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CORPORATE LAW & PARTNERSHIPS

I. INTRODUCTION

- First major concern of business organizations law - related to owners and managers to the business and to each other
- Second, the responsibility of the business organization, owners, and managers to stakeholders
- Relationships between business & its trade creditors (suppliers of goods), financial creditors (banks), and customers are not the subject of business organizations law—they are dealt under other categories of law ie contract, property, tort, criminal etc.
- Business organizations law → concerned with narrower issue: when the business organization is liable for the obligations created under the other categories of law

WHAT IS A BUSINESS?

- All businesses carry on some commercial activity

Most Common forms of business organizations in Canada:

1) Sole-proprietorship
2) Partnership → can be further divided in to a) general partnerships, b) limited Partnerships (LPs) c) Limited Liability Partnerships (LLPs)
3) Corporation

Sole Proprietorships (sp) → oldest and simplest form of business organization

- Comes into existence whenever an individual starts to carry on business for her own account without taking steps to use other forms of organization (e.g. corporation)
- One owner who has both prerogative & responsibility of making ultimate decisions re business (managing it)
  - **Sp** responsible for performing all contracts entered
  - **Sp** responsible for all torts committed in business
  - **Sp's** personal assets may be seized in fulfilment of the business's obligations
  - For income tax purposes, the income or loss from the business is included with the income or loss from other sources in calculating the **sp's p**ersonal tax liability

- Nothing in law to prevent **sp** becoming large & powerful- tend to be small & localized
  - May be due to unlimited personal liability & limited financing options

Advantages: the ease of creation and easy to dissolve- provided not subject to municipal/prov/fed licensing requirements and the modest expenses involved in starting up

- Taxi-driving businesses, restaurants etc

Disadvantages: **sp** enjoys none of advantages which apply to corporation, inc the one person corporation- the unincorporated owner is fully liable for all debts & other obligations incurred by his business: unlimited liability

- In law- unincorporated business has no separate personality
- **Sp** may not be an employee of the business
- Cannot enter into contract with himself
- No distinction between sole proprietorship and the person who is the **sp**, all benefits from business accrue to the **sp**
- The only method of financing is borrowing money directly
- As scale of business & liability increases, this exposure becomes an increasing disincentive to

using this form of business organization—corp provides protection—it is cheaper—& more effective at times. However the **sp** can try and manage the risk through insurance or provisions in the contracts with customers but incorporation is often cheaper.

- Legal requirement: name of **sp** may have to be registered under the business names leg
  - **ON: s2(2) Business Names Act (OBNA)**

- Registration required if **sp** using name other than his own but may voluntarily register (OBNA s.4)
- OBNA (and other prov names leg) provide incentives to register- in ON if don't register when required to do so w/o reasonable cause = offence committed and liable for fine of up to $2000 (OBNA s10(2))
- If fail to register- u can't sue in ON for obligation incurred in connection with business except with leave of court (OBNA s7)
  - Court must grant you leave to sue if your failure to register was inadvertent/no evidence of public being deceived/misled & @time of application to court registration must be done (OBNA s7(2))
- Purpose of registration: to ensure public record that creditors & others can search to find out identity of person behind business.
- Advantage of registering: It discourages others who search register from using your name— therefore reduced likelihood of confusion in a marketplace and the right to statutory damages up to $500 against anyone who registers a name deceptively similar to yours & that causes injury to you (OBNA s6)
- Where action under s6 successful court must order cancellation of offending registration
- Availability of damages and cancelation encourages sps to police names of register themselves— helps protect integrity of register—only in cases of passing off & fed TM laws.

Partnerships:

- ***The provincial Partnerships Acts*** define partnership as the relationship subsisting between 2 or more persons carrying on a business with a view to profit (s2 ON Partnerships Act 1990)
- Has more owners that sp and a more complex organization so there's a need for rules to govern the relationships among partners. OPA s. 20 -- 31 sets out a framework of rules that are not mandatory but operate as default rules. These are typically modified by rules agreed on between the partners (Partnership Agreement)
- The partners directly carry on the business themselves

- Easy to form and dissolve - general lack of formalities - great flexibility in designing internal managerial structure of a business= hallmarks of partnerships
  - With respect to the compliance with the registration requirements under BNA and
  - The obligation to give notice to creditors under the Partnerships Act if a partner retires

General partnerships

suffer from same weaknesses as sp -- inc the unlimited liability of each partner, jointly or jointly severally, for all debts & obligations of partnership, partnership not legal entity separate from partners, cant enter into contract of employment with the partnership

- Partnership statutes provide that each partner is liable to contribute equally to any obligation owed by the partnership to a third party (OPA s24)—unless some other allocation agreed upon—this has no effect on third parties
  - A tort victim may recover full amount from any partner or all of them—if a partner pays more than his share—he can sue to recover a contribution from other partners

Partner can limit liability by becoming a limited partner-

but involves reduced role in playing a part in the direction of the business

- Partners in qualifying professional firms can exclude liability for negligent/other wrongful acts of partner by 5registering as Limited Liability Partnership (LLP)

Disadvantages of unlimited liability

for general partnerships can be bypassed by forming partnership between incorporated companies- which is quite common

- Incorporated general partner is liable for all debts of partnership, but if corporation has few assets the practical effect is the same as if the partner had limited liability for the partnership debts

Determining liability of partners for income tax →

the income (or loss) of business is calculated for the partnership by adding up all of the partnership's revenues and deducing its expenses

- OPA ss6 -- 19: a code governing the liability of partnerships to 3rd parties—these rules = mandatory

- The only time when 3rd party can't rely on the ability of a partner to bind the partnership when acting in the usual course of the partnership business is if the partner has no authority ie due to a restriction in the partnership agreement—mutual agency—allocates to the partners the risk of unauthorized behaviour by an individual partner
- OPA s2(3): All partnerships in ON must register their names—for the same reason as do sp (above)

Corporations

- Occurs upon making a filing with appropriate gov't authority and paying requisite fee
- Statutory creature
- Incorporation may be under the federal Canada Business Corporations Act (CBCA) or under the corporate statute in a province/territory
- It's possible for shareholders in a corporation to customize their relationship to the corporation and each other subject to some limits – they may augment or replace the statutory scheme
- Upon incorporations it's filing become public record
- No registration under prov business names leg—unless diff name used from corporate name

Main Characteristics

1. **Separate legal existence/personality**- separate from its shareholders, directors and officers- even when it's a one person corporation. Means the corporation carries on its own business, owns property, possesses rights and incurs liabilities.
   - Therefore it can sue and be sued in its own name & enter into contracts with shareholders
   - Represented by 'agents' □ directors, officers & anyone who may act on behalf of corp
   - A shareholder can be an employee and a creditor of a corp
   - Corp has perpetual existence and doesn't depend on the continuations of shareholders. It has perpetual succession & not affected by any changes in, or deaths/retirements of its members = advantage for investors and to be preferred mode of business
   - Corp is taxed separately (shareholders only pay when they receive something from the corp)

Shareholders not liable for debts/other obligations of the corp.

- Shareholders have rights in relation to the corp through their ownership of shares but they don't own the business carried on by the corp or the corp's property
- Shareholders—have limited liability in relation to the proportion of money, property or services they have transferred to the corp in return for their shares
- Creditors, employees and other claimants against corp can demand to b paid out of assets of

corp but can't claim to be paid personally by shareholders

- Liability can be imposed on the corp through agents when they are acting on behalf of the corp.

Separation of Ownership and Management:

These are legally distinct. Corps are managed by the board of directors, which are elected by the shareholders by majority vote, and by officers who are appointed and delegated responsibilities by directors. There is conflict amongst these roles.

- **4 major legal mechanisms to ensure management is accountable**
  a. **Corporate democracy:** Shareholders have collective power to elect directors & to remove them & thus influence the directors' decisions, inc their choices of officers. Certain fundamental changes can't be made to the corp w/o approval of shareholders

  b. **Directors' and officers' duties:** Law protects the interests of shareholders by imposing a duty on managers to act in best interests of the corp & to take reasonable care in performing their responsibilities

  c. **Shareholder rights to info:** Shareholders have certain rights to access certain info which helps them know whether management is performing its duties

  d. **Shareholder remedies:** in the event of management failing to perform its duties

Incorp has some minor disadvantages:

- Incorp must be sought from govt agency or official & requires the filing of docs &the adoption of a corporate constitution
- Annual return containing prescribed info must be filed in many provinces
- Corp wishing to do business in more than one prov will either have to incorporate federally or obtain an extra- provincial license
- Legal costs are involved

- Corps are required to hold meetings, to elect directors and to provide shareholders with info
  - These requirements been simplified & can be satisfied easily in the case of one person corp and closely held corps

- Advantages of incorp greatly outweigh its disadvantage
- From legal perspective - corp= a superior business vehicle

Why would a person choose not to incorporate his/their business?

- Various professionals (lawyers) not allowed in some provs to conduct business in incorporated form
- Promoters may only envisage short term business relationship
- Partnerships- esp those of short duration usually between corporations- they may feel already protected by their status
- Unincorporated form of business may offer tax advantages dominant reason
- Many small business persons may not realise how easy & inexpensive incorporation is and the many advantages it can offer

- Share holders don't participate in management of corp—in small corps these distinct roles are played by the same ppl—shareholders are the directors and officers

- Management receives most of its income from the corp's activities, thus it will be reluctant to take risks
- Shareholders by contrast, are more likely to want the corp to take possibly beneficial risks, since their exposure to loss from the corp's activities is much less than that of management
- Due to conflicting interests, corporate law contains a variety of legal mechanisms designed to ensure that management is accountable to shareholders w/o unduly constraining the freedom that management needs to do its job in most effective way:
- Primary power of shareholders elect directors, then refuse to re-elect and to remove them
    - This gives shareholders the power to ensure directors & officers they appoint will act in best interest of shareholders
- CBCA s122(1)(a) - imposes obligation on management to act in the best interests of the corp and prohibits managers from favouring one group of shareholders over another—this fiduciary duty requires managers to act in the best interest of the corp as a WHOLE
- CBCA s241- minority shareholders may obtain relief in majority cause corp to act in a manner that is unfair/oppressive to minority

Other Forms and Methods of Carrying Business

1. *Special forms of corp*

- There's some businesses that can only be carried through special kinds of corps, incorporated and governed under statutes that combine the many features of the general corporate law with other provisions imposing a scheme of regulation of these businesses.
- Eg: Banks can only be incorporated under the fed Bank Act. Insurance businesses must be incorporated and governed by either fed or prov leg regulating insurance business.

2. *Joint ventures*

- Not a distinct form of business organization or relationship that has any precise legal meaning
- Refers loosely to a variety of legal arrangements in which 2 or more parties combine their resources for some limited purpose, for a limited time, or both

3. *Strategic Alliances*

- No precise legal meaning- refers to a variety of relationships between business organizations involving more or less legal formality, and greater and lesser degrees of cooperation among the alliance partnership (Eg an agreement to do research and development together, to market products jointly, to share info)

4. *Licenses*

- Purely contractual relationship, under which one party, the licensor, agrees to permit another, the licensee, to use something, that the licensor owns or has rights in, such as patent, TM, or copyright, in return for compensation—usually in form of royalty (Eg McDonalds allowing its franchisee to use its logo in his McDonalds franchise)

5. *Franchises*

- Contractual relationship; Franchisor gives franchisee the right to operate its business "system" in return for a set of fees. Current prov leg enacted to protect franchisees.

6. *Distributorships*

- Exist when one business agrees to sell another's product

Business Trusts

- Mutual funds and real estate investment funds (REITS) are set up in the form of trusts
- A trust may be set up to have many of the features of a corporation

- A way to create a form of business organization using a trust would be for investors to give money to trustees for the purpose of acquiring assets to be used to carry on a business for the benefit of the investors as beneficiaries
- The responsibilities of Trusts mirror the corresponding rights of shareholders and the responsibilities of the directors in a corp
- Problem using trusts this way there is no statute comparable to fed and prov business corps statutes to provide a set of rules to govern a trust
- Must be created in a declaration of trust= writing
- Another challenge: rules regarding liability of B are more complex than those applicable to shareholders
- Trusts are often used as a structure to achieve favourable tax treatment for investors

- Income Tax Act, effective Jan 1 2007: amended to eliminate tax benefits of structuring a business as an income trust—tax changes treat an income trust as a corp with the result that it must pay tax on the income it receives from the corp—even if the full amount is transferred to the trust unit holders—this made income trusts less attractive

II - PARTNERSHIPS

WHAT IS A PARTNERSHIP?

- Partnership law determines when partnership is created
- Unlike Canada, the ***English Limited Liability Partnerships Act 2000*** has corporate personality & does not constitute a partnership under ***Partnership Act 1890***—all CDN provinces have copied the 1890 Act—they have adopted a limited partnerships Act or provisions dealing with limited partnerships
- In Canada the province have constitutional jurisdiction to enact laws regulating partnerships under
  s. 92(13) of the ***Constitutional Act 1867***

Ontario Partnerships Act, R.S.O 1990, c.p.5

1) Nature of Partnership (**ss2-5**)
2) Relation of partners to persons dealing with them (**ss6-19**)
3) Relation to Partners to One Another (**ss20- 31**)
4) Dissolution of Partnership (**ss 32-44**)
5) Miscellaneous (**ss45-46**)

- The Act = not complete code
- **S45** (Ont.) provides: the rules of equity and Common Law applicable to partnerships continue in force except where they are inconsistent with the express provisions of the Act
- In Quebec—Canada's only civil law jurisdiction—partnerships governed by *civil code* still same nature of a partnership as in other provinces but:
  - Partnerships either declared or undeclared
  - Declared partnerships are registered under the Code
  - Undeclared partnerships are similar to those in CL jurisdictions ie no registration required to exist
- Important difference between undeclared partnerships under the Code and in CL jurisdictions is that in undeclared partnerships, only those partners who are known by a 3rd party creditor are liable to the 3rd party.
- In declared partnership (like partnerships in other provinces): all partners are liable whether 3rd party knows about them or not
- Declared partnerships may be limited partnerships in CL jurisdictions/general partnerships which have characteristics similar to CL partnerships
- Statutory law in Quebec & other provs deals with
  - Nature of partnership
  - Relationship of partners to each other & outsiders
  - Dissolution of

partnership

2) Legal nature of partnership

- Prov partnership laws provide that a partnership exists when there are "*persons carrying on a business in common with a view to profit*"
- Partnership like **sp**- partners carry on business directly

- Partnership is not a separate legal entity from its partners
- As a consequence - each partner is liable to the full extent of his personal assets for debts and other liabilities
- If a partner leaves = partnership terminated
- Partner may not be an employee of the partnership business
- Partner cannot be a creditor of the partnership
- Several ways in which a partnership is treated as a collective entity:
  - For sake of convenience, partnership often called 'firm'
  - For income tax purposes - income/loss calculated at the firm level
  - Action against partnership/defence by referring to firm name

Harris text: 3- Defn of partnership= *s2 Partnerships Act*

- **S3** provides guidelines in determining whether a partnership exists or not
- These rules are of late origin—evolved from 1860 onwards—prior to that: much litigated issue: whether a person's entitlement to a share of profits of another's business was sufficient to make him a partner
- Affirmative proposition laid down in 1775 by De Grey C.J in **Grace v Smith (1775):** *"every man who has the share of the profits of trade, ought also to bear his share of the loss"* ← this doctrine approved 18yrs later in the leading case of **Waugh v Carver (1793)**
- House of Lords, in **Cox and Wheatcroft v Hickman (1860)** rejected validity above

doctrine

3) Definition of a Partnership - When is someone a partner?

- In case law, the issue of whether a person is a partner arises when the partnership business has become insolvent and a creditor is looking for someone with assets to claim against
- Creditor then argues—person with assets should be liable for obligations
- Lawyers need to be aware of circumstances in which a partnership is found to exist in order to ensure either that their client does not inadvertently become involved in a relationship or take appropriate steps where a partnership can be found
- A simple agreement '*to carry on a business*' in the future is not sufficient to est a partnership
- Business less likely to be found to have partnership if ppl involved are passive investors
- '*view to profit'*: not charitable, social or cultural purpose—view to profit is enough to est partnership—profit need not be made
- **Spire Freezers Ltd v The Queen**: SCC clarified that investors must have a view to profit for a partnership to exist. Spire was allowed to make the losses deduction. SCC held even if Spire's main purpose was to deduct partnership losses; it also intended to carry on the business of the apartment complex.
- Opposite conclusion in **Backman v The Queen (2001):** re a business invested in a partnership to take advantage of the deductibility of the partnership losses. In this case the remaining assets in the partnership were nominal and little management was required—the SCC found that there was no partnership because there was no business being carried on with a view to profit.
- 'in common': the putative partners are carrying on a business together, based on

some kind of agreement which may be written oral or implied

- Existence of agreement is objective, in the sense that persons may be characterised as partners w/o their knowledge & even contrary to their express intention so long as the court decides that the circumstances show the existence of such agreement. The agreement must demonstrate an intention to participate in relationship that fits within the defn of partnership

- **Green v Harnum (2007):** two men signed all documents relating to acquisition of a fishing boat, borrowed equal amounts of money to do this, set up a bank account, shared equally all expenses and profits. CoA of New Foundland and Labrador found a partnership

- **Red Burrito Ltd v Hussain** the court found that even though the parties had not fully implemented their agreement, it was clear that they planned to carry on business together and did so. In the court's view this was sufficient to conclude that a partnership had been formed.

- **Cressman, Foster Health Facility Inc v Furniss (2006):** the court found that there was no partnership because the alleged partners had not agreed on the date the partnership business was to be commenced, or the contribution of one of the putative partners.
- These cases show that no formal agreement is necessary to find an agreement to carry on business within the meaning of the definition of partnership
- Common ownership of property alone doesn't make the co-owners partners **s3.1 OPA**
- Sharing of gross returns, meaning business revenues w/o deduction of related expenses, doesn't create a partnership **s3.2 OPA**

- In **Cox v Hickman** it established that the fundamental characteristic of the relationship of partnership is mutual agency: a partnership exists where each person alleged to be in the partnership carries on the business on behalf of the other alleged partner. The test is whether business is being conducted on behalf of that person (the most important indica of this is sharing profits (revenues – expenses))
- Since decision of **Waugh v Carver,** the principal indicia of carrying on a business in common has been whether profits were shared (conclusive)—set out in **s3.3 OPA**
- **S.3.3 OPA:** the construction of this provision doesn't yield a rebuttable presumption of partnership where sharing of profits is found. This section illustrated relationships that should not give rise to an inference of a partnership even though there is a sharing of profits.
    - This section doesn't say sharing of profits alone is conclusive evidence that a person is a partner in the absence of evidence to the contrary—although it almost does—something more required but don't know what: to find out its important to analyze case law

- if person compensated out of revenues—she only has a stake in how much business sells
- if person is sharing profit—that person must also be concerned how the business is conducted
    - this stake in the effectiveness of management means that the sharing of profits is more suggestive of being in business together

- interest in profits is a residual claim—similar to shareholder's interest in a corp
- agreements to share losses as well as profits indicates partnership—though partnerships can exist even though the agreement between the parties contains a provision indemnifying one of them against losses from the business
- **3.3(a)-(e):** list of relationships that should NOT give rise to an interference of partnership even though there is sharing of profits. However, it does not assist with the Q of whether any particular relationship is, in law, one of these relationships or a partnership
    - A lender receives repayment of a debt or some other fixed amount out of profits
    - An employee's remuneration varies with profits, such as under a profit-sharing plan
    - A lender's compensation is to be a share of profits or based on an interest rate varying with profits
    - A spouse or child of a deceased partner receives an annuity paid out of the profits
    - The purchaser of a business pays a share of profits of the business to the vendor

Debtor/ Creditor Relationships - Partnership

Cox and Wheatcroft v Hickman (1860): key Q: whose behalf business is being carried on

Facts: ironworks business, had troubles; entered into deed with creditors who appointed trustees to run business – trustees also creditors; 2 of those Cox & Wheatcroft (C & W) – ran business, use profits to repay outstanding debt, & then business would revert back to owner – during this Hickman became creditor, sued C & W as partners with Smith in running of business

- Hickman argued that since C & W sharing profits, they are partners and can be sued.

Issue: is person in question a partner in the Partnership?

Ratio: in such a case the Q to ask is if the business is being conducted on behalf of that person; (test) fundamental characteristic of the relationship of Partnership is mutual agency – is a Partnership where each person alleged to be in a partnership carries on the business on behalf of the other alleged partners

Analysis: HL ruled C & W are NOT partners; said that trustees not sharing in profits of business; profits just payment mechanism that allowed them to have debts satisfies b/c as soon as debt satisfied business reverted to Smith / shared profits but was NO partnership

- to find a partnership involving C & W, business had to be carried on for their benefit, as principals & here, they got benefit of profits but agreed that exclusive purpose was to repay debt
- ct found not if entitled to share of Profit but **on whose behalf is partnership being carried on** – that is Q to ask (not who if recipient gets share of profits) just b/c share profits doesn't mean are partner – mimicked in s.3(3) of Partnership act]

Pooley v Driver (1876) [*illustrates how rights belonging to a person alleged to be involved*

in and even in control of the partnership business, as well as the behaviour of an alleged partner in connection with the business, are relevant to determining whether she's a partner]

- In this case Borrett and Hagan= partners carrying on a grease, pitch, and manure business. They entered into a partnership agreement that provided (among other things) that the 'capital' of partnership would be split between them and persons 'advancing money by way of loan' (referred to as Lenders) and that the profits from the partnership business were to be paid out to Borrett, Hagan and the Lenders in accordance with their interests in the capital. Complex relationship was expressly designed to ensure that the Lenders were not found to be partners. In looking at the whole relationship between the Lenders and the partnership as described in the partnership and loans agreements—court concluded that the Lenders were partners because: VAN DUZER pg 43—such obligations imposed on the Lenders are more like a partner's liability—coincidence of the loan and partnership terms suggest that the lenders were partners.

- The court's analysis demonstrates the limited operational effect of paragraphs **s33(a)-(e) OPA**
- Court made it clear these provisions = examples of relationships which aren't partnerships
- In every case, court must decide if relationship is one of partnership or some other partnership
- In **Pooley** court had to decide if the relationship was that of partnership or that of debtor and a creditor
- That the return to the person claiming to be a creditor is dependent on the profits as described in **s3.3(d),** does not mean that the relationship is therefore deemed not to be a partnership
- It means that the sharing of profits in these circumstances does not give rise to a presumption of partnership.
- For **s3.3(d)** to apply, there must be "an advance by way of loan"—but this dictates relationship one of debtor and creditor

Co-ownership - Partnership

- **S3.1 OPA:** provides that holding property in some form of common ownership doesn't create a partnership in relation to the property, even if the co-owners share profits made from the use of property
  - Co-ownership may arise in variety of circumstances where relationship not considered a partnership eg the passing title to a piece of real estate from one person to several on the owner's death
- Co-owners have diff legal consequences to partnerships—co-owners are NOT agents of each other
- Co-owner CANNOT bind another
- Co-owner at liberty to deal with its interest in the common property as his own w/o consent of others
- Conversely, In absence of agreement of all partners, a partner cannot transfer his interest – though can transfer his right to receive profits from the partnership business
- In a partnership the firm's property is held jointly as an asset of the business—NO PARTNER HAS THE RIGHT TO DEAL WITH PROPERTY SEPERATELY

- Partner's right is the division of profits, NOT to any particular property of the partnership business
- Where the co-owners share profits from the use of the property, the relationship approaches a partnership, but there must also be something more than owning property and sharing profits for a partnership to exist—there must be some management or business activity
- One-way of formulating the Q: "*the intention of the co-owners...[was] 'to carry on a business' or simply to provide by an agreement for the regulation of their rights and obligations as co-owners of a property?*"

In the case of **A.E LePage Ltd v Kamex Developments Ltd (1977)** co-owners of an apartment building were held not to be partners even though (1) profits were to be paid to the co-owners in proportion to their respective interests and each co-owner was liable to pay any deficiency in the same proportion; (2) co-ownership rights were subject to a right of first refusal; and (3) sale of or other dealings with the property required approval by the majority vote of the co-owners. For the court, the critical issue was that the co-owners did not relinquish their rights to deal separately with their interests in the property. Further, the fact that the co-owners contractually agreed to restrict their dealings in respect of their interests in certain circumstances was not inconsistent with their rights as co-owners. Consequently, the court did not find the requisite intent to create a partnership.

- Difficult to say how much activity required to co-ownership in order to create a partnership

In **Volzke Construction v Westlock Foods Ltd (1952)** the use of a common bank account, an agreement to share costs of developing business, and common participation in financing the business and in dealing with tenants' concerns were all held to be indicative of a partnership between co-owners of a shopping centre.

- Difficult to determine partnership in real estate co-ownership cases as some management will be required

Agreeing to be a Partner - Partnership

In **W v M.N.R (1952)** the widows and daughters of number of deceased partners in a law firm claimed they were partners in the firm. They did not contribute/participate in the business of firm. Revenue Canada challenged their status because it objected to the taxation of the partnership profits in their hands. RC believed the partners working in the business, who were paying tax at a higher marginal rate, should have been liable for the tax. Court held that it was sufficient for a finding of a partnership, that the widows and daughters had entered into an agreement in which they were identified as partners and acknowledged (although not in the operative part of the agreement) but in recital, that they were liable for losses as well as profits. Therefore, RC's challenge was defeated

Managing the risk of being found a Partner

- Caselaw illustrates an important aspect of partnership law: the difficulty in defining precisely the circumstances in which a partnership may be found to exist

- This has important implications for lawyers advising their clients
- If there is a risk of a partnership being found, the client should be advised to take whatever steps are available to avoid this consequence (these include contractual provisions stating the nature of the relationship…)
- More on page 48-49

Thorne v New Brunswick (Workmen's Compensation Board) (1962) Thorne and Robichaud were partners in a tree-felling and sawmilling operation. Robichaud would fell the trees and Thorne would do the sawmilling. Thorne was injured in the sawmill and sought worker's compensation. The Board refused compensation on the basis that Thorne was not a worker. The New Brunswick *Workmen's Compensation Act*, R.S.N.B. 1952, c. 255 defined a "workman" as an "employee." The Board argued that Thorne could not be an employee because he was a partner with Robichaud. Partnership, the Board argued, was not a legally recognized entity and that meant that an employment contract in the context of the Thorne- Robichaud partnership business had to be a contract between the employee and Thorne and Robichaud as co-employers. For Thorne to be an employee he would had to have made a contract with himself.

This, argued the Board, was not possible – it takes two to contract. Several arguments were made on behalf of Thorne that a partnership had in fact come to be regarded as a separate legal entity. The New Brunswick Court of Appeal did not accept these arguments.

1 HOW DOES A PARTNERSHIP CARRY ON A BUSINESS?

1 Relations Between Partners

- **S20-31 Partnerships Act** contain the statutory presumptive rules governing the partners' relationship towards on another.
- Read collectively, the rules lead to the conclusion that the partners' relationship is based on equality, consensualism, utmost good faith and the personal character of the partnership contract (These are simply default rules and in practice rarely apply)

Default Rules and Fiduciary Duty

i) Equality - principle of equality is reflected in the partners' right and obligation to share equally in:
  - profits and losses of the partnership business (**s24.1**)
  - in the right to participate in management of business (**s24.5**)
  - to have access to partnership books (**s24.9**)
  - the duty to render to each other true accounts and full info of all things affecting the partnership (**s28**)
- all these aspects provide important contrasts with distribution of power within a corporate structure—particularly instructive is the right to participate in management
- modern business corps Acts confer no inherent right in a shareholder, even a majority share-holder in a closely held corp, to participate in management
- if shareholder wants to play such role then he must have himself elected as a director or enter into a "unanimous shareholder agreement" **CBCA s146**
- in absence of contrary agreement, every partner entitled to participate in

management—this explains the reciprocal agency basis partnership

- it also explains the fundamental rule enshrined in **s6** of the Act that "the acts of every partner who does any act for carrying on in the usual way of business of the kind carried on by the firm of which he is a member" bind the firm and partners unless the 3rd party allows that partner is in fact w/o authority to act in the matter (implications examined in(ii))
- although every partner is entitled to play a managerial role—not clear whether he is bound to do so—The Partnership Act is silent on the matter

2 Consensualism

- principle of consensualism in the conduct of partnership affairs is evinced in several provisions:
- **s20** provides: the mutual rights & duties or partners, whether ascertained by agreement or determined by the Act, may be varied by consent of all partners
- rule of unanimity also governs the admission of new partners (**s24.7**)
- and any changes in the fundamental character of the business (**s24.8**)
- consensual character of partnership manifests itself in the rule that, unless otherwise agreed, any partner may determine the partnership at any time by giving notice of his intention to do so to the other partners (**s26(1)**)
- no majority of partners can expel a partner unless the power to do so has been expressly conferred in the partnership agreement (**s25**)—parties would have to seek judicial relief under **PA s35** (they may also be entitled to terminate the partnership under one of the provisions in s35)
- deviation from unanimity rule appears in **s24.8**—it allows majority opinion to prevail in "ordinary matters" connected with the partnership business

Fiduciary Duty

- Partners must deal with their partnership and partners with utmost good faith
- Partners must never put their personal interests ahead of the interests of the partnership
- There's no general expression of this duty in the OPA—its well established in the CL that the fiduciary duty is a guiding principle of partnership law
- There's several other provisions in OPA which create specific obligations consistent with this general duty
- Each partner obliged to render to each other partner 'true accounts and full info re all matters affecting the partnership (**OPA s28**)
- Each partner must account to the partnership for certain benefits obtained w/o the consent of other partners—these benefits include those derived by the partner from "any transaction concerning the partnership or from any use by the partner of the partnership property, name or business connection" (**OPA s29(1))**
- And any profits made by competing with the partnership business (**OPA s30**)
- Exact content of fiduciary duty depends on the facts

In **Rochwerg v Truster (2002)** a partner in an accountant firm became director of one of the firm's clients. He invested in the client's firm. The partner disclosed the directorship to his partners and paid the director's fees he received to his partnership. He didn't disclose his investment because he believed it was a private transaction. ON CA decided his duty under **s28** OPA required him to disclose the investment because it affected the partnership.

He was required to account for the profits he made from the shares and options because they were a benefit derived from the partnership business connection for the purposes of **s29 OPA**. It was not necessary to show that the partnership suffered a loss as a result of the partner's activities

In **Mohammadamin v Zameni (2000)** a partner's non- competition obligation was held to extend beyond the termination of the partnership. Z sold his interest in the partnership's auto parts business and then set up a competing business nearby. The court found this was a breach of his fiduciary duty not to damage the goodwill of the partnership.

In **Olson v Gullo (1994)** it was held that a partner who sold part of the real property owned by the partnership had to pay the profits of the sale over to the partnership based on **S29(1) OPA**, as well as common law principles of fiduciary duty.----one of the difficult features of cases like this is that the partner in breach of his duty receives a benefit from the breach because, as a partner, he shares in the profits when they are paid over to the partnership.

- By agreement, partners may exclude certain activities from the full operation of the fiduciary duty:

pg53

Partnership property: consists of all property contributed to the partnership. Includes all property acquired on behalf of the partnership or for the purpose of the business partnership. When property is bought with money belonging to the partnership, it is deemed in the absence of evidence to the contrary, to have been bought on behalf of the partnership and to be partnership property—even if bought/retained by individual partner.
pg54

Relations of the Partnership with Third Parties

1 Basic rules

- Unlike rules governing internal relations of partners, the rules governing the relationships between partnerships and 3rd party = are mandatory to protecting 3rd parties
- In general—all partners are liable for all liabilities of partnership
- Partnerships liable in contract: agent entering in contract on behalf of partnership
- **S6** provides that the acts of the partner in the usual course of business binds the firm
- These rules don't apply where partner has no authority to act = there's no partnership liability for acts outside the usual scope of the partnership business
- Usual scope of business depends on business activity
- Partnership liable for torts & other wrongful acts/omissions of its agents/employees
- Liability arises where something wrong authorised by partnership in ordinary course of the business
- Where liability established, firm liable for all damages, to same extent as authorising partner
- Partners may be liable for fraudulent acts by their partners

In **Ernst& Young v Falconi [1994]** the estate partner in a law firm was held liable for acts of another partner who assisted bankrupt clients disposing their property contrary to the

Bankruptcy Act. The fraudulent activity was held to be in the ordinary course of the law firm's business. The court said the test is: *"...whether the unlawful acts are the sort that would be within the scope of the partnership if done for legitimate, as opposed to illegitimate, purposes as seen from the perspective of the overall business of the partnership"*

- It was sufficient that the partner used the assets and the facilities of the law firm to perform services normally performed by a law firm in carrying out the transactions, and as a result, the creditors of the firm's clients suffered loss.

Similar conclusion reached in **Dubai Aluminium Co. Ltd. V Salaam [2003]** HL held that a law firm partnership was liable for the dishonest acts of one of the partners. HL determined that the Q was not whether the dishonest conduct was specifically authorised by the firm, but rather whether the partner was authorised to engage in conduct of the same general kind as the dishonest conduct. As long as the dishonest conduct was sufficiently closely connected to act that the partner was authorised to engage in, the conduct may be regarded as done in the course of the business of the firm. HL found this test was met. **pg 56**

SCC recently considered the nature of partnership liability for civil wrongs in **3464920 Canada Inc v Strother [2007]** [*SCC made clear that liability of the firm under partnerships statutes is not limited to common law torts. The statute expressly refers to liability for a "**wrongful act or omission**"—including breach of fiduciary duty*]

- In this case a partner in a law firm breached his fiduciary duty and the terms of his retainer to a particular client of the firm when he took a direct financial interest in a competitor of that client. Court determined this conflict meant there was a great risk that the partner would not fulfill his duty to zealously represent the initial client's interest. The firm was completely innocent because they had no knowledge of this partner's actions. But, the court held that the firm was still responsible because the partner's act was so closely connected with the business of the firm as to be within the ordinary course of its business. The court rejected the argument that the firm should be isolated from liability based on the general tort principle that a firm should not be liable where a partner was on a frolic of his own because it was not possible to separate the wrongful act from the firm's ordinary business of the firm **pg 57**
- **The time @ which liability arises = critical**
- Generally, partners are liable only for obligations incurred while they were partners in the firm
- A partner is liable even though she may have a right to be indemnified, in part or whole, by the partner who incurred the obligation for the firm
- Any right to indemnification is irrelevant because the purpose of imposing liability is to ensure that the 3rd party is compensated
- Liability for obligations of the firm continue after the partner leaves the firm (**s18(2) OPA**) and binds her estate (**s10 OPA**)
- Partner not liable for new obligations incurred after she leaves/prior to becoming partner (**s18 OPA**)
    - Exception to this rule arises where partnership assets are seized by a creditor after a person becomes a partner in satisfaction of an obligation to the creditor that arose prior to that person joining the partnership

- Such proceedings are permitted expressly by the Ontario Rules of Civil Procedure

2 Holding Out and Related Sources of Liability

- A person may be liable for the obligations of a partnership even though he was never a partner or was not a partner at time the partnership incurred the obligation, if he was held out as a partner.
- **S 15 OPA** imposes liability on a person held out as a partner (**pg 58**)
- Examples of representations that may give rise to liability under this provision include use of person's name in firm name, on a sign at premises of firm, or on the letterhead or invoices.
- **Essential element is that the person held out must knowingly permit it**
- Not sufficient if person negligent/careless by failing to ensure she was not held out as a partner
- Person held out needn't know that the holding out was to the particular person who advanced credit to the firm
- Knowledge of holding out, such as in advertising is sufficient
- To est liability based on holding out, the person who advanced credit to the firm must have relied on the holding out in doing so

In **National Building Society v Lewis (1998)** a client of a law firm relied on a title opinion from the firm in granting a mortgage. The title opinion turned out to be wrong and the firm was held liable for the negligence. Court held in the absence of any proof that the client had relied on the employee being a partner; liability for holding out did not arise. The client had relied on the opinion—not on the employee being a partner

- Holding out may occur when a partner retires, in such case, there may be various conflicting interests at stake
- Retiring partner generally interested in limiting his liability for obligations arising after retirement
- Persons who dealt with firm prior to the retirement and who innocently continue to rely on the creditworthiness of the retired partner in their dealings with the firm would expect to be able to continue to hold retired partner liable unless they were told about their retirement
- There'd be no expectation if these old clients of the firm never knew that the retiring partner was a member of the firm or that the person ever existed as a partner
- Those who deal with firm for first time after retirement could not reasonably expect to hold retired partner liable in absence of some representation to them that the person was a partner at the time (e.g. firm name)
- In interest of goodwill, after retirement of a partner the name may be continued as business name
- Use of firm name is likely to be found as holding out, sufficient to render the retiring partner liable for any obligations arising after retirement
- OPA has various provisions that strike a balance between these various interests
- A retired partner is liable to every person who dealt with the firm prior to his retirement for obligations of the firm incurred after retirement unless:
  - Actual notice of retirement is given to the person (**OPS s36(1)**)
  - The person never knew that the retiring partner was a partner (**OPA s36(3)**)

- The partner left the firm because he became insolvent or dies (**OPA s36(3)**)

- **S15(2) OPA** provides that a partner who dies is not liable for obligations of the firm arising after death even if the partner's name continues to be used in the firm name
- Persons who deal with a firm for the first time *after* a partner retires are entitled to hold liable any person who is an *apparent* member of the firm including a retired partner (**OPA s36(1)**)
- Example of apparent member: name on letter head, invoice, signs at business premises, if name appears as a partner in a registration filed under ON BNA
- "Apparent": apparent to someone dealing with the firm, that the person whose name is stated, is a partner—several provisions make it imprudent to do so.
- **S36(2)** provides retired partner not liable to such person if a notice that the partner has retired has been published in the ON Gazette
- **S36(3)** provides that a retiring partner is not liable to any person who deals with a partnership after the retirement who did not know that the person was a partner
    - The net effect of these provisions is that the retired partner will be liable for any obligation incurred by the partnership to a person dealing with the firm for the first time after his retirement only if the action making her an apparent partner also constitutes a holding out within the meaning of **s15** ie he must hold himself out or knowingly permit himself to be held out as partner
- This was the conclusion reached in **Tower v Ingram (1949):** Ingram was a partner in a firm whose name was used on firm letterhead after his retirement, but w/o his consent and contrary to his express instructions. **The court held** that a 3rd party who dealt with the firm for the first time after Ingram's retirement and received the letterhead could not hold Ingram liable because there had been no holding out for the purposes of s15. Plaintiff could have succeeded only if, prior to Ingram's retirement, he had known that Ingram was a partner in the firm. Being an 'apparent' partner at the time the plaintiff first dealt with the firm was not enough
- For a retiring partner to minimise his risk of liability for obligations of partnership after retirement, he should ensure that all persons who had dealings with the firm prior to date of his retirement have actually received notice of his departure. If this is impractical, then a newspaper advertisement may be useful he should also ensure that he documents his instructions to the remaining partners that notice is to be given to ensure that liability based on holding out cannot be claimed. He should also ensure his retirement is published in the ON Gazette and that the OBNA is amended. He should have his name removed from the firm name. If he permits for his name to be used in the firm name then he should insist on a reliable indemnification from the remaining partners for any liability he incurs as a result.
- To assess the creditworthiness of a particular person, it would be desirable to obtain some form of specific representation or acknowledgement of that person's membership in the partnership from that person. If there's any uncertainty, checking the ON Gazette would also be prudent.

3 *Risk Management in Partnerships*

- There are practical protections against unauthorised activity in partnerships that are likely to be more effective than legal ones such as fiduciary obligation
- Most partnerships involve a small number of individuals, each being vitally involved in the business and affairs of the partnership on a daily basis

- There is no separation of ownership and management
- In these circumstances, the likelihood of unauthorised activity is reduced; the opportunity to monitor the activities of one's fellow partners is increased
- As partnership gets bigger, involving more and more people, these practical protections break down
- Eg in large law firms few partners are actively involved in all aspects of the business of partnership or even know all of their partners, and formal monitoring must be established

DISSOLUTION OF THE PARTNERSHIP

- Partnership is not a separate legal entity from its partners, therefore its fragile
- Reflected in the ways it can be dissolved under OPA and the partnership laws of other provs
- These provisions may be varied by agreement & are altered to render partnership more stable
- Partnership terminated if:
    - Formed for a fixed term, on expiry of the term (**OPA, s32(a)**)
    - Not formed for a fixed term, on notice by one partner to all the others (**OPA ss26 and 32(c)**)
    - If formed for a single venture/undertaking, on termination of the venture/undertaking (**OPA, s32(b)**)
    - On the death or insolvency of any partner (**OPA s33(a)**)
- There may be other reasons for termination of partnership ie inability of a partner to continue to work in the partnership
- **S33(b)** contemplates that partners may agree that dissolution should occur if any partner permits his share of the partnership property to be charged for his personal debts
- Termination occurs regardless of any agreement by the partners if it becomes illegal to be carried on by the members of the partnership (**OPA s 34**)
- The act provides that a court may order dissolution on a wide variety of grounds, including mental incapacity of a partner, persistent breaches of partnership agreement, and a catch-all ground: a court may order dissolution when, in the opinion of the court, it is just and equitable to do so.
- Courts have high threshold to order a dissolution on the above ground (I.e. complete breakdown of mutual trust and confidence between partners where reconciliation in the future or future cooperation would not allow the partnership to operate)
- **S44** of the Ontario Act provides a skeleton of a process to deal with the settlement of the many claims needing to be dealt with on dissolution
- Debt & liabilities to persons who are not partners are paid out first out of the assets of the firm, then advances of partners (other capital), and finally, capital is returned
- If shortfall after debts/liabilities to non- partners are paid, then whatever is available to distribute to partners is apportioned based on the loans from the partners
- If any assets remain, they're distributed to partners in proportion to their claims to share in the capital of the firm
- Anything left over is distributed amongst partners in accordance to their entitlement of profit

- The statutory scheme may be fleshed out in a partnership agreement

PARTNERSHIP AGREEMENTS

1 General

- Law provides the skeleton of rules for regulation of relationship amongst partners
- Default rules may be inappropriate
- It is commonplace for partners to enter into a partnership agreement to flesh out their relationship, though in some cases no written agreement prepared
- Main purpose of partnership agreements:
    - To modify the default provisions of prov partnership legislation, either to replace them or to supplement them by extending and tailoring them to particular needs of the partners.
      Through their agreement, the partners can provide a structure for operating the partnership where the legislation is silent/where the partners want something diff from what it provides
    - To respond to mandatory provisions of prov partnership leg, esp those providing for liability to 3rd parties, by structuring the relations among partners to address liability, and to create reporting, monitoring, and control mechanisms to manage liability risk
    - To reproduce provisions of prov partnership leg for partners' info

Selected Elements of Partnership Agreements and Commentary

a Name : Partnership may carry on business using any name

- ***Ownership issues*:** Name of partnership forms part of goodwill of business & belongs to partners. In absence of a provision in the partnership agreement, each partner may be entitled to use the name on the dissolution of the firm. Therefore, it is often desired for the partnership agreement to address this issue before is arises. To avoid conflict, partners may agree that no one is permitted to use the name on dissolution. Where a 'name' partner retires, dies the firm may want to continue to use the name. In such case, the partnership agreement may provide for the continued use of the name. If so, the agreement should address the resulting liability issues for the retiring partner.

- **Liability issues:** use of a person's name as part of the firm name with his knowledge constitutes holding that person out as a partner within the meaning of prov partnership statutes. Such person will be liable to persons dealing with the firm even after retirement. If the retiring person's name is going to be continued in use, the firm should agree to indemnify him against any such liability. This agreement gives him a right to recovers losses from partners in event of liable to 3rd parties. Deceased partner's estate not liable for obligations of partnership after he leaves the partnership, therefore no need to indemnify where firm continues with the deceased person's name.

- **Registration Issues:** partners must register their firm name, as provided by OPA. In choosing a name, it is advisable to search the register maintained in the province as

well as trade directories and other sources of info to ensure that the name chosen or similar name is not in use. If there is, then loss of own goodwill, possible liability for passing off, TM infringement. Registration of a name that is the same as or deceptively similar to another person's registered name can give rise to a claim for damages under the **OBNA s6**.

b Description of Business

- Each partner = agent of partnership capable of binding the firm to obligations within the usual course of the firm's business
- Each partner's authority as an agent is limited by the nature of the business undertaken
- Scope of each partner's authority to bind the partnership to a 3rd party will be determined by what the partnership actually does rather than by any limit in the partnership agreement—unless the 3rd party has knowledge of the limit
- Describing business makes the activities of the business clear for benefit of partnership
- It helps to avoid disagreements in the future about what income earned by the partners must be paid to the firm (Eg in a law firm partnership, the partners may want to provide expressly that the business includes teaching a law school course or writing papers, so any fees or honoraria received are income for the partnership)
- Such a provision gives specific content to partners' obligation to account for all benefits derived from any use by a partner of the partnership property, name, or business connection and helps avoid conflicts over what is personal and what is partnership income
- For the same reason many partnership agreements provide that each partner will devote his full time and attention to the business of the partnership and will not engage in any other business w/o consent of the other partners.
- If there's some specific business activities that carry on outside the firm business then they should be identified as permitted. This would avoid future disagreements.
- Legally, permitting activities that would otherwise be a breach of a partner's fiduciary obligation allows the partner to engage in them w/o fear of being required to account for any profits made
- Describing business also gives substance to partners' non- competition obligations.
- Many partnership agreements also contain provisions prohibiting partners from competing with the business for a period of time and in a limited geographic area after they leave the partnership
- While default obligation is not to compete in the partnership statute may be extended beyond termination, a more certain approach to dealing with this commercially important issue is to specify the length, the geographic scope, and the business to which the non-compete obligation applies
- As long as the obligation is reasonable ie is limited to protecting the legitimate commercial interests of the firm, it will be enforced.
- Describing scope of business provides basis for the firm to claim against a partner for liabilities imposed on the firm as a result of unauthorised actions by the partner that are outside the firm's defined business.
- An agreement would allow the partners to seek indemnification from any partner who saddles the partnership with a liability outside the defined business of firm

c. Member of Partnership

- Admission of new partner = most important decision for partnership
- Prov partnership statutes provide: in absence of an agreement to contrary, all partners must consent to the admission of a new partner
    - This requirement of unanimity is changed depending on each partner's economic interest In the partnership
- Partnership statutes are silent on the arrangements for admission to partnership
- Issues such as capital contribution and interests of new partners- to be addressed in agreement
- Expulsion of partner is prohibited under default rules—so many agreements provide for expulsion on vote of some specified majority

d. Capitalization

- Capital: the amount contributed by partners to the firm
- All partners share equally unless stated otherwise in agreement
- Circumstances in which capital may be withdrawn are often addressed too
- Each partner is entitled to receive his share of capital when he leaves the partnership
- Under OPA no interest is paid on capital—but partners who advance more than their share are entitled to 5% interest unless the partners otherwise agree

e. Arrangements Regarding Profits and Their Distribution

- Pursuant to prov statutes, all profits are to be equally divided among partners BUT this provision is invariably changed to allocate each partner a share proportionate to his contribution
- Some contributions typically considered are:
    - Capital contributions
    - Billable hours worked
    - Hours worked on matters that are not billable
    - Fee billed and collected
    - Total billing to new clients introduced to the firm by the partner
    - Total billing to clients of which the partner is in charge
    - Business development
- Each partner's entitlement will change each time their input is evaluated
- Typically, partners are permitted to draw against their anticipated share of profits, maybe based on forecasted profits or their previous year's entitlement—subject to adjustment at the annual review

f. Management

- Default rules in prov partnership leg provide that all partners are entitled to participate in mgmnt
- Decisions on ordinary matters are to be made by a majority of partners
- Decisions relating to nature of the partnership business require consent of all partners
- prov statutes contain no procedures for partnerships to act collectively
- Rules regarding such procedures- usually included in partnership agreement
- Management arrangements are an important way in which the risk created by mutual agency may be addressed
    - restrictions on who may sign contracts, write cheques are examples of

how the risk of unauthorised/undesirable activity with the potential for creating liability for the firm and the partners may be reduced
- these mechanisms have no effect on avoiding liability to a 3rd party where they are contravened, but, to the extent that they are implemented in practice, they will tend to prevent liability from arising
- Where a partner fails to observe requirements imposed in the partnership agreement, the other partners will have a claim for breach of contract and maybe grounds for dissolution

g. Dissolution

- Prov laws permit partnerships to be dissolved easily & in variety of ways
- Dissolution on death or insolvency of partner usually excluded or replaced by a provision requiring either unanimous consent or the consent of a specified majority for dissolution
- Partners may agree on certain other events that will result in dissolution
- **S44 OPA** - deals with the settlement of many claims needing to be dealt with on dissolution may be fleshed out in agreement. **Pg76**

OTHER RELATIONSHIPS

1 Joint Ventures

- A relationship among persons who agree to combine their money, property, knowledge, skills, experience, time or other resources for a common purpose
- Joint ventures agree to share profits/losses from venture
- Each has some degree of control over it
- Distinguishing feature: it is an arrangement set up for a limited period of time, for a limited purpose, or both.
- 'Joint venture' is used loosely to refer to all sorts of legal arrangements given effect in corps and partnerships in relationships based exclusively on contract
- The main legal issue of JVs: to what extent are there legal consequences associated with the JV outside those specifically provided for in the agreement creating the relationship

The leading case, **Central Mortgage & Housing Corp v Graham [1973]** suggests that in a JV with the following characteristics, each of the joint venturers is responsible for all obligations if the JV, just as each partner is responsible for al obligations of a partnership:

- Contribution by both parties of money, property, skill, or knowledge to a common undertaking;
- Joint interest in the subject matter of the JV;
- Mutual control and management; o Arrangement limited to one project o Expectation of profit;
- Mutual sharing of profit.

- In this case CMHC initiated a relationship with a builder (Bras D'Or) and provided the financing for the builder to build some houses to specs provided by CMHC on

property owned by builder
- Financing was secured by mortgage on property in favour of CMHC
- CMHC was consulted during construction & had the right to approve purchasers
- With each sale by the builders, the purchaser would assume a portion of the debt owed by the builder to CMHC as well as a portion of the mortgage relating to the property sold

- Builders would be released to the same extent
- Graham bought one of the houses from the builders
- After taking possession he stopped making mortgage payments on the mortgage due to some defects in the house
- CMHC commenced foreclosure proceedings & Graham counterclaimed for damages based on the defects, alleging that CMHC was liable for the defects because it was in a joint venture with the builders
- Court held that the relationship in this case sufficiently satisfied the characteristics of a JV.
- ***Therefore CMHC was liable for the obligations of its fellow venture Bras D'Or***
- CMHC has never been overruled & has been cited as an accurate statement of law
- Even if JVs legal position is not appropriately analogized to partnership, JVs may have more limited legal consequences
- Some courts have held that parties to a JV owe a fiduciary duty to each other
- There is an obligation not to disclose confidential info provided by one joint venturer to the other for the purpose of the JV

- An example of one JVer attempting to enrich itself at the expense of the other was found to be a breach of the fiduciary duty in **Wonsch Construction Co v Danzig Enterprises Ltd [1990]**: W had entered into a JV with D to build and operate an apartment and office complex. W was responsible for the construction of the complex and in he course of fulfilling its obligation incurred substantial debt to Bank of Canada. D negotiated an assignment of debt owed by W, paying the Bank significantly less than the full amount, and immediately sued W for the full amount. The court held that D owed a fiduciary duty to W which precluded it from, in effect, trying to make a profit from dealing in W's debt incurred for the purpose of the JV.

- In recent cases, courts made clear that a fiduciary duty will not be found in all JVs (in fact they are rare)
- Relying on a policy that a fiduciary duty should not be imposed on commercial parties who have recorded their relationship in an agreement, the courts have said that a fiduciary duty will be found only where one party is vulnerable in some way to the unilateral power or discretion of the other
- In general there must be some inequality or bargaining power resulting in an unfair agreement
- At least one case suggests that judicial reluctance to find that a fiduciary duty exists in a JV relationship has increased over time

Limited Partnerships (LPs)

1) General

- Specialised vehicle designed to fulfil needs of particular investors who want to be able to share in the profits but limit their liability for partnership losses
- Most cases—limited partners are not interested in participating in management—their investment is passive in nature
- In ON LPs are governed by the ***Limited Partnerships Act*** **(OLPA)**
- The Quebec ***Civil Code*** creates a distinctive regime but is substantially similar in effect
- LP must consist of at least one general partner (unlimited liability) and one limited partner
- Unlike general partnerships, LPs require a declaration to be filed with the registrar appointed under the Business Names Act (**OLPA s3**) - the declaration expires after 5yrs unless renewed
- Expiry doesn't terminate the LP—but an additional fee must be paid for renewal (**OLPA s3(3)**)
- LP doesn't have separate legal existence
- General partner has all rights and powers & is subject to the same restrictions and unlimited personal liability as a partner in a General Partnership subject to certain constraints designed to protect limited partners (**OPLA s8**)
- Limited partners have certain narrowly defined rights and their liability is limited to the extent of their contribution (**OLPA s9**)
- Limited partners have the right to share in profits and to have their contribution returned (**OLPA ss11 and 15**)
- **S10 OPA** provides that a limited partner has the same rights as a general partner to
    - Inspect books and make copies
    - Get full and true info regarding the LP and to be given a complete and formal account of the partnership affairs
    - Obtain dissolution by court order
- A limited partner may transact with the LP including lending it money, but cannot hold a security interest in its assets and cannot receive anything from the LP if it is insolvent
- Unlike a general partner, a limited partner may be an employee of the partnership (**OLPA s12**)
- Partnership by limited partners is subject to significant restrictions
- A limited partner may "enquire into the state and progress of the LP business and may advise as to its management" (**OLPA s12(2)(a)**), but if the limited partner "takes part in the control of the business" (**OLPA s13(1)**) or allows his name to be used in the firm name (**OLPA s6(2**)), he loses his limited liability
- Difficult to draw distinction between advising as to management and taking part in control
- More difficult issues arise where the general partner is a corporation & individual limited partners are involved as directors, officers, employees &/or shareholders
    - In these circumstances, a person who acts in his capacity as an employee, officer, or director of the general partner—may be taking part in control of limited partnership

Q: When does doing so result in the loss of a limited partners limited liability?

A: in **Haughton Graphic Ltd V Zivot (1986)**

> Z= limited partner in limited partnership as well as a substantial shareholder & president of corporation that was the general partner. In his capacity as president of the corporate general partner, he acted as the manager of the limited partnership. The court held that Z was liable as a general partner because he took part in the control of the limited partnership business. In interpreting the ***Partnerships Act of Alberta***, the court expressed the view that any time a limited partner was an employee, officer, or director of a corporate general partner and, in the capacity, took part in the control of the business, he would be liable personally as a general partner for the obligations of the partnership. –this position= unduly broad as it disregards the separate existence of the corporation & has NOT been followed in subsequent cases.

In **Nordile Holdings Ltd v Breckenridge (1992)** the court specifically held that where individual limited partners act only in their capacities as directors and officers of a corporate general partner, they are NOT liable as general partners.

Since **Zivot** = substantial shareholder in **Haughton**, it may be possible to argue that the right approach is that limited partners may act as employees, officers, and directors of corporate general partners and take part in control w/o losing their limited liability, UNLESS they also control the corporate general partner.

- Limited partner's interest = transferrable, but transferee has the full rights of transferor only if partners consent, or the transfer is in accordance with the partnership agreement (**OLPA, s18**)
- Limited partner has right to receive repayment of his investment:
  - Dissolution of partnership
  - @time specified in the partnership agreement
  - 6 months notice, if no time specified in partnership agreement
  - On unanimous consent of all partners (**OLPA s15(1)**)
- No return to investment may occur if not enough assets to pay claims of all creditors (**OLPA s15(2)**)
- Dissolution occurs in same circumstances as for a general partnership—death, incompetence, and retirement of general partner—unless at least one general partner remains, the partnership agreement provides for continuation of the business of the limited partnership, and all the partners agree to continue (**OLPA s21**)
- Limited partner entitled to have limited partnership dissolved if:
  - The limited partner's contribution is not returned when required to be;
  - The liabilities of the limited partnership are not paid or assets of partnership not enough to pay liabilities (**OLPA s15(4)**)
- Declaration of dissolution must be filed when limited partnership is dissolved or upon the withdrawal of all limited partners (**OLPA s23**)
- Just as general partnership—limited partnership may be dissolved by court order (**s35 Partnerships Act**)
- A person may be both a general and limited partner (**OLPA s5(1)**)
- General partner's liability can only be unlimited & becoming a limited partner has no effect on this liability
- Limited partnerships formed under the laws of one province must register if they carry

on business in another (**OLPA s25**), and they are subject to penalties if they don't (**OLPA s35**)
- Limited partners don't lose their limited liability if limited partnership fails to register (**OLPA s27**)

Tax Effects
- Most common reason for investing in LPs = to receive a share of tax losses generated by LP business.
- Sharing of losses = very attractive to ppl w/ high incomes from other sources
- Losses will be deductible against that income, with effect of reducing individual's overall tax liability.

Limited Liability Partnerships

- The lack of practical protections against un-authorised liability in large modern partnerships, combined with an explosion in professional liability, encouraged professionals to lobby for changes to the laws governing them to permit carrying on business using a corporation, which has the effect of limiting the liability of the owners of the business.
- Use of corp would not reduce the risk associated with carrying on a business—it has the effect of shifting risk to non-owners dealing with the business
- Limited liability permitted for lawyers and accountants.
- Partners not personally liable for the negligence, wrongful acts or omissions, malpractice or misconduct of partners, employees or other agents of the firm unless:
    - The wrong committed under supervision of partner whom failed to provide adequate supervision
    - The partner knew of act or omission & failed to take reasonable steps to prevent it
- Each partner remains liable for own negligence
- Except for this distinctive scheme regarding liability, the limited partnership is same as general partnership
- In ON→ an individual partner is not liable for debts obligations and liabilities of partnership or any partner, arising out of negligence or wrongful acts or omissions that another partner, employee, agent, or representative commits in the course of the partnership
    - This protection does not relieve partners from liability for their own negligent or wrongful act or omission.
    - Nor does it apply to actions of persons under the general partner's supervision
- Distinctive feature of ON regime: even if a partner or employee is not under the partner's direct supervision, the partner may be liable in 2 circumstances:
    - The act/omission of the partner or employee is criminal or constitutes fraud (even if there was no criminal act or omission);
    - The partner knew or ought to have known the act/omission and did not take the actions that a reasonable prudent person would take to prevent it.
- As in other provinces, the firm remains reliable.
- OPA clarifies that the liability shield created in the statue does NOT protect a partner's interest in the partnership against claims related to a partnership obligation

(**OPA S10(3.1)**)

- Rules to be LLP in ON= **page 66** text book

III. THE CORPORATION

Introduction

General/History (pgs90-98)

- Before 19th century there were only 2 types of incorporation (1) Royal prerogative (2) By special or general Act of the legislature.
- **Stock Companies Act 1844** a new approach of incorporation by registration of certain documents specified in the statute. This still doesn't reflect modern business since they were set up for limited purpose and didn't provide shareholders with limited liability.
- **1850** United Provinces of Canada adopted incorporation by registration of certain documents (this included separate legal personality and limited liability)
- **1864** United Provinces of Canada reverted back to the model of the royal prerogative in a new general incorporation statute in – incorporation only occurred upon the issue of *letters of patent* by the Governor in Council. This is a discretionary Act of the Crown (unlike the registration approach in England (memorandum) which as long as the documents were filed then it was granted). Letters patent don't have to file their by-laws with the state so there is less information to the public (can't as easily escape liability due to public knowledge).
- **1970** Ontario amended it's corporate law in favour of a registration system
- **1975** based on recommendations of the Dickerson Committee the federal government it's new corporate law stature **CBCA.** They adopted articles of incorporation approach similar to Ontario but went further to protect minority shareholders. It also provided greater flexibility in structuring (default rules), unanimous shareholder agreements were introduced.
- Most corporate law statutes eventually followed the **CBCA**
- BC legislation remains distinct still following the memorandum and articles association model in the English Companies Act
- Major amendments to the **CBCA** were made in 2001
- 2004 BC replaced the **Companies Act** with a new **Business Corporations Act** it retains the English registration model but clarifies some features of the **CBCA**
- Now all models provide for incorporation upon the registration of certain documents, no govt discretion is required.

Constitutional Matters:

Division of Powers The Charter

Intro Jurisdiction to Incorporate (below)

A) Provincial Incorporation

- **S92(11) Con. Act 1867→** provs have jurisdiction over "Incorporation of Companies with Provincial Objects"
- Limitation imposed by 'prov objects'- interpreted narrowly - it doesn't restrict nature of the business nor does it impose an effective limit on the territory within which it operates

- Provs can & do incorp corps with no restriction on what they can do or where they can do it
- Prov not capable of endowing a corp with the right to carry on business in any other jurisdiction, inc other provs
- The most prov can do is grant the capacity to carry on business in another jurisdiction
- Corp can carry business if obtain permission from relevant jurisdiction (ie extra-provincial licensing regimes - although discretionary, licences rarely refused EXCEPT when name likely to be confused with that of a business which has a similar name)
- Therefore mobility of a prov corp is almost unrestricted

B) Federal Incorporation

- **Con. Act 1867** grants fed govt limited powers to incorp corps operating in specific fields (eg banks)
- Does NOT contain express power of incorporation
- In **Citizens Insurance Co. Of Canada v Parsons (1881)** it was held that such a power was implicit in fed govt's residual jurisdiction to "*make laws for Peace Order and Good Government of CA in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provs*"
- Privy Counsel reasoned: since provs had jurisdiction to incorporate corps with prov objects, fed govt must have jurisdiction to legislate in relation to the incorp of corps with objects to be carried out in more than one prov
- Unlike prov incorp corps, fed corps have a right to carry on business in each prov
- It cannot be barred from a prov even if name likely to be confused with one that already exists in the prov
- Commencing business in a prov, fed corps are required to file info similar to that of required of a prov corp in an application for an extra-prov licence
- Therefore there's little difference in the treatment of fed and prov corps

Jurisdiction to Regulate

Provincial Regulation of Federal Corporations

- Provs can regulate a fed incorp corp depending on the division of powers
- Provs cannot legislate solely in relation to the status or powers of a fed corp (e.g. to limit it)
- Provs can't legislate restriction on powers of fed corps (eg removing limited liability)
- Provs can't directly regulate intra corp relations (ie those between directors & shareholders or require a fed corp to use a name other than its corp name for carrying on business in the prov due to the risk of confusion in the prov marketplace)
- Provs can legislate to affect directly the way in which fed corps exercise their powers if two requirements are met:
    1. The legislation can be justified as primarily in relation to a prov head of jurisdiction in **s92 Con. Act 1867**

2. The legislation is not inconsistent with fed law
- If 2nd requirement not met, the prov law = ineffective: doctrine of paramountcy
- Name registration statutes are examples of valid provincial legislation that can affect federal corps: purpose = to provide public with a means of ascertaining identity of person legally responsible for a business conducted under a name other than the corporate name. This is a matter of CRs in the prov
    - & such requirement can be imposed on fed corps
- Provs can enact laws under the enumerated heads of **s92 Con. Act 1867**, such as labour law, contract law & much industry specific leg even if the effect is indirectly to affect the fed corps business

Federal Regulation of Prov Corps

- Less important than prov regulation of fed corps & has little jurisprudence
- **Hogg's view**: fed govt may not regulate prov corps directly in relation to their corp status or characteristics. It may, however, directly affect the way in which prov corps exercise their powers if the leg can be justified as primarily in relation to an area of jurisdiction assigned to the fed govt.

Regulation of Extra-prov Corps

- Both govts have broad jurisdiction to regulate corps operating outside of Canadian province or foreign jurisdiction in which they were incorpd
- Apart from extra-prov licensing schemes enacted in each prov, neither level of govt has enacted leg that imposes a heavier regulatory burden on extra-prov corps incorporated into CA, though some statutes discriminate against foreign-incorpd corps.

D. APPLICATION OF THE CHARTER OF RIGHTS AND FREEDOMS TO CORPORATIONS (pg104)

1) Introduction

- Incorporation brings into existence a new legal person whose rights & obligations may be thought of as analogous to those of a human person in many respects
- Charter does NOT protect property rights or economic interests
- Corps are the focal point of relationships amongst shareholders & other stakeholders—denying a corp any rights under Charter may prejudice those individuals who have stake in it
- Charter protection of corp is to a lesser degree than that of an individual

2) Overview of Charter Cases on the Rights of Corporations

- When corp asserts breach of Charter right—court determines whether or not the corp falls in the defined class of right holders—if they do, court engages in analysis to determine if the right in question can be exercised by a corp—if both Qs answered and the right has been breached—the court considers whether the govt action that infringes the right can never the less be upheld under **s1** of Charter
- "citizens" does NOT include corps as they cannot obtain Canadian citizenship

- "everyone" does not inherently exclude corps, and the extension of any specific protection to corporations will depend on whether the substance of the protection is one that a corp may enjoy
- Even if the Charter provision has no application to corporations, a corporation may argue that a government measure is unconstitutional because it would violate the right of an individual.

Charter cases page 104

- **Parkdale Hotel Ltd. v Canada (A.G.)** court held that a person didn't include a corporation for the purpose of enjoying the mobility right under s. 6(2) on the basis that the purpose of the provision was not to protect corporations.
- **Re PPG Industries** it was held that a corporation accused charged with an offence under the Combines Investigation Act did not have the right to trial by jury
- **Van Media Inc. v Oakville (Town)** a corporation challenged a municipal by-law severely restricting the location of billboards within the municipality. Ontario SC held that it violated s. 2(b) and that the by-law could not be justified under s.1. This test was applied in the **R v Oakes** where they found that the some of the limitations in the bylaw went beyond what was necessary to minimally impair the corporations right to freedom of expression.
- **Canadian Egg Marketing Agency v Richardson** the SC considered a claim by a corporation that its freedom to associate was being infringed by territorial restrictions on where it could market its eggs.
- **Irwin Toy** held that, because a corporation cannot be imprisoned or lose its life, it cannot enjoy the right to life, liberty and security of the person guaranteed under s. 7. This was confirmed by the SC in **R v Wholesale Travel Group Inc.**

Incorporation Process

What is a Business Corporation?

- CBCA does NOT apply to: banks—they're governed by the **Bank Act**
- Insurance companies – **Insurance Companies Act**
- Trust and loan companies—**Trust and Loan Companies Act** ect **pg113**

The Incorporation Process

- one or more/people or corps must choose to incorporate either federally under CBCA or under the corp law of the prov
- Then need to file certain prescribed material with the branch of the govt in the chosen jurisdiction that has responsibility for incorps
- to incorp under CBCA, it's necessary to file the following with Corporations Canada, which is part of Industry of Canada:
  - Articles of Incorp (**s6**, Form 1)
  - Initial Registered Office Address and First Board or Directors (**ss19(2), 10(6),** Form 2)
  - A name search report on the proposed name of the corp
  - Fee of $250

- Articles = most important: set out fundamental characteristics of corp
- Once all steps above done, Director appointed to administer CBCA issues a certificate to which articles are attached more on **pg114**
- Corp is incorporated on the date of the certificate (**CBCA ss. 8 and 9**)
- Corp comes into existence on the date of the certificate (**s. 9**)
- The Directors named hold office until the first meeting the shareholders at which election is held (**s.106(2)**)
- No need for a corp to carry on business, its existence is derived exclusively from the certificate
- All documents must be maintained by the corporation at its registered office (**s.20**) and shareholders and creditors must be given access to them (**s.21**)

Function of Corporate Law

Introduction –

corporate law operated to encourage people to invest money in starting, maintaining and expanding businesses

Corporate Law Increases Returns by Decreasing Costs –

corporate law provides default rules that apply to govern the relationship between the corporation and its shareholder. This standard-form contract saves time and money. The default rules are called "enabling rules" and increase returns to shareholders by reducing costs in setting up a corporation.

1) Corporate Law Decreases Shareholder Risk

a. Limited Liability

- The most a shareholder can lose in connection with business is the investment
- Corp law provides shareholders not liable for debts & obligations of corp
- Only corp is respons for debts & obligations= consequence for corp being a separate legal entity
- By providing a cost effective mechanism to limit shareholders potential losses, corp law reduces the risk associated with investing
- Limited liability for shareholders does NOT eliminate the risk but shifts it to other stakeholders, such as employees and creditors

b Mandatory Rules Protecting All Shareholders

- Where management not carried out by shareholders themselves, there's a risk that managers will act to benefit their own interests instead of those of the corp and shareholders
- Corp law seeks to ensure that management is accountable through various mandatory rules
- In addition corporate law: (list on **pg119** – later addressed in course)

c Mandatory Rules Protecting Minority Shareholders

- Rules to protect minority shareholders from majority
- To guard against majority shareholder favouring himself: 2/3 majority required
- If minority does not agree—have the right to be bought out
- As these rules impose limits on control by majority shareholders, they increase the

risks and decrease the possible returns for majority shareholder investors correspondingly

Balancing Mandatory Rules Protecting Non-shareholder stakeholders

- Protection of interests of stakeholders other than shareholders is dealt with through leg outside the corp law area
- Corp law however, does contain certain mandatory rules in favour of such stakeholders
- These rules represent a further intervention in the marketplace to shift the risks associated with business activities carried on by a corp back to the corp and the shareholders

Limits on Limited Liability (LL)

- One category of rules that protect non-shareholder stakeholders = rules that reduce the effective protection for shareholders provided by the separate legal personality of the corp

- Limited liability = creation of law designed to encourage entrepreneurship by shifting risk of business activity from shareholders to other stakeholders.
- Despite express statutory grant of LL (**CBCA s45**)- courts have claimed the power to disregard the separateness of corporate legal personality
- Directors & officers may be held liable for torts where they have involvement in activity which constituted a tort (based on the idea individuals should be responsible for their torts)
- Corps can act only through individuals so it would be more consistent with the separateness of legal personality of the corp to hold only the corp liable when directors& officers are acting on the corp's behalf

a) Other Rules Protecting Non-shareholder Stakeholders

1. CBCA & other corp statutes require all corps to have as part of their name a word or abbreviation which indicates the business is carried on by an entity with LL (under **s. 10(1)** of the CBCA it must include 1 of the following Corp. Ltd. Inc.). Not setting out the full corp name on documents is an offence under **ss.10(5)** and **521.**

2. Corp statutes have certain rules protecting the assets of the corp for the benefit of creditors and others with claims against a corp

    - Unlike other jurisdictions, most corp statute in CA no longer require any minimum investment by shareholders
    - Minimum initial capitalization (investment) requirements do little to protect non-shareholder stakeholders after inc.
    - Money invested by shareholders does NOT generate a pool against which creditors &others may claim—must be used for purpose of business
    - There's no guarantee the investment will not be squandered or lost—for this reason Canadian corp statutes impose rules designed to prevent certain uses of a corp's assets that will render it unable to pay its obligations (e.g. shares

cannot be issued on credit **s.25(3)**)

- Corps cannot:
  - Pay dividends
  - Redeem/repurchase shares
  - Make payments on exercise of certain shareholder remedies
- If the directors have reasonable grounds to believe the corp is insolvent or would be made insolvent by the distribution (**CBCA ss34, 35, 36, 190(26) and 241(6)**)

3. Corp and/or its directors may be liable if they act in a manner that is oppressive to or is unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer

- This provision was intended to protect shareholders in small corps
- Liability for oppression is another way in which the protection of LL may be lost
- The most general standards of behaviour imposed by corp law also benefits stakeholders—each director and officer had a fiduciary obligation to act in the best interests of the corp and its duty to exercise reasonable care, diligence, and skills in discharging obligations (**CBCA s.122(1)**)
- Recently, SCC confirmed that the fiduciary duty is owed exclusively to the corp but that the duty includes an obligation to take stakeholders interests into account
- Court also confirmed that the standard of care in the CBCA may have to be met in relation to other stakeholders as well as shareholders, though the scope of the obligation in this regard is not clear

4. Corp statutes provide for certain public filings so that ppl dealing with a corp will be able to find out something about its activities

Corporate Law and Securities Law

Securities Regulation

- Securities: Shares, debts or obligations, like bonds, or other claims on a corp or other business organization

Introduction

- Securities are issued by business organizations to investors in order to raise the money they need to carry on their businesses
- Funds contributed by investors in exchange for securities constitute the capital of business & may be used for the purpose of the business
- Each prov has own law concerning regulation of the marketplace for trading securities with a view to protect investors
- To achieve this objective, disclosure is required from business
- 5 main areas of securities regulation
- 1st: the regulation of securities market participants.
- Securities dealers are subject to registration requirements and are regulated to ensure they meet the requisite high standards of competence and responsibility
- Prov regulators oversee activities of 'self-regulating organizations' (SROs) that regulate the operations and practice standards of their members—therefore play strong role in regulation of securities
- To carry on a business, securities dealers & brokers must be members of IDA (Investment Dealers Association)
- Mutual fund dealers must be members of the MFDA (Mutual Funds Dealers Association)
- Securities regulators have the authority to review directions, decisions, orders, and rulings of SROs
- 2nd: consists of requirements for business offering securities to the public to disclose info about the securities and are first offered for sale, thereafter on a regular basis, as well as whenever something happens that is likely to affect value of securities
- 3rd and 4th: the regulation of insider trading and takeover bids
- 5th: the securities rules for corporate governance
- Administration and enforcement of securities laws of each prov is the responsibility of a specialised agency of the govt of the prov
- In ON it is the ON Securities Commission (OSC) more **pg.467**

The Relationship between Corporate Law and Securities Law

Scope of application: Corp and securities law differ in their scope of application. Corp laws of a jurisdiction are concerned with only corps incorporated in that jurisdiction. The corp laws of the jurisdiction of incorp apply to the corp and its shareholders whether or not the corp operates in that jurisdiction or the shareholders are resident there. The corp law of the jurisdiction of incorp applies even if there is no other link between the corp and the jurisdiction apart from the act of incorp

Securities laws of a jurisdiction are concerned with all business organizations, not just

corps, which sell or offer to sell securities to investors within the territory of that jurisdiction—regardless of the jurisdiction under which the business organization was created. As securities laws are directed to the operation of markets, they are concerned with prospective and current investors equally, whereas corp law affects only current shareholders. So regardless of jurisdiction under which a corp is incorped, ON securities laws will apply if it sells or offers to sell securities in ON.

Enforcement: securities- OSC has broad discretionary powers to ensure that participants in the securities markets are acting in the public interest (**OSA s127**) The enforcement of corp law rules is generally left to the parties affected.

Substantive Law: Corp law addresses a significant number of areas not dealt with in securities laws. Look in book **pg470**

- Securities law are typically mandatory in nature
- Prov incorp corps must comply with the requirement in their jurisdiction as well as security laws in each jurisdiction in which their securities are held or offered.
- Caused corps and securities market participants to lobby for a single set of requirements. Proposals for this have floundered.

Nature of the Corporation

Separate Existence and Limited Liability

- Incorporation bring into existence a new legal person whose rights and obligation are analogous in many but not all ways to those of a human
- **S15(1) CBCA:** a "*corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person*"
- The separate legal existence of the corp was confirmed by HL in **Salomon v Salomon [1897]**: Arom Salomon transferred a leather-boot business, which he carried as a SP to a corp. He and his 6 family members were shareholders. As part of consideration for transfer of business, corp issued debentures to him that represented a claim against the corp for £10,000, secured against assets of business now owned by the corp. It also issued shares to him. As result, after transfer he held vast majority of shares & was in effective control of corp as well as being a secured creditor to it. Business ran into financial difficulty—liquidator was appointed to gather assets of corp, pay off debts and transfer any remaining assets to shareholders. If secured claim of Aron S had been paid first, as it would normally be, there would have been no assets left out of which to pay the other creditors who were unsecured. Liquidator claimed corp was a sham & that S was merely continuing business in another name. HL rejected this claim and held: S had done what was exactly contemplated in the Companies Act 1862 and that all the requirements of the Act had been complied with. In these circumstances there was no reason to give effect to the separate legal existence of the corp and to permit Aron S's claim to be paid ahead of the unsecured creditors. More **pg 127**
- As indicated in case above, the separate legal existence of the corp means that a shareholder may also be a creditor or even a secured creditor of the corp
- The only restriction is that a corp may not grant a security interest in its assets in

favour of shareholder as security for a loan from the shareholder if the purpose of doing so is to defeat the claims of existing creditors.

- Another consequence of the separate existence of the corp is that it owns its own property
- Shareholders have certain property like rights in the corp through their shares but no property interest in the assets of the corp
- Shares represent claim to the residual value of the corp after the claims of all creditors have been paid

- Courts considered the nature of the residual claim represented by shares of a corp in **Kosmopoulos v Constitution Insurance Co. of Canada [1983]** K was the sole shareholder and the only director of a corp. He was not careful to distinguish his personal rights and obligations from those of the corp and as a result, the insurance on the assets of the corp was taken out in his name rather than in the name of the corp. When a fire damaged assets of the business, the insurance company refused to pay on the ground that K did not have any 'insurable interest' in the assets. The SC held: even though K had no ownership interest in the assets, his interest was the sole shareholder in the residual value of the corp's assets gave him substantial stake in those assets that it could amount to an insurable interest.

- Unlike partners, a shareholder may be an employee of the corp in which he holds shares just as he may be a secured creditor
- In **Lee v Lee's Air Farming Ltd [1960]** a person was held to be capable of entering into a contract of employment with a corp of which he held all but one of the shares was appointed "governing director...for life." The PC held it did not matter that this would mean that he would negotiate his employment with himself, acting on behalf of the corp.

Disregard of the Separate Corporate Legal Personality (pg129)

Intro

- It shifts the risk of business activity from shareholders to other stakeholders
- courts disregard the separate personality by using an expression of piercing the "corp veil" in regard to some specific claim of a creditor of the corp whose claim would not be paid because the corp has insufficient assets to satisfy it
- this does NOT destroy its separate existence for all purposes, but only for the limited purpose of granting relief to the creditor directly against the shareholder
- however, cases in this area illustrate no consistent principle (**Clarkson→** below)

- **Clarkson Co. Ltd. v. Zhelka [1967]**
  - Selkirk was a real estate developer who operated through a maze of corporations.
  - When he was in financial problems he had one of his companies transfer the property he owned to his sister who then took out a mortgage on the property.
  - **Ratio**: <u>If a company is a mere agent for an individual, formed for the purpose of doing a wrongful or an unlawful act, then the individual(s) who</u>

formed it are fully liable for that act.

- The company was incorporated prior to the financial problems and was not incorporated in order to avoid his financial problems.
- **Though close to the line, the company was not merely an agent for Selkirk,** therefore the incorporation stands and limited liability applies.

- **Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd. (1972):** Court decline to pierce the corporate veil. R did not have any assets and there was action between R and N. The question was whether or not award for cost should be fixed personally against the shareholder? Court ruled in favour of R. Shareholder was not a party to the contract as recognized in *Salomon* because the contract was made with the company on its own

  Pierce the Veil Cases: There is no authority to perform the action of piercing the corporate veil. They can be lumped into a couple of categories:
  - There are evil things going on (fraudulent conduct)
  - Clear that there was deliberate action by shareholders
  - Involving tort claims against the company
  - Company not incorporated for *bona fide* business reasons
    - Tax advantages
  - Non-arm's length transactions between parent and subsidiary companies
    - Agency principle applied

- **De Salaberry Realties Ltd. v. Minister of National Revenue (1974):** There was a complex series of holding companies created for the purpose of purchasing some properties. For every property purchased they incorporated a new company. They had no money and every time they need money they must get it from their parent corporation. The only way that these companies exist is by the control of the parent company and ALL the directors of all the businesses were the same people. **Held:** The companies were not independent businesses. Thus must be assessed for taxation with their parent corp.
  - Courts may sometimes treat more than one legal corporation as a single legal entity where one has a controlling interest in the other(s) and has integrated their respective affairs.
- **Walkovsky v. Carlton (1966)** Issue: *Can the veil be pierced when a company is incorporated to avoid tort liability?* In this case, though the SH has set up several separate corporations in order to avoid tort liability, this is not illegal, as **there is no evidence of these individual corporations acting as an agent of a larger corporation**. If it is not fraudulent for the owner-operator of a single cab corporation to take out only the min required liability insurance, the enterprise does not become either illicit or fraudulent merely because it consists of many such corporations.

It is Just Not Fair

- Courts have held that they have the power to ignore the separate existence of the corp where to fail to do so would yield a result which is "*flagrantly opposed to justice*" = UNCLEAR!
- In **Transamerica Life Insurance Company of Canada v Canada Life Assurance Company [1996]** the court made it clear that any uncertainty in this standard doesn't give the court a blank cheque to disregard the corp's separate personality

- Courts likely to be more sympathetic to claims by 3rd parties, such as creditors and tort victims than those by shareholders who benefit from separate corp personality
- In **Kosmopolous**, the court declined to disregard the separate existence of a corp at the request of the sole shareholder in order to give him an ownership interest in the assets of the corp that would have allowed him to recover insurance proceeds for loss of corp's assets
- In **Meditrust Healthcare Inc. v Shoppers Drug Mart [2002]** a parent corp was not allowed to claim damages for loss of goodwill in connection with actions injuring the business it carried on through subsidiaries. The court refused to disregard the separate existence of the corps to allow the parent to claim for injuries to the subsidiaries.

- There are cases in which the courts have disregarded the separate existence of the corp for the benefit of the shareholders
- Where creditors or other 3rd parties seek to have a separate personality of the corp disregarded, the courts are more likely to disregard the separate personality if in doing so results in liability being imposed on another corp as the share holder rather than on an individual (**De Salaberry**)
- Where the separate corporate personality is disregarded there is some element of unfairness in the way the corporation is being used combined with another ground described below (e.g. objectionable purpose)

Objectionable Purpose

- Where corp been incorped to facilitate or do something illegal/improper for the individual shareholders to do personally, or in order to reduce taxes paid to the Canada Revenue Agency, courts have been willing to disregard the corp's separate legal personality in some circumstances
- Most common objectionable purpose is fraud which can arise when shareholders use the corp to effect a purpose or commit an act that he could not effect or commit on his own

- In **Big Bend Hotel**, Kumar had fire-loss insurance that was cancelled due to previous fire-loss claim. He incorped a corp to own a hotel and had the corp apply for fire insurance, instead of applying himself. In application he failed to disclose previous fire-loss claim. Hotel burned down & the insurance company refused to pay & the corp sued.
    - HELD: Kumar's failure to disclose his personal fire-loss history was fraudulent. The corp's sole purpose was to disguise the fraud & so court refused to permit the corp's claim, in effect treating it as if it had been made by K.

- In **Gilford Motor Co Ltd v Horne [1933]** D entered into agreement not to solicit customers of former employer. He incorped a corp to carry on a competing business and sought to attract the employer's customers. Even though he did not hold shares in the corp, court held that the corp could not be used to permit the D to avoid his contractual obligations and ordered the corp to cease soliciting the employer's customers

- **Rogers Cantel Inc v Elbanna Sales Inc [2003]** *(the court disregarded the separate existence of the corp to ensure the effectiveness of a non-competition obligation)* the non-competition obligation was in a contract between the 2 parties. Elbanna, a corp was controlled by Annable, the main individual through whom the corp's obligations were to be performed. Annable became involved in another corp that entered into an agreement with a competitor of Rogers. A was not a shareholder but was actively involved in its activities, including soliciting customers on behalf of Roger's competitor. Quebec CoA found that the actions of A violated the non competition obligation

- Fraud also arises when assets are transferred to a shareholder for the purpose of rendering the corp incapable of performing an obligation that is owed to a 3rd party
- Fraud, at times, will consist of a representation to a 3rd party that the person the 3rd party is dealing with is not the corp, but an individual or another corp that has substantial assets
- The fraud must involve misrepresentation regarding the identity of the corp and NOT merely some attribute of the corp, such as assets

- In **B.G Preeco I (Pacific Coast) Ltd. v Bon Street Holdings Ltd [1989]** court refused to disregard the separate existence of the corp in an obv case of fraud because the fraud din't relate to the identity of the corp. FACTS: 2 individuals acted on behalf of a corp in negotiating the purchase of some property. Vendor knew the corp has substantial assets. Just prior to closing the transaction the 2 individuals changed the name of the corp and another copr that had no assets. The contract was signed on behalf of the new corp with no assets. More facts on **pg134**
- Contract damages are intended to put the innocent party in the same position as if the contract had been fulfilled
- Tort damages are intended to put the victim back in the same position he would have been in if the tort had not been committed
- Here, because the property rapidly declined in value after the sale was negotiated, only contract damages would have given the vendor the high price agreed to in the contract
- As illustrated in this case, fraudulent misreps by a director, officer, or shareholder that a corp has sufficient assets to meet its obligations will result in personal liability for fraud for these people
- The "interests of the Revenue" have been considered to be a special case in need of protection" eg
  Salaberry: pg 135

- **Stubart Investments Ltd v M.N.R [1984]** SCC signalled that the courts should be less willing to disregard the separateness of corp personality in the interests of imposing tax liability even where no business purpose for the corp is shown, other than minimizing tax liability.

- In 1988 the **Income Tax Act** was amended to introduce what has been called the "General Anti- avoidance Rule" (**s245(2)**) This provision allows Canada Revenue Agency to disregard transactions if they are abusive tax-avoidance transactions
- It is a tax-avoidance transaction if it is entered w/o any real purpose other than obtaining a tax benefit
- In light of the General Anti-avoidance Rule- courts will be reluctant to disregard separate corp personality on the basis of the "interests of revenue"
- But some tax cases continue to apply the prior case law on piercing the corp veil

- Courts also disregard the separate corp existence when a corp is being used to avoid other statutory requirements but judicial intervention of this kind is rare
- In **Wildman v Wildman [2006]** the disregard of the separate existence of a corp was being used for an objectionable purpose. W was the sole shareholder, director, and officer of a corp. He was in complete control and did not distinguish between corp and person assets. By determining when and how the money was paid to him by the corp, he prevented support from flowing to his spouse and children. CoA of ON determined the corp could be made responsible as well as W, for an order for spousal and child support, inc substantial arrears and costs. Court held that it would be flagrantly opposed to justice to allow him to use the separate corp existence to avoid his family law obligations.

Agency

- Courts disregard separate corp personality when the corp is merely acting as the agent of someone else (usually the controlling shareholder)
- The corp form is not disregarded by a holding that it is an agent, rather the business of the corp or the activity which gives rise to the claim by a 3rd party is determined to be carried on not by the corp directly but only as an agent of the controlling shareholder.
- Test for this form of agency - whether there is extensive control by the shareholder over the corp
- Factors referred to in **Smith, Stone, and Knight Ltd v Birmingham Corp [1939]** are cited as relevant to determining whether agency exists: **pg 137**
- Extensive & even complete control by a single person is permitted under **CBCA**, so the existence of the control satisfying the test in **Smith** (above) cannot in anyway be conclusive
- There's legitimate reasons that corps may carry on business through subsidiary corp in which they hold all the shares.
- Where subsidiaries are used, the degree of control by parent corp may range where the same person owns 100% and is the sole director, officer of the parent corp and minimal ownership subsidiary, as if it were independent.
- There's nothing in any corp statute which suggests that any particular degree of control is inappropriate or prohibited
- In **Alberta Gas Ethylene v M.N.R [1989]** Madame Justice Reed observed that

Smith does not propose that the separate existence of a subsidiary corp is to be ignored when the 6 criteria are met. One must ask for what purpose the corp was incorped and used, and consider the overall context in which the obligation to the 3rd party arose

- In **Gregorio v Intrans-Corp [1994]** it was held that the policy behind holding a parent corp liable is "*to prevent conduct akin to fraud that would otherwise unjustly deprive Cs of their rights*."
- Where court finds a subsidiary set up for legitimate reasons, disregarding the seperate existence of the subsidiary is inappropriate
- More restrictive approach has been applied in a number of recent cases **pg138**
- Cases may still be found where courts simply apply the **Smith** factors to justify piercing the corp veil

Other Factors

- Lack of respect for the corp form is cited in some cases as supporting the disregard of corp personality
- In **Wolfe v Moir** an officer of a corp that operated a roller skating rink was held personally liable for the negligence in connection with an injury to a skater. Basis of the court's finding was that the business was advertised using a name incorporating the officer's name, and not the corporation's name. The name used had not been registered as required under Alberta law and the failure to refer to the proper corp name was a contravention of the corp law then in place
- In other decisions, the lack of proper corp authorisation for transactions and the use of shareholder funds to pay corp obligations were NOT found to be sufficient reasons to pierce the corp veil (**Rockwell Developments)**
- Inadequate or "thin" capitalisation is also sometimes referred to as supporting or leading to the disregard of corp personality (**De Salaberry**). This occurs when the shareholders' investment in a corp is inadequate to meet its anticipated obligations.

Incorporation

Considerations and Process

Introduction (pg146)

- Under the CBCA individual incorporators cannot be any of the following:
  - Less than 18 yrs of age
  - Of unsound mind as found by a court in Canada or elsewhere
  - Have the status of bankrupt (**s.5**)

Registered Office p. 161

- Under CBCA: necessary to identify in its articles the prov/territory in Canada where the registered office of the corp is situated
- It doesn't need to be the head office but only a place within the jurisdiction at which the records of the corp are kept (**CBCA s20 (1)**) and may serve as the address for the correspondence with the CBCA Director and for service docs (**CBCA s254**)
- Office may be changed by amending articles (**CBCA s173(1)(b)**) which requires

approval by a special resolution of shareholders and filing articles for amendment

- Change in address within the province/territory may be made with approval of directors. Where change is approved, a Notice of Change of Registered Office must be filed with the director within 15days of date of change (**CBCA s19(4)**)

- Registered office of a prov corp must be located inside the incorping prov in the municipality/geographic township specified in the articles (**OBCA s14**)—registered office may be changed by resolution of shareholders (**OBCA s14(3)**)
- Articles of amendment need not be filed but a notice of change of address needs to be filed
- In ON such notice is required under **Corps Info Act 1990**

Class and Number of Shares p 162

- Articles define classes of shares the corp is authorised to issue
- They set out the name by which each class of shares is to be identified as well as "rights, privileges, restrictions and conditions" of each class
- In small corps = 1 class of shares: Common shares, which vote and are entitled to receive dividends declared by the board of directors and the remaining property of the corp on dissolution
- Characteristics of shares determine their price and value
- "Preferred shares": **pg 162**
- necessary to specify the # of shares a corp may issue which is provided for in the articles
- Additional shares may be issued after amending articles to change the limit—requires shareholder approval by special resolution

Number of Directors p 163

- Under CBCA: specify in articles # directors (**s6(1)(e)**)→ can be changed by special resolution of shareholders
- corp statues impose certain requirements: eg CBCA: corps that distribute their shares, must have at 3 directors @least 2 of whom are not officers or employees of the corp or affiliated to it
- all other corps need only 1 director (**CBCA s102(2)**) → # of directors may be changed by amending articles

Restrictions on Issuing, Transferring, or Owning Shares p 164

- due to lack of restriction on share transfer, they are presumed to be freely transferable, unlike partnership interests
- normal for there to be a restriction in articles on transfer of shares where there's few shareholders
- "right of first refusal" when shareholder wants to sell his share - has to offer to other shareholders before offering to anyone else
- Restrictions on transfer w/o director/shareholder consent are often included to ensure that the share transfers will be exempt from prov securities law requirements
- Restrictions may be imposed on issuance
- CBCA permits the inclusion in articles of a right for each existing shareholder to purchase any new shares to be issued in proportion to his holdings of shares prior to issuance of shares to anyone else (**CBCA s28**): known as "pre-emptive right"
- Another restriction- the class of acceptable shareholders: not to non Canadians- maybe

to ensure corp continues to qualify under a govt program requiring Canadian ownership **pg165**

- Corp's articles may provide restrictions for the same purpose

Restrictions on the Business the Corp May Carry On p 166

- Under CBCA not necessary for corp to describe its activities
- The corp has all the capacity and, subject to certain limitations in the corp statute, the rights, powers and privileges of a natural person (**CBCA s15**)
- To avoid risk of ultra vires activities - common practice not to include in articles any restriction
- Even where restrictions are included in the corp's articles, the rules that ultra vires obligations are unenforceable against the corp has been largely mitigated under CBCA
- If restriction is included in articles, CBCA provides that the corp is forbidden to act in a manner contrary to the restriction (**CBCA s16(2)**)

- If corp does something contrary to restriction the act is not invalid by reason only that it is contrary to the articles (**CBCA s16(3)**)
- Therefore, no 3rd party should be prejudiced because a corp enters into an obligation with the 3rd party that is contrary to its articles - 3rd party should still be able to enforce the obligation
- This doesn't mean that the restrictions in articles are of no effect
- Shareholders may seek relief from any contravention of such a provision if its effect on the shareholders is "oppressive, unfairly prejudicial to or unfairly disregards [their] interests" (**CBCA s241(2)**)
- Also, shareholders & creditors may apply to a court for an order restraining the corp from acting in a manner contrary to the articles to directing compliance with the articles (**CBCA s247**)

vi) **Other Provisions→** a variety of other provisions are sometimes put in the articles **pg167**

- In addition any provision permitted by the CBCA to be included in a by-law may be included in the articles (**s.6(2)**) and what may be included in a by-law is virtually unrestricted (**CBCA s.103(1)**)
- Articles can only be amended by special resolution of shareholders requiring approval of 2/3rds and are a matter of public record
- By-laws only require a simple majority and are not a matter of public record
- Thus many lawyers suggest that the content of articles should be minimized to simplify the process of incorp

Other Documents Required to be Filed on Incorp

- Initial Registered Office and Address& First Board of Directors- needs to be filed
- CBCA requires @least 25% to be residents of CA (**s105(3)**)
- All jurisdictions charge fee on incorp
- More on **pg169**

Completion of Incorp

Post Incorp Organization pg172

- If the Directors named in the initial registration have resigned or been removed and not replaced, any person who manages/supervises the business/affairs of the corp is deemed to be a director (**CBCA s.109(4)** and **(5)**)
- At the first meeting the directors will typically adopt arrangements for carryong on the formal legal business of the corp, these arrangements are usually set out in a by-law
- The by-law must be passed by the directors but will only continue to be in effect if it's passed by the shareholders at their next meeting (**s.103**)
- Once shares are issued shareholders meeting are usually held to pass the by-laws
- Shareholders often enter an agreement to customize the way in which the corp is governed by agreeing to alter the rights/obligations provided for in the corp statute
- All of these documents must be maintained by the corp

Considerations Relating to the Scale of the Corp

- Vast majority of corps are: private corps
- OBCA distinguishes between "offering" and "non-offering" corps
- Offering corps are those that have offered their shares to public
- Non-offering are all the rest types of corps
- More on **pgs174-178**

JURISDICTION OF INCORP p 178

Factors Affecting Choice of Jurisdiction

Disclosure Obligations

- This does not play a significant role in the selection of where to incorporate because information filing is similar in all jurisdictions and is not considered onerous
- Corps must make filing in every province where it carries on business outside its jurisdiction of incorp
- Failure to file or filing untrue or misleading info are offences under the CBCA and provincial law
- More on **pg178**

Where the Corp will Carry on Business

- Incorp under CBCA gives right to carry on business in all provs
- Prov incorp gives right to carry on business only in prov of incorp
- Prov incorp means that a corp may carry on business in another prov, but only if it obtains a license under the extra-prov licensing leg in place in the prov
- Under the **ON Extra-Prov Corps Act** (**s4(1)**) corps incorped under the laws of other Canadian provs are exempt from the requirement to obtain a licence
- Where a business is intended to be carried on across the country or in several provinces, fed incopr avoids provincial licencing requirements altogether and so may be desirable

Liability for Prov tax

- Prov income tax is based on the income earned by the business in the prov regardless of its jurisdiction of incorp

Provisions of Corp law

- "uniformity" is an express objective of the CBCA (**s.4**) so differences in the corp law regimes among fed/prov/territorial jurisdictions are not significant
- Main changes to the CBCA by the 2001 amendments as well as the differences in BC legislation are on **pg183**

Recognition

- If business to be carried on outside CA, it's preferable to incorp under CBCA as foreign ppl may be unfamiliar with law of prov jurisdictions

Corporate Names

Names

- A name may be recognised by consumers/business customers as indicative of prestige, product quality, or service: GOODWILL
- One policy of name regulation is to protect legitimately created goodwill of a business against appropriation by others
- Courts have stated "the danger to be guarded against is that the person seeing or hearing one name will think it to be the same as another which he has seen or heard before" (ie name regulation seeks to prevent confusion in the marketplace)

Corporate Law Rules Regarding Names

- CBCA regulates use of names of corps incorped under the Act to ensure that they are not confusingly similar /deceptively misdescriptive
- **S12(1)(a) CBCA** provides a corp may not be incorped with or carry on business using a name that is "prescribed, prohibited or deceptively misdescriptive."—if a name is contrary to this provision, the director who administers the CBCA may refuse the incorp
- Under **OBCA** a hearing must be held before any name changed is ordered (**s12(1)**)
- CBCA Regs set out absolute and qualified prohibitions in the use of names for the purpose of **s12**
- Names may not be used that are obscene, or that use phrases that others are entitled to **pg149**
- **S22--6 CBCA** Regulations prohibit use of certain names w/o consent
- Names that are not distinctive enough cannot be used—**s24** sets out criteria to determine this
- An exception is the names that are not inherently distinctive but through use, have acquired a secondary meaning eg General Motors—in other words if a name has been used in CA for so long that it has obtained a level of recognition that distinguishes it from its competitors, then its not prohibited
- In order for name to be distinctive, it must combine a distinctive element with a descriptive element
- whole name needs to be distinctive **CBCA Regulations s19**
- if distinctive element is highly original coined word then no descriptive element is necessary
- **s25 CBCA Regulations** sets out a list of factors to be considered in assessing whether corp name is confusingly similar to a TM or trade name—**pg150**
- In **I Browns Packaging Inc. v Canada (Consumer and Corp Affairs) (1982)** the court found that I. Browns Packaging Inc. designed packaging products for a small number of industrial customers, whereas Browns Bottle (Canada) Ltd acted as distributor for various packaging products. **Pg151**
- **s 27-31 CBCA Regulations**: further rules re the possible confusion of names
- deceptively misdescriptive names are prohibited—term defined by **s32 CBCA Regulations pg152**

- Final requirement in CBCA & all corp statutes: each name has a legal part (e.g. "Ltd" "Inc")
- corp must use its full legal name on all "contracts, invoices, negotiable instruments and orders for goods or services issued or made by or on behalf of the corp" (**CBCA s10(5)**)
- Where indiv acts on behalf of corp in carrying on a business but fails to clearly use legal name of the corp as to ensure that any person dealing with the business is aware that the person who is carrying on the business is the corp, the indiv may be found personally liable for obligations of the business
- in **Commercial Tire Supply Ltd v Tanney (2000)** the failure to set out the corp name on a credit card application and cheques, used to pay what were later claimed to be corp debts, or otherwise indicate that the corp was responsible for a credit obligation led to the imposition of personal liability (PL) on the corp's shareholder.

- However, liability is NOT automatic—it depends on the facts of each case
- If an individual does not take reasonable steps to ensure that he is perceived as representing the corp rather than himself as an individual, he risks PL to a person that he deals with
- In some provs PL is expressly provided for

Provincial Registration and Licensing Rules Regarding Names

- Each prov regulates names used to carry on business within its borders
- A corp carrying on a business in ON using a name other than its full corp name must also register its other name. Failure to do so means the corp cannot maintain action in courts of ON in connection with an obligation of business. With consent of court, an action may be permitted to proceed if **pg153**. Failure to register is an offence under **s10** - enforcement is rare. **S6** provides incentive to private enforcement of the Act, a registered person may claim compensation of up to $500 for damages suffered by another registering a name that is the same/deceptively similar to his own

- Claims of compensation under OBNA are legally independent of any Q of confusion under corp statutes, TM infringement, or common law passing off- liability under these heads tends to overlap

- Provs regulate use of corp names by corps incorped outside the prov through their extra-provincial licensing regime. These licences are routinely granted except where the name of the corp is confusingly similar to the name of the business already being carried on in the prov
- Fed incorped corps have a right to carry on business in any prov—no licence is required
- It has been held by Manitoba CoA that a prov has no constitutional jurisdiction to refuse to permit a fed corp to use its corp name, since use of its name relates to the status of the corp **pg154**
- In the same case, court had to consider to what extent a prov is competent to regulate a fed corp's use of names other than its corp name and any TM it owns - held that the prov power to regulate the use of a business name depends on whether the corp conducts business interprovincially or wholly within the province, only in the latter case may the prov regulate the use of the name
- The power granted to the Registrar under the BNRA of Manitoba to order the change of a name could not be applied to a fed corp carrying on an interprov business
- Court held that the provisions of the Act, equivalent to those of **s2 OBNA** that require only registration of a business name used by a fed corp, were within the constitutional competence of the prov regardless of the nature of the corp's business
- They were validly enacted to permit the public in Manitoba to find out who is responsible for a business being carried on by a corp under a name other than the corp's legal name, a matter of CR within the prov
- The registration requirement was held NOT to impede the ability of interprov businesses to carry on their businesses

- The Manitoba CoA also held that a prov has no jurisdiction to restrict the use of a TM by a corp out of concern that the TM is similar to a business name in use in the prov

- TMs are a matter of fed jurisdiction
- However, prov is not prevented from restricting the use of the TM in a business name used by a corp other than its corp name in accordance with the rules described above
- Any challenge to use of TM would be under fed law—NOT prov registration leg

Trade-marks Act Rules Regarding Names

- A trade mark is a word, phrase or symbol used in association with goods or services
- Use of a mark in association with goods/services in the marketplace gives the owner certain rights to use the mark exclusively in association with those goods/services, including a right to claim damages against anyone who infringes the mark
- Registration of TM is not requires but is provided for under the **TMs Act**
- Registration gives benefits, such as a presumption of the TM being valid
- **S20 TM Act**: TM is infringed by use of confusing TM or trade name
- **S6 TM Act**: defn of confusion
- Trade name for the purposes of the **TMs Act** is simply a name used by a business
- Trade name is not a TM unless its also used to identify the goods/services
- A corp name or other trade name is not necessarily a TM, and the use of words claimed to be a TM in a corp name will only be one factor court will consider in determining whether the words are a valid TM. The words must be used as a TM to identify goods or services to be valid
- There are no cases that address the extent to which confusion for the purpose of TM infringement and for the purposes of the corp statutes are the same. More **pg156**

- The remedies are very different: A successful TM infringement action may entitle the plaintiff to damages and an injunction directing the defendant to cease using the TM and to deliver up any goods bearing the mark. A successful complaint under the corp statutes results in only a direction of the corp to change its name. Any use of a TM would be unaffected
- The Fed Court has jurisdiction over TM matters, whereas corp names disputes under the CBCA must be resolved first, before the Director appointed under CBCA and, then, on appeal, in prov superior courts

d. Passing- Off

- A person carrying on business under a name has a common law right to seek damages against someone selling products in a manner that is likely to deceive purchasers of the products into thinking that they are purchasing the first person's products, thereby depriving him of profit.
- An injunction to prevent such "passing-off" may also be claimed
- Passing off action may be brought under **s7(b) TM Act**
- SCC held that to succeed in a passing off action, the plaintiff must show: **pg 157**
- In **Greystone Capital Management Inc. v Greystone Properties Ltd. (1999)** the Plaintiff Greystone Capital Management (Capital), had started carrying on a business of soliciting investments under its corp name in BC in 1994. Many companies including Greystone Properties began carrying on similar business in 1995. The court found that before the D began to use the Greystone name, Capital had established a reputation in the

investment community in BC. The court also found that the adoption of corp names incorping the word "Greystone" constituted a misrep by the Ds that their businesses were connected with Capital's and that some people has confused the Ds business with Capital's. Court ordered that Ds corps change their corp names to names that did not include the word Greystone within 4months.

- Claims for passing off are legally independent of any Q of confusion under corp statutes, TM infringement, or liability under business names legislation
- There's many limitations to passing off action that don't apply to TM infringement. Most importantly, to est passing off, the plaintiff must prove that it has a reputation associated with the mark and some likelihood that the public will be deceived. Use of a TM will not be required for a successful infring action, it's not necessary to prove that this use has resulted in a market reputation
- Passing off can be used only to protect a business against others operating in the region in which the plaintiff carries on its business. Once a TM is registered is must be recognised by courts all over Canada.
- An infringement action can be successful against a confusingly similar mark w/o any proof of damage
- In **Brick Warehouse Corp. v Brick's Fine Furniture Ltd. (1992)** Fed Court refused to order a stay of proceedings before the CBCA Director while the trade-mark dispute on the same facts was being dealt with in the Fed Court. The passing-off action stayed on the basis that the passing off claim had been raised by counterclaim in the Fed Court proceeding. Dispute was settled out of Court **Pg159**

e. Names and the Incorporation Process

- A name search must be obtained and submitted with the other docs required for incorp
- Along with name search, ppl seeking to incorp under CBCA must submit a Corp Name Info Form or otherwise provide certain info relating to the name they have chosen to assist Corps Canada with its assessment of whether the name is available. The following Qs must be addressed see **pg161**

Landmark Inns v. Horeak, [1982]

- Horeak and 3 other persons were planning to enter into an optical business. On Oct 25, 1979 Horeak signed a lease for space in the plaintiff's shopping mall (the Gordon Place Shopping Centre). He signed the lease as chairman of "South Albert Optical and Contact Lenses Ltd." The company was not incorporated until February 25, 1980. In the interim Horeak and his 3 partners decided to lease other premises in another mall (the Southland Mall). The plaintiff had incurred costs of modifying the premises according to the D's plans. The D (Horeak) then notified the plaintiff of its intention not to proceed with the lease. The plaintiff then claimed for the cost of renovations ($4,150) and 6 months of lost rent ($1,792.99 per month = $10,758). On March 19, 1980 South Albert Optical and Contact Lenses Ltd. adopted the Gordon Place Shopping Centre lease contract. Horeak then claimed that since the corporation adopted the contract he was relieved of any liability on the contract by s. 14(2) of the Saskatchewan Business Corporations Act (the same provision as CBCA s. 14(2)) and that since he signed in the name of the corporation it was an express provision in the terms of s. 14(4) that he was not to be bound. The court held for the plaintiff awarding damages of $12,419.61. The

court held that s.14(1) codifies ***Kelner v. Baxter*** (although it did not indicate which interpretation of ***Kelner v. Baxter*** it thought was codified by s. 14(1)). The court also held that a corporation cannot adopt a contract which has been repudiated since the contract is at an end and thus there is nothing to adopt. Horeak had repudiated the contract when he notified the plaintiff of the intention not to proceed with the lease. Therefore s. 14(2) would not operate to relieve Horeak from liability. With respect to the operation of s.14(4) the court held that having the name of the company on a contract is not sufficient for the purposes of s. 14(4) to alter the liability of the promoter under s. 14(1) – altering s. 14(1) requires an express provision. The circumstances of the case are consistent with the kinds of circumstances in which the Dickerson Committee (the drafters of the CBCA) felt s. 14(3) was necessary. However,instead of invoking s. 14(3) to allocate the liability back to Horeak, the court seized upon the notion that a corporation cannot adopt a contract that has already been repudiated.

Pre-Incorporation Contracts

Intro

Common law

- Under CL it was clear that the corp was not liable for contracts purported to be entered into on its behalf before it came into existence and could not be made by any unilateral act of adoption or acceptance afterwards. For the crop to be liable there had to be a new contract between the corp and the 3rd party. Such a contract requires a post-incorp exchange of promises between the corp and the 3rd party
- Circumstances in which the agent would be personally liable were unclear
- Liability of agent depended on the intention of the parties as determined by the courts
- If parties both knew that the corp was not in existence, a presumption arose that the parties intended that the agent would be personally liable
- This was the conclusion reached in **Kelner v Baxter**. Facts on **187**
- If parties thought that the corp was in existence no such presumption arose and the parties' intention had to be determined from all the circumstances
- In **Black v Smallwood (1966)** B entered into a contract with S who purported to act on behalf of Western Suburs Holdings Pty. Ltd. Both believed that the corp was incorped. S signed the contract as director of the corp. In fact, the corp had not been incorped. When B sued S alleging that S was personally liable, the court held that he was not. Since the parties both believed that the corp was in existence, the court determined that they had not intended S to be personally liable.
- Where the agent knew that no corp was in existence but the 3rd party believed that he was dealing with an existing corp through an agent, one might think that no contract could arise because there would be no consensus btw the parties. Often courts have held the agent liable in these circum.
- even if contract cannot be enforced against the agent, the 3rd party may be able to claim damages against the agent where he can show a misrepresentation by the agent that the agent was acting for a corp, which induced him to enter into contract to his detriment.

Statutory Reform

- The CL rules regarding pre-incorp contracts were unsatisfactory. In many cases 3rd parties were denied relief based on highly artificial conclusions regarding the parties' intention
- More important, the inability of the corp to adopt contracts made for its benefit was often manifestly inconsistent with what the parties intended
- As a result statutory reform attempted in most jurisdictions
- **S14 CBCA:** attempts to reform the law to make the indiv agent liable in most circumstances and to permit the corp to adopt contracts made on its behalf before it came into existence.
- Elements of the scheme are on **pg 188**
- Statutory reforms have tried to eliminate the problems of the common law.
- Now agents bear the risk of all liability prior to the adoption of a contract, unless the agent's liability is expressly excluded by the agent and the 3rd party, in which case the risk of non-adoption is transferred to the 3rd party
- This arrangement reflects the view that the agent is usually in a position to ensure that the corp is incorped and adopts the contract and so can manage the risk of non-adoption more effectively than the 3rd party
- However, there's several problems with the statutory scheme:
    - The CBCA and corp laws of AB, Manitoba & Saskatchewan apply only to written contracts, so old CL rule still apply to oral contracts made by or on behalf of a corp. By contrast, the OBCA and others don't distinguish between oral/written contracts, while the corp laws of NS & PEI don't address pre-incorp contracts at all. These differences may lead to anomalous results, depending on the jurisdiction in which the agent chooses to incorp. Eg on **pg189**
    - If a corp is never incorped, it is unclear what rules should apply to determine the respective liability of the agent and the corp. It may be argued that the provisions of a corp statute come into play only when there has been an incorp under the statute, since they refer to contracts made " *before [the incorp] comes into existence"* and, moreover, the scope of corp law in each jurisdiction is generally limited to corps incorped in other jurisdictions
    - Language used in some of the corp statutes is problematic. (Eg, a close reading of **s21(1) OBCA** seems to suggest that its necessary to determine that a contract exists in order for the section to have any application. But if it's necessary to find an effective contract, then the provision simply restates the CL rule that an agent is liable only if the parties intended the agent to be bound under the contract. Similarly **s21(2),** permitting the corp to adopt a contract made up for its benefit, applies only if there is a contract, suggesting that adoption is permitted only where the agent is bound personally to a contract under CL rules. Such an interpretation has been suggested by commentators and was adopted in ON in **Westcom Radio Group Ltd. v MacIsaac (1989)**, but seems contrary to the overall intention of the provision and has been strongly criticized. **Westcom** was effectively overruled in **Szecket v Huang (1998)** where the ON CoA held that the intention of **s21** was to replace the CL and that it was not appropriate to ask if there was a contract at CL before

applying stat scheme.

- Courts have been reluctant to grant relief under the provision permitting a court to hold the agent wholly or partly liable after the contract has been adopted by a corp. The provision was intended to provide a remedy in circumstances where the agent had arranged to have the contract adopted by a corp with insufficient assets to satisfy the obligations under the contract. In **Bank of NS v Williams (1976)** the court refused to exercise its discretion because the 3rd party was entering the contract was not misled regarding the identity of the person with whom it was really contracting and who would be responsible for performing the obligations under the contract.

Application of the pre-incorp contract rules of interest to lawyers occurred in: **Sherwood Design Services Inc. v 872935 ON Ltd (1998):**

- A law firm's client signed an agreement to purchase some real property "on behalf of a corp to be incorped". The client then instructed the law firm to prepare the docs to complete the transaction. A lawyer in the firm, instead of incorping a new company, decided to complete the transaction by using a corp that had already been incorped by a partner in the law firm (the shelf corp) to buy the property.
- The lawyer completed the legal docs to transfer title of the shelf corp to his client and to permit it to purchase the real property. He drafted a transfer of the one issued share from the partner to the client, a shareholder's resolution appointing the client as the sole director, a director's resolution authorising the transaction, a legal opinion that the contract was enforceable against the shelf corp, and some other docs in the name of the shelf corp. He then sent the package of draft docs to the vendor's lawyer for the comments, together with a cover letter indicating that the shelf corp would complete the purchase. When the date came to close the transaction, the client decided that the price was too high. He therefore refused to take a transfer of the share, sign the resolutions, or pay the vendor. Subsequently, the law firm transferred the partner's share in the shelf corp to another client, who began to carry on a profitable business through the shelf corp.
- Eventually, the unpad vendor sued the shelf corp. The vendor alleged that the agreement to buy the property was a pre-incorp contract that had been adopted by the corp based on the sending of the draft docs by the purchaser's lawyers to the vendor's lawyers. The issue was whether the letter by the purchaser's lawyer, indicating that the shelf corp would complete the transaction and attaching drafts of the docs necessary to complete the purchase, should be viewed as an adoption of the contract by the shelf corp.
- The ON CoA held the communication was sufficient evidence of the corp's intention to be bound. The court found that it would be within the usual authority of the lawyer acting for a purchaser to advise the lawyer on the other side of the transaction as to the identity of the corp that would close the transaction. The court also noted that, as a matter of policy, it is important for ppl to be able to rely on a lawyer's communications.

In **Design Home Associations v Raviv (2004)** the court had to interpret the words "*any action or conduct signifying an intention to be bound*" the test for what constitutes adoption for the purposes of the CBCA and OBCA. It held that a corp has adopted a lease signed by some indivs prior to incorp based on a subsequent request by the corp to have correspondence relating to the lease directed to it, paying the rent called for under the lease and requesting an assignment of the lease. Under both the CBCA and OBCA, adoption must be within a reasonable time following incorp.

- In **TMD Investments Led v Fiddleheads Cafe Inc (2007)** held that starting to pay rent under a lease, beginning almost 1 yr after incorp, did not signify an intention to be bound within a reasonable time.

The Corporation in Action

Liability of Corporation for Crimes and Torts

Intro

- **Lord Thurlow:** corps have "*no soul to be damned; no body to be kicked*"
- Imposing crim liability on a corp are diff from those associated with imposing liability on natural persons
- Mgrs of a corp will be discouraged from causing the corp to commit crimes to some extent by the prospect that the corp for which they are responsible will be found criminally liable
- The deterrent effect associated with the prospective damage to the corp's reputation caused by a crim conviction, however, will not be as great as the deterrence resulting from the threat of personal responsibility.
- This problem is mitigated significantly by provisions in the crim law and many regulatory statutes that impose liability on individuals through whom corps commit crimes
- To some degree remedies used to sanction crim behaviour are problematic when corp is the offender
    - Imprisonment is not possible
    - If a fine is imposed then shareholders, employees will suffer
- For a time, courts held corps immune from crim liability but more recently courts have developed rules on the basis of which corps may be convicted of crim and regulatory offences

Absolute Liability Offences

- The simplest types of offences
- Require the accused to only engage in certain proscribed behaviour→ *mens rea* not necessary
- Once behaviour proven→ no defence available
- D cannot argue it was an honest mistake
- Absolute liability offences are designed to encourage compliance with some regulatory scheme and address behaviour that is not criminal in nature eg

speeding on highway, environmental

- As only need to prove person engaged in prohibited act, these offences can be easily identified and efficiently prosecuted
- Corp liability arises for this type of offence when a person who engages in the behaviour does so on behalf of corp
- All acts of employees in course of their employment will give rise to corp liability for these offences
- Absolute liability offences punishable by imprisonment have been held to be unconstitutional as violating **s7 of the Charter** (the right to life, liberty and security of the person)
- Currently no case has held that such offences infringe rights of corps
- Since corp cannot be imprisoned—it doesn't have a s7 right in the circumstances
- A corp charged with an offence may challenge the constitutionality of the offence if it would violate
  s7 of indiv accused. If such challenge successful corp could not be held liable for offence
- Effect of **Charter**: many absolute liability offences being treated as strict liability offences, meaning that the accused can avoid liability if he can show he exercised reasonable care in the circumstances
  - Courts have adopted a general presumption that offences are subject to strict rather than absolute liability

Strict liability Offences

- Are subject to a defence that the accused acted reasonably in the circumstances "due diligence defence"
- The fault required to be shown is negligence
- Once its proven that the act was committed, the burden is on the accused to show on the balance of probabilities that it was not negligent
- SCC recently said that offences should be presumed to be strict liability offences unless a due diligence defence is expressly negated by the legislative provision creating the offence.
- For a corp to rely on this defence, the person who must exercise due diligence on behalf of the corp is someone who can be considered to be the directing mind and will of the corp such that he may be considered to be the corp itself
- "Directing mind and will" has been used by courts to determine whether a corp is liable for a mens rea offence

Offences Requiring Mens Rea (MR)

- Most criminal offences require the accused to have a degree of knowledge or intention = MR
- Under "identification theory" criminal liability may attach if the person having the necessary mental state and committing the crime has the identity of the corp (ie he is the corp for the purposes of the behaviour constituting the offence)
- Typically, the natural person will be criminally responsible also
- **Criminal Code** was amended effective 13 March 2004: to alter the rules used to determine when a corp is criminally liable, expanding the categories of persons

whose actions can trigger corp crim liability—these changes described as a "revolution" in the crim liability of corps

a) The Common Law Test—The Identification Theory

- Test for whether the identity of the corp and that of the indivi coincide: Is the human actor who committed the crime a vital organ or a directing mind and will of the corp? Any person who has the governing executive control over an area of the corp's business or affairs is considered to be the corporation in relation to that area
- Consequence: there may be more than one directing mind
- There is no need for the directing mind to have general decision making power over ALL aspects of the corp's business
- Each person responsible for a discrete aspect of the corp's business, whether defined functionally, geographically, or otherwise may incur criminal liability for the corp

- Eg in **R v Waterloo Mercury Sales Ltd (1974)** liability was imposed on a corp operating a car dealership as a result of the used car sales manager fraudulently causing odometers on used cars to be turned back. The used car sales mgr was found not to be the directing mind of the corp for the purposes of the crim activity

- The test is whether an employee has been delegated, expressly or by implication, the authority to design and supervise the implementation of corp policy, as opposed to only the authority to carry out such a policy

- In **R v Safety-Kleen Canada Inc (1997)** ON CoA held that a truck driver employed by a waste disposal business was not the directing mind and will of the corp and, as a result, the corp was not liable for the driver's actions in transporting hazardous waste w/o the necessary authorisation. The driver was the corp's only representative in a large geographical area and was responsible for collecting waste, billing, completing documentation, maintenance, and responding to calls from customers and regulators. CoA found that, notwithstanding these responsibilities, the driver didn't have any managerial or supervisory functions and did not have any influence over the corp's policies.
- Actions by employees giving rise to corp liability are not limited to those taken in the course of their employment (ie their terms of contract)
- Corp is responsible for any act by a directing mind in the general area of her responsibility, even if not specifically authorised by a corp rule or policy
- Even if there is a corp rule/policy prohibiting the action, that is no defence to corporate liability.

- Eg in **Waterloo Mercury Sales**, the car dealership had a policy against odometers, but the court held this did not absolve the dealership from responsibility
- Similarly, although a person must have actual power to make decisions regarding corp policy in the relevant area for her mind to constitute the corp mind, its not necessary to find that the responsibility over the area was created in accordance with the express provisions of the corp constitution or was formally authorised in any other way.
- Liability may be imposed on corps where, by virtue of the practice of the corp, the person with the guilty mind exercised corp authority in the area in which the offence

was committed

- The result of holding corps liable for acts of ppl in the area of their responsibility is that the corp bears the risk associated with unauthorised activity; no simple statement of policy that crimes should not be committed will save the corp
- Its not clear whether there is anything a Canadian corp may do to avoid liability

- One difficult Q in connection with corp criminality is whether there can be corp liability where the person alleged to be the directing mind of the corp was acting in his own interests and against the interests of the corp.
- These issues were considered in the leading case of **R v Canadian Dredge and Dock Ltd**: several corps charged with fraud. They agreed in advance who would submit the lowest bid to do dredging work at an inflated price. The lowest bidder would make payoffs to the others and subcontract some of the work to them. This fraud was negotiated by senior officers of each of the corps. Sometimes an officer would keep a portion of the payoff that was supposed to go to his corp for himself. The corps argued that the identification theory could not operate when the alleged directing mind was perpetrating a fraud on the corp in this way. The court accepted that where a person ceases completely to act in the interests of the corp and acts "totally in fraud of the corp employer" appropriating to himself all the benefits that should have gone to the corp, the identification theory should not apply. On the facts of this case, the requirements of this very narrow exclusion were not met. The corps were liable because the directing minds were not engaged in a scheme to deprive their corps of all benefits associated with the dredging contracts
- The requirements for the exclusion were met in **Oger v Chiefscope Inc (1996)** where the court found that a corp was not responsible for the fraud of 2 individuals who were directing minds of the corp because all of their actions were for their own benefit. They stripped the corp of all its assets, including those obtained fraudulently. In these circumstances the court determined that the individuals were not acting as the corp.

c) The New Standard for Corp Criminal Liability in the Criminal Code

- No longer necessary for the crim act to be committed by a person who's a directing mind of the corp
- A corp is deemed to be a party to a criminal offence committed by one of its "representatives"
    - Where a "senior officer" was knowingly involved in the offence in specified ways, even where the senior officer did not actually commit the offence;
    - Where the senior officer was aware of the offence and knowingly failed to take reasonable steps to stop the representative's participation in the offence;
- Liability is no longer limited to situations in which a single person commits the criminal act and has the requisite guilty mind
- The MR and action may be split between multiple reps
- Significantly, the amendments impose the same liability rules on non-corp forms of organizations including partnerships
- In revised provisions of CC, "representative" and "senior officer" are broadly defined
- "Representative": a director, officer, partner, employee, member, agent or contractor of the organization" → this defn includes any person who acts on

behalf of the corp

- "Senior officer": any person who either plays an important role in setting the corp's policies or is responsible for managing an important aspect of the corps activities. → a senior officer of the corp doesn't need to be a "directing mind" as defined under CL—also includes a director, chief executive officer, and chief financial officer of a corp
- Prior to amendments, if the crime was committed by a person who had authority only to carry out policies that someone else in the corp created, the corp was not liable. It may be that the inclusion of all people responsible for management means that liability may be imposed even if a manager did not have the authority to create policy.
- Corp liability for fault-based offences is now triggered in 3 distinct circumstances:
    - A senior officer, acting within the scope of their authority, is a party to an offence;
    - A senior officer, having the MR required to be a party to an offence and acting within the scope of their authority, directs the work of their representatives of the corp so that they commit the act/omission specified in the offence;
    - A senior officer, knowing that a representative is or is about to be party to an offence, does not take all reasonable measures to stop them from being a party to the offence

- **The first situation**_= similar to the circumstances in which corp crim liability traditionally arose: the offence is committed by a person who has the requisite guilty mind. The only diff is that the person whose behaviour can create corp liability is diff. Senior officer may be a broader category than persons who are directing minds.

- **The second situation**_= has no analogue under the CL. Corp liability can now arise where the actions constituting the crime were innocently committed by employees or other lower level representatives of the corp, so long as a senior officer had the required guilty mind. If a senior officer directed employees to deal in stolen goods for eg, the corp would be liable even though the employees had no knowledge that the goods were stolen. As well, a senior officer with knowledge that an offence will be committed must act to prevent corp liability from arising. The amendments retain the CL qualification that there must be some benefit to the corp in order for liability to attach.

- **For negligence based offences**, a corp is a party to an offence if (i) one of its reps is party to the offence or two or more of its reps engage in conduct that, if the conduct had been engaged in by a single rep, would have made that person a party to the offence and (ii) a senior officer responsible for an aspect of the corp's activities relevant to the offence departs markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a rep from being party to the offence. Departing "markedly" from the requisite standard of care suggests a standard that is higher than negligence, but the specific nature of the standard is not clear.

- CC amendments identify a number of unique sentencing criteria for corps and other organizations
- These include whether the corp realized any advantage and whether any regulatory penalties were imposed on the corp or its reps
- The impact of sentence on the viability of the corp and the continued employment of employees— who are typically innocent of any wrong doing—must also be taken into account

- Measures taken by a corp to reduce the likelihood of recurrence of the offence, including penalties imposed by the corp on a rep for their role in the offence, must also be considered

C. LIABILITY OF CORPS IN TORT

Intro

- A corp may be liable in tort vicariously and directly, if the corp is found to be committing the tort

Vicarious Liability

- The corp may be vicariously liable where a tort has been committed by someone acting on behalf of the corp. In such a case, the person is personally liable for the tort, but the corp may be vicariously liable where:
    - There is a master and servant relationship btw the person and the corp. (Ie the person must have the legal status of an employee, not an independent contractor)
    - The person committing the tort was acting in the course of his employment, and not a frolic of his own
- VL of corps is broad and easy to establish
- Will catch most situations where Direct Liability (DL) could have been found because a person who is a "directing mind" will usually be an employer
- Remember, a director or officer of a corp is not an employee simply because he is a director/officer

Direct Liability

- The corp may be DL for a tort if the person committing the tort is not merely an employee but can be considered the directing mind and will of the corp in such a way that the acts done are the acts of the corp itself
- DL been imposed on the same basis as criminal liability under the CL
- **Lennard's Carrying Co Ltd. v Asiatic Petroleum Co. Ltd. [1915]** DL was imposed where the boilers of a ship owned by the corp proved defective and the cargo was lost. English HL held that the person who was negligent in not knowing about the defective boilers was the responsible mgr of the ship. Since this person was the directing mind and will of the corp for the purposes of taking care of the ship, the corp was liable to the owner of the cargo and its loss **pg 207**
- DL for an international tort was considered in **Nelitz v Dyck (2001)** ON CoA held that the insurance company was not VL for the actions of the chiropractor because he was an independent contractor. The court did hold that the insurer could have been held DL on the basis that it had retained the chiropractor to commit the tort. In the end, the insurer avoided liability because the court found that the insured person had consented to the examination.

Corporate Agency (Liability of Corp in contract)

Intro

- Law of agency must seek to balance the interests of the principal, for purposes of the

corp, with the interests of 3rd parties seeking to enter into binding contracts with the corp

- Issue of authority arises where corp refuses to perform its obligation to 3rd party on the basis that the agent had no authority to bind corp

Common Law Rules

- Where person has no connection of any kind with the principal—the principal is not liable
- Person who falsely represents that he has authority may be liable for breach of warranty of authority or fraudulent misrepresentation—but the corp principal is not
- **General rule**: agent cannot bind corp unless he has some kind of authority from the corp to do to
- At Common Law 2 types of authority recognised:
    - **Actual authority:** the agent is actually authorised by the corp to enter into the obligation sought to be enforced against the corp
    - **Apparent authority:** where someone represents to a 3rd party, on behalf of the corp, that the person the 3rd party is dealing with has authority to bind the corp. It is the authority of the agent as it reasonably appears to the 3rd party.

- Actual authority is a legal relationship between the corp and the agent that may arise as a result of powers being conferred on the agent by statute/articles/by-laws/a resolution of the board of directors or some other permitted delegation within the organization of the business carried on
- Under Canadian corp statutes the board of directors have full power and responsibility to manage or supervise the management of the corp
- Actual authority includes not only the authority expressly given but also authority that may be implied from the authority given: in **SMC Electronics Ltd v Akhter Computers Ltd (2001)** the court held that a person with the job title "Director of Sales" had the implied authority to conclude a significant commission-splitting arrangement with another supplier on the basis that entering into such an agreement on behalf of the corp was reasonably identical to a job with this title
- 3rd party dealing with agent may be ignorant of existence of that person's actual authority, but any agreement entered into is binding on the corp if it fell within actual authority of agent
- As its difficult to est actual authority, 3rd parties often rely on apparent authority
- Apparent authority is a legal relationship between the corp and the 3rd party created by a representation on behalf of the corp that the agent has the authority to contract with the 3rd party.
- Representation may be express or implied from the conduct of the corp
- Difficult to know what constitutes a representation creating apparent authority.

- In **Canadian Laboratory Supplies Ltd v Engelhard Industries of Canada Ltd** the SCC considered whether the behaviour of an employee constituted a representation creating apparent authority. Cook arranged to have his employer CLS purchase platinum from E. Cook received the platinum and then sold it back to E as used platinum and pocketed the money. Cook had no authority to buy the platinum on behalf of CLS. E claimed CLS had cloaked Cook with apparent authority through a representation by

Snook, a purchasing agent for CLS. E called Snook after payments by CLS for some of the platinum shipments were late. Snook only said he didn't know anything about purchases and referred them to Cook. SCC found Snook's conduct amounted to a misrep that Cook had authority to act on behalf of the corp in relation to the platinum contracts and so the contracts were binding on CLS. **Pg 213**

- For a 3rd party to rely on apparent authority, the representation creating it must be made by someone with actual authority to make such representation
- The representation creating the apparent authority must have induced the 3rd party to enter into the contract with the corp

- **Leading case on principles of corp agency: Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd (1964)** →
    - D corp was formed by Kapoor and Hoon to develop and then re-sell a large estate. Facts on **pg 214.** CoA held that, by permitting Kapoor to act as Managing Director, the board had represented that he had the authority to enter into contracts of a kind that a Managing Director would. Since the articles of association conferred full management powers on the board, it had actual authority to make this representation. The court found that the architects had relied on Kapoor being authorised to contract on behalf of the corp when they entered the agreement. As a result, the corp was held liable to pay the architects fees.

- At CL a claim by a 3rd party could not succeed if she knew some restriction on the authority of the agent. This rule is known as "**constructive notice**"

- Thus courts developed the "**indoor management rule**" or the "**rule in *Turquand's* case**". Under this rule, a person dealing with a corp has no obligation to ensure that a corp has gone through any procedures required by its articles, by-laws, resolutions, contracts, or policies to authorise a transaction or to give authority to a person purporting to act on behalf of the corp. The rule does not relieve 3rd party from having to establish actual or apparent authority to enforce claim against the corp. What the rules does is limit the effect of the constructive notice rule by making clear that it's only actual restriction in public documents that will defeat the 3rd party claim. **Pg 215**

Statutory Reform

Intro

- When CBCA was enacted in 1975, it abolished constructive notice and codified and supplemented the other CL rules (**CBCA ss 17 and 18**)

Constructive Notice Abolished

- **S17 CBCA** provides that no person is deemed to have knowledge of any document relating to the corp "by reason only" that the document has been filed with the director and so is a matter of public record.
- Use of "by reason only" suggests that the drafters intended to leave open the possibility that knowledge may be deemed in some circumstances.

Common Law Rules Codified and Expanded

- **S18** codifies rules regarding apparent authority and enhances ability of 3rd parties to enforce contracts. Structure of **s18** reflects typical civil procedure rules in CA's CL jurisdictions
- Once plaintiff makes claim against corp that its breached contractual obligations entered into by agent with authority from corp, **s18** denies the corp the ability to rely on certain kinds of defects in the agent's authority—this makes it easier for 3rd parties to succeed in their claims

- **S18** codifies an aspect of CL rules. If a corp makes a rep to a 3rd party by holding someone out as a director, officer, or agent, the corp cannot deny that the person is duly appointed or that he has authority customary or usual for such a director, officer, or agent
- Although section does not expressly require holding out be by someone with actual authority, no case has interpreted the provision as ousting the pre-existing CL rule to that effect and there would seem to be nothing in the language which would suggest a legi intention to make such a change
- Balance of **s18** deals with situations in which the corp cannot rely on defects in actual authority to defeat claims by 3rd parties that the corp is bound by a contract entered into by agent
- Main purpose of these provisions is to ensure that corps cannot escape their obligations to 3rd parties because of internal corp restrictions on authority or their failure to follow their own procedures
- **s18(a)** → any provision in a corp's articles, by-laws, or a unanimous shareholders' agreement that restricts the authority of any person to bind the corp, or requires some procedure to be followed before a transaction may be entered into cannot be raised by the corp as a defence against a 3rd party's claim
- Under CBCA there's no need to state a corp's objectives, though its possible to include restrictions in the articles
- However, **s18(a)** makes clear that such a restriction doesn't impair the ability of a 3rd party to enforce a contract which is inconsistent with the restriction
- **s18(b)** → if a person appears as a director in the most recently filed Initial Registered Office Address and First Board of Directors or Notice Regarding Change of Directors, the corp cannot deny that such a person is a director

- **s18(c)** → a 3rd party may rely on the registered office (that identified in the most recently filed Initial Registered Office Address and First Board of Directors or Notice of Change of Registered Office)
- **Effect of s18(b):** even if a person is no longer a director, he will have the usual authority of a director as long as his name appears on the public file
- **Effect of s18(c):** to ensure that a 3rd party can rely on the address in the public file for the purposes of communicating with the corp, including ultimately initiating legal proceedings to enforce its claim
- All of these provisions are based on the same policy as the CL indoor

management rule: 3rd parties should not have to worry about whether internal corp house keeping is in order. The corp is responsible for insuring that its agents respect internal restrictions and procedures

- **S18(b)** & **(c)** also create an incentive for the corp to ensure that the public file is kept up to date
- **S18(f)** protects 3rd parties against claims by corps that one specific kind of transaction was entered into by the corp in a manner contrary to CBCA
- Sale, lease, exchange of "*all or substantially all the property of a corp other than in the ordinary course of business*," as referred to in **s189(3)** must be authorised by a special resolution of shareholders
- According to **s18(f)** failure to obtain shareholder approval doesn't impair ability of person(s) who acquired the property to enforce their claim
- **S18(e)** addresses the situation in which a person who is authorised to "issue" a signed document (to deliver a signed copy to the other party indicating that the person on behalf of whom the document is delivered has agreed to the terms in the document) is NOT the person with authority to sign the document

- Effect of **s18(e):** 3rd party can rely on a doc issued to him by a person who has actual or usual authority to issue it. The corp cannot later say that it was not signed by the proper person
- Authority to sign and issue separated in issuance of share certificates
- **s18(e)** - as long as shareholder receives his share certificate from a person with the actual or usual authority to issue share certificates, the corp cannot claim that the share certificate is not valid
- It was necessary to reverse an old CL rule that a share certificate that had been fraudulently issued by the person responsible for issuing certificates is invalid. In **Ruben v Great Fingall Consolidated (1906)** secretary of a corp who was responsible for issuing share certificates arranged to borrow money from a bank on the security of 5000 shares in the name of bank. Secretary created the share certificate and received the loan. He had forged the signatures of the 2 directors of the corp and affixed the corp seal. Court held that the forgery rendered the issuance of the certificate a nullity; it was not simply a matter of internal management with no effect on the 3rd parties. Secretary's authority was only to issue, not to create share certificates. Therefore he could not have actual authority to create the certificate given to the bank. Also, there was no representation by the corp clothing him with apparent authority. Giving him the position of secretary could only be a representation that he had the authority usual for a secretary, which would include the authority to issue a certificate but not create one. As a result, court held that the bank could not claim to hold a security interest in the shares of the corp. Had the case been decided under the CBCA, the bank would have been able to rely on the certificate as valid by virtue of **s18(e).**
- All provisions of s18 are subject to a significant qualification
- 3rd parties dealing with a corp cannot benefit from these protections if they were aware of the defect in the authority of the person they were dealing with or they ought to have known of the defect in the authority of the person due to their "relationship to the corp"

- This qualification codifies the CL position regarding apparent authority: the 3rd party must have relied on the authority of the person they were dealing with in entering the contract

- Its most likely to apply to contracts between a corp and its directors, officers, and shareholders who may be in relationships with the corp where they will be found to have reason to know of any defect in the authority of the person they are dealing with
- CBCA and other Canadian corp statutes contain a provision that an act of a director or officer is valid notwithstanding any irregularity in his election or appt of any defect in his qualifications (eg **CBCA s116; OBCA s128**)
- Thus a corp cannot rely on such irregularities or defects to dispute the existence of actual authority.
- It has been held that the section does NOT apply where there was no appt at all as opposed to an irregular one. In **Morris v Kanssen,** a director who continued to act after his term expired was found not to have been appointed rather than irregularly appointed where the "*office has been from the outset usurped w/o the colour of authority*"
- Where the action of a director or officer is not saved under this provision, however, the director or officer may still be found to have apparent authority—applying principles above
- Not clear how this provision (which creates an absolute prohibition on the corp relying on an irregularity in the election or appt of a director/officer) relates to the qualified prohibition in **s18(d)**, (under which a corp cannot rely on a director or officer not being "duly appointed" unless the 3rd party knew or ought to have known of the situation
- Statutory scheme doesn't completely protect ppl dealing with a corp
- It doesn't address restrictions on authority in various private and internal arrangements, like employment contracts, that may, in some cases, prevent a 3rd party from being able to claim successfully that the person with whom they were dealing has either actual or apparent authority to
- bind the corp in contract

Sherwood Design Services Inc. v. 872935 Ontario Ltd. (1998 Ont. CA)… *Lawyer's letter adopted K*

Facts: P was company that was to be sold to indiv persons in trust "for a company to be incorporated"

- D gets in touch with their lawyers who give them a "shelf company"
- **Shelf companies** are companies incorporated by a lawyer for the purpose of transferring to a client who needs a corporation fast
- D's lawyer sent P a letter stating "872935 will purchase Sherwood"
- Individuals then decided against the purchase, never took the corporation, and the corporation was transferred to another client a year later
- P wants to sue for breach, but doesn't want to sue individuals personally, as they have no assets. Instead, P sues corporation under new ownership that owns a valuable commercial building
- TJ said letter didn't bind corporation because a corporation acts through its

agents/corporate officers, and individuals never instructed the lawyer to draft the letter to authorize the purchase

Issue: Was the corporation bound by purchase agreement executed by individual respondents when the corp had no legal existence? Did the lawyer's letter constitute "action" by the corp signifying an intention to be bound?

Judgment: Yes, for P (with big dissent by Borins J.)…clients who bought shelf company were liable because of letter written by solicitor which majority of court found was ratification of a pre-incorporation K

- P argues that the legal effect of the lawyer's letter is ratification of the pre-incorporation contract
- Even though there is almost no link between the individuals and the current corporation, company adopted the contract according to P

Shares and Shareholders

Intro to Shares

- **Bowater Canadian Ltd v R.L. Crain and Craisec Ltd (1987)** A CBCA corp could not have a provision in its articles of incorporation to the effect that shares carried 10 votes each in the hands of the person to whom they were initially issued, but only one vote in the hands of a transferee.
- Other: Case exemplifies the attempt to prevent management entrenchment in Canadian provisions like CBCA

SHARES

INTRO

- **Issuing shares**= equity financing
- **Debt financing** = raising money by borrowing
- **Share** = bundle of rights against a corp
- Characteristics of share determine risks and returns regarding investment (eg degree of control)
- Especially in corps with few shareholders provisions are kept simple for several reasons: more expensive to have complex share provisions, may not meet needs of future investors and will need to be amended, and may be hard to sell.

BASIC RULES

- Basic rights associated with shares:
  - To vote at meetings of shareholders;
  - To receive dividends declared by the board of directors;
  - On dissolution of the corp, to receive the property of the corp remaining after creditors and any other persons with claims against the corp are paid
- Where corp only has one class of shares, the rights of each shareholder are equal & must include each of 3 basic rights listed above (**CBCA s24(3)**)
- If articles provide for more than one class of shares, then each of the basic rights must be possessed by at least one class of shares, although all 3 rights are not required to be

attached to the same class (**CBCA s24(4)**)

- If articles silent on right to vote, then each share has one vote (**CBCA s140(1)**)
- Where corp has multiple classes of shares, all such shares are presumed to have equal rights, regardless of class, except to the extent specifically provided in the articles
- Each owner is entitled to share certificate—although not a necessity **pg 227**

Characteristics of Shares

Classes

- A class is a category of shares with particular characteristics
- No requirements regarding what classes of shares a corp may have, subject to the requirement that the basic rights must exist within whatever classes of shares are created
- Name & characteristics of each class are set out in a corp's articles **pg227**
- CBCA refers to only "shares" (**s24)** no restriction on what they can be called
- A record of ownership of all shares issued by a corp called a securities register must be maintained as a part of corporate records at the registered office of the corp or any other place in Canada designated by the directors. Basically for proof of share ownership

- "**Common shares"→ have the 3 basic rights identified above** and usually the characteristics below
    - No dividend paid until entitlements of other classes of shares paid off
    - No payment on dissolution until other claimants have been paid
    - Represent residual claims: they're entitled to whatever is left over after everyone is paid
    - Might be the only type in small corps
    - Some public corps have voting and 'non-voting' or 'subordinate voting' common shares
    - Non-voting common shares have same characteristic as common shares except that they do not vote
    - Subordinate voting shares are the same as common shares except that they have fewer votes than the common shares more **pg 230**

        Subordinate = same as common shares but with fewer voting rights Non voting CS = same as common shares but do not vote at all

Essentially it is a means to **raise capital** without majority SH's having to give up much control

- Many corps also have 'preferred' or 'preference' shares which usually do not vote but have a preference to be paid before common shares
- Non-voting shares are attractive to an investor who doesn't want to have any say in how the business is run but wants a fixed return
- Difference between preferred share and investment in a corp in the form of interest bearing loan: management may decide not to pay dividends to shareholders but if decide not to pay interest on debt or adhere to obligations of loan, the creditor could sue to recover amount even if it means corp is bankrupt. **Pg 230-1**

Dividends

- Board of directors distribute profits to shareholders by declaring a dividend
- Declaring dividend means that a resolution is passed by the directors identifying the amount of dividend, the class of shares on which the dividend will be paid, and the payment date.
- Record date: Date by which a shareholder must officially own shares in order to be entitled to a dividend. Record date is not important for shares of corps that trade infrequently. Record date is important for corps whose shares trade in public markets, with shares changing hands daily
- If no record date fixed, and default rules apply, a person who was a shareholder at the close of business on the date the dividend was declared will be entitled to receive a dividend even if she no longer owns her shares on the payment date
- Person buying shares on day (record date) of dividend declared will not get the dividend, and the value of their shares, as a residual claim against the corp, will be reduced by the amount of the dividend
- Each share has an equal right to receive any dividend declared by the corp unless there are specific provisions in the articles granting diff dividend entitlements to diff classes of shares
    - A type of qualification to this rule permits a common form of dividend provision where directors are allowed to allocate dividends to one or more classes of shares at their discretion (ie by distributing diff classes of shares to members of a family for tax purposes- reducing family's overall tax)

- A discretionary dividend provision was challenged in **McClurg v Canada (1998)** on the grounds that using such a provision to allocate diff dividends to diff classes of shares was inconsistent with the CL principle of equal treatment of shares. It was argued that all shareholders should receive the same

  dividends and be taxed accordingly unless diff dividend entitlements were expressly set in articles. SCC upheld the provision on the basis that the classes were distinguishable because of the discretionary dividend provision itself, which contemplated that the shares would be treated differently. In this case the classes of shares had other differences as well, including diff voting rights
- Unclear whether such differences were necessary for a discretionary dividend provision to be valid
- Effective 1st August 2007, ON amended the **OBCA** to expressly allow corps incorped under that Act to have two classes of shares with identical provisions (**s22(7)**)
    - Apparent intent of this amendment was to ensure that discretionary dividend provisions could be used to allow directors to sprinkle dividends among various classes that all have the same characteristics

- Arrangements regarding dividends are highly variable but there's 2 invariables **pg 232**.

1. The declaration of dividends is a matter within the discretion of the directors:
    - The power to declare dividends cannot be delegated by the BODs (**CBCA s.115(s)(d)**)
    - No provision of the articles or any SH's agreements can compel the directors to declare/pay dividends
2. Dividends cannot be declared or paid if there are reasonable ground for believing that

the corp cannot meet either of the following financial tests:

- The corp is, or would be, after the payment, be unable to pay its liabilities as they become due (**Solvency Test**)
- The realizable value of the corp's assets would, after the payment, be less than the aggregate of its liabilities and stated capital of all classes (**Capital Impairment Test**) (**s.42**)

- If dividends paid in contravention of these requirements, the directors who consented to the declaration of the dividend are personally liable to pay the amount of the dividend back to the corp **CBCA s118(2)(c)**
- Directors don't have unlimited discretion re payment of dividends
- They may be compelled to declare dividends if the failure to do so would be oppressive to shareholders **CBCA s241** or would breach the fiduciary duty
- In **Ferguson v Imax Systems Corp (1983)** the failure to pay dividends was held to be oppressive. The failure to pay dividends on one class of shares was part of a planned effort by management to prevent one shareholder from receiving any benefit from the corp. The shareholder was the separated wife of the major shareholder. Other shareholders were not hurt by the failure to pay dividends because their spouses were compensated as employees and by dividends on another class of shares.
- As directors have discretion to pay dividends → important characteristic: whether dividend is cumulative or not
- If it is cumulative and dividend isn't paid - it continues until it is
- Cumulative dividend provisions state that no dividend may be paid on other classes until all cumulative dividends paid off
- The amount of any unpaid dividend is added to the amount the shareholder is entitled to be paid by the corp if share is repurchased/redeemed or on dissolution
- If dividend isn't cumulative & isn't paid when due: shareholder has no claim to it
- For dividend to be cumulative the amount of dividend must be fixed
- Is share is entitled to dividend in priority to other dividends on shares of another class & the entitlement is not expressly described as non-cumulative—it's to be presumed cumulative **pg 234**
- Dividend need not be paid in cash. Dividend can be declared and paid in the form of specific assets (*dividends in specie*) including shares of the corp. These do not reduce the assets of the corp.

Rights on Dissolution

- CBCA requires at least one class of shares be entitled to receive remaining property of corp on dissolution—usually common shares
- Due to principle of equality of shares: where there's multiple classes of shares, each share is entitled to participate on an equal basis in any remaining property of the corp in the absence of any limitations on such entitlements which are expressly provided for in the articles
- Preferred shares: given a right to receive only their "capital" before any payment to common shareholders—otherwise don't participate in dissolution
- Capital may be defined to mean the amount paid for the shares, plus all unpaid cumulative dividends
- If shares of a class of preferred shares were issued for diff prices, the amount to which each preferred share is entitled to on dissolution could be the average amount paid for a share over time or a portion of the stated capital for the class that is determined by dividing the stated capital for the class by the total number of issued shares of the class
- Stated capital for a class is the total amount contributed to the corp in return for shares of that class
- Because entitlement of each class of shares on dissolution may be determined in diff ways, it must be addressed in drafting the share provisions

Voting

- Voting to elect directors and on matters requiring shareholder approval—probably most important of shareholder rights
- All shares carry right to vote unless articles provide otherwise
- Due to principle of equality of shares, all shares within a class must have same voting rights
- In **Jacobsen v United Canso Oil & Gas Ltd (1980)** a by-law that purported to restrict each shareholder/s votes to a max of 1000, regardless of the number of shares held, was struck down.
- Shareholders can agree to vote their shares in a particular way—concluded in shareholders' agreements
- Policy of CBCA is to provide voting rights as mandatory protection in certain circumstances, regardless of being provided for in the articles or not

Special Vote

- Under CBCA all shares vote on certain fundamental changes, even if they do not otherwise have the right to vote.
- These changes include:
  - An amalgamation under which one corp is combined with another (**CBCA s183(3)**)
  - The sale, lease, or exchange of all substantially all the assets of the corp, other than in the ordinary course of business (**CBCA s189(6)**)
  - The continuance of a corp incorped under the CBCA under some other corp law, with the result this it is governed by that law (**CBCA s188(4)**)
  - The liquidation and dissolution of the corp (**CBCA s211(3)**)

Class Vote

- All shares of a class that are entitled to vote have a right to vote separately as a class on certain fundamental changes if shares of that class will be prejudicially affected by the change in ways that are different from other classes that will also be affected as specifically defined in (**CBCA s176**). These changes include:

- An amalgamation (**CBCA s183(4)**)
- A sale, lease, or exchange of all substantially all the assets of the corp, other than in the ordinary course of business (**CBCA s189(7)**)
- Certain amendments to the articles (**CBCA s176**)

- These changes must be approved by a special resolution—a class vote is required—2/3 majority needed to vote separately as a class
- CBCA also provides that any shareholder who disagrees with the outcome of any such vote may opt out of the corp by requiring the corp to buy his shares at fair value (**CBCA s190(3)**)—this remedy is known as the "**dissent and appraisal remedy**"

Cumulative Voting (CV)

- Person who holds majority of the shares can determine who the directors are—regardless of the views of the minority shareholders
- Cumulative voting can be used to ensure minority shareholders can elect directors to represent them
- CV means that the # of votes each shareholder has is equal to the number of shares held multiplied by the # of directors to be elected.
- Each shareholder can allocate his votes to one director or to any # of candidates as he chooses
- In order to set up a CV scheme, it must be provided for in the articles. There must be a fixed number of directors and each director's term must end at the close of the first annual meeting held after their election. If directors have staggered terms- purpose of CV is defeated
- CBCA contains provisions designed to prevent CV from being defeated

*No Par Value - **Now abolished by CBCA***

- **S24(1) CBCA** provides that all shares issued under the CBCA are w/o nominal or par value.
- If a corp that is incorped under a regime that permits par value has shares with par value, and the corp is continued under the CBCA, the shares are deemed to be w/o par palue once the continuance occurs

Series of Shares

- A corp must have more than one class of shares if it wants to give diff rights to diff shareholders because of the rule that shareholders within the same class must be equal in all respects
- The only circumstance in which shares within a class may be given diff rights is when shares in that class are subdivided into diff 'series'
- **S27 CBCA** provides that the articles may authorise the issue of any class of shares in one or more series and fix or authorise the directors to fix the following characteristics attaching to the shares of each series:
  - The number of shares in the series;

    - The designation of series (eg a name: series F)
    - The other characteristics of the series (ie rights, restrictions etc)
  - In order to be able to issue shares in series, the articles must expressly permit it **pg 241**
  - Issuing shares in series- only of interest to public corps
  - It permits the creation of shares with particular characteristics faster & more cheaply than if the corp had to amend its articles to create a new class of shares **pg 241**
  - Only restriction on the use of series is that all shares of the same class must have the same priority in relation to receiving dividends and return of capital, even if they are in diff series (**CBCA s27(3)**) (ie shares of one series cannot have a right to receive dividends or to receive what has been paid into the corp on the issuance of the shares that has priority over the same rights attaching to another series of shares of the same class.)
- If any cumulative dividends or amounts payable on return of capital to a series are not paid in full when they are required to be, the shares of all series of the same class participate rateably in respect of accumulated dividends and return of capital (**CBCA s27(2)**)
- Participating 'rateably' means that each share in the class receives the same proportion of whatever is distributed

*Pre-emptive Rights (**CBCA s28**)*

- The corp desiring to issue shares must offer them to the existing shareholders first and any unsolduur
- shares may be offered to others after
- Under CBCA it is contemplated that the pre-emptive right would permit shareholders to purchase shares only in proportion to their existing holdings
- Under OBCA- there's no such restriction
- Pre-emptive right may be attractive to shareholders for 3 reasons: (1) Avoiding dilution of their proportionate interest (2) Constraining inappropriate issuance of shares for improper purposes (e.g. to defeat a takeover bid) (3) Preventing issuance of shares at under value **pg 242**
- Important limitation on effectiveness of the pre-emptive right for any of those purposes is that it can be exercised only by those with the ability to pay
- Courts have recognised that requiring shareholders to buy additional shares or face dilution of their proportionate interest will sometimes be unfair to shareholders who cannot afford to participate, and may give rise to a claim for relief under the oppression remedy

Issuing and Paying for Shares and the Stated Capital Account

- There's no requirement to set a max # of shares of a class that may be issued—but articles may provide for one
- If there is then in order to issue additional shares - articles need to be amended
- Directors have power to issue shares which cannot be delegated to anyone else **CBCA s115(3)(c)**
- Subject to articles/by-laws/and any USA shares can be issued to any person for whatever consideration the directors determine is appropriate (**s.25(1)**). If a

consideration is other than money, directors are obliged to ensure that whatever is received is not worth less than the "fair equivalent of the money that the corp would have received if the shared had been issued for money" (**s.25(4)**)

- If directors fail to get the fair equivalent they are personally liable to make up shortfall unless they could not have reasonably known that it was insufficient (**s.118(6)**) or they exercised the care, diligence, and skill that a reasonably prudent person would have exercised in the circumstances, including relying on a prof opinion regarding the value (**s.123(4)**)
- Regardless it must be paid in full at the time the shares are issued. Only fully paid shares can be issued (**s.25(3)**)
- Some rules protect creditors and non shareholder stakeholders against distribution of corp assets to shareholders, such as restriction on payment of dividends where solvency and capital impairment tests not met
- Since its amendment in 2001, the CBCA provides that certain debt obligations owed by a 3rd party to the person who wants to buy shares can be transferred to the corp by that person in return for shares **CBCA s25(5)**
- Previously, directors could ask shareholders to pay more money into the corp at times as and when the corp needed it—such shares were called 'assessable'
- Now all shares are 'non-assessable'

2) Stated Capital Account

- A corp must maintain a separate account for each class and series of shares it issues (**s.26(1)**), recording the "stated capital" for that class and historical total of the amount paid into the corp in return for the issuance of the shares of that class or series
- The stated capital per share is simply the total for the class divided by the number of shares, even if shares of a class are issued for diff prices at diff times
- Stated capital is not cash; it's a bookkeeping record
- It [stated capital] remains the same whether the money, property, or past services are wasted, saved or used to increase the value of the corp's assets
- It must be adjusted whenever shares are issued, including the payment of a dividend in the form of the share, or reacquired by the corp
- It is relevant for calculating whether the capital impairment test has been satisfied. More on **pg 247**

Redemption and Repurchase of Shares

Introduction

- In general a corp may not hold shares in itself or in a corp that controls it (Parent corp) (**s.30**)
- Historically corps were prohibited from buying and selling their own shares. Consistent with this rule, corps couldn't hold their shares either
- Corps can now buy their shares!!!
- Another concern was: if a corp can hold its own shares, then its invested share capital will be overstated. Shares held by the corp itself do not represent a contribution to the value of the corp. And creditors who lend to such a corp may be misled as to how much shareholders have invested
- There's 2 exceptions to this rule:

- The corp may now hold its own shares as security or as a trustee—even still, the corps not free to exercise rights associated with those shares
- Subject to certain limitations a corp may acquire its own shares by purchase or redemption, though when it does, the shares must be cancelled in most cases

Holding Shares as Security or as a Trustee

- A corp may hold shares in itself or it parent corp as trustee or as security for a transaction if it is acting in the ordinary course of business that includes lending money (**CBCA s31**) eg **pg248**
- A corp may also hold a lien on its own shares as security for any debt owed by the shareholder to the corp (**s. 45(2)** and **(3)**)
- If a corp does hold shares as security or as a trustee, it cannot vote them unless the corp is acting as a trustee and then only in accordance with written instructions from the beneficiary (**CBCA s33**)

Purchase or Redemption of Shares

Purchase

- A corp may want to buy back its shares as a way of returning capital to its shareholders
- A corp can buy back its own shares on any terms negotiated as long as the financial tests won't be breached in **CBCA ss 34 & 35**
- These tests are intended to protect creditors and any shareholders of any class ranking ahead of the class whose shares are being purchased
- These tests for most purposes are the same as for solvency and impairment of capital, which must be satisfied for the payment of dividends (**CBCA s34**)
- The capital impairment test is relaxed, however, if the purchase is
  - To settle or compromise a debt claimed by or against the corp
  - To eliminate fractional shares
  - To fulfil the terms of a contract between the corp and a director, officer, or employee
- In such a case, the realizable (profit) value of the assets of corp after the payment need only exceed its liabilities plus amount required to be paid on a liquidation or on redemption of all the shares held by holders who have the right to be paid prior to the holders of the shares to be purchased (**CBCA s35 (1) & (3)**) more **pg249**
- If the repurchase is to satisfy the claim of a SH who has dissented from some fundamental change approved by the SHs and who is entitled as a result to have her shared purchased under **s.190** or to comply with a court order to purchase the shares where the court has found oppression under **s.241** the test is relaxed further – the corp can complete the purchase as long as the realizable value of the assets exceeds its liabilities **ss. 35(2), 190(26)** and **241(6)**
- If a corp buys its own shares is must either cancel them or if the articles provide, restore them to the status of authorized but unissued (**s.39(6)**)

Redemption

- Redemption: corp may buy own shares- must be expressly permitted in articles **CBCA s36**
- It's another way to return invested capital to shareholders

- Before corp may redeem any of its shares, the directors must have reasonable grounds for believing that the basic financial tests for solvency and impairment of capital are satisfied, subject to one modification for the capital impairment test to be met, the directors need only have reasonable grounds to believe that the realizable value of the corp's assets exceeds its liabilities plus the stated capital for classes of shares with a right to be paid on redemption or liquidation ranking with or ahead of the shares to be redeemed
- So if a corp had a class of redeemable preferred shares that ranked ahead of its common shares, and the directors wanted to redeem half of the outstanding preferred shares, they would have to be satisfied that there were reasonable grounds to believe that the realizable value of the corp's assets was at least equal to the total of the corp's liabilities plus the stated capital of the preferred shares that were not being redeemed
- The directors would not have to be concerned about whether the realizable value of assets also exceeded the stated capital of the common shares

Adjustment to Stated Capital

- Whenever a corp repurchases, redeems, or otherwise acquires its shares, it must deduct from its stated capital account the stated capital per share calculated before the transaction, multiplied by the number of shares acquired (**CBCA ss37 & 39**) how to do this is on **pg251**

IV MANAGEMENT AND CONTROL OF THE CORPORATIONS: THE BASIC LEGAL FRAMEWORK

Introduction → Shareholders, Directors and Officers

- **CBCA provides:** shareholders elect directors who have the power and responsibility to manage and supervise the management of the corp
- Directors appoint officers and delegate to them some of their powers and responsibilities in relation to management

Management and Control under the CBCA

- Traditional breakdown of power to manage and control the corp: **pg255.** CBCA and statutes modelled after it adopt this breakdown (**ss.102, 115 & 121**)
- Under that breakdown, shareholders are essentially passive; they have no power to initiate action related to the management of the corp, to control management directly, or to decide on any matter related to the ordinary business of the corp except as specifically provided in the articles or by-laws
- Approval by shareholders is required before certain significant changes can occur to corp, listed on pg256
- CBCA gives shareholders a limited scope for actively initiating corp action
- To facilitate shareholder action CBCA gives shareholders certain rights to access corp info (**ss. 20, 21, 143, 160 & 243**

CBCA provides for an active role for shareholders in 2 ways:

i. **Proposals** – shareholders can have matters put on the agenda (**ss 137 & 103(5)**)
ii. **Unanimous shareholders' agreements (USAs)** – shareholders can

assume all powers of the board of directors if they unanimously agree (**s.146**) **pg 257**

- Remedies provided by CBCA for abuse of directors' power to manage include: **pg 257**
- Notwithstanding those adjustments, under CBCA, directors retain power to manage the corp and the shareholders' power consists primarily of their ability to determine the composition of the board of directors and to vote on matters put to them
- If a majority of shareholders are unhappy with the board of directors' management, they can replace the board at the next annual meeting. Or can requisition a special meeting for this purpose [(**CBCA s143**-- requisition) (**CBCA s109**-- removal by ordinary resolution)]

How Shareholders Exercise Power-Shareholder Meetings & Resolutions

Shareholders' Meetings and Resolutions

Intro

- To exercise their power to vote - shareholders must act collectively
- Effectiveness & significance of shareholders' meetings varies depending on scale of corp
- Small corps w/few shareholders - may be a formality
- Corps w/large # of shareholders may be the only opportunity to engage with management directly
- SH's meetings don't give SHs the input into corp decision making that the corp rules envision
- This may be because a controlling shareholder determines outcome of all shareholder votes **pg258**

Types of Meetings

- First annual meeting - must be held within 18months of incorp
- Then each annual meeting must be held no later than 15months after previous or 6months after end of corp's preceding financial year (**CBCA s133**)
- Most corps hold annual meeting at same date each year
- Annual meetings are identified & defined by the occurrence of
    - election of directors
    - receipt of financial statements and the auditor's report on the statements
    - reappointment of incumbent auditor (unless dispensed with be the unanimous agreement of shareholders in certain circumstances) (**CBCA s 135(5)**)
- Meetings concerning any other thing than the 3 listed above are known as '**special meetings'** (**CBCA s135(5)**). Directors may call special meeting at any time (**CBCA s133(2)**)

Calling Meetings

- Directors responsible for calling both kinds of meetings
- BUT shareholders holding at least 5% of voting shares may require the directors to call a meeting (**CBCA s143**): known as "requisition"
- Requisition must state business to be transacted at meeting and be sent to each director as well as the corp's registered office

- If directors fail to call a meeting within 21days of requisition then any shareholder who signed the requisition may call a meeting & corp must reimburse shareholder for costs incurred (**CBCA s143(4)**)
- Directors not obliged to call meeting if they have already called a meeting or the business identified in the requisition is improper (**CBCA s143(4)**)
- Shareholder/director entitled to vote may apply to court to have meeting called if its impractical to call a meeting within the time or in ways mentioned above or to have a meeting conducted as prescribed in the by-laws or the CBCA (**s144**)
- Courts reluctant to intervene in internal affairs

Place of Meetings

- Must be a place specified in by-laws
- If none specified, meetings must be in a Canadian location specified by directors, or at a place outside Canada if location is unanimously consented to by the shareholders or permitted in the corps articles (**CBCA s132**)
- May be held via phone or any method which allows all participants to communicate effectively (**CBCA s132(5)**)

Notice of Meetings

- CBCA provides min (21 days) & max (60 days) notice periods of notice
- Notice must go to
    - Each shareholder entitled to vote
    - Each director
    - The auditor of the corp (**CBCA s135(1)**)
- Under **CBCA s135** - shareholders who are entitled to notice are those who appear in the shareholders' register on a certain date called the 'record date'
- Directors may fix record date by resolution no more than 60 and less than 21 days before meeting (**CBCA s143; CBCA Regulations, s43**)
- If directors don't do so, **CBCA s134(2)(a)** provide that the record date is at the close of the business day immediately preceding the day on which the notice is given
- Directors may set a separate record date for determining the voting rights of shareholders
- If they don't do so, then the record date for the purpose of determining voting rights is the same as the record date for notice of the meeting or, if no such record date has been chosen, close of business on the day preceding the day that notice is given
- If shareholder acquires shares AFTER voting record date - he doesn't have the right to attend and vote at the meeting unless he has a validly executed proxy from the transferor entitling him to vote the shares on the transferor's behalf (**CBCA s138(3) & (3.1)**)
- In corps w/few shareholders, notice is often waived and attendance is deemed to be a waiver of notice, except when the shareholder attends to object to a transaction on the grounds that the meeting has not been lawfully called (**CBCA s136**)
- Where it's a special meeting, notice must state the nature of the business and the text of any special resolution that will be voted on during the meeting (**CBCA s 135(6)**)

Proxies and Proxy Solicitation

- Any SH not able to be personally present at a meeting may appoint another person

[proxy or proxy holder] who need not be a SH to represent him at the meeting and vote his shares (**CBCA s148(1)**)

- The appointment is also called the proxy - it must be in writing and signed by shareholder
- Proxy holder must act as directed by shareholder otherwise it is an offence (**CBCA s152(4)**)
- For all corps incorped under CBCA that have more than 50 shareholders or that are distributing corps, management must send a '*management proxy circular'* and a form of proxy (**CBCA ss148, 149 and 150**)
- Form of proxy lists the matters to be voted and permits shareholders to identify the person who will be their proxy and how their shares should be voted
- If shareholder fails to nominate someone, a management nominee is selected by default in forms of proxy sent out in management
- If shareholder fails to indicate how shares should be voted - shares are by default to be voted in favour of management's proposals
- As the # of shareholders of a corp grows, the proxy-solicitation process is an increasingly important way of enhancing shareholder participation by providing both general and specific info regarding management proposals, as well as directly facilitating the exercise by shareholders of their voting rights through the proxy
- Under CBCA, management is required to send annual financial statements to shareholders in connection with annual meetings, along with the report of the auditor and any other info regarding the financial position of the corp required by the articles, by-laws or any USA (**CBCA s155**)
- Prior to 2009, CBCA prescribed own requirements for form of proxies and management proxy circulars
- In 2009 regulations under the CBCA were amended to bring them into line with prov securities law requirements regarding these docs
- A management proxy circular must include these categories of info **pg263** among others
- Info regarding matters to be dealt with at the meeting must be sufficient to permit shareholders to make a reasoned judgment.
- **Dissident shareholders**: shareholders who disagree with management proposals may also solicit the votes of their fellow shareholders **pg263.** They are entitled to obtain a list of shareholders, the shares they hold, and their addresses from the corp and to contact other shareholders for the purpose of influencing their votes (**CBCA s.21(3) & (9)**)
- Dissident proxy circulars and other public efforts to affect the voting of other shareholders have been relatively rare in Canada -- at times they occur in circumstances of hostile takeover bids—in the form of advertising
- Under the more relaxed new rules in CBCA, proxy battles waged in the press may become more common
- Rules regarding proxies and proxy solicitation may be enforced in the same way as other shareholder rights pg265 (e.g - may seek a court order to comply with rules (**s.247**))
- Under 2001 amendments to the CBCA, any notice or document required to be created or provided to shareholders or anyone else is satisfied by the creation or provision of an electronic document, so long as the articles or by-laws of the corp don't provide otherwise (**CBCA s252.4**) **pg265**

Shareholder Proposals

- Normally directors set the agenda for shareholder meetings
- CBCA provides limited right for shareholders to add items to agenda (**s.137**)
- Any shareholder entitled to vote may submit to the corp notice, known as 'proposal' of any matter he proposes to discuss
- If corp required to send out a management proxy circular under **CBCA s150**, the proposal must be included, along with supporting statement from the proposing shareholder—together mustn't exceed 500 words
- Proposal mechanism intended to facilitate communication among shareholder at expense of corp
- Proposals aren't binding on corp—merely advice to management
- Proposal mechanism not intended to allow shareholders to decide for themselves matters that are within the authority of directors
- Appears that CBCA contemplates that shareholders may, on their own initiative, use the proposal mechanism to make, amend, or repeal by-laws or amend articles, though the statute does not clearly state that shareholder approval of such a proposal is sufficient to effect the contemplated change
- There's certain limits on content of proposal—designed to prevent frivolous use of process
- Proposal may include nominations for the election of directors only if the proposal is signed by the holders of not less than 5% of the shares entitled to vote
- To be eligible to submit any proposal, on any matter, a shareholder or group of shareholders must
    - Hold voting shares equal to at least 1% of the total of voting shares outstanding at the date the proposal is submitted or worth at least $2000 at the close of business on the day before it is submitted
    - Have held the shares for at least 6 months prior to the date of submitting the proposal (**CBCA s137(1.1), CBCA Regulations s46**)

- Corp may require proof of these requirements (**CBCA s137(1.4)**)
- Under 2001 amendments of CBCA beneficial holder (no need to be registered owner) may submit proposal
- A corp doesn't have to circulate a proposal in 5 circumstances **pg267**
- The limits on what may be subject to a proposal apply equally to what may be the subject of a shareholder-requisitioned meeting
- Prior to 2001 amendments, CBCA contained another limitation: a corp could refuse to distribute a proposal if it was primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes

- Several cases have considered the scope of this limitation eg **Varity Corp v Jesuit Fathers of Upper Canada (1987)**: shareholder sought to have a corp circulate a proposal to have the corp sell off its investments in South Africa. Held that the primary purpose of the proposal, based on the language used in the supporting statement, was the abolition of apartheid in South Africa. Since the proposal was primarily for the purpose of promoting a political or social cause, the corp was not obliged to distribute it. The court acknowledged that there was a more specific purpose relating to the business of the corp - the divestment of its interests in South Africa - but held that this objective didn't prevent the exception from operating.

- Similarly in **Re Greenpeace Foundation of Canada &Inco Ltd 1984** a proposal to institute pollution-control measures to limit sulphur dioxide emissions was held to be for the purpose of advancing an environmental cause and so fell within the exception.

- 2001 amendments of CBCA replaced the social-cause exclusion with the exclusion for matters NOT RELATING to the business or affairs of the corp in a significant way
- Some recent cases suggest that the attitude of the courts may be shifting slightly in favour of shareholder participation through the proposal mechanism, at least in relation to corp governance issues

Conduct of Meetings

- Meetings are conducted by the same rules regarding quorum and procedure as apply to Parliament, except where CBCA or by-laws provide otherwise
- A discussion right - expressly provided for in **s137(1)(b)**: a shareholder is entitled to discuss any matter with respect to which he could have submitted a proposal at an annual meeting
- In addition to this statutory right, shareholders have been held to have a right to speak to the matters on the agenda; the chair cannot arbitrarily terminate the meeting to prevent shareholders from discussing an agenda item and voting on it
- The right to discuss may be terminated by the chair if she determines, in good faith, that it is being abused, such as where a shareholder seeks to obstruct a meeting
- Discussions at meetings-one of few opportunities for shareholders in public corps have to engage management-often the result is determined before the meeting as a result of proxies being filed ahead of time, nominating management as the proxy holder and supporting whatever management proposes
- **Wall v London and Northern Assets Corporation [1898]:** Chair of the meeting must act in good faith and in an impartial manner. Must allow shareholders to speak to matters before the meeting. Chair need only allow a reasonable time for reasonable arguments and can put down a minority bent on obstructing the business of the meeting
- In **National Dwelling Society Ltd v. Sykes [1894] 3 Ch. 159**, it was held that the chairman has a duty to ensure that 'the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting'. In doing so the chairman should put resolutions to a vote, ensure that the votes are properly counted and declare the results of that vote. In order to prevent issues regarding the precise number of votes cast for and against the resolution being re-opened after the meeting, **s. 378(4)** provides that, unless a poll is demanded, a chairman's declaration that an extraordinary or special resolution has been carried is conclusive evidence of that fact without proof of the number or proportion of votes
- **Blair v Consolidated Enfield Corp. (1993):** Issue was whether Blair, as chair of the shareholders' meeting had acted honestly and in good faith as is required for an order of indemnification. Held that legal advice does not automatically sanctify the director – but it is to be considered. Q of the chair's interest in the result (i.e. chair's conflict of interest) - court noted that the chair in a corporate meeting often has an interest as a director or shareholder and the court should therefore not say that that interest automatically makes the decision not *bona fide* – i.e. chair conflict of interest does not automatically mean chair has acted in bad faith. Court noted that some decision had to

be made – no obvious error –no suggestion that Osler's advice was other than professional (although they too had an interest in the matter)

Quorum

- A majority of shares entitled to vote, represented in person/proxy at meeting, constitute a quorum unless the by-laws provide otherwise **CBCA s139**
- Most by-laws provide that a certain number of shareholders, often only two, must be present in person or by proxy to constitute a quorum for holding a meeting

Voting

- Unless articles provide otherwise, each share gets 1 vote and matters are decided by a majority of votes cast on any resolution at the meeting
- Special resolutions, required for amendments to articles and certain other fundamental changes, must be passed by 2/3 of votes at meeting (**CBCA ss140, 173, 189**)
- Unless by-laws provide otherwise, voting is by a show of hands, but any shareholder may require that a ballot be taken—ie collected and counted (**CBCA s141**) **pg270**
- Under CBCA Regulations, electronic voting is subject to 2 requirements: (1) the gathering of votes must be verifiable; and (2) when the tally of votes is presented to the corp, it must not be able to identify how the shareholder who electronically voted his shares

Access to Information

Intro

- CBCA requires a corp to provide shareholders with access to certain info to enhance their ability to monitor management and to exercise their rights as shareholders
- A corp must maintain certain records and allow access to them by shareholders as well as certain other people, including directors, officers, and creditors

Special Requirements

- Every shareholder - entitled to copy of articles, by-laws, and any unanimous shareholders' agreement free of charge (**CBCA ss21(1) and (2)**)
- Any list of shareholders or info from a share register that has been obtained cannot be used except
    - In an effort to influence the voting of shareholders
    - In connection with an offer to acquire shares of the corp
    - For any other purpose relating to the affairs of the corp
- Corp has no discretion to refuse to provide such info upon receipt of a request complying with the relevant statutory requirements, even if it suspects that the restrictions may not be honoured **pg271**
- Additional rights of access to info include the right to requisition meetings and to ask questions (**CBCA s.143**) and the right to have inspector and auditors appointed (**CBCA Part XIX**)
- Auditors must meet certain standards to ensure that they are independent of the corps management (**s.161**)
- A corp is also required to make certain limited disclosures to the public – list on **pg272**

Signed Resolutions and Single Shareholder Meetings

- Any action taken by shareholders must be given effect by a resolution passed at a meeting
- Under CBCA, if a class or series of shares has but a single shareholder, he alone can constitute a meeting (**CBCA s139(4)**)
- Alternative to meetings: where a single shareholder or each shareholder entitled to vote, if there is more than one, signs a written resolution, it will be just as effective as if it had been passed at a meeting (**CBCA s142**)
    - This way eliminates the need for shareholders to get together and to worry about all formalities involved
    - This is common for small corps, esp if the shareholders are not in the same location
    - Such signed resolution is effective as soon as shareholder has signed it

Directors and How they Exercise Power

Qualifications

- A person is NOT qualified to be a director if he is
    - Less than 18yrs old
    - Of unsound mind as found by a court in Canada or elsewhere
    - An undischarged bankrupt
    - Not an individual (**CBCA s105**)
- Regarding last qualification- even though corp cannot be a director- it may be an incorporator (**CBCA s5**)
- No statutory requirement for directors to hold shares in the corp, though this may be provided for in the articles (**CBCA s105(2)**)
- Under CBCA 25% of directors must be Canadian residents (**CBCA s105(3)**)
- However, in certain sectors prescribed by regulation, and subject to some exceptions, a majority of the directors must be resident Canadians – uranium mining, book publishing or distrib , book sales and film distrib.
- The CBCA requirement that a majority of each board committee be resident Canadians has been abolished
- These changes provide significant new flexibility that may be useful for CBCA corps with foreign shareholders
- '*Resident Canadian*'- **s1(1)** includes Canadian Citizens ordinarily resident in Canada and a PR within the meaning of the Immigration Act who is ordinarily resident in Canada.
- Director ceases to hold office on becoming disqualified (**CBCA s108(1)(c)**)
- However, any act of director after disqualified is valid (**CBCA s116**)
- Individuals cannot be made directors of CBCA corps w/o their consent
- Ppl who are appointed/elected are deemed NOT to be directors unless
    - They were at the meeting at which the election/appointment took place and did not refuse
    - They consented in writing either before their election or appointment or within 10 days afterwards
    - They acted as directors pursuant to the election/appointment (**CBCA s106(9)**)

Election and Appointment of Directors

General

- The first directors of a corp are listed in the Initial Registered Office Address and First Board of Directors filed with articles. They become directors at the time the certificate of incorp issued and incorped (**CBCA s106(2)**). These directors hold office until first meeting of shareholders—must be held no more than 18months after incorp (**CBCA s133**)
- At that and subsequent meetings, shareholders must elect directors—simple majority vote unless specified otherwise in articles (**CBCA s6(3)**)
- Term of directors cannot extend past the date of the 3rd annual meeting following their election
- In most cases directors must be elected annually
- If no term is specified on their election, the directors stay in office only until the annual meeting following their election (**CBCA s106(3)**)
- If shareholders fail to elect directors when they're supposed to, the existing directors remain until their replacements are elected, so there is no problem with the authority of the board of directors to act in the interim (**CBCA s106(6)**)
- When directors are changed, the corp must file a Change Regarding Directors for with the Corps Canada within 15 days (**CBCA s113**)
- Where a corp has no directors, any person who manages/supervises management of business and affairs of the corp is deemed to be a director (**CBCA s109(4)**)
- Exceptions are an officer acting under the direction of a shareholder, lawyers and accountants providing professional services, and creditor representatives (**CBCA s109(5)**)
- Shareholders have the power to remove a director by passing an ordinary resolution to that effect at a special meeting of shareholders called partly for that purpose (**CBCA s109**)

- Where director is elected by a particular class or series, the director cannot be removed w/o the approval of that class/series

b) Filling Vacancies on the Board

- If there's no quorum remaining in place or a vacancy has occurred because somehow the shareholders failed to elect the required number of directors at the shareholders' meeting, the remaining directors must call a shareholders meeting to fill vacancy (**CBCA s111(2)**)
- If a quorum remains in place, the remaining directors may fill the vacancy by appointing a new director for the unexpired term of the director whose departure created the vacancy (**CBCA s111(1)**)
- Articles may provide that all vacancies must be filled by shareholders (**CBCA s111(4)**)
- As long as quorum remains, board can still act as a board
- Major changes, such as replacement of whole board can be done w/o shareholder approval, if one can obtain cooperation of both the departing and the incoming directors and follow a process of sequential resignations and appointments. **pg276**

Number of Directors

- Under CBCA there's only one restriction on number of directors: If corp made a distribution of its shares to the public and those shares remain outstanding and are held by more than one person, the corp must have 3 directors, at least 2 of whom are not officers/employees of corp (**CBCA s102(2)**)
- Number of directors or min/max must be specified in articles of corp (**CBCA s6(1)(e)**)
- Min/max number may be changed via articles of amendment
- Amendments require approval of shareholders by special resolution
- No specific mechanism for fixing the number of directors within a min/max set in articles
- Usually articles provide that the directors can determine the number of directors

Directors' Meetings

- At meetings, directors act by resolution – meaning they can vote on a formal expression of some decision (e.g. to declare a dividend). These resolutions are recorded in the "minutes".
- Modern corp statutes set out a code for directors' meetings
- Unless the articles or by-laws specify a place, meetings may be held wherever the directors decide. There is no statutory default requirement.
- Notice of meetings must be specified in the corps by-laws, there is no default provision (**s. 114**) more on **pg 278**
- A min number of directors (quorum) must be present or no business may be carried on. In default of a provision a quorum consists of a majority of directors if the articles specify a fixed number of directors or a majority of the minimum number of directors permitted by the article (**s.114(2)**).
- If all directors consent they may participate in meetings by telephone or other electronic means as long as it permits all to communicate adequately (**s.114(9)**)
- If a Director is present at a meeting, he is deemed to consent to any resolution passed at the meeting unless he expressed his dissent in one of the following ways listed at the bottom of **pg279**
- As an alternative to holding meetings, directors may act by resolution signed by all directors (**CBCA s.117**)

Officers

General

- Nothing in CBCA addresses what officers a corp should have or what their duties should be
- CEO has overall responsibility for running corp's business
- Day to day operations are delegated to other officers who report to CEO
- Directors have power to designate power to offices
- 2001 amendment **CBCA s2(1)** definition of officer **pg 281.** This definition if broad. Directors can be officers. Any person may hold 2 or more offices.
- No qualifications required other than the need to be in full capacity (**CBCA s121(a)**)
- There's no such requirement in OBCA
- Officers subject to same duty of care as directors (**CBCA s.122**) as they are given power to manage the business and affairs of corp

- Legal relationship created by appointing person as officer is distinct from any employment relationship that the person may have with the corp—though—many or all of the duties associated with the employment contract may be coextensive with the duties of office
- Principal situation where the distinction between these relationships becomes relevant is on the termination of the person's involvement with the corp
- Officer can always be removed by corp
- Common for corps to provide in their by-laws that officers hold office at pleasure of the board of directors, so their employment may be terminated at any time by a decision of the directors
- An officer's employment contract, by contrast may be terminated only for cause or on reasonable notice as with any other employee
- Absence of such cause or notice, termination of employment is a breach of his employment agreement, even where right to remove officers from their offices has been stipulated in the articles or by-laws.

Delegation

Delegation within the corporation

- **S115 & s 121 CBCA** create statutory code for delegation within the corp
- Directors can delegate their powers "to manage the business and affairs of the corp" to a managing director (who must be Canadian resident), to a committee of directors, or to one or more officers
- Language in **s 121(a)** and **s 102(1)** refer to the power to "manage the business and affairs of corp"
- Directors can then delegate subject to 2 limitations:
    - They cannot delegate the power and responsibility to *supervise* the management of the business and affairs of the corp
    - They cannot delegate powers listed in **s115(3)** (mostly to do with shares – declare, issue dividends, purchase or redeem shares etc)

a) Delegation outside the Corp

- Board of directors cannot completely delegate its control over the day to day management of the corp's business; the board must retain power to supervise the delegate in performance of his duties
- **Kennerson v Burbank Amusement Co (1953)** is an example of a board exceeding this limit **pg283**
- What delegation is permissible is a Q of degree
- In choosing and supervising a delegate, directors are bound by their duty of care and fiduciary duty to act in the best interests of the corp

Remuneration and Indemnification

Remuneration

Remuneration is the compensation that one receives in exchange for the work or services performed. Typically, this consists of monetary rewards,

- Unless some arrangement is made in the corps articles or by-laws or in a USA, the directors may set their own remuneration as well as that of all officers and employees

(**CBCA s.125**)

- The CBCA and other statutes expressly permit directors to vote on the terms of their compensation (**CBCA s.120(5)(b)**)
- This does not mean that directors are not required to act in the best interest of the corporation in setting their remuneration
- **Radtke v Machel [2000]:** Court held that, where a director had decided upon his salary unilaterally, he had an obligation to ensure that the salary was fair
- Canada Revenue Agency will have an interest in these decisions.
- Where excessive compensation is prejudicing the interest of one or more of the shareholders, a shareholders best remedy is likely to sue for oppression.
- In several cases the court has found excessive compensation oppressive.
- Payment of excessive compensation diminishes the value of the residual claims to the corps assets represented by shareholders shares.

Indemnification

To protect against damage, loss, or injury; insure

- Directors and officers are subject to a wide range of potential liability in connection with fulfilling their responsibilities
- Exposure to these liabilities creates a strong disincentive to becoming a director or an officer of a corp
- Scheme for indemnification: **CBCA s124**
- Scheme seeks a balance: to permit indemnification is sufficiently broad circumstances to encourage responsible people to become directors or officers, and to deny indemnification in circumstances where directors are engaged in improper conduct
- It has 3 parts. The corp
    - Must indemnify directors and officers in certain circumstances
    - May indemnify in additional circumstances
    - May obtain insurance for the benefit of directors and officers in a still broader range of circumstances
- *Mandatory indemnification*: A corp must indemnify a director/officer of corp/anyone acting at corp's request as a director/officer/a similar capacity, in a partnership, trust, or other entity against any costs/expenses reasonably incurred by him in connection with the defence of any civil, criminal, administrative, investigative, or other proceeding in which he was involved because of his association with the corp or other entity, if the individual… see **pg286**
- *Discretionary indemnity*: where the person doesn't meet the first criterion set out in **286** because he was judged to have committed a fault, a corp may still indemnify the director/officer for the same costs and expenses, including any amount paid to settle an action for judgment, so long as the other 2 criteria are met **pg287**
- CBCA provision is more liberal than provincial statutes (e.g. subject to court approval the CBCA permits the corp to advance litigation costs in an action against a director/officer)
- In the 2001 amendment indemnification was expanded to include events of investigative proceedings.
- The SCC addressed the availability of an indemnity in **Consolidated Enfield Corp. v Blair [1995]:** Court ruled that the votes cast in favour of the Canadian Express nominee were valid and so Blair had not been re-elected. Blair sought an order to be indemnified by Enfield for his legal costs. SCC granted an indemnification order. Court held that

the corp had an obligation to establish that Blair had no acted in good faith with a view to the best interests of the corporation in connection with the vote to avoid an obligation of indemnity. Here where Blair was confronted with a difficult legal question, it was reasonable to seek legal advice and to rely on it. Facts on **pg287**

- **Catalyst Fund General Partner I Inc. v Hollinger Inc:** A director was denied indemnification for costs incurred in defending an action to remove him.
- **Bennett v Bennett Environmental Inc. (2009):** Court ordered that the corporation pay indemnity. Court held that even though in the settlement agreement the CEO had acknowledged that the failure to disclose was wrongful, he had an informed, honest and good-faith belief that the matter would be resolved in the corps favour and that as a result, there was no duty to disclose and that his conduct was thus lawful. **Pg 288**
- *Insurance:* A corp may obtain insurance for the benefit of a director/officer or any other individual eligible to be indemnified.
- Indeminity and insurance tend to reduce the effectiveness of the legislative scheme
- In **R v Bata Industries Ltd. (1995):** Judge ordered that the accused pay fines and that the corp not indemnify them. On appeal the court determined that the trial judge had no authority to make such an order because the statutory scheme in the OBCA expressly permits indemnification in the circumstances of the case.

Shareholders' Agreements and Unanimous Shareholders' Agreements

Voting and Management

- Ability of shareholders to agree on decision making structures is subject to one limitation
- Shareholders may not by contract require directors to vote in a certain way
- Directors have duties—a duty of care & fiduciary duty & their decision making discretion cannot be restricted so as to prevent them from being able to fulfil these duties
- This rule applies even when directors & shareholders are the same persons
- Shareholders can bind how they vote their shares but not how they exercise their discretion as directors-→ this constraint does not apply to USAs involving CBCA corps
- Under a USA, all shareholders agree that certain matters ordinarily falling to the directors will be decided only by the shareholders
- CBCA expressly provides that, where shareholders have taken directors' powers under a USA, they can fetter their discretion as to how they exercise them (**CBCA s146(6)**)

Share Transfer pg292

- Shares in small corps are usually hard to sell. This is not so much the case in large public corps
- Interests in closely held corp are inherently difficult to value
- Each SH has an interest in minimizing the number of restrictions on his shares and who they can be sold to. It is common to set up a mechanism to restrict share transfer in a SH agreement **pg293**
- Right of first refusal is a common one – SH must sell at same price to SH's as offered to

3rd party

- SH agreements also often have mandatory transfers on death to prevent transfer to heirs p294
  - This usually requires corp to maintain some form of life insurance under which proceeds buy shares from the deceased automatically
  - Other common situations include, retiring from active participation, ceasing to be able to perform duties, and breaching SH agreement. All could trigger a share transfer if negotiated for in the SH agreement…don't forget about pre emptive rights could also work!! **Pg294**
    - Better to have this in a USA than in articles since articles are a matter of public record

Dispute settlement

- Some form of dispute resolution mechanism is often included in SH agreements to avoid going to court
- Private, cheaper, and less adversarial **pg295**
- Incls arbitration, mediation etc

Unanimous Shareholders' Agreements

- **CBCA s146** permits decision making power to be transferred from the directors to the shareholders through a USA **pg295**
- SH under such an agreement has all responsibilities of a director **pg296**
- Effectiveness of transfers of directors' liability is not clear. How can CBCA be able to remove liabilities from directors who have liabilities imposed by legis from other provinces?
- 2001 CBCA amendments hold that SH may agree how they will exercise the power taken from directors **CBCA s146.6. OBCA** has similar provision.
- Apparently a board of directors is still required even after a USA **pg297**
- The 2001 CBCA amendments have not addressed deficiencies in USA's

Enforcing USAs and Other Shareholders' Agreements

- Breach of SH agreement may be held to constitute oppression **S241 CBCA**
- Oppression remedy may also under some circumstances be used to defeat shareholders agreement
- **Deluge holdings v Air Canada** – actions of SH were consistent with SH agreement but for oppressive purpose of removing another SH from a corporation **pg297**
- Under **S247**, SH may make a summary application to have the provisions of any USA enforced
- Failure to comply with a USA can be grounds for dissolution of the corp **s214 pg298**
- A shareholders agreement is different from a USA in that it is not binding on a share transferee unless they sign the agreement. Shareholders agreements usually thus provide that the share transfer is conditional on the transferee signing said agreement **pg298**
- Any transferee is deemed to be party to any USA in effect. However, transferee entitled

to rescind contract within 30 days if unaware of existence of USA agreement **CBCA 146.3 p298**

- Notice is deemed to have been given if it is on the share certificate **s.49.8**

- RULES UNDER OTHER PROVINCES ARE DIFFERENT THAN FOR CBCA BUT ARE IN THE TEXT **Pg298**

V CORPORATE CHANGES

Amendment of Articles, By-laws and Changes to Stated Capital

Amendment of Articles

- Articles must be amended to add, change, or remove any provision **CBCA S173-79**
- Other things requiring amendment in the articles can be found on **pg303**
- REQUIRES APPROVAL THROUGH SPECIAL RESOLUTION - Passed at SH meeting requiring at least a 2/3rds majority OR has been consented to in writing by **ALL** shareholders. A level of approval higher than 2/3rds may be specified in articles **Pg304**
- Notice of meeting must be sent to SH and must have sufficient detail re the situation
- If corp has more than 50 SHs, proxy must also be sent out **pg304**
- Shareholders may initiate amendments to articles by making SH proposals **s.175**
- Any class affected by proposed article amendment may vote on issue regardless of normal voting right possessed by the class **pg304**

- **S.176** lists exhaustive circumstances where a separate class/series vote is required
- Basically entitled to vote separately if they are affected prejudicially by comparison to other classes if the amendment were adopted
  - Might occur if new class of shares were to be issued which would receive dividends prior to the other prejudiced class of shares **pg304**
- If separate vote is required, amendment not passed unless approved by special resolution of the class of shares entitled to vote separately
  - Basically creates a veto right over proposed amendment!!! **pg304**
- If amendment is approved by special resolution of separate class, those in said class who voted against it are entitled to have their shares purchased by corp for **"**fair value" **pg305**
- Dissent and appraisal also exists for SH who vote against certain amendments
  - E.g. Restricting issue, transfer, ownership of shares of that class, or restricting the business corp engages in
- Resolution authorizing amendment may provide opportunity for directors to revoke resolution. Done so that directors can see how many SH dissenters may have to be bought out etc. Amendment might be too rich for the corps blood
- Then corp has to file articles of amendment stuff at corps Canada.
- If name is changed then a name search report must be done as well as supporting information – cbca dir. then issues certificate of amendment **pg305**
- **T**ypes of amendments which can be done WITHOUT SHAREHOLDER APPROVAL
  1. Directors may adopt new corp name if it was simply a number assigned to it on incorporation
  2. Fixing rights, privileges, conditions, and restrictions of a series of shares within a class may be done by directors alone if authorized in the articles. – discussed in chap 6 van duz **p244/163/306** (only authorized in the articles if the articles don't contain restrictions) **pg163**

Changes to Stated Capital

- The stated capital account MUST be reduced when the corp acquires or redeems its own

shares and in a few other circumstances.

- The CBCA also provides that a corp may reduce its stated capital for any reason subject to certain limits (**CBCA s.38**)
- If a corps stated capital is set out in the articles then a reduction can only be done by articles of amendment (**CBCA s.173(1)(f)**). In practice this is rarely done, in all other circumstances a reduction in stated capital must be approved by a special resolution of SHs (**s.38(1)**)
- A corp cannot reduce its stated capital if there are reasonable grounds for believing that it is insolvent, or the realizable value of the corps assets will be less than its liabilities after reduction (**CBCA s.38(3)**)
- These contraints are intended to protect creditors
- Where shares are redeemed/purchased the stated capital account for the class or series of shares redeemed or acquired must be reduced accordingly (**CBCA s.39**)
- A corp must increase its stated capital account for a class or series of shares if it pays stock dividend on shares of a class or series. The declared amount of the dividend in money must be added to the stated capital account for the class or series (**CBCA s.43(2)**)

By Laws

- General by-law passed on incorp creating detailed set of procedural rules for directors and shareholders and offices etc **pg308**
- By laws may also be passed which regulate business or affairs of corp!!!!
- Directors have power to make, amend or repeal bylaws and action effective as soon as their resolution is passed
- Must be submitted to SH at the NEXT meeting. SH may confirm, reject, or amend…
- By law ceases to be effective if not confirmed by SH or brought up at meeting immediately after meeting
- **Directors can't simply just do it again after the meeting CBCA s103 pg308**
- **Wells v Melnyk 2008** – A major SH Melnyk wanted new director elected. When it became clear he was going to lose, revoked his proxy so not enough SH present as per 51% quorum. Director tried to pass by-law by reducing quorum to 25%. Did NOT bring it up for vote at meeting. SH went ahead and director was re-elected. Court ruled against this. As SH was allowed to revoke proxy, new by-law not confirmed at NEXT meeting, and directors failed to send out new notice to SH indicating approval of amendment to be voted upon (amendments to articles not by laws|). **Pg308** Could not have pulled it off anyway since not enough notice was given to SH's anyway
- New by laws can also be initiated by SH in a SH proposal **CBCA S103.5** all that is needed is SH approval. No director approval is needed. **Pg309**
- Greater than majority (51%) can be required in articles or USA if necessary **pg309**

Continuation under the Law of another Jurisdiction

- Basic requirement is permission from exporting jurisdiction and shareholder approval
- Most common reason for doing this is to have an amalgamation- for this usually all corps must be governed under the same corporate law **pg310**
- **IMPORT** – corp governed under another statute including foreign law wants to be gov under CBCA must apply to director in form of articles of continuance (**CBCA form 11**).

Articles become articles of incorp on continuance when finalized. Must include previous names of corp, previous jurisdiction, and date of incorp in prev jurisdiction. Changes needed to conform to CBCA must also be amended in continuance art.

- ANY OTHER AMENDMENTS MAY BE MADE SO LONG AS THEY RECEIVE SAME SH APPROVAL REQUIRED UNDER THE **CBCA S187.2** **Pg310**
- Extra things are required other than articles of continuance and can be found on **pg310**
- If corp incorporated in nova scotia or quebec or foreign, it is necessary to file legal opinion **pg311**
- *CBCA* director checks over everything and if it's a foreign corp may submit it to the dept of justice.
- If everything is good, certificate of continuance issued which takes place of articles of incorporation pg311

- **EXPORT** – export of CBCA corp to another jurisdiction must be authorized by special SH resolution CBCA S188.5.
- <u>All SH will have right to vote even if they don't otherwise have a right to vote</u>. May have shares bought by company if they vote against continuance but it is adopted **S190.1** notice of this vote must refer to these rights of dissent and to be bought out **Pg311**
- Directors may be permitted in the resolution to abandon the continuance
- Once approval has be garnered, directors file for permission to continue
  - CBCA director must be satisfied that continuance will not adversely affect creditors or SH of corp S188.1

- Info sent to SH must be reasonable and laws of importing jurisdiction will be considered for SHs and creditors.
- CBCA prohibits continuance under another jurisdiction unless the laws of that jurisdiction provide that
    - Property of corp continues to be property of the corp
    - Corp continues to be liable for obligations of the corp
    - Existing action/claim/liability is unaffected
    - Civil, criminal, administrative action or proceeding pending will be unaffected
    - Enforcement of judgment may occur against corp and may be enforced (**CBCA s.188(10)**)
- Exporting into quebec and foreign jurisdiction requires a legal opinion that laws meet CBCA requirements **pg313**
- Director receives notice of continuance then issues certificate of discontinuance.

Amalgamation

- Amalgamation: 2 or more corps combined into 1 corp (**CBCA ss.181-186**)
- The old corps don't cease to exist but continue in the amalgamated corp
- One common tax reason is to combine a corp earning taxable income with one that has tax losses, so as to permit the losses to be deducted against the income
- Where amalgamating corps have diff shareholders: 'long-form' amalgamation required
- Where amalgamating corps are affiliated: 'short-form'

Long Form

- The corps need to enter into an amalgamation agreement setting out the terms of the amalgamation. Some of the items that must be addressed are stipulated in the statute (**s.182**)
- Any shares of one of the amalgamating corps which are held by another, must be cancelled upon the amalgamation (**CBCA s.182(2)**)
- An amalgamation may also be used to give effect to an acquisition of a business – **pg316**
- In order to proceed with an amalgamation the board of each corp must approve the amalgamation on the terms of the amalgamation agreement and then submit the agreement to the SHs for approval by special resolution (**CBCA 183(1)**)
- All SHs have the right to vote
- All SHS have dissent and appraisal rights if they vote against the amalgamation – **pg317**

Short Form

- A short form *vertical* amalgamation may be effected between a corp and one or more subsidiaries that are either wholly owned by the corp or where the only

shares not held by the corp, are held by one or more of the other amalgamating subsidiaries
- Short form *horizontal* amalgamation may be effected between subsidiaries that are wholly owned by a parent corp.

Arrangements and Reorganizations

- Arrangement: is a procedure used to effect certain fundamental changed to the corp where its not 'practicable' to follow the procedure contemplated in the Act for some reason (**CBCA s192**) (eg an amalgamation of two corps from different jurisdictions)
- Arrangement not 'practicable' where following usual procedure would be inconvenient or less advantageous for the corp
- Necessary to obtain court approval to implement an arrangement
- Under **OBCA** subject to court order, an arrangement must be approved by a special resolution of shareholders (**s182**)
- Also, each separate class is entitled to a class vote if the arrangement contains anything that, if it was in articles of amendment, would require a class vote under **s170 OBCA**. **pg321**
- Arrangements used more frequently - especially by corps whose shares are publicly traded
- Where corp insolvent-arrangement not permitted (**CBCA s192(2)**)
- Insolvent when cannot meet liabilities or realizable value of its assets is less than the aggregate of its liabilities and stated capital
- In these circumstances → necessary to proceed under ***Bankruptcy and Insolvency Act 1985*** **or**
  Companies' Creditors Arrangement Act 1985
- Practice developed under which the corp seeking court approval of an arrangement makes an application to court for an interim order dealing with issues such as
  - Who needs to receive notice
  - What approvals are required from SHs and other stakeholders, such as debenture holders
  - Whether dissent and appraisal rights need to be given
- Once requirements of interim order fulfilled, the corp goes back to court to seek a final order approving the arrangement
- Until recently, the test employed by the courts to determine if an arrangement should be approved was whether an intelligent and honest business person acting in her own best interests would approve the plan—known as "**business judgment test**"
- **Savage v Amoco Acquisition co** - In some cases arrangements have been permitted where applicant is insolvent but other corps involved in the arrangement are not. – read bottom of page, maybe irrelevant?? – **pg322**

- This test reconsidered by SSC in **BCE Inc v 1976 Debenture Holders (2008)** SCC confirmed the general approach to the approval of plans of arrangements but it

rejected the **business judgment test.** In order to grant approval a court has to be satisfied by the corp that **pg322**

- The statutory procedures have been met
- The application is being put forward in good faith
- And the arrangement is fair and reasonable

To conclude that the fair and reasonable test is met, the court must be satisfied that

- The arrangement has a valid business purpose
- The objections of those whose legal rights are being arranged are being resolved in a fair and balanced way

In the courts view a reduction on trading value is not an exceptional circumstance that entitled the debentures holders to have their financial interests taken into account. Held the court approved the plan for arrangement.

Sales of Assets or Shares

- "sale', lease or exchange of all or substantially all the property of a corp other than in the ordinary course of business of the corp" cannot be completed w/o approval of shareholders by special resolution (**CBCA, ss189(3)-(9)**)
- Purpose of special treatment to such sales - recognition that they fundamentally change the nature of the shareholder's investment.
- Courts will consider whether assets disposed off are quantitatively substantial when compared to remaining assets of corp, and whether the disposed assets are integral to corps core business **pg325**
  - Basically whether SH investment is different after the sale in some fundamental way
  - On a resolution to approve a sale, every class of shares entitled to vote plus possible separate class vote if necessary

  pg325

Going Private Transactions

- "going-private transactions" result in the extinguishing of a shareholder's interest in an offering corp (**s190**) shareholder approval required
- Shareholders prejudiced by going - private transactions may be able to claim relief under the oppression remedy
- **OBCA**: a going private transaction is defined as any amalgamation, arrangement, amendment of articles, or other transaction carried out under that Act that would cause the interest of a holder of a "participating security" to be terminated w/o consent of the holder and w/o the substitution of an interest of equivalent value in another participating security
- Participating security usually means one that has a right to participate in earnings that are not fixed or limited in amount, such as common shares that carry a right to receive dividends when declared by directors, and a right to receive the remaining property of the corp on dissolution (**OBCA s190**)
- CBCA provides that CBCA corps must meet the requirements of applicable prov

securities laws (**CBCA s193**)

- "**Squeeze-out transaction**": essentially going private transactions involving non-distributing corps (**CBCA ss2(1)** (defn of "squeeze-out transaction") and **194**)
- CBCA establishes a special approval process for such transactions approval process **pg327**

Termination of the Corporation's Existence

- If the reason for termination is corporate insolvency then CBCA procedures cannot be used **s.208**
- Must be terminated by insolvency act or winding up act **pg329**

VOLUNTARY DISSOLUTION –

Simplest and most common form, usually handled by corps management

- If corp has **never** issued any shares it may be dissolved at any time by directors **s.210.1**
- Corp which has issued shares but has no property…or if there are multiple share classes, each class must pass a special resolution regardless of whether they have the right to vote **pg330**
- If corp has assets/liabilities then it will dissolve using the means listed above.
- If the corp is very intricate in its liabilities and business dealings, and where directors may have their own claims against the corp, it may be necessary to hire a professional liquidator
- On proposal of dissolution by director or SH entitled to vote at SH meeting, special meeting must then be held to consider liquidating corps assets and dissolving corp. If it is approved through the means **pg331** listed above (spec. resolution or special resolution of each class if multiple classes exist) = statement of intent to dissolve **pg331**)
- Any interested party may apply to court to have liquidation supervised **s.211.8** and **s.215**
- Advisable to obtain consent of Canada revenue agency for dissolution. Directors will be liable for any unpaid taxes otherwise (up to the amount distributed to SH) **pg331**

INVOLUNTARY DISSOLUTION

- **By court order** - any SH, CBCA director, or other interested person such as a creditor may apply to have corp liquidated and dissolved on a variety of grounds such as (**CBCA s.213 & 214**)
  - i) Failing to comply with provisions of the act
  - ii) Occurrence of an event, which entitles complaining SH to demand dissolution in accordance with a USA
  - iii) Circumstances where it is just and equitable to dissolve the corp.
- Dissolution may also be ordered as a result of oppression **s.241** **p332**
- Court may appoint a liquidator and designate payments to be made **s.217**
- Liquidators have certain powers such as retaining lawyers, accountants, other professionals too
- Liquidators must also give notice to creditors and prepare financial statements

Dissolution by the director –

There are **3 grounds** under which a director may order dissolution
pg332

i) The corp has not carried on business for 3 yrs
ii) Corp is in default of filing a document required by the act for one year
iii) The corp has no directors (**s.212**)

- Before dissolving the corp, the director must give at least 120 days notice and include a bulletin
  s.212.2
- Under OBCA, director dissolution is slightly different but not really p332

EFFECT OF DISSOLUTION

- If a certificate of dissolution has been issued; the corp ceases to exist on the date of the certificate being issued by the CBCA director. Any property not disposed of by this time vests in the crown. Legal proceedings existing at the time will still continue and new proceedings must be commenced within 2 years of the dissolution.
- Each SH remains liable for property received on dissolution to satisfy any judgment from such proceedings **CBCA S226**
- There are some situations when corp can be REVIVED by interested person **pg333**
- Can be SH, creditor, director, or any other person in a contractual relationship with corp
- CBCA director maintains discretion on whether to issue certificate of revival or not
- Under OBCA, revival only available where dissolution ordered by director
- Where corp is revived, any assets vested in the crown return to it or if property is disposed of the payment of money will be made of equal value @ date of dissolution **s.228.2** **pg334**
- The purpose of revival is to put corp in same position as though it had never been dissolved retroactively
- **EC Munday LTD. V Canada Safeway** - anything done purportedly on behalf of revived corp while it was actually dissolved still will be held to be effective as though it was actually in existence **Pg334**

VI DIRECTORS' AND OFFICERS' DUTIES

Fiduciary Duties

Introduction

- Directors and officers subject to a fiduciary duty to act "honestly and in good faith with a view to the best interests of the corp", as well as a duty of care to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." (**CBCA s.122(1)(a)**) **pg 340**
- These duties were developed by the CL and are now enshrined in statute in most jurisdictions.
- The fiduciary duty is owed to the corp rather than to SHS directly
- CBCA has greatly enhanced access to SHs remedies by expanding the circumstances in which a SH can initiate actions for a breach of duty owed to the corp if the directors refuse to do so.
- Corps incorped under the CBCA the SCC has said that the statutory duty of care is owed not just to the corp but is a general standard of behaviour that reflects the standard of care owed to corp stakeholders and creditors.
- 2 theories that justify the rationale behind the duty – **pg340-341**
- In almost all cases in which a breach of fiduciary duty occurs, the fiduciary has made some profit or received some advantage at the expense of the corp.
- "Ratification" – CL developed this rule that SHs could agree to absolve a fiduciary of her breach of duty. THIS IS NO LONGER EFFECTIVE under the CBCA and other statutes BUT SHs approval may be taken into account.

The "Best Interest of the Corporation"-meaning

- Content of the duty will be defined by reference to the interests of the corp in the circumstances
- Until recently the courts used to disregard the interests of other stakeholders and treated the interests of the corp as coextensive with the interests of SHs in the value of their shares.
- **But in BCE Inc. v 1976 Debentures Holders [2008]:** SCC rejected this conception of the duty, and rejected the debenture holders' challenge finding that the BOD had adequately taken into account their interest in approving the transaction. The court expressed its conception that while the interests of SHs and other stakeholders often will be "coextensive" with the interests of the corp, where they conflict, the duty is to the corp. As a duty to the corp, the duty is not simply an obligation to maximize SH value. It will depend on the situation. Court indicated that it was not mandatory for directors to take into account the impact of corp decisions on stakeholders. However later in the judgment the court described the obligation of directors where conflicts arise between the interests of the stakeholders as an obligation to treat individual stakeholders fairly and to resolve conflicts in accordance with their duty to act in the

best interest of the corp, viewed as a good corp citizen. Where there is no issue regarding conflict of interest the court should apply the "business judgment rule" meaning it should defer to the business judgments of the directors regarding how they consider and weigh competing interests. It remains to be seen how the courts will deal with this -ie fiduciary duty which does not give any priority to stakeholders interest vs the biz judgt rule which gives deference to how directors and officers decide to accommodate conflicting stakeholders interest. **Pg343**

Transacting with the Corporation

- Conflict of interest arises when director/officer contracts with the corp
- These sort of transactions voidable at option of the corp—regardless of good/bad deal for corp
- This standard was described in **Aberdeen Railway Co v Blaikie Bros (1854)** this case involved the purchase of chairs from a partnership in which a director was a partner. Under this strict rule it doesn't matter whether the fiduciary's interest was direct and beneficial or indirect, or as a trustee.
- **Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co (1914):** Director of one corp held shares in a second corp as a trustee for the benefit of his wife under her father's will. In a transaction in which the director took no part, all the shares of a third corp (held by the second corp) were sold to the first corp. Court held there was a breach of fiduciary duty and that it didn't matter that there was no direct conflict between the director's personal interest and his duty as a director. Contract was voidable. **pg346**
- Part of the rationale for this strict rule is that the courts don't want to make difficult judgments about when a conflict is a problem. It also doesn't require a person in the conflict to make a decision about whether the conflict is sufficiently serious and should exclude themselves.
- CBCA and other statutes has modified this rule to allow some transactions provided they are beneficial to the corp and certain procedural safeguards are observed:-
- **S. 120 CBCA** applies where a director/officer of a corp….**pg347**
  - Is a party to a material contract or material transaction whether entered into or proposed with the corp
  - Is a director or officer or an individual acting in a similar capacity of a party to such a contract or transaction
  - Has a material interest in a party to such a contract or transaction
- The materiality threshold above seems to be intended to eliminate the need to comply with the requirements for trivial conflicts. One way of defining it is to ask whether the interest is such that there is any reasonable basis for a concern that it may affect his ability to perform his duty.
- Only if the above are met must the procedures in **s.120** be followed.
- One way of defining the materiality threshold for directors or officers interests is to ask whether the interest is such that there is any reasonable basis for a concern that it may affect

his duty.

- **Zysko v Thorinson (2003):** Court found that a material interest is not just a financial interest but anything more than a de minimus interest. Suggested a good rule is that there should be disclosure whenever the interest of the director/officer might be relevant to the corps decision making.
- **McAteer v Devoncraft Developments Ltd (2001)**: Director who was trustee of a trust that entered into a contract with a corp he was a director of, had a material interest in the contract even though he was not a beneficiary – **pg348**
- **Exide Canada Inc v Hilts (2005):** Held a close personal relationship betw director and a p negotiating a contract, amounted to a material interest which had to be disclosed.
- If s. **120** applies to a transaction the director/officer must give notice. The Act sets out specific requirements regarding when notice must be given.

- **UPM-Kymmene Corp v UPM-Kymmene Miramichi Inc (2002) (the Repap case):** Addresses a directors disclosure obligation. Look at the facts – Berg's failure to advise Board of these facts meant he had not given the notice as reqd under the Act and therefore in breach of fiduciary duty – **pg349**
- In some cases disclosure would have to be made repeatedly and to address this the CBCA permits a general notice to be made. (**CBCA s.120(6)**) and there is a requirement to disclose any material change in directors/officers interests from time to time – **pg 349-350**
- 2001 amendments of CBCA – CL remedy of accounting for profits is excluded. The director/officer cannot be required to pay over to the corp any benefit received in connection with the transaction.
- CBCA provides alternative scheme to save contracts which have not complied with the requirements. The contract is enforceable (not voidable) and the director/officer is free to keep any profits if 3 requirements are met:
    1. The director/officer's interest was disclosed to SHs in sufficient detail to indicate its nature
    2. Contract or transaction was approved by special resolution of SHs; and
    3. Contract or transaction was reasonable and fair to the corp at the time it was approved (**s. 120(7.1)**)

- **Rooney v Cree Lake Resources Corp (1998):** a 5yr contract for management services was found not to be fair and reasonable
- Both substance of the contract and the way it was negotiated must be considered
- If the 3 criteria are not met the contract/transaction is voidable at the option of the corp
- CBCA states that No provision in a contract/articles or by-laws or a resolution relieves a director/officer from the duty to act in accordance with the Act or the regulations or relieves him from liability of such a breach (**s.122(3)**)

Taking Corporate Opportunities

- Personal interest and fiduciary duty conflict where the fiduciary considers investing/taking advantage of some other project or opportunity in which the corp has an interest
- If fiduciaries were permitted to invest personally in projects to the exclusion of the corp there is a risk that, in pursuit of their self-interest, they would appropriate to themselves valuable investment opportunities that they should have fought for the corp
- Fiduciary duty prohibits fiduciaries from allowing their personal interest to conflict with their duty to the corp in this way
  - When corp actively negotiating for opportunity and has reasonable prospect of getting it, there's no question that the corp has a strong interest in the opportunity and a fiduciary is prohibited from exploiting it for his own benefit—good example: **Cook v Deeks:** 3 directors of a corp were negotiating with a railway to obtain construction contract for the corp. They decided to obtain the contract for themselves. Held to have breached their fiduciary duty and had to pay their profits over to the corp.
- Where there's some impediment to the corp obtaining opportunity, courts have held that it nevertheless can belong to a corp, with the result that the fiduciaries cannot exploit it themselves— good eg **Regal (Hastings) Ltd v Gulliver (1942):** Regal owned a cinema and was seeking to obtain a lease of 2 others through a wholly owned subsidiary corp. Landlord of the 2 refused unless either the directors guaranteed the lease obligation personally or the amount invested in shares of the subsidiary was at least £5000. Regal only had £2000 to invest so they personally invested. Held that the directors had used their positions to make a personal profit, which the board was obliged to obtain for the corp. Court stated there was no requirement to find that the directors had not acted in what they thought was the best interest of the corp, nor was it relevant whether the corp could have otherwise obtained the leases. <u>There doesn't have to be any actual conflict of interest</u>– **pg353**

- Test in **Regal** was narrowed in **Peso Silver Mines Ltd v Cropper (1965):** A few months after Peso rejected the opportunity, Cropper and others formed a corp that acquired it. Peso sued Cropper for breach. Court denied relief because (1) Peso ceased to have an interest in the claims when the board decided not to buy them (2) court rejected that because Cropper acquired knowledge of the opportunity by being a director/officer of Peso, he was thus prohibited from taking advantage. <u>To be liable he must have access to the opportunity only because of his position.</u>

- **Peso** been criticised as making an express rejection of an opportunity by a corp a complete defence to a claim that a fiduciary breached his duty to the corp
- This [expedient] creates a risk that fiduciaries seeking to acquire an opportunity will simply create undesirable situation to have it rejected by the board
- The facile nature of the rule can be seen by noting how it led to opposite results on essentially similar facts in **Peso** and **Regal**
- In both cases the directors had decided that they could not proceed as planned because of the financial constraints on the corp
- Arguably the only diff was that in **Regal** this decision was implicit in the

directors' decision to implement an alternative strategy, while in **Peso** the board expressly rejected the opportunity

- Also, by requiring the fiduciary to have access to an opportunity and to have exploited the opportunity in the course of acting in his capacity as a fiduciary, the court in **Peso** severely constrained the classes of cases in which a breach of fiduciary duty could be found
- This constraint was shattered in the decision of SCC in **Canadian Aero Service Ltd v O'Malley (1973)**: SCC held O'Malley and Zarzicki did breach their duty(they had worked at Canaero to do survey mapping in Guyana, They resigned and formed their own Co, Terra and bid successfully against Canaero for a new contract) : In reaching its conclusion SCC determined test from **Regal** to be too restrictive to be used as general test. In SCC's view the court in **Regal** had characterized a breach of fiduciary duty as occurring where the fiduciary received "profits by reason only of being directors and in the course of the execution of their office" simply because that reflected the facts in that case. It wasn't intended to define exhaustively the circumstances in which a fiduciary duty could be breached.
- Court had to set itself free from limits imposed in **Regal** because in **Canadian Aero** the **Regal** test was clearly not met: O'Malley and Zarzicki weren't acting in their capacity as fiduciaries when Terra acquired the project; and they didn't obtain the project in the course of exercising their powers as officers of Canaero. Also the project Terra acquired was somewhat diff from the one they had been working on while with Canaero. So arguably, it wasn't even the same opportunity
- Saying that the categories of breach of fiduciary duty are never closed, the SCC developed an open- ended analysis based on weighing of various factors that the court stated could not be listed exhaustively **pg357**
- The purpose of this analysis is to answer two questions:
    - Does the opportunity belong to the corp considering how closely it is connected to the corp?
    - What is the relationship of the fiduciaries to the opportunity?
- **Star-Link Entertainment Inc. v Star-Quest Entertainment Inc. (2003):** Applied this approach. Star was seeking a valuable license but cd not afford the financing. Two directors started their own CO and obtained the license. Held to be breach and ordered to hand over profits to Star. Ct disregarded the fact that the two directors did not hold the shares directly but as trustees or nominees.
- Factors relevant to determining whether appropriation of an opportunity is a breach of fiduciary duty – list on **pg 359**
- The more factors in favour of corp interest in the opportunity and close relationship btw the fid, the more likely court will find a breach.

Competition by directors and officers

- Not a breach of fiduciary duty to terminate one's relationship with a corp and go into competition with it or else this would cause an unreasonable restraint on trade
- A fiduciary CANNOT compete with the corp while she remains in her capacity as a

fiduciary

- Competing fiduciary will be forced to pay over all her profits from the competing business
- A fiduciary CANNOT use her fiduciary position and the opportunities afforded to her in that position to develop competing business then quit to begin competing.
- Fiduciary has some obligations extending beyond the termination of his relationship with the corp
- If a departing fiduciary attracts customers/employees due to their qualifications/experience this will not amount to a breach. If they solicit customers/employees it will.
- Often employers and fiduciaries who are employees will agree on what is permitted post- employment
- In Canada there is no absolute rule regarding multiple directorships, the question is whether they can act in the best interest of both corps.

Takeover Bids

- When a bidder offers to purchase a controlling interest in a corp.
- Often the reason is because the bidder believes the value of the corp can be increased by changes in management.
- Often "defensive measures" by directors to defeat take-over bids will be contrary to the interests of the SHs. However if not permitted the only way a director could prevent a take-over bid would be to manage the corp so effectively that no bidder could improve the value.
- Some take-over bids are not threatening to management. The wide range of motivations makes it difficult to formulate a general rule to govern the behaviour of directors.
- A number of old cases have held that it was improper for directors to issue shares for the sole purpose of defeating an attempt by someone to gain control of the corp, even if they bona fide believed such an action to be in the best interest of the corp. However this was rejected in **Teck Corp. v Millar** on the basis that directors must be able to act in the best interest of the corp in responding to bids. But how is the court to determine what actions are in the best interest of the corp? In the above case Justice Berger suggested that the court should ask if there were reasonable grounds for director's belief that they were acting in the best interest of the corp. Some cases have applied this approach.
- **Olympia & York Enterprises Ltd. v Hiram Walker Resources Ltd.:** seemed to suggest that the fid. Duty to act in the best interest of the corp imposed a positive duty to take defensive measures if the board believed that completion of the bid was not in the corps best interest.
- **Exco Corp v Nova Scotia Savings & Loan Co.:** Took a more restrictive approach and held that the test was whether an action taken by the directors was consistent only with the best interest of the corp and inconsistent with any other interest (including personal).

- These cases provide little assistance. But one guiding principle endorsed by the court is that SHs should have the right to determine to whom and on what terms they may sell their shares. This suggests defensive measures should be approved by SHs.
- **347886 Alberta Ltd. v Producers Pipeline Ltd.:** Court said they must be able to show that whatever action they take is a reasonable response to the risks associated with the bid and is for the purpose of benefitting the corp and SHs. If possible, defensive actions should have prior approval by SHs.
- Courts look at whether the director acted reasonably in the circumstances, NOT perfectly.
- No general duty to set up an auction but will depend on the circumstances. (ie canvass the market to obtain higher prices from competing bidders).
- Break fees have been approved by cts.- ie the BOD entices competing bids by paying a break fee.
- **Pente Investment Management Ltd. Schneider Corp:** Family held majority block of shares and they did not want to sell to the bidder Maple leaf. \the board formed a committee to decide how to respond to the bid. It found price of Maple leaf bid was inadequate and found another bidder by canvassing the market. Smithfield's bid was accepted. Court found that the board has fulfilled its duty and was not obliged to go back to Maple Leaf to try to obtain a better offer in the circumstances. – **pg369**
- **BCE:** makes things more complex since the best interest of the corp may require stakeholder's interests to be taken into account. – **pg370-373**

Other Breaches of Fiduciary Duty

- **Canadian Aero Service v O'Malley:** Justice Laskin said *the categories of breach are not closed*
- Other cases involve directors making decisions where the interest of majority SHs are in conflict with minority SHs. Because the majority has the statutory right to replace the directors, the directors may feel tempted to act in favour of the majority –this a breach if they do

Reliance on Management and Others

- There is a limited defence where directors rely on others
- **S.123(4)** of the CBCA provides that a director is not liable if he relies, in good faith on:
    - Financial statements of the corp represented to him by an officer or in a written report by the auditor of the corp to reflect fairly the financial position of the corp or
    - A report of a person whose profession lends credibility to a statement made by the person

This doesn't permit the director to avoid liability by demonstrating that they acted reasonably in the circumstances. The fid. Obligation continues to apply but is subject to the limited reliance expressly permitted.

Sanction by Shareholders of Fiduciary Breach

- CBCA greatly reduced the effect of SH approval of fiduciary breaches. – more on **pg 374**
- Under s 120, a SH resolution does not cure a breach or relieve a fid of liability for the breach.

Duty of Care

Common Law

Statutory Reform

Introduction

- **S122(1)(b) CBCA**: imposes a DoC on directors and officers – **pg375**
- The content of this duty is highly dependent on the "comparable circumstances"
- SCC recently confirmed that the DoC sets out an objective standard by referring to the care, diligence and skill of a reasonably prudent person. This represents a departure from the CL which only required directors to exercise care that could be reasonably expected for a person for their knowledge and experience.
- Prior to SCC's decision in **Peoples Dept Stores** most understood DoC as being owed to the corp
- In **BCE** SCC confirmed that the novel approach in **Peoples** under which the duty is not an obligation owed to the corp, but represents a standard of behaviour to be served in relation to creditors and other stakeholders as well----the extent to which the statutory duty can be used to support a claim against the directors and officers is now unclear
- SCC's decision in **Peoples** was criticized significantly – **pg376**
- In effort to avoid the possibility that the approach to the DoC in **Peoples** and **BCE** would be applied to corps incorped under OBCA, effective 1st Aug 2007, that Act was amended to specify that the DoC is owed ONLY to the corp
- SCC did not suggest that previous caselaw on the DoC should be rejected, so underneath is relevant case law on the duty.

The Standard of Care

- First traditionally courts viewed director's responsibilities as intermittent in nature, to be performed at periodic board meetings – the general standard of care under the CBCA likely demands a higher level of involvement. **S. 123** provides an incentive to attend meetings because *a director is deemed to consent to all resolutions passed at a meeting at which she was present unless she records her dissent*. If she misses a meeting she is deemed to have consented to all decisions unless she records her dissent. Directors cannot escape responsibility by not attending meetings.
- Second beforehand, the CBCA courts established that directors/officers were entitled to trust employees and others to act honestly in performing their obligations and could rely on what they were told. This is now subject to express statutory standard –a director is not liable if she, in good faith, relies on financial statements and reports of lawyers and other professionals (**s.123(4)**).

- **Peoples Department Store:** SCC held it did not extend to protect reliance on advice from officers who are not members of a recognized profession. (VP of finance had degree in commerce and 15 years' experience but was not an accountant and therefore not subject to regulation and did not have indep insurance against prof negligence)
- Where reliance does not fall within one of the categories (professions) it may be allowed if it was reasonable in the circumstances.
- Third used to be common for corps to set their own standard of care at a level lower than CL. This is now precluded by statute (**s. 122(3)**), which imposes a min standard of competence; they must have at least a rudimentary understanding of the business and if not, should acquire it. No prov in contract or by –laws etc relieves director from the stat duty of care or from liability for breaching it.
- NB apart from this, the substance of the duty must be gleaned from case law.
- In addition, some monitoring of the corp is required by the DoC, from directors.
- This doesn't involve a detailed inspection of day-to-day activities but does include general monitoring of the corps policies and affairs and attending meetings regularly.
- They need to have some familiarity of financial affairs of corp. thru regular review of the financial statements.
- But if financial statement have some problem, directors have a duty to enquire about problems.
- **Francis v United Jersey Bank** □a director was found to have breached her DoC when she paid no attention to a problem appearing clearly on the face of the corp's balance sheet (loans to her sons) Not enough to simply object but also make an adequate response.
- **UPM-Kymmene Corp v UPM-Kymmene Miramichi Inc** □court found that the members of the committee, who decided to recommend the package after 5-7mins meeting, hadn't fulfilled their duty of care because the committee didn't have or seek sufficient info to provide the basis for a reasonable judgment. More examples on **pg380-382**
- Finally DoC cannot be delegated, though delegation of responsibilities may have an effect on what is considered "comparable circumstances". One director who is assigned responsibility for a certain area cannot relieve the others of liability for this area.

The Business Judgment Rule

- Courts reluctant to second-guess management due to lack of expertise and they do not want to set the SoC too high to inhibit business ppl from doing their jobs as a result of increased risk of liability. Courts also conscious to avoid "hindsight bias"
- As opposed to the USA, in Canada the rule requires courts to defer to the business judgment of the directors where certain preconditions are met but who bears the burden of demonstrating these preconditions is unclear.
- The decision must have been exercised honestly, prudently, in good faith, and on reasonable grounds before it is entitled to the deference. Courts require this process be reasonable in the circumstances. Not required to make a perfect decision.

- In **UPM-Kymmene Corp** (above) court refused to apply the business judgment rule

Statutory Duties and Oppression

Other Duties Imposed on Directors and Officers

- Directors are liable to employees for up to 6 months unpaid wages if the corp is either bankrupt or in liquidation proceedings or the corp has been successfully sued for the debt and the judgment has been unpaid (**s.119**). Not liable unless the lawsuit against the corp by the employee was commenced not more than 6 months after the date the payment was due.
- Directors responsibility for unpaid wages ceased 2yrs after he ceased to be a director (**s.119(3)**)
- SCC has held that liability does not extend to unsatisfied judgment for wrongful dismissal or other severance or termination payments
- Directors personally liable under **s.18 CBCA** in various circumstances. They are liable if they vote for or consent to a resolution authorising….list on **pg386.**
- In each case there must be reasonable grounds to believe that the indicated version of the capital management impairment test is met…list on **pg387.** In each case the directors are responsible for repaying the corp any amounts paid out where these requirements are not met.
- The 2001 amendments added a "due diligence defence" to all the bases of liability under **s.118** and
  s.119. The defence is also available in relation to alleged breaches of the duty to comply with the act, the regulations, the articles, the by-laws and any USA under **s.122(2).**
- A director is not liable if she exercised the care, diligence, and skill that a reasonably prudent person would have exercised in the comparable circumstances, including reliance on good faith on….financial statements…a report of a person who's profession lends credibility.
- See chart on **pg389** for director's duties and reliance on others.

Liability of Corporate Managers for Torts

- Generally directors/officers are NOT liable for the corp's torts simply by virtue of their positions with the corp. However, where directors/officers commit torts in the course of their employment, they can be held personally responsible.
- Courts recognised tension between tort principle that each person should be responsible for her own wrongs, and the principle of separate corp personality
- Whether director/officer/employee responsible for tortuous act depends on degree and kind of his personal involvement
- **Scotia Macleod Inc v Peoples Jewellers Inc (1995):** Ontario CoA suggested a test for liability that provides greater protection for directors acting in the scope of their employment and gives greater deference to the separateness. Held for a claim against directors/officers to succeed, it's necessary t o allege that they had committed the tortious behaviour outside their formal decision-making roles.

- **ADGA Systems International Ltd v Valcom:** Offered clarification. The requirement that the actions of corp managers have a "separate identity" from the corp didn't mean the corp mgrs. could not be held liable for torts when acting in the course of their duties.
- Current case law seems to be moving away from abstract concepts and more based on the degree and kind of personal involvement in the tort.
- **Berger v Willowdale A.M.C (1983):** Court found sidewalk had not been cleared adequately. Found president has a general responsibility to ensure that the workplace was safe. He was in a position to know about the danger and remove it but failed to do so. Court stated that personal liability would not arise in every case and would depend on a variety of factors. The significance of this case is that they are not excused just because they are the president of a cop that happens to own property.
- Employees may be held liable for negligence for actions in the course of their employment.
- **London Drugs Ltd. v Kuehne & Nagel International Ltd.:** Leading case on employee liability negligence. SCC held that they had a personal duty to the corps customer however they ultimately escaped liability on the basis of an exclusion of liability clause in the employer's contract with the P.
- There have been a number of decisions holdings managers liable **(NBD Bank, Canada v Dofasco Inc (1997) – pg 393-394)**
- **Inducing breach of contract:** a person, knowing there is a contract btw the plaintiff and a 3rd party, induces the 3rd party, without justification, to break the contract with the intention of doing so. Every time a corp breaches a contract, someone must have caused it, so if liability arose every time
  the innocent party would ALWAYS have an action. An exception to this is **Said v Butt:** "*if a servant acting bona fide within the scope of his authority procures or causes breach of a contract between his employer and a 3rd person, he does NOT become liable to an action of tort"*
- **McFadden v 481782 Ontario Ltd.:** Held that the effect of this exception was to excuse directors/officers if they were acting "under the compulsion of a duty to the corp" Court held the **Said v Butt** exception, since they were acting with a view to their own interest and not the corp, and so could not be said to be acting "under compulsion of a duty of the corp" were liable.
- **Aiken v Regency Homes Inc (1991):** Acting outside the scope of their employment and therefore directors/officers liable – **pg395**
- This compulsion defence is not available for other torts including deceit and negligent misstatements. It's no excuse that the D's were obeying orders of the employers in such cases.

VII SHAREHOLDERS' REMEDIES

Introduction

- Two main procedures through which a shareholder may assert a claim for relief are the:
  1. ***Derivative action***-a SH may seek the court's permission to initiate a lawsuit on behalf of the corp
  2. ***Oppressive action***-SHs may seek relief where actions of the corp or its directors oppress the SH's interests
- In addition to these rights, there's some corp law rights that belong to SHs personally—may be enforced through an ordinary civil suit

Personal Action

- The major limitation on a personal action to enforce SH rights is that the most important legal constraints on directors & officers, the fiduciary duty and the DoC, are not obligations owed to and enforceable directly by SHs
- As a result, breaches of these duties CANNOT be the basis of a personal action by a shareholder
- Relief from oppression is to be available whether or not the claim is essentially personal or derivative, so long as the prescribed standard of behaviour has been violated
- For this reason almost all shareholder claims are brought using the oppression remedy

Derivative Actions on Behalf of the Corp

- General rule that only a corp may sue for an injury to it was developed in **Foss v Harbottle (1843)**
- Rule is based on the notion that because the corp is a separate legal entity, only it should be able to sue for wrongs it's suffered
- If shareholders were permitted to take action for corp wrongs it would create the possibility of multiple actions for the same wrong and the consequent risk of inconsistent results
- **Foss** has been interpreted as saying that the SHs could approve or ratify breaches of duty to the corp and as a result it'd be inappropriate interference with the majority rule, for courts to permit actions by minority shareholders where the action had been or could be ratified by the majority
- There WERE 4 situations in which a minority shareholder could sue for injury to corp **pg407**
  1. *Fraud on the minority*
  2. *Ultra Vires Acts*
  3. *Defect of majority approval*
  4. *Personal Right*
- Restrictive conditions developed in **Foss** have been replaced by a scheme allowing shareholders to proceed with derivative actions subject to court approval
- Under the scheme, approval will be given if the court is satisfied that 3 conditions are met **pg408**

1. The complainant gives not less than 14 days' notice to the directors of the corp of her intention to apply for leave to bring an action if the directors fail to do so
2. The complainant is acting in good faith
3. The action proposed to be initiated by the complainant appears to be in the interest of the corp (**s.239**)

- Requirement for notice doesn't mean that a shareholder must specify all the legal bases on which a claim might be made or the facts or the evidence on which the shareholder relies
- Its sufficient if shareholder gives some general info disclosing nature of the claim
- Failure to give notice isn't fatal to application if its obvious that directors will refuse to act
- "good faith" is satisfied as long as bad faith is not shown.
- Doesn't matter if the complainant has a personal interest in the outcome as long as it's consistent with the corps interest.
- Leave should only be denied if the action is bound to be unsuccessful.

Regarding scheme:

- First, CBCA expressly provides that evidence of SH approval, or the possibility of future SH approval, is not determinative of whether a derivative action may proceed (**CBCA s242(1)**), thus eliminating that aspect of the rule in **Foss**. SH approval may still be taken into account by court in deciding whether leave to commence a derivative action should be given….# meaninf :seeks court's permission (leave of court)
- Second, once application made, it cannot be stayed/discontinued/settled without approval of court (**CBCA s242(2)**)----to prevent corps from settling so-called 'strike suits' where shareholder brings frivolous suit to extort corp **pg410**
- Third, contrary to usual rules of civil procedure, a SH making an application for leave to commence a derivative action cannot be required to give security for the corp's costs **pg410**
- Finally, a court may award a shareholder [who has little money] with an action, though he may be required to repay them if he is unsuccessful (**CBCA s242(4)**)
- In **Barry Estate v Barry Estate (2001)** the court suggested that whether interim costs should be awarded depended on top of **pg411**
- CBCA permits a wider class of persons to bring a derivative action (even though mostly SHs). CBCA permits applications for leave to be brought by a complainant which is defined to mean:
  - Current or former registered or beneficial holder of securities of the corp or any affiliated corp
  - A director/officer of the corp or any of its affiliates
  - The director appointed under the CBCA
  - Any other person whom a court determines is a proper person to make an application (**s.238**)
- **Sammi Atlas Inc, Re:** A committee of trade creditors held to be proper complainants

- **Peoples Department Stores (Trustee of) v Wise (2004):** SCC suggested a creditor could be a proper person to bring an action. Where a corp is prospering their interests might be the same as the corp.
- Once the court has given permission to bring a derivative action the CBCA gives the court unlimited remedial discretion (**CBCA s.240**)

Oppression

Introduction

- Traditional remedies such as the derivative action for injuries to corp have been displaced by the flexible and procedurally simple oppression action
- Main intended beneficiaries were minority shareholders
- CBCA provides other categories of corp stakeholders may seek relief, and the courts have a discretion to allow anyone who, it thinks is a 'proper person' to be a complainant for the purposes of bringing an oppression action

The Statutory Scheme

- Key provisions: **s. 238** – defines complainant **s.241** – sets out substantive standard of oppression
  s.242 – deals with interim costs and procedural issues
- Definition of oppression in CBCA **s.241** – "…that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of." **pg 414**

Interim Costs - s.242(4)

- Complainant seeking relief from oppression may apply for an award of interim costs **pg415**
- **Wilson v Conley:** Minority SH sought interim costs. Justice Rosenberg set out considerations applicable to the motion (i) the applicant is in financial difficulty (ii) the financial difficulty arises out of the alleged oppressive actions of the respondents (iii) the applicant has made out a strong prima facie case. In this case the requirements have been met.
- **Alles v Maurice (1992):** Considered the elements in the case above however he disagreed with the second criteria and stated that it would be sufficient if the financial difficulty resulted from the "general drain of resources" due to their pursuit of the lawsuit.

Who may claim relief from oppression: The complainant

Statutory complainants:

  - Security Holder **Section 238(a)**

- First defined as "a registered holder or beneficial owner and a former registered holder or beneficial owner of a security of a corp or any of its affiliates."
- "Beneficial owner" is defined broadly to include ownership through any trustee, legal rep, or agent.
- "Security" means a share of any class or series or debt obligations.

- "Debt obligation" defined as a bond, debenture, note or other evidence or indebtedness whether secured or unsecured.
- Broad language intended to ensure that SHs interests were protected however they arose.
- Courts have recognized minority SHs have status under this section.
- **Moriarity v Slater:** held a minority SH of an affiliate of the corp may be a complainant
- Courts confirmed that former SHs can be complainants under this section however the oppression must be occurring at the time the application for relief is sought.
- A person who was a SH continues to have status under this section even if they have invoked their dissent and appraisal right with the result that they lose all their rights as a SH – **pg419**
- **Csak v Aumon (1990):** Held that applicants with a contractual claim to be issued shares were beneficial owners of securities of the corp for the purposes of this section. Court noted it is not a bar to complainant that the applicants claim to be a beneficial owner of the shares is disputed. More on **pg419-420**
- A sympathetic court can grant standing to anyone it deems a proper person
- It is apparent in the stat definition of "security" that some holders of debt obligations are also entitled to bring actions. However "registered holders" seeks to limit the claims of debt holders.
- In **First Edmonton Place**: court determined that an unpaid landlord was not a "security holder"
    - Directors and Officers and the Director, **Sections 238 (b)** and **(c)**
- Courts have expressed their reluctance to consider wrongful-dismissal claims
- **Naneff:** trial court held the dismissal was part of an "overall pattern of oppression" however this analysis was rejected by the Ontario CoA which held that a court could protect the interests of a complainant in an oppression action only in his capacity as a SH, director or officer (NOT EMPLOYEE)
- **Murphy v Phillips (1993):** the general mgr of a car dealership, who wasn't a SH was held to be an officer and given standing as a complainant.

Discretionary complainants:

- **General**

- Courts have been asked to exercise their discretion by creditors in a number of cases and some by the corp itself.
    - **Creditors**
- They like to use the oppression action due to the remedial flexibility.
- Most common situation is where directors transfer assets out of a corp to themselves to defeat creditors. Yet if they are granted standing then this might threaten to displace other bases of liability so the courts are reluctant.
- Reluctance was clearly expressed in **Royal Trust Corp. of Canada v Hordo:** *"I do not think that the courts discretion should be used to give 'complainant' status to creditor where the creditor's interest in the affairs of a corp is too remote or where the complainants of a creditor have nothing to do with the circumstances giving rise to the debt or if the creditor is not proceeding in good faith."* – **pg424**

- The final criteria (underlined above) suggests a more workable standard.

- This standard was elaborated on in **First Edmonton Place** where justice McDonald made clear that to grant complainant status to a creditor there must be some evidence of oppression. He identified 2 circumstances where this would occur – **pg425**
- In general courts have granted relief where there has been some action by the corp, often intentional, which has had the effect of rendering the corp unable to perform its obligations.
- One of the first cases to grant complainant status to a creditor was **R v Sands Motor Hotel Ltd.** the Crown was given status on the basis of being a creditor under the ***Income Tax Act***
- **Canadian Opera Co. v 670800 Ontario Inc. (1989):** Court granted complainant status to a creditor who had purchased a car from a corp, but not obtained possession of it, where the funds paid to the creditor had "gone south" from the corp to an associate controlling SH.
- **Prime Computer of Canada Ltd. v Jeffrey (1991):** A judgment creditor with no hope of recovery against a corp because of excessive salary payments to the controlling SH was permitted to be a complainant.
- In both these cases the complainant obtained an order directly against the controlling SH of the corp
- Some courts held that a creditor must have been a creditor at the time the oppression occurred
- **Devry v Atwoods Furniture Showrooms Ltd (2000):** Held that it was not appropriate to give a judgment creditor standing where the allegedly oppressive dividends were paid before the creditor became a judgment creditor.
- However it HAS been held that a creditor has a reasonable expectation that a corp will not engage in conduct during/after the trial of a civil action that would render recovery impossible. Where the corp does so the creditor should be able to seek relief from oppression.
- **Peoples Department Stores:** SCC decision in this case may herald new openness to granting standing to creditors though hasn't been seen yet
- 2 advantages of oppression action for creditor (1) may be commenced by way of an application w/o discovery/pleadings and will be faster (2) discretionary remedial powers

o ***Corporation***

- **S. 238** makes no reference to the corp
- 2 Alberta decisions have held that the corp may be a complainant
- **Kredl:** Alberta Queens Bench held that the corp was a proper person to be a complainant where all the SHs, other than the respondent, were joined as plaintiffs in action. This confirmed **Pocklington** in which Justice MacDonald refused to strike out a statement of claim on the grounds that the corp was not a proper person to be a complainant
- **Fiber Connections Inc v SBCM Capital Ltd:** A corp was granted standing to bring an action on behalf of a majority SHs
- **Canada (Attorney General) v Standard Trust Co:** Houlden J.A. refused to grant leave to a trustee in bankruptcy to pursue an oppression claim on the basis that the trustee succeeded to the rights of t h e corp and the transaction had been unanimously

approved by the board of the corp. such that, in the view of the court, the corp could not have claim oppression.

- **Dylex Ltd (Trustee of) v Anderson (2003):** Lederman J suggested **Pocklington** was preferable and refused to strike out a claim on the same grounds. – **pg429**
- The cases seem to suggest that a corp should not be given standing in every case but it may be permitted where the corp is, in effect, representing the interests of others (e.g. SH or creditor)
- A SH may also be able to initiate an oppression action and seek relief both for themselves and the corp

1) The substantive standard

- **Ferguson v Imax Systems Corp.:** Brooke J. "each case turns on its own facts"

General Approach to Interpretation

- Oppression remedy to be interpreted broadly
- **820099 Ontario Inc v Harold E. Ballard Ltd. (1991):** Justice Farley explained SHs interests "they must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the SHs".
- **Westfair Foods Ltd. v Watt:** Alberta CoA endorsed the above approach and added that the reasonable expectations of SHs should not be limited to those existing when the relationship first arose.
- **BCE (2008):** SCC confirmed the fundamental role of reasonable expectation. Court identified factors that were useful in determining whether a reasonable expectation exists – on **pg433**
- All corp stakeholders—not just shareholders—have a reasonable expectation to be treated fairly- criteria **pg433**

Statutory Language

- Classic statement of the meaning of oppression comes from the HL decision in **Scottish Co-operative Wholesale Society Ltd. v Myer – pg434**
- **Brant Investments Ltd v KeepRite Inc:** A finding of bad faith is not required but would be highly probative.
- More on "unfairly prejudicial" and "unfairly disregards" – **pg435**
- **Westfair Foods Ltd. v Watt:** Alberta CoA rejected the idea that the different terms could be given a sensible, distinctive, operationally useful meaning and favoured general fairness standard instead.

Indicia of Oppressive Conduct

- **Arthur v Signum Communications Ltd:** Justice Austin set out a helpful catalogue of criteria – **pg437**

Actions of Directors

- Directors actions are oppressive only when they are acting in their capacity as directors
- Most courts have rejected arguments that claims for relief from oppression should be

thrown out because the injury to the SH was incidental to an injury to the corp.

- Contrary view was taken in **Pappas v Acan Windows Inc:** where an application sought derivative and personal relief by way of oppression and leave of the court had not been obtained to commence a derivative action, the court had to exercise discretion regarding whether to permit the personal claim under the oppression remedy to succeed. Court concluded that oppression does not arise where the only injury to an applicant is incidental to an injury to the corp. this approach is generally inconsistent to **BCE** where the SCC confirmed there is no barrier to bringing an oppression claim for breach of fiduciary duty.

What interests are protected?

- Courts have held that a complainant must have some legitimate interest in pursuing the oppression claim based on some relationship with the ppl who are oppressed.
- More on **pg440-441**
- Some courts have held that past acts are only relevant if there is ongoing oppression at the time of the application.
- **Royal Trust v Hordo:** A claim by a person who bought shares in a corp after and with full knowledge of the alleged oppressive acts was thrown out as being an abuse of process.
- There is no oppression where the credit obligation did not exist at the time of the alleged oppressive act (**First Edmonton Place v 315888 Alberta Ltd**)

Actions Against Shareholders

- Under **s.241** once there is a finding of oppression, an order may be made against a SH <u>Oppression and Shareholders Agreements</u>
- Several cases have held a breach of a SHs agreement may be oppressive but not all.
- Compliance with an agreement is a reasonable expectation.
- Compliance with the strict terms of a SHs agreement does not guarantee that no oppression has taken place (**Deluce Holderings Ltd. v Air Canada**)
- Another issue is whether it is appropriate to provide remedy where the matter in dispute is governed in the agreement
- **Beazer v Hodgson Robertson Laing Ltd:** an application for an order directing the purchase of shares was denied on the grounds that the parties had addressed this in the circumstances that had arisen in their agreement.
- **Deluce** (above): Air Canada argued that an application for relief from oppression was precluded by the SHs agreement which required arbitration if the parties couldn't agree. Court determined that the real subject matter of the oppression action was not the share valuation (as in the agreement) but other acts of oppression so the application was allowed. If it was a general agreement to arbitration the outcome would have been different (such as in **Armstrong v Northern Eyes Inc.**)

Oppression and Business Judgments

- See **pg447**

Remedies

- Under **s.241(2)** the court is empowered to make an order to "rectify the matters complained of"
- Under **s. 241(3)** the court may make "any interim or final order it thinks fit"
- The main remedies are:
  - Share purchase – most common
    - Found to be appropriate where the parties have lost confidence in each other and their relationship has become unworkable.
    - May not be appropriate if neither the corp nor the controlling SHs are in a financial position to purchase the applicants shares
  - Liquidation and Dissolution
    - Where the parties relationship has completely broken down this may be the only remedy
    - **Stel-Van Homes Ltd. v Fortini:** winding up of a family business was ordered.
  - Remedies Against Shareholders and Others
    - The court has been willing to grant remedies for oppression directly against SHs at the instance of creditors where the SH has participated in rendering the corp unable to satisfy the creditors claim.
  - Compliance
    - Where there has been a failure to prepare and distribute financial statements, holder meetings or act in some other way governed by the corp statute.
  - Other kinds of relief
    - Including orders directing amendments of by-laws and the replacement of management, the appointment of receivers, amendment of SHs agreements, investigations and the creation of a pre-emptive right.

Compliance and Restraining Orders

- CBCA and most modern corp statutes allow complainants to apply for a court order requiring compliance with or restraining a breach of the Act, the regs, the corps articles or by-law or USA (**s. 247**)
- Such an order can be made against a corp itself or against a director/officer, employee, agent…
- The benefit of this is it is an easy way to deal with discrete problems
- This cannot be used if it requires a determination of complex issues.

Rectification Orders

- Where a person's name has been wrongly entered or retained in a corps shareholder register or other records of the corp, a security holder or any other aggrieved person may apply to a court to have the register or record rectified (**s. 243**)
- Court may also restrain the calling/holding of any meeting or the payment of

dividend until the register or record is rectified to ensure there is no wrongful exclusion (**s.243(3)**)

- The right to obtain the rectification of records on an expeditors summary basis is important because corp registers and other records are in the absence of evidence to the contrary, proof of what they disclose, including share ownership (**s.257**)

Investigations

- Part **XIX** of the CBCA sets out a scheme under which investigations into the business and affairs of a corp or any of its affiliates may be carried out (**ss.229-36**)
- A court may order an investigation on the application of a security holder or the CBCA director where it appears to the court that any of the following grounds has been made out: (list on **pg453**)
- It is only necessary to show that it "appears" as though any of these grounds exist for the courts to order an investigation
- However courts have held that they will not use their discretion to order them lightly
- Investigations should not be used to permit the applicant to obtain info that it could have obtained through the regular discovery process in a civil proceeding
- CBCA sets out the powers of inspectors, procedures for hearings and various other procedural matters (**CBCA ss.229-36**)
- The purpose of an investigation is ONLY to find facts and the corp pays the costs of it

Corporate Purchase of Shares of Dissenting Shareholder (dissent and appraisal)

- Shareholders who dissent in relation to a shareholder vote on certain specified matters of fundamental importance to the corp, may require the corp to buy their shares (**CBCA s190**)
- Shareholder votes on the following (**pg454**) fundamental changes trigger this right—referred to as the shareholder's dissent and appraisal right
- All these triggering events are fundamental changes to the nature of the SHs investment
- The availability of dissent and appraisal right must be disclosed to SHs in the notice of the SH meeting at which the fundamental change will be voted on
- The main issue has been the price at which corp must buy the shares. The corps obligation is to purchase them for "fair value"
- The corp must make an offer and the SH may object and request the court to determine fair value. The corp can also apply for this as well.
- Fair value is not synonymous with fair market value.
- How to calculate it – **pg 456**

***In Brant Investigations Ltd v KeepRite Inc** CoA identified 4 methods for valuing all shares of the corp pg456*

  - *Market value*
  - *Asset Value*
  - *Earning Value*
  - *Combination Method*

- Courts have used each of the above methods and have stated no rigid rule about

which method is appropriate; the choice of method will depend on the facts.

- General rules about valuation: They must be conducted as of a particular date based on the facts known at that time. **Pg457**
- Dissenting SHs are not entitled to special premium just because they are dissenting **Brant Investigations** held that no such premium should be paid to dissenters as an element of fair value

Winding Up and Dissolution

- In addition to permitting a winding up and dissolution order in oppression, the CBCA separately provides for an application for winding up and dissolution (CBCA **ss. 213** and **214**)
- Most extreme form of SH relief
- On application for this the court can order other relief (**s.214(2)**)
- It may be ordered where the court is satisfied that a USA
- entitles the complaining SH to demand liquidation and dissolution.
- The other ground on which a court may order it is when it is "just and equitable to do so" (**s.214(b)(ii)**)
- Often ordered where (1) it is no longer possible for the corp to carry on business (2) where the SH has a justifiable lack of confidence in the conduct of the management of the corp. (3) Where the corp is a partnership between 2 or more persons, with more or less equal power in the corp, who have come to disagree fundamentally on how the business should be operated (referred to as "deadlock")
- Lack of confidence cannot consist only of a disagreement about the policies of mgmnt, there must be some serious misbehaviour.