the court for Sunwest to be wound up /w surplus capital to be distributed according to how much was PAID for the shares, at time of purchase (as opposed to equally)

**HELD**: Once shares are purchased you have no property right in the $ amount you paid; M has no right to more return than Mr B.

**TAKEAWAY**: Shares vary in value over time (and shares of the same class are equal in value upon winding up/distributing remaining capital); no right to $ amount paid for shares on issuance/purchase.

### McClurg v Canada (1990 SCC)

**FACTS:** Class A and B shares had identical rights, etc, only difference was divided rate. It was claimed difference was discriminating on the bases of who owned the shares (which is not allowed)

**HELD:** Different dividend rate enough to have two different classes of shares

**TAKEAWAY:** any differences between classes of shares are fine as long as they are detailed and allowed under the articles of incorporation?

* Treating classes of shares differently is ok

## Dividends

*\*\*always governed by articles, defer to court/common law for gaps/ambiguity\*\**

= distribution of money or property paid by the coronation to SHs

- Only directors can declare dividends (by resolution), at their discretion, only subject to statutory rules preventing their payment in circumstances that would impair the corporation’s ability to repay creditors

Restriction on declaring dividends CBCA s. 42 p. 24, OBCA s. 38 p. 27

Director Resolution: The declaration will state: (1) The “record date” (i.e., the date on which a shareholder’s name must appear in the share register to be entitled to receive the dividend) and (2) The payment date (the date on which the dividend will actually be paid)

ONCE declared, a dividend becomes a **debt** (and SH can sue for payment)

Cumulative dividends: roll over if not declared one year, to the next year (only for preferred shares)

Non-cumulative dividends: do not roll over if directors don’t declare dividends one year/quarter/etc

### Trevor v Whitworth (1887 HL)

**TAKEAWAY**: At common law, corporations were not ALLOWED to purchase their own shares back from SHs

### Westfair Foods Ltd v Watt (1991)

**FACTS**: P altered a long-standing corporate policy and began paying out all additional earnings (after preferred share dividends were paid) in dividends to common SHs. Watt, and other preferred SHs complained this was oppressive in reducing the amount left for preferred SHs upon dissolution.

**HELD**: Claim of preferred SHs to the policy ASSURING their retaining larger earnings on winding up> an unwarranted extension of the (recognized) claim to a fair break up of assets upon winding up

**TAKEAWAY**: In line with statutes and articles, directors can declare and distribute dividends as they see fit

### Re Canada Tea Co (1959 ON)

**TAKEAWAY**: no right to unpaid accumulated dividends (for preferred shares) upon winding up

### Bowater Canadian Ltd v RL Crain Inc (1987)

**FACTS**: B challenged a ‘step-down’ provision in R’s articles (special common shares carry 10 votes per share, but in hands of a transferee, carry only 1 vote per share)

**HELD**: provision not allowed,

**TAKEAWAY**: Where a corporation has only one class of shares, the rights of the holders are equal in all respects. A bad provision can be severed without invalidating the chapter of an articles of incorporation.

## Financial Statements: Basics

1. Statement of Financial Position (Balance Sheet)
   * Assets /=/ Liabilities + SH Equity
     + Assets: what corporation **owns** \*only records buyable/sellable assets
     + Liabilities & Equity: what corp owes + (shares, retained earnings)
   * \*useful info, not a full evaluation fo value; available online for any company
2. Income Statement (Statement of Comprehensive Income is required under IFRS)
   * Sums financial performance over the accounting period
   * Top Line: Total sales (before deducting expenses)
   * Bottom Line: net income
   * Revenue - Expenses = Net income (Loss)
3. Statement of Cash Flows
4. Statement of Retained Earnings/Statement of changes in equity

Corporate Governance: Structure

# Directors

\*powers are conferred upon directors collectively as a board

### Automatic Self-Cleansing Filter Syndicate Co v Cuninghame (1906)

**FACTS**: Directors refused to comply w SH majority vote to sell assets because it wasn’t “in best interest of the company”.

**ISSUE**: Do directors need to sign-off on sale organized and voted by SHs as “owners” of the company? *\*Who has decision-making authority?*

**HELD**: Directors are not agents of SHs, but the corporation (did not need to comply /w vote)

- If a simple majority vote is not enough to REMOVE directors, it isn’t enough to direct their actions.decisions as directors either

**TAKEAWAY**: SH-Director arrangement shows intent to confer powers upon directors that can only be varied by extraordinary resolution; 3/4 majority at a meeting

- SHs cannot order director action by simply majority vote (**NOT AN AGENT RELATIONSHIP**)

## Board of Directors: Procedures

Upon Incorporation> an incorporator or director may call a meeting of directors. The directors may make by-laws and conduct all of the other business required to complete the organizational procedures of the corporation (CBCA s. 104, p. 50, OBCA s. 117 p. 54).

**A) Number of directors**: CBCA s.102 OBCA 115

* Only 1 director is required for a private corporation, 3 minimum for offering corporations
  + - \**CBCA- offering corp /w outstanding shares held by more than 1 person*

**B) Quorum & Meeting requirements**: CBCA s. 114, p. 56/OBCA s. 126, p. 58-9

* Powers of the board of directors can be exercised in directors’ meetings or written resolutions
* subject to articles and by-laws: minimum # or majority of directors required constitutes a quorum for directors’ meetings
  + - \*Common law: a majority of board members = a quorum
    - \*OBCA: a quorum cannot be less than 2/5ths of the number of directors & where there are fewer than 3 directors, all must be present for a quorum
    - \*CBCA: has residency requirement for meetings (s.114(3), p. 57)
* **Written Resolutions**: The directors may agree that a face-to-face meeting is a waste of time and a resolution in writing signed by all the directors entitled to vote on that resolution shall be as valid and effectual as if passed at a meeting. **(See CBCA, s. 117, p. 58; OBCA, s. 129, p. 60)** 
  + - **Must be ALL** directors eligible to vote because there is no opportunity for discussion with a written resolution

**C) Director Qualifications:** CBCA s.105, p.50/OBCA s.118, p.54

Statutory requirements: a director must be an individual, over the age of majority, and not an undischarged bankrupt or of unsound mind or incapable and so found by a court.

**D) Citizenship/Residency**: CBCA s.105(3) OBCA s.118(3)

* “resident canadian” definitions (CBCA s.2.1, p. 4, OBCA s.1.1, p. 5)
  + CBCA definition excludes “permanent resident who has been ordinarily resident in Canada for more than one year after the time at which he or she first became eligible to apply for Canadian citizenship;
    - * Illogical/odd: eliminates people without citizenship *because they have resided in Canada longer*

**E) Outside Directors**: CBCA s. 102(2), OBCA s. 115(3)

- public corporations typically require at least 2 directors be outsiders (not officers, employees or corp or any affiliates)

**F) Delegation of Authority**: CBCA, s.115, s.121; OBCA, s.127, s.133

* \*Power is conferred on the board collectively> directors had no common law power to delegate their powers under common law.

**G) Appointment & Removal of Directors**: CBCA s.106(3) , OBCA s. 119(4)

* Board must be elected by SHs in a general meeting
* Directors are permitted 3 year terms & staggered terms (to ensure board continuity)
* \*provisions do NOT apply where a corporation adopts cumulative voting>
* CBCA s.109 OBCA s.122 : SHs can remove directors at any time by ordinary resolution (simple majority vote), unless corp adopts cumulative voting
  + - No common law right for SHs to remove directors

**H) ^Cumulative Voting**: CBCA s.107 p. 53, OBCA s.

- can be included in articles; a system of voting **at shareholders meetings** that is designed to overcome the perceived unfairness that normally results when shareholders holding just over 50% of a corporation’s shares are, in fact, able to elect 100% of the members of the **board of directors**.

## Access to Corporate Information

- Statutes have increased access of shareholders, creditors, general public

SHARE REGISTERS- CBCA s.21 p. 13, OBCA s.145 p.71

- shareholders and creditors (and sometimes others): access **SH registers & other info**

- \*CBCA requires applicant file a declaration to access

DIRECTORS MINUTES- no access; impossible to limit information to just SHs in a publicly held corporation, ~ must be kept private

## Management and Senior Officers: De facto Distribution of Powers

**Senior Officers & Executives**

Management powers supposedly vested in the board of directors are actually vested in the senior officers and executives, at least in the case of the large publicly-held corporation.

* through delegation of the board's authority?
* due to the inability of directors to acquire either the information or the expertise to manage effectively or supervise the affairs of a large public-issue corporation?

**Institutional Investors & Activist Investors**:

Institutional investors pool money to purchase securities, other investment assets, concentrating shares into fewer hands;

* i.e. Pension funds, mutual funds, insurance companies, other institutions
* tip balance of corporate power back towards shareholders
* such institutions are becoming increasingly willing to exercise the power that flows therefrom

Hansmann and Kraakman- argue a SH-oriented model of the corporation has become the dominant model— owing to the fact that it is the most **efficient** model, and other interests are better protected outside the realm of corporate law.

## Auditors

A) **Appointment**: CBCA s.161-172, OBCA s 148-153

* appointed by SHs; at SH discretion for private corporations and required for public corporations (unless SHs choose to be exempt)
* Appointed every year, unless SHs have unanimously agreed none is required (not really possible for public corp)

B) **Responsibility**: statutes give no specific standard of care/skill; if articles also do not, common law applies:

* “skill, care, and caution of a reasonably competent, careful and cautious auditor would use”
* “a watch-dog, justified in believing trusted servants of the company.. entitled to assume they are honest/rely on their representations”

# Shareholders

In *partnerships*, the default is that equity partners control the business

But in corporations, management/supervision of corporation rests solely with directors (\*exception: can be limited by SHs with USAs in private companies)

* SHs can be elected as directors, but their management rights aren’t based in equity status
* SHs ALSO have no right to sue for capital paid for shares, or dividends
* SHs are some of the only parties involved in a corporation who have 0 contractual rights

WHY?

* historically corporations were formed TO lock in SHs
* Non-interference with management: initially SHs delegated management to directors by choice, this became standard practice, then became the legal rule under statute

Reality: **SHs’ power is in voting to ELECT directors** (& appoint auditors)(+ on major transactions> via **special resolution** as per statutes)

**Competing Concerns:**

1. If directors feel responsible only to SHs, they may concern themselves only with SH interests to the detriment of all other stakeholders, ~ profit-maximizing at all costs (corporation as a vampire/sociopath)
2. Directors may feel no fear of SH power (holding effective control of voting processes), ~ ensuring their own re-election

OPTIONS for Dissatisfied SHs: **Exit** or **Voice**

* historically, SH chose to exit; have since shifted to voice (SH Activist)

## Voting Rights

* Each share entitles its holder to one vote, unless otherwise stated (CBCA, s. 140(1); OBCA, s. 102(1)).
* Voting rights may differ between share classes; however, voting rights within a class must be equal (*Bowater)*
* *C*ertain **fundamental changes** (e.g. the sale of all or substantially all the property of the corporation or company):
  + CBCA s.189(6) provides that each share carries the right to vote (whether or not the share otherwise carries the right to vote)
    - CBCA s.189(7) also provides for separate class votes in cases where one class of shares is affected differently by the proposed sale lease or exchange
  + OBCA s.184(6) provides non-voting shares a vote only in cases where the sale, lease or exchange would affect such shares in a manner different from another class of voting shares. (entitled to a separate class vote- MUST be approved by class vote by a 2/3 majority OBCA s.184(7)

**Voting Process**

* at SH meetings
* Matters are brought up in SH meetings by moving and seconding of a motion, followed by discussion, then put to a vote
* CBCA s.141, OBCA s.103: votes are by **show of hands** (one hand=one vote), but CAN be **by ballot** if demanded (accounts for # of shares controlled by individuals voting)

### SH Resolutions

- the type of resolution required is stipulated under statute

\*Votes/% required for resolutions can be different if stated in the articles of incorporation

**Ordinary Resolutions**: CBCA p.3, OBCA p.4

* majority of votes cast (51% of the quorum voting)
* CBCA s.109, OBCA s.122SH can **remove directors** at any time by ordinary resolution (but cannot be in written form)

**Special Resolutions**: CBCA p.4, OBCA p.5

* 2/3 of votes cast (/w quorum meeting requirements met)

- **Written resolutions** can be passed IF unanimous (except not to remove director or auditor), and qualify as special resolutions

\***Unanimous Shareholder Agreements** (see p.15) CBCA s.146, OBCA s.108

* must fetter director power in some way
* CBCA s. 103 and OBCA s. 116: the directors’ power to make, amend, or repeal any bylaws that regulate the business or affairs of the corporation is subject to any contrary provision in the articles, bylaws, or unanimous shareholder agreement. **The shareholders must confirm any proposal for change instituted by the directors.**

## Meetings

* CBCA s.133, OBCA s.94
* Required to be held every year:
  + 1st must be within 18 months of creation
  + Subsequent meetings, w/in 15 months of the previous annual meeting
  + \*CBCA: can’t be more than 6 months after financial year end

RESOLUTION in Lieu of Meeting: CBCA s.142, p.74 OBCA s.104 p. 47

* Small corporations will often do **written resolutions instead** of annual in-person meetings

**Annual Meetings** MUST:

1. elect/re-elect directors (vote for or withold, 1 vote enough to)
2. appoint/re-appoint auditors if applicable
3. Receive and consider financial statements, auditor reports
4. Consider last meeting’s minutes

**Special Meetings**

* For any special business (anything beyond the 4 annual meeting topics)
* CAN but need not be separate from annual meeting

A meeting convened for another purpose **cannot be converted into a shareholders' meeting** in the face of protests from some of the shareholders (*Spicer* v. *Volkswagen Canada Ltd.)*

***NOTICE required*** *for meetings* CBCA s.135(1.1) OBCA s.96(1)

### Blair v Consolidated Enfield Corp (1995 SCC)

**FACTS**: Blair, director, substantial shareholder & CEO of Enfield & **chair of the meeting**. Canada Express (largest SH) said it would support management’s slate (including Blair) but then changed and voted for a different director. Lawyers told Blair CE could not change their choice, Blair invalidated their proxies. Court held the proxies were valid, Blair removed as director.

Issue: Blair suing for costs incurred (acted in good faith, looking to be indemnified by Enfield)

**HELD**: Blair acted appropriately & was owed costs from Enfield

**TAKEAWAY**: A chair has a duty as one of honesty and fairness to all individual interest, and directed generally towards the best interest of the company.

* Duty not only to the shareholders in the room

TEST: duty of chair: **Administrative fairness**

## Proxy Voting & Solicitation

* used to mean a person going in place of another
* NOW: document the person uses to vote
* Historically corps could allow proxy at their discretion
  + SHs were often disenfranchised depending on their location & cost/convenience of attending meetings
* NOW: SHs have **right to vote by proxy** (CBCA s.148, OBCA s.110)
  + Proxy solicitation MUST be done by corp: Burden for making proxy votes possible, i.e. mailing, providing forms, covering costs

When **Management** MUST solicit proxies:

* + CBCA s.149: public corporations and private corporations with 50+ SHs
  + OBCA s.111: only public corporations must

**Information circular** must be included in proxy solicitation**-** whether solicited by management or dissident shareholders

Exception: dissident SHs soliciting 15 or less SHs

CBCA s.147, OBCA s.109: **define proxy solicitation** (based on content)

\*dissidents’ launching **proxy fights** is expensive and usually sponsored

### Brown v Duby (1980 ON)

**FACTS**: dissidents letter sent to US shareholders only, “not soliciting proxies yet”, without information circulars

**HELD**: proxy rules violated (but didn’t grant injunction- waiting for a circular to be sent out prior to the meeting)

**TAKEAWAY**: Dissidents must provide info circulars (except soliciting 15 or less SHs)

## Proposals CBCA 137 OBCA 99

SHs with a singular issue they want addressed that doesn’t amount to wanting directors removed can bring SH PROPOSALS to being included in info circulars

* must give draft of proposal to management, who must include it in their information circular (at the cost of management)

**Who can bring a proposal?**

CBCA s.137(1.1): SH with min# of shares, time holding shares

OBCA s.99: SHs, beneficial owners (i.e. trustees) (less restricted than CBCA)

**When must it be submitted?**

CBCA s.137(5): min 90 days before anniversary date of NOTICE of last year’s meeting

OBCA s.99(5): min 60 days before anniversary date of last meeting (first meeting: 60 days before); different requirements for privately held- 21-60 days as per by-laws)

**Must be 500 words or less**: CBCA REG 48, p. 162 and OBCA REG 23.4, p. 162

**Management can exclude a proposal IF**: CBCA and OBCA

Substantially the same proposal has been brought within 5 years

* Once, and got less than 3% of votes
* Twice, and got less than 6% of votes
* Three or more times, and got less than 10% of votes

**Management can BLOCK a proposal**: ex: Varity

* It is clearly submitted to address personal grievance (ie disgruntled employee)
* Primarily for purpose of promoting a general cause (i.e. social, economic), not related to business affairs of the corporation

### Varity Corp v Jesuit Fathers of Upper Canada (1987)

**FACTS**: Jesuits wanted a proposal put on Varity’s information circular on its investments in South Africa, proposing it withdraw (immoral, supporting Apartheid)

**- Action shares**: Jesuit Fathers bought shares TO bring this proposal to SHs

**HELD**: Directors did not have to distribute this proposal, primary reason is not about the company/business

**TAKEAWAY:** CBCA 137(5)b/OBCA 99(5)b: directors can not include proposals in info circulars IF not about the business

# Directors’ Duties

TRUST: requires honesty/loyalty AND skill/competence

## Duty of Care, Diligence & Skill

**Directors owe a Duty of Care to**: corporation, creditors, shareholders (not under statute, an open list/possibly other stakeholders?)

Common law duty of care exceptionally low:

* Intermittent (non-continuous attention)
* Subjective duty (depends on individual’s capacity)
* Justified in leaving a manager in charge of fulfilling their duties (presumption of honesty and competency)

Directors’ business skills are largely developed outside of a professional school/official setting; hard to establish a high standard (Still hard to sue directors because of business judgement rule)

### Common Law Duty of Care: Re Cardiff Savings Bank

FACTS: Marquis inherited position of president, board member of bank at 6 years old, attended 1 meeting in his lifetime.

**HELD**: He wasn’t required o attend meetings or do anything

**TAKEAWAY**: You aren’t liable for a decision if you aren’t at a meeting where a decision takes place

### Re City Equitable Fire Insurance Company Limited (1924)

**FACTS**: Fraud of some directors> issue: are the directors innocent of fraud liable for breaching duty of care/not catching it?

**HELD**: Not liable (see CL standard above)

**TAKEAWAY**:DoC based on directors’ capacities, courts shouldn’t interfere with SH electing inadequate or stupid directors

### Duty of Care: Statutes CBCA 122 OBCA 134

REFORM: Dickerson Committee

* Make it an OBJECTIVE rather than subjective standard
* “We are aware of the argument that raising the standard of conduct for directors may deter people from accepting directorships. The truth of that argument has not been demonstrated and we think it is specious.”
  + Suggest imposing the same duty of care “the common law imposes on every professional person”, which has not dried up the supply of lawyers, accountants, architects, surgeons or anyone else.

**CBCA s.122(1)(b), OBCA s.134(1)(b)**

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; and
  + (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

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.

**\* OBCA s.134** was amended post-Peoples “duty of care- to the corporation” (but SCC has final say, Peoples decisions allows creditors to be owed a duty as well)

## Business Judgement Rule

Brought into common law in Ontario in 1998

* deferential, judges should not second-guess decisions made by directors as long as it is in good faith on reasonably informed and prudent basis.

### Smith v Van Gorkom (1985) DELAWARE

**FACTS**: Board of Trans Union approved merger with Pritzker based on Van Gorkom’s proposal, after a 2 hr meeting in which the proposal was presented but not read, based on VG’s assertion that it was for a good/reasonable price (55$/share)

**HELD**: Directors liable; directors let SHs down by not finding out the details of the proposal they were agreeing to.

**TAKEAWAY**: Under the business judgment rule, a business judgment is presumed to be an informed judgment, but the judgment will not be shielded under the rule if the decision was unadvised.

\* Trans Union's directors settled the damages claim for the sum of $U.S. 23,500,000. $10,000,000 of this amount was covered by insurance while the remainder was paid by Pritzker.

### Peoples Department Store Inc v Wise (2004 SCC)\*also good faith

**FACTS**: Wise brothers acquired Peoples (after it had fallen on hard times), and elected to put a system in place for inventory which resulted in Peoples owing creditors and being unable to pay, going bankrupt

Trustee for Peoples claimed SHs were favoured unfairly over creditors

**HELD**: Duty in this case was owed to the corporation, not to creditors, (and was met) ~ not liable

**TAKEAWAYS**:

**Business judgement rule**: decisions, made in good faith, are fine, it’s about the care taken in making the decision, not about whether the outcomes were good; - Courts will not second guess unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available after the fact

**The test for DOC** is an objective standard: of a reasonably prudent individual in “comparable circumstances” indicates context and does not bring a form subjectivity into the test.

## Duty of Loyalty and Good Faith

FIDUCIARY DUTY: Corporation is owed the duty, but can consider “shareholders, employees, creditors, consumers, governments and the environment” (SCC-*Peoples*)

### Fiduciary Duty: Statutes

CBCA s.122(1a) / OBCA s. 134(1a)

BOTH: owed to corporation

### Peoples Department Store Inc v Wise (2004 SCC) \*also business judgement rule

**HELD**: Issues with procurement policy (/w Peoples always owing $ to Wise) not a breach of fiduciary duty, Wise brothers not liable.

**TAKEAWAY**: best interests of the corporation =/= best interests of shareholders

- fiduciary duty to corp may involve consideration of may stakeholders’ interests, but they are not owed a fiduciary duty

- Relative claims of stakeholders may be different depending on whats happening in the life of the corp (healthy- creditors and SH interests will be aligned)

* *Para 51: Section 241 of the CBCA provides a possible mechanism for creditors to protect their interests from the prejudicial conduct of directors. In our view, the availability of such a broad oppression remedy undermines any perceived need to extend the fiduciary duty imposed on directors by s. 122(1) (a) of the CBCA to include creditors.*

### BCE v 1976 Debentureholders (2008 SCC)\*also oppression remedy

**FACTS**: Debentures were subordinated (others would rank ahead the debenture holders) in BCE’s plan to have all shares purchased by a consortium, leaving BCE subsidiary with a lot of debt. BCE decided it was in the corp’s best interests (and SHs- who approved sale by 97% of SHs)

**HELD**: Directors did have a duty to consider their interests bu this was met

**TAKEAWAY**: Fiduciary duty is not owed to creditors but corporation- no liability (or oppression remedy)

Para [81] “As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where 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**.”

## Corporate Social Responsibility

### Dodge v Ford Motor Co (1919 Michigan)

**FACTS**: Ford regularly gave 60% dividend on increased capital and special dividends. Thereafter no special dividends were filed because Henry Ford wanted to redistribute the wealth and make cars cheaper for all. The business made “too much money.”

**HELD**: SH primacy affirmed

**TAKEAWAY**: A business corporation is organized and carried on primarily for profit of shareholders and cannot change the goal of the business to anything else. Charitable works are “incidental” and cannot be primary purpose of corporation.

### Berle-Dodds Debate, 1930s

Berle

* about equitable limitation on directors’ powers: balancing interests of Shareholders
* No legal definition of how to determine CSR, not workable
* To the detriment of shareholders?
  + - * Milton Friedman- hostile to idea of CSR

Dodds

* makes normative and positive claim for CSR: it should be that directors have a certain degree of freedom to observe CSR, look out for other interests

- Brookings Institute: West also makes positive claim of CSR

**Should corporate law impose a duty on directors to maximize SH interests?**

- equity partners, in charge in other forms of business, ie. partnerships

- corp as sociopath, to the detriment of ALL other stakeholders

* **SUPPORT FOR CSR:** longterm, SHs benefit from good CSR
* **\*SUPPORT for CSR\***: Mangerialist view popular in the 1950s, that directors’ positions entailed more than just SH benefit was held during a huge economic boom
  + Shifted away in 1970s, have not had the same economic boom since… related??

### Alternatives to For-Profit Corporations

US: **Benefit Corporations** (a certification for meeting CSR standards)

UK: **Community Interest Companies** (regulated as a cross between charity and for-profits)

**CANADA**: none currently legislated

> NO Canadian cases like Ford limited corporations’ directors to the sole aim of SH benefit

\*Nothing in case law or statutes in Canada stops Canadian corporations from making these regulations part of their articles/practice for themselves\*

## Corporate Opportunities

CBCA s.120 OBCA s.132

### Regal Hastings Ltd v Gulliver (1942 HL)

**FACTS**: Party selling theatres to a subsidiary/shell of Regal Ltd wanted assurance that the corporation had the funds to pay; 4 directors invested their own money and Gulliver got another company to cover his share (500$ each) & profited Regal Ltd wanted directors to account for profits

**HELD**: 4/5 directors held liable (acted in good faith, but cannot allow for conflict of interest); G not liable bc G had not invested his own money (but profited from the earnings through the Swiss company that contributed the 500)

**TAKEAWAY**:No one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interests in conflicting with the interests of those whom he is bound to protect.

- General rule of having to **account for profits if conflicting interest** between fiduciary duty and self; not enough to avoid ACTUAL conflict need to avoid potential conflict as well

**\*could have protected themselves by holding a SH meeting and getting consent/votes, and the directors WERE the majority SHs**

### Peso Silver Mines Ltd v Cropper (1966 BC)

**FACTS**: A prospector came to Peso Ltd with some mining claims (typical for these pitches to be made to the board); Peso rejects the proposed mining, Cropper, a director on the board, takes up the offer and profits. Peso sues C for profits.

**HELD**: Cropper not liable/Peso not due profits

**TAKEAWAY**: If corp rejects opportunity, director can take it and profit so long as the opportunity wasn’t unduly taken away from the corporation

**\*was an opportunity corp could have taken up, but rejected> different if corp WANTS but is unable to secure the opportunity\***

### CANAERO Services Limited v O’Malley et al (1974 SCC)

**FACTS**: 2 officers of CANAERO tried to secure it a K to map Guyana and never secured it; subsequently both quit, formed their own corp: Terra, submitted a proposal and got the K for Terra.

**HELD**: Duty as senior officers breached, just pay CANAERO profits received

**TAKEAWAY**:Affirms Peso

* Senior officers and directors owe fiduciary duty
* conflict even if the company is actually thought to “technically unable” to get the deal anyway (non-Canadian SH/ownership- in a deal w Canadian gov’t, may not have been workable).
* Fiduciary duty follows after you quit (for how long is a question of fact, and especially if you’ve quit TO GET the opportunity)
* K obtained by Terra wasn’t IDENTICAL- not important, loss to corporation still

\*distinguished from Peso: 1 time, huge opportunity, CANAEROS was actively pursuing/hadn’t rejected the opportunity\*

## Interested Directors’ & Officers’ Contracts

**MUST BE DISCLOSED;**

CBCA 120: officer or director

OBCA 132: director

* Allow directors to enter into contracts with corporation that they serve.
* Different from Corporate Opportunities because Corporation is NOT a party to the contract.

**CBCA 120**

**120 (1)** – in writing, nature and extent of the – disclosure if you are a director and the company is about to enter into a contract with you directly or a company you control. You have to disclose that to other members of board.

Doesn’t deal with family members. Some ppl say material interest. But that’s straining language.

**120(5)** Disclosure: that director shall not vote to approve **unless it deals with his compensation** for OFFICER OR DIRECTOR, with affiliate, or indemnity or insurance. (Can count in quorum)

* + (responsibility of board of directors to set directors’ fees/salaries, NO ONE else has that power, and to exclude that director, the room would be empty (directors fees are the same across the board)
  + IN REALITY doesn’t happen in any public corporations that directors vote on their own remuneration

**120(6)**: Access to directors meeting minutes available WHERE they are about DISCLOSURE

- NO equivalent OBCA provision

**120(7)** Disclosure must be approved where “fair and reasonable”> built in allowance for courts to second-guess decision makers

**OBCA 132**

**132 (5)** – interested director provision in the provision where the OBCA say who can vote in interested stuff unless it’s remuneration as a DIRECTOR

**132(7)** K not voidable “by reason ONLY that “fair and reasonable”> there must be other factors to strike down the K/deny approval

### Directors’ Repercussions

* /w indemnity insurance, unlikely that they would actually ever pay when found personally liable
* REPUTATIONAL risk is high though

Remedies

Conflicting principles of limited liability and majority rule in corporate law create issues that require specific SH remedies to resolve.

# Compliance Order

If corporation isn’t acting in accordance with an Act or its Articles (including USAs), a “complainant or creditor” can ask the court for a compliance order

* rarely used because there is no $ remedy, just the compliance order~ not really worth the expense of litigating

# Derivative Action

FOR: Alleged **harms done to the corporation**, that directors will not instigate action for (usually would be against themselves)

**STEPS/REQS**

1. **‘Complainant’**
2. **Leave from Court**
3. **Notice to Directors** (14 days)
4. **Costs** (prima facie right to indemnification once leave is granted- *Turner v Mailhot*)
5. **Available Orders**: Any the court sees fit; can be made to pay PAST security holders (instead of paying the corporation directly, if the previous security holders were the ones harmed)
6. Relationship between Derivative Action and Oppression?

## Common Law: The Rule in Foss v Harbottle (1843)

The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action.

* made it hard for individual SHs to sue successfully

## Statutes

**CBCA, ss. 238, 239, 240, 242; OBCA, ss. 245, 246, 247, 249**

**Definition of “Complainant”** CBCA s.238 OBCA s.245 : SHs, directors… “any other proper person”

**C 239(1) \*Leave of Court REQUIRED to bring action\***

* WHY? Prevent shakedowns for corporations to opt to pay settlement rather than take on cost of litigating

**C 242:** SH approval alone does not stay/dismiss a derivative action claim

### First Edmonton Place Ltd v 315888 Alberta Ltd (1989 AL)

**FACTS**:FEP leased to numbered company (without assets), and granted it 18 months free rent and PAYMENT to #d company, of which the only shareholders and board members were 3 lawyers. 3 men occupied the building without a sublease /w numbered company,

**HELD**: FEP was granted leave to bring derivative action for #d company against its directors (the lawyers) \*WAS NOT a “proper person” to bring oppression action

**TAKEAWAY**: definition for complainant “a person who could be reasonably be entrusted with responsibility of advancing interest of corporation by seeking a remedy to right the wrong allegedly done to the corporation” – doesn’t need to be an officer, director or security holder of corporation

### Turner et al v Mailhot et al (1985 ON)

**HELD**: Turner granted leave to bring derivative action, with costs

**TAKEAWAY**: Prima facie right to indemnification once granted leave to bring derivative action

# Oppression Remedy

**\*No Common Law Oppression remedy\***

Protects “reasonable expectations” of complainants

- invoked most frequently /w private corporations

For acts **committed BY the corporation**, its affiliates that effects a result, or business or affairs or powers of directors of corporation or affiliates conducted in a manner, that “i**s oppressive or unfairly prejudicial or unfairly disregards the interests of any security holder, creditor, director or officer**”

[NOTE: OBCA INCLUDES THREATENED HARM]

**2 Step Test** (post BCE)

1. Evidence must establish a complainant’s expectation, AND that the expectation was objectively reasonable
2. Reasonable expectation must have been thwarted in a manner that was oppressive, unfairly prejudicial, or unfairly disregarded complainant’s interest

**Oppressive** = coercive and abusive, suggests bad faith

**Unfair Prejudice** = conduct less offensive than oppression; has unfair consequences

**Unfair Disregard** = least serious of 3; ignoring c’s interest as unimportant in decision making

“the oppression remedy is concerned with the effects of oppressive conduct, not the intent of the oppressor”

## Statutes

**Definition of Complainant: same as derivative action**

**CBCA s.241/OBCA s.248**

## Reasonable Expectations

* not in the text of the statutes, but established in case law as KEY to oppression remedy

### BCE v 1976 Debentureholders (2008 SCC) \*also fiduciary duty

**FACTS**: see p. 37

**HELD**: Debentureholders failed to establish reasonable expectations; the reasonable expectation that their interests be considered was fulfilled.

**TAKEAWAY**: **2 Step Test for Oppression:**

1. Evidence must establish a complainant’s expectation, AND that the expectation was objectively reasonable
2. Reasonable expectation must have been thwarted in a manner that was oppressive, unfairly prejudicial, or unfairly disregarded complainant’s interest

- “Where valid commercial reasons exist for the change and the change does not undermine the complainant’s rights, there can be no reasonable expectation that directors will resist a departure from past practice”

### Wilson v Alharayeri (2017 SCC) \*personal liability of directors

**FACTS**: TJ finding of oppression not at issue; Wilson challenging whether it was appropriate to hold him, as director who made oppressive action, personally liable.

**HELD**: Wilson personally liable

“Accordingly, the trial judge’s order against the appellant represents a fair way of rectifying the oppression that goes no further than necessary to vindicate the respondent’s reasonable expectations. ”

**TAKEAWAY**: Personal Liability of directors for oppression:

Four general principles to consider in determining **if it is “fit” to find a director personally liable for oppression:**

**1**. The oppression remedy request must in itself be a fair way of dealing with the situation. (Usually personal benefit OR bad faith will be present in a case in which a director is held personally liable)

**2**. An order should go no further than necessary to rectify oppression

**3**. An order must “only… vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders”

**4**. The court should consider the general corporate law context in exercising its remedial jurisdiction

# Derivative Action or Oppression Remedy?

Where mix of both, plaintiff can choose which action to pursue:

**Dickerson Committee, Para. 484**: “Scrutiny of these examples shows that there is no clear dividing line between the cases. *Example:*But the payment of excessive salaries to dominant shareholders who appoint themselves officers is a borderline case: it **may constitute a wrong to the corporation and at the same time may have as its specific goal the squeezing out of minority shareholders**…In such case the aggrieved person may select the remedy that will best solve his problem.”

Procedural hurdles are higher for derivative action, ~ **plaintiffs prefer oppression** where **defendants prefer derivative action**

A SHAREHOLDER bringing action- if the only impact they feel as SH is l**owered value of shares**, does not amount to personal harm ~ no oppression remedy

### Ernst & Young v Essar Global Fund Ltd (2017 ONCA)

**TAKEAWAY**:“derivative action and the oppression remedy are not mutually exclusive and the there may be circumstances giving rise to overlapping derivative actions and oppression remedies where **harm is done both to the corporation and to stakeholders in their separate stakeholder capacities**”