# CHAPTER ONE: CHOOSING THE FORM OF BUSINESS VEHICLE

**DIFFERENT RISKS:**

1. If the director/officer acts in a self-interested way, to the detriment of the corporation/shareholders.

##### Example) If a director sets up a competing company to steal a corporation’s business opportunity.

1. If the shareholders don’t agree.

##### Example) If one shareholder owns a small number of shares in a corporation and the majority owner uses their voting power to take the corporation in a direction that the smaller shareholder disagrees with.

1. If there is a disagreement about who will be held liable for the corporation’s obligations.

##### Example) If the business runs out of money, who is responsible for paying the employees? The creditors?

There are two options to get money to get a business started:

1. **Debt Financing:** loan money to the business. They’re obligated to pay you principle amount + interest (creditors).
2. **Equity Financing:** acquire an ownership stake in the business/right to share in profits (shareholders).
   1. **Upside:** unlimited profits if they’re profitable.
   2. **Downside:** if they become insolvent, you get paid your principle amount last and after the debt financers.

## TYPES OF BUSINESS VEHICLES

**Consider:** the creation of the business, risk of loss, power/control, participation in profits/distribution of assets, and dissolution. **Other Considerations:** # of ppl involved, borrowing requirements, availability of government grants, estate planning, costs, and flexibility.

|  |  |  |  |
| --- | --- | --- | --- |
| **CHARACTERISTIC** | **SOLE PROPRIETORSHIP** | **PARTNERSHIP** | **CORPORATION** |
| **CREATION** | At the will of the owner. No documents need to be filed with any government authority. | By agreement or conduct of the parties. A partnership agreement is optional. | Corporate registry issues certificate of incorporation after incorporating documents filed. |
| **RISK OF LOSS** | Unlimited/full personal liability. | Unlimited/full personal liability. This can be jointly or severally. | Limited liability. |
| **POWER OF CONTROL** | Sole Proprietor. | Partners manage equally, unless altered by an agreement. | Shareholders elect Directors. Directors manage the business and can appoint Officers. |
| **DISTRIBUTION OF ASSETS** | Sole Proprietor. | Partners receive equal profits, unless altered by an agreement. | Transferrable, unless incorporating documents restrict. |
| **DISSOLUTION** | Stop doing business, death, or retirement. | Death of partner, or by agreement. | Perpetual until formally dissolved. |

Sole Proprietorship:it comes into existence when an individual carries out business w/o steps to form an organization like corporation.

* Not a separate legal existence.
* Must get a business license like any other business.
* Profits are taxed as personal income.
* **Benefits:** easy to set up/not as costly and the individual only has to file one tax return.
* **Drawbacks:** full personal liability, it’s hard to raise money (no equity financing), and you are responsibly for employee’s actions.
* If you operate a business under a different name than your own 🡪 register that name at the Corporate Registry.

Partnership:the relationship that subsists between persons carrying on a business in common with a view to profit (**section 1(g)** *PA*).

* Not a separate legal existence.
* Profits are taxed as personal income.
* The property of the partnership is not owned by the parties and cannot be used for private usage.
* **Benefits:** easy to set up and not as costly.
* **Drawback:** full personal liability, meaning that each partner who has personal/business assets can have those assets satisfy debts.

Corporation: a creature of statute that has a **separate existence** from its owners.

* Profits are taxed separately from their individual income.
* They can use the profits to pay out shareholders in the form of a dividend, or keep the cash.
* **Benefits:** ease of raising capital and the shares are easily transferable.
* **Drawbacks:** Cost of incorporating, ongoing filing and expenses with the Corporate Registry, and taxes.

**There are exceptions to the principle of limited liability such as:**

1. A shareholder signs a personal guarantee for the corporation’s debt.
2. A loss occurs as a result of a shareholder’s personal act or negligence.
3. A shareholder has not fully paid for their shares, to the extent of the unpaid amount.

Guarantee: a formal pledge by one person to pay another person’s debts or fulfill another person’s obligations. When borrowing money, the Bank typically requires a guarantee for the money that they are lending to the individual.

* In AB, when guarantor is not the corporation, they must receive advice about the contents of the guarantee from a lawyer; and
* Both the lawyer and guarantor must sign a certificate (*Guarantees Acknowledgement Act*).

## DIFFERENT TYPES OF CORPORATIONS

* Banks – *Bank Act*.
* Insurance Companies – *Insurance Companies Act* and *Insurance Act*.
* Unlimited Liability Corporations – *Business Corporations Act*.
  + - No liability shield with these corporations.
  + Professional Corporations – *Business Corporations Act*.
    - Subject to additional rules set by professional regulators.
    - Can be used by professionals for providing services.
    - For lawyers, under the *Legal Profession Act*, there is a restriction on who can be a shareholder/director and lawyers cannot have limited liability.
  + Non-Profit Corporations – *Non-for-Profit Corporations Act* and *Companies Act*.
    - Existed at Common Law, but first recognized in Canada by statute in Nova Scotia.
    - Have been primarily used by Americans as a tax effective vehicle to hold business interests in Canada, but Canadian tax law has changed, which makes it less tax effective.
  + Community Contributions Corporations – *Business Corporations Act* and *Communities Interest Companies Act*.
  + Business Trust – can take a variety of forms and uses the trust mechanism (settlor, trustee, and beneficiaries).
  + Cooperative – Jointly owned enterprise engaging the production/distribution of goods or the supplying of services, operated by its members for their mutual benefit.

##### Example) Linda wants to open up a coffee shop. Any individual who frequents the coffee shop can buy a membership in the coffee shop enterprise. Members have a right to vote on matters of enterprise governance and to share in profits. Linda has set up a cooperative.

Franchise: a contractual arrangement between a manufacturer, wholesaler, or service organization and an independent business, who buys the right to own and operate one or more units of the franchise system. Example) 711, Pizza Hut, McDonalds, Subway, and Curves.

🡪 Contracts cover how the business is run, where supplies are bought, royalties to be paid, the charges for management/advertising and other services.

🡪 Alberta is one of the only provinces that has legislation to protect franchisees.

Joint Venture: an association of business entities (corporations, individuals, or partnerships) that unite for the purpose of carrying on a business venture. Example) Oil and gas companies may join for offshore exploration in a certain region.

🡪 “Joint Venture” is pretty much a meaningless term. It is limited to a specific project or period of time.

🡪 May be a partnership (therefore, partnership rules would apply) or an equity joint venture – the parties incorporate a separate corporation for the project and each party holds shares of that corporation.

🡪 Different than a partnership: they are not agents of each other except where they agree, they can compete with each other, liability is several and not joint, and they are direct owners of the assets used in the joint venture.

Strategic Alliance:a cooperative arrangement among businesses that may involve joint research, technology sharing, or joint use of production. Example) Toshiba has alliances with many companies to develop new products such as mobile telecommunication.

🡪 No precise legal meaning and is a contractual relationship.

Distribution or Dealership: contractual relationship where a manufacturer agrees to provide products and the distributor or dealer agrees to carry products/perform services.

Sales Agency: an arrangement where a manufacturer contracts with an agent to sell goods or services supplied by the manufacturer on a principal/agent basis. As this relationship is one of agency, fiduciary obligations are owed.

Product Leasing: the licensee is granted the right to manufacture and distribute products associated with the licensor’s trademarks or other proprietary rights. This is common for many consumer goods such as clothing and sporting goods.

## PARTNERSHIP

**Section 3:** A corporation is not a partnership.

**Section 4:** Sets out determining whether a partnership does/does not exist based on rules. A partnership is formed depending on:

* The sharing of profits 🡪 *prima facie* evidence of partnership.
  + What is the distinction between profits and revenue:Revenue is the gross amount you are getting in and profits are what is left over after paying out expenses. If both individuals are invested in the expenses, then this looks more like a partnership.
* Sharing in returns (revenue is NOT profit) does not give rise to partnerships w/o more.
* Common/joint ownership does not give rise to partnerships w/o more.

**Section 22:** The mutual rights and duties of partners, whether ascertained by agreement, may be varied by the consent of the partners.

**Section 28:** The interests of the partners in the partnership property/their rights and duties in relationship to the partnership:

* All parties are entitled to share equally in the capital/profits and contribute equally towards losses.
* Each partner may take part in the management of the partnership business.
* No person shall be introduced into the firm as a partner w/o consent of all existing partners.

**Section 29:** No majority of the partners has any power to expel a partner unless a power to do so has been previously conferred.

**Section 34:** If a partner w/o the consent carries on a business of the same nature/competing w/ firm, the partner shall account and pay over to the firm the profits made by the partner in that business.

**Section 36-38:** Dissolution of a partnership.

###### VOLZKE CONSTRUCTION LTD. V WESTLOCK FOODS LTD.

**FACTS:** Volzke contracts with Bonel (80% owner) to do construction work on Westlock Foods (20% owner). Volzke completes construction work, but is not paid. B&W hold the mall as tenants-in-common. V argues B&W were in a partnership.

**RULES:** The test for whether there is a partnership is based on intent. Intent is assessed based on conduct and it should be asked: Does the conduct of the parties fit the definition of a partnership? **Consider:** the sharing of profits, guaranteeing the partnership debt, joint ownership of property, what the control in the business is, participating in management, and whether there was a stated intention to form a partnership in contract.

**RATIONAL:** Court = Operating a partnership, both liable. There was an agreement to share profits, they represented themselves to other people as partners, the cheques they were issuing had both of their names on them, they were both signing loans together, and there was a previous litigation between Westlock and Bonel where they had tried to sell the Court that they were in a partnership together.

**PARTNERS’ LIABILITY TO THIRD PARTIES** (section 6-11, 13-21)

\*you cannot amend these in a partnership agreement because you cannot alter third party rights\*

**Section 6:** Each partner is an agent of the firm and of the partner’s other partners for the purpose of the partnership.

**Section 7:** The acts of each partner in carrying on the usual way of business bind the firm and the partner’s partner unless **(a)(b)**.

**Section 8:** An act relating to the business of the firm and executed in the firm name binds the firm and the partners.

**Section 10:** Partners can agree that the firm is not bound by the acts of a partner.

**Section 11(2):** Partners are jointly liable for debts.

**Section 15:** Partners can be jointly and severally liable for any loss, injury, or penalty caused by a non-partner.

**PARTNER’S RELATIONSHIP TO EACH OTHER**

Fiduciary Duty:a duty of loyalty and to deal with each other in utmost good faith.

🡪 Disclosure of relevant information (*PA* section 32); Accounting for improper profits (*PA* sections 33 and 34).

**LIMITED PARTNERSHIP**

1. At least 1 General Partner
   1. Unlimited personal liability, *PA* section 56.
   2. Manages the business of the partnership.
   3. Can also share in profits, *PA* section 53 – can also be a limited partner.
2. At least 1 Limited Partner
   1. Personal liability is limited to the contribution to the partnership, *PA* section 57.
   2. Right to share in profits, *PA* section 59.
   3. Will lose the protection of limited liability if: (1) Involved in managing the business of the partnership, *PA* section 64; and (2) Limited partner’s name is used in the firm name, *PA* section 54(2).

**LIMITED LIABILITY PARTNERSHIP**

* Available to people working in some “eligible professions” 🡪 lawyers and accountants.
* Partners in LLP have the same general liabilities as partners in ordinary partnerships such as for the firm’s debts.
  + Except as it relates to liabilities arising from negligence, wrongful acts or omissions, malpractice, misconduct of other partners or employees of the firm, *PA* section 12.
* The partners in LLP are only liable for negligence, wrongful acts of other partners or employees **ONLY** if:
  + You knew of it at the time it was committed and did not take reasonable steps to prevent it.
  + The wrongful act was committed by the employee who the partner supervised, and the partner’s supervision is inadequate.

# CHAPTER TWO: A BACKGROUNDER TO CORPORATIONS

## INTRODUCTION

**Shareholders:** own the Corporation and responsible for electing directors. They do not have direct managerial power.

**Directors:** oversee the management of the Corporation and appoint Officers. They are elected and represent the shareholders.

**Officers:** supervise the daily operation of the Corporation.

###### SALOMON V SALOMON & CO. LTD.

**FACTS:** Salomon was operating as a sole proprietor. The business was doing well, so he transferred the business to a corporation. He secured the corporations debts (debentures). The company failed, insolvency proceedings commences, and the corporation only paid out the debentures, and the other creditors thought this was fraud. They said Salomon should be held personally liable.

**ISSUES:** Is Salomon personally liable for the debts of Salomon Ltd. and is he a legitimate creditor of Salomon Ltd.?  **RULES: Separate Corporate Personality:** a corporation is recognized as a legal entity distinct from its shareholders, directors, officers, and creators. A corporation is not an agent for a shareholder. Absent any fraud, a corporation properly incorporated under the *Act* will protect directors from liability. If you want to shelter yourself from unlimited liability 🡪 incorporate.

**CONCLUSION:** Decided for Salomon. A company is either a legal entity or it isn’t and, if not, then there’s nothing to be an agent for. There was no fraud to the shareholders or creditors by not telling them that he incorporated because it’s up to them if they want to lend money or not, so they could have looked the information up for themselves.

## CORPORATE CONSTITUTION

**Section 91:** Federal Government can make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Province [and]

**Section 91(15):** Banking, Incorporation of Banks, and the Issues of Paper Money.

**Section 92(11):** Incorporation of companies with Provincial Objects

### METHODS OF CREATING CORPORATE CONSTITUTIONS/DIFFERENT FORMS OF INCORPORATIONS

1. **f of Incorporation** – are used by the federal and provincial governments to create corporations for specific purposes**.** 
   1. Railways, telephone companies, banks, universities, and Crown corporations.
   2. This method is rare, not available to the ordinary business person, and created for a distinctly identified purpose.
2. **General Acts of Incorporation** –used to create corporations that engage in business of all kinds/descriptions. There are three specific models presently used in Canada.
   1. **Letters Patent** (PEI & QB)**:** involves an application being made to the Crown’s representative who, in turn, has the power to issue an incorporating document known as the letters patent.
   2. **Memorandum of Association Company** (NS)**:** achieved by registering a memorandum of association and articles of association with the registrar of the appropriate government office. The memo is a brief document that sets out the constitution of the company, the name, its share capital, and its restrictions.
   3. **Articles of Incorporations Company** (most provinces)**:** articles of incorporation are filed with the appropriate government body, which issues a certificate of incorporation, which serves the same function as a memo.

**THE CORPORATE FIRM: ORGANIZATIONAL MATTERS**

**Section 101(1)** *ABCA*: Subject to any USA, the Directors shall manage or supervise the management of the business and affairs of a corporation.

###### CANADIAN JOREX V 477749 ALBERTA LTD.

**FACTS:** The company is incorporated pursuant to the *CBCA*. The Directors call a special meeting and decided to cancel the meeting. The Shareholders argued that there was no provision within the constitution empowering them to cancel the meeting.

**RULES:** Directors have a residual power to manage corporate affairs under the *Act*, so just because their power is not expressly granted, does not mean that they do not have the authority to manage the corporation. This power can be altered by the existence of a USA.

# CHAPTER THREE: THE PROCESS OF INCORPORATION

## INCORPORATION PROCEDURES (FOR PROFIT ORGANIZATIONS)

**WHERE TO INCORPORATE**

* Federal or Provincial
* Where will the company have business activities?
  + One province – just incorporate within that province.
  + Multiple provinces – incorporate federally (not required), but you still have to register within the different provinces.
  + Internationally – incorporate federally (should do this).
* Availability of specialized corporate forms
  + Unlimited Liability Corporations – some jurisdictions allow this (BC, AB, NS), so you should incorporate there.
  + Community Contribution Corporations – BC and NS are the only two that have this.
* Fees

**PROCEDURE OF INCORPORATION**

1. **Prepare incorporation documents and file them with the Registrar**
   1. Articles of Incorporation: legal document filed with a provincial, territorial, or federal government, which sets out a corporation’s purpose and regulations.
   2. Notice of Registered Office
   3. Notice of Directors
   4. NUANS Search
2. **Registrar issues certificate of Incorporation**
3. **Directors hold a Meeting** 
   1. Issues shares to shareholders
   2. Pass bylaws
      1. Meeting Procedures – how will notice be given, what constitutes quorum, what # of votes are needed to pass a resolution?
      2. Officers – which officers will be appointed and what responsibilities will they have?
4. **Shareholder hold Meeting**
   1. Elect directors
   2. Ratify bylaws

Resolution: is a formal expression of some decision that is voted on. When a resolution is passed at a meeting, the decision is recorded in the minutes of the meeting. Directors and shareholders act by passing resolutions.

Written Resolution: is a resolution in writing instead of holding a meeting. All directors must sign off on the written resolution and it is added into minutes as if a meeting occurred. A written resolution must be unanimous by all Directors, but this can be changed within the bylaws. Example) Bylaws State: Whenever we are borrowing money, the decision needs to be unanimous.

Ordinary Resolution:majority of shareholder votes cast in favor of resolution at a meeting, or 100% sign a written resolution. *ABCA* **section 1(w)**. Example) Election of Directors, ABCA section 106(3).

Special Resolution:2/3rds of shareholder votes cast in favor of a resolution at a meeting or 100% of shareholders sign a written resolution. *ABCA* **section 1(ii)**. Example) Amending articles of incorporation, ABCA section 173.

**ARTICLES OF INCORPORATION**

1. Name of the Corporation
2. Classes of Shares
   1. Can have one or more classes.
   2. Different rights can attach to each class.
   3. There must be at least one class that can exercise each of the three basic rights of shareholders.
3. Restrictions on Share Transfers Example) Other shareholders might be given a right of first refusal.
4. Number of Directors
5. Restrictions on Business (usually none).

**ARTICLES VS BYLAWS**

* Anything that can be put in a bylaw can also be included in the Articles of Incorporation (*ABCA* **section 6(2)**).
* Articles can only be amended by special resolution of the shareholders (*ABCA* **section 173**) and they must be filed at a Corporate Registry, so they’re publically available.
* Bylaws can be passed, amended, repealed by Directors, but subject to ratification at the next shareholder’s meeting (*ABCA* **section 102**), and it is not filed at the Corporate Registry.

## SHARE CAPITAL

Share: define the ownership interest in a corporation. It is usually represented by ornate certificates, printed on crisp bank-note-type-paper, bearing engraved borders and curious illustrations. Having a share gives an individual three key rights (*ABCA* **section 26(3)**):

1. Vote at shareholder’s meetings.
2. Receive dividends (profits).
3. Receive a residual value of the corporation when it’s wound up.

Shares can be issued from the corporation in exchange for money/services or you can purchase them from someone. A person, partnership, or corporation can be a SH.

### UNANIMOUS SHAREHOLDER AGREEMENTS (USA)

Unanimous Shareholder Agreement:an agreement among all shareholders of a corporation, and it may include provisions that:

1. **Govern relationships between/amongst shareholders.** 
   1. **Change shareholder voting entitlements/requirements**.

##### Example) If Anne purchases 90% of the shares, she will be able to vote in who she wants as Directors, unless the USA changes the distribution of the voting to allow for others to have a higher voting right.

* 1. **Impose restrictions on issuing shares.** 
     1. Pre-emptive rights. **ADVAN:** Ensures that someone can maintain an ownership stake in the company. If not, they can become a minority shareholder.

##### Example) If more shares are added to the company, and Anne has a pre-emptive right, she will be offered them first before others.

* 1. **Impose restrictions on share transfers (this can also be done in the Articles of Incorporation).** 
     1. Right of First Offer. **ADVAN:** Ensures that the SH has control over who is coming into the company. This also price fixes the shares.

##### Example) A&B both hold 50% of the shares in the company. B wants to sell his shares and A has a Right of First Offer, so he has to offer them to her at price X. If she doesn’t want them, he has to sell them at price X to someone else.

* + 1. Right of First Refusal. **ADVAN:** Ensures that the SH has control over who is coming into the company. This also prices fixes the shares.

##### Example) A has a Right of First Refusal. If B gets an offer from C to sell his shares, he must first offer them to A for X before selling them to C for X.

* + 1. Piggyback. **ADVAN:** Ensures that you do not get stuck as a SH in a company w/ whoever the SH sold their shares to. If they can get a higher value for the shares, then you would also be entitled to more money.

##### Example) If A wants to sell her shares to C, and there is a piggyback right, then B can also force C to buy his shares.

* + 1. Drag Along. **ADVAN:** Ensures that, if you don’t have all of the shares, you can get the benefit from someone wanting to pay a higher price.

##### Example) If A has a Drag Along Right and she wants to sell her shares to C, she can force B to sell his shares to C, too.

* 1. **Contain dispute resolution mechanisms.** 
     1. Binding Alternative Dispute Resolution.
     2. Shotgun Clause (this is not a requirement).
        1. A specific type of exit provision that allows a SH to offer a specific price per share for the other SH shares. The other SH must then either accept the offer, or buy the offering SH’s shares at the price per share.
        2. It is triggered where a business partnership has severely deteriorated or there is a fundamental disagreement about the direction that the company should do in.
        3. **ADVAN:** In situations where one person has more money, it allows for a fair valuation of the shares. It also protects the interests of both/all parties regardless of their stake in the company. If one party triggers the clause, it is within their interest to make a fair offer – if they offer too low, their partner can raise the resources to turn around and buy the shares instead.
        4. It also allows for all the shares to be purchased by a third party.

##### Example) A&B disagree fundamentally about the direction the company should go. Anne makes an offer to Benji: buy my shares/I’ll buy yours. Benji must decide whether he’s going to Buy A’s shares/sell his. It forces her to set a reasonable share price.

##### 

1. **Restrictions in whole, or in part, the powers of the directors to manage the corporations.**

In Alberta, both #1 and 2 can be USA, but in some jurisdictions, only #2 can be USA.

**SHAREHOLDER ASSUMPTION OF DIRECTOR’S DUTIES**

A SH can assume Director’s powers, but this requires the SH to incur all of the liabilities of the Director to which the agreement relates. The SH then assumes the Director’s ability to manage the business affairs of the corporation, including liabilities, and the Directors are relieved of their duties. Example) The Shareholder assume the ability to declare dividends.

* To declare dividends, Director must make sure doing so will not cause the corporation to be insolvent, which is assessed using the Solvency Test. It requires certain factors be taken into account. If done w/o meeting ST, Director = personally liable.

**BINDING**

* USA are binding on new shareholders even if they did not know about it. If they did not know about it then they can rescind the share purchase agreement or have their shares repurchased by someone else.
* Share Certificates should make mention of the USA.

**ENFORCEMENT OF USA**

This depends on who you are attempting to enforce the USA against. They are enforced through:

1. A civil suit for breach of agreement.
2. Oppression remedy, **section 242**.
3. Compliance or restraining order, **section 248**.
4. The breach may entitle a party to demand dissolution of the company, **section 215(1)(b)**.

###### cicco v 609940 ontario inc (trustee of)

**FACTS:** B&C are 50% shareholders of the Corporation, enter into a USA, B adopts a resolution to assign the Corporation into bankruptcy. C applies to annul the bankruptcy on the basis it was made w/o proper authorization.

**RULES: Indoor Management Rule:** A person dealing w/ a corporation has no obligation to ensure that a corp. has gone through any procedures required by its articles, by-laws, resolutions, contracts, or policies, to authorize a transaction or to give authority to a person purporting to act on behalf of the corporation.

An individual may be accountable for failure to comply with an agreement, but a statute does not render an assignment void or disentitle the trustee to rely on the assignment and supporting resolution.

**CONCLUSION:** Decided against the C. The assignment should not be annulled because of a breach of the USA. The bankruptcy agent might not have had any idea that there existed a USA, to decide otherwise, would result that no trustee could safely act under a corporate assignment w/o inquiring into the internal and UNPUBLISHED fetters on authority of the duly appointed directors.

**Section 19:** Codifies the **Indoor Management Rule**.

* Exception 🡪 Unless the person has, or by virtue of the person’s position with, or relationship to the corporation, ought to have knowledge of those facts at the relevant time. Example) USA says: Directors aren’t allowed to run up bills in excess of $5K w/o getting SH approval. Director cannot claim that he did not know.

## CORPORATE NAMES

Names are regulated because it protects the goodwill of existing corps, prevents confusion in market place, and promotes accountability.

NUANS = Newly Updated Automated Name Search

* File w/ Registrar at the time of incorporation.
* It is not required if you’re using a numbered name such as 123456 Alberta Inc.

**ELEMENTS OF A NAME**

1. **Distinctive –** a name cannot be too general and must have a distinctive element unique to the identity.
2. **Descriptive –** a name must describe the business to be carried out.
3. **Legal Element –** it must have limited/limittee/incorporated/incorporee/corporation/professional corporation.

*ABCA* **Section 10(8):** A corporation shall set out its name in legible characters, in or all contracts, invoices, negotiable instruments, and orders for good or services, issued or made by or on behalf of the corporation.

### LIABILITY BASED ON TOTAL DISREGARD OF FORMALITY

###### WOLFE V MOIR

**FACTS:** The P was injured at D’s company’s roller skating rink, so P sued D personally. D says the company should be sued. D had been operating the rink w/o properly identifying the owning company. Instead, he said he was the true operator of the rink.

**RULES:** An individual can be held personally liable if they do not comply with the *Business Corporations Act* in properly identifying the corporation under which they are carrying on business.

**CONCLUSION:** Failing to comply with the requirements of the *Act* leads to personal liability and reliance does not need to be shown. D was therefore personally liable to P.

###### VALLIS V PRAIRIE ALTERNATIVE ENERGY SOLUTIONS

**FACTS:** Karras was the president, SH, and Director of a corporation, Prairie Alternative Energy Solutions Ltd., he entered into a contract w/ P to install a geothermal heating system. Karras never gave any indication to P that he was anything more than a sole proprietor (did not have business cards, no business name on his truck, never informed P he was incorporated, documents exchanged did not include “Ltd.” part of the corporation name).

**RULES:** An individual can be held personally liable if they do not comply with the *Business Corporations Act* in properly identifying the corporation under which they are carrying on business.

**CONCLUSION:** Mr. Karras was decided against and held personally liable.

### RULES OF NAMING

See, generally, *Business Corporations Regulations*, **sections 4-18**.

* You cannot have a corporate name that is obscene.
* No name can suggest an affiliation w/ royalty, government, universities, or banking.
* Cannot exceed 200 characters and no “Kananaskis”.
* Tradenames must be registered too, *Partnership Act*, **section 110**. A corporation/partnership can use a tradename.
* Cannot have a name that is similar to the name of:
  + An existing company, unless it consents.
  + A dissolved company.
    - If the name is similar = company must have been dissolved > 3 years.
    - If the name is identical = company must wait > 6 years.
* If considering if the name complies with Rules, the Registrar is directed to consider:
  + Distinctiveness of the name.
  + Length of time it has been used.
  + Degree of similarity in sound/appearance of names.
  + Geographic area in which names are used.
  + Likelihood of competition between corporations.
* If the name is too similar to an existing corporation: the registrar can force you to change it (**section 13** *ABCA*), you can be liable for the tort of passing off, or you can be liable in trademark infringement.

###### PAWS PET FOOD AND ACCESSORIES LTD. V PAWS AND SHOP INC.

**FACTS:** Two companies have names that are very similar and both are in Calgary. PPF&A opens first and PAS opened afterwards. PPF&A engaged in extensive advertising, and customers came into their store asking if there was another store. PPF&A ask the Registrar to ask PAS to change their name.

**ISSUES:** Should the order be granted on the basis that the respondent’s corporate name is confusing or misleading?

**CONCLUSION:** Ordered to change name as required by the *Act*.

Passing Off: CL action protecting the goodwill associated w/ a trademark or trade name.

* There is a representation of D’s goods as being those of P.
* This can be done through D using a name that resembles Ps name.
* Plaintiff must establish that there is goodwill associated with their name on a BOP.

Goodwill: the benefit/advantage of the good name, reputation, and connection of a business. It is the attractive force that brings business.

###### STENNER V SCOTIA CAPITAL INC.

**FACTS:** Daughter (Stenner-Campbell) works as an investment advisor business w/ father (Stenner) and husband (Campbell). She was supposed to take over the business, but her father is unsure of her husband, so decides to sell. She leaves to start a new business at a new firm, and operates under different names: Stenner/Campbell, Stenner-Campbell, and Vanessa Stenner. He sued for Tort of Passing Off.

**RULES:** Tort of Passing off: there must be the existence of goodwill, deception of the public due to the misrepresentation, and actual/potential damage to the Plaintiff.

**CONCLUSION:** Decided for G Stenner (father). G Stenner had a good reputation and the Stenner/Campbll name is clearly misleading and, therefore, tortious. He is allowed to receive either the amount lost as a result of the passing-off, or a share in the portion of her profits from D’s gain using the name.

## PRE-INCORPORATION CONTRACTS

Pre-Incorporation Contract: a contract entered into in the name of/behalf of/in trust for a corporation that is not yet incorporated.

Promotor: the person who enters into the contract on behalf of the yet-to-be-incorporated.

The intent is to incorporate a corporation following the signing of the pre-incorporation contract and to have the newly incorporated corporation adopt the contract and, thereby, be bound by its terms.

**Three Questions:**

1. Will the promotor be liable to the third party on the contract?
2. Will the corporation be able to adopt the contract once it comes into existence?
3. If the corporation adopts the contract, does that relieve the promotor of liability?

Novation: a trilateral agreement by which an existing contract is extinguished and a new contract brought into being in its place. For a valid novation, the consideration is the discharge of the original contract in return for a promise to perform some obligation.

**Three-Part Test for if novation has occurred:**

1. The corporation must assume the complete liability.
2. The third party must accept the corporation as a contracting party, and not merely as an agent or guarantor; and
3. The third party must accept the new contract in full satisfaction and substitution for the old contract w/ the promotor.

Novation allows for the pre-incorporation contract to be replaced w/ a contract between the corporation and third party. There are risks: What if the third party does not agree to novation? What if the corporation never comes into existence?

**Pre-Incorporation Contracts – COMMON LAW**

* Whether or not a promotor will be liable depends on whether the third party and promotor **intended** for the promotor to be liable.
* The only way for a corporation to have taken over a contract was through novation. Corporation: I am going to enter into a contract w/ a third party. Third party: Great. Corporation: To do so, you must discharge the promotor of all rights, obligations, and liabilities. Pre-incorporation contract is then cancelled and promotor cannot be held liable.
  + If novation occurs 🡪 Promotor is not liable.
  + If novation does not occur 🡪 Promotor will be liable.
* Why would a third party not want a novation?
  + Want to keep the promotor liable on the contract.
  + They might look at the new corporation and figure out that they have no assets, so if novation occurred and the corporation defaulted, then the third party would not be entitled to anything.
  + If promotor has a lot of assets and the corporation doesn’t, the third party would want to keep the promotor on the hook.

**\*\*CL still applies to oral contracts in Alberta, but no longer applies to written contracts.**

**Pre-Incorporation Contracts – STATUTE** (*ABCA* **Section 15**, *CBCA* **Section 14**)

* *ABCA*: The promotor is not deemed to be a party to the contract, but a warrantor. *CBCA*: Promotor is a party to the contact.
  + Promotor is “deemed to warrant” two things:
    - The corporation will come into existence in a reasonable amount of time.
    - The corporation will adopt the contract.
* The promotor is always going to be liable unless the contract explicitly excludes liability.
  + If the contract is silent re: promotor liability, they are still on the hook.
* The corporation can adopt the contract once it comes into existence through **act** or **conduct**.
  + No traditional novation is required.
  + If the corporation does not adopt the contract, the promotor can sue to recover the value of any benefit the corporation received under the contract.
  + The promotor will no longer be on the hook for any liability.

**\*\*In the case of oral contracts, CL rules will apply.**

###### SHERWOOD DESIGN: A CAUTIONARY TALE

**FACTS:** P entered into a contract w/ D (promotor). D’s lawyer then says, “P, here is the #Corp we are going to be using for this contract,” but the lawyer then takes the corporation and “puts it back on the shelf.” Another client comes in who wants a company to buy land, and the lawyer assigns the #Corp. The client buys land, but the #Corp is still liable under the pre-incorporation contract. Client #2 is therefore on the hook for the liabilities.

**ISSUE:** Did the D corporation “adopt” the pre-incorporation K w/n the meaning of *CBCA*?

**CONCLUSION:** Court found that, through the lawyer assigning the #Corp to P, this was the #Corp “adopting” the pre-incorporation contract. Therefore, #Corp is liable under the agreement with P.

###### westcom

**FACTS:** Contract entered into by a promotor and third party who believe that the corporation exist. The corporation does not exist (yet).

**ISSUE:** Is the promotor liable?

**CONCLUSION:** The Court finds the promotor is not personally liable because a “contract cannot be entered into with a non-existent corporation” and there is no “contract” for the statutory provisions to apply. Since the statutory provisions do not govern, the CL says intention governs = no personal liability.

###### szecket v huang

**FACTS:** The TJ adopts a two-step analysis: Is there a contract? If so, apply the pre-incorporation rules set out in the statutory provision.

**RULE:** Statutory provisions apply to contracts whether or not they would constitute a contract under a CL analysis.

**CONCLUSION:** The ONCA critiques and states that the two-step analysis is wrong. The statutory pre-incorporation rules should be applied to agreements whether or not they’d be considered valid contracts at common law.

###### wickberg v shatsky et. al.

**FACTS:** D decided to incorporate a company, but never did, although they carried on business under that name (improperly). Wickberg was hired to be a new manager for the new corporation under a contract, signed by Shatsky as president. The business was not successful, W was terminated for refusing to work on straight commission. W sued for wrongful termination/breach of warranty.

**ISSUES:** Does the promotor have personal liability or is it a question of intention? What does the P get by way of damages?

**RULES:** Under *ABCA*, **section 15**, a third party will not be able to recover for a breach of warranty unless they demonstrate that the warranty of the authority of the promotor agent caused the loss.

**CONCLUSION:** Court decided for P, but he only received $10 in nominal damages. W did not demonstrate that any loss was a result of the promotors’ breach of warranty. The fact that the business was not actually incorporated did not cause W’s loss.

# CHAPTER FOUR: THE CORPORATION AS A LEGAL PERSON

## NATURE OF CORPORATE: PERSONALITY

Body Corporate: corporation.

Individual: means a natural person.

Person: includes an individual, partnership, association, body corporate, trustee, executor, administer, or legal representative.

**Section 16:** A corporation has the capacity and, subject to this Act, the rights, powers, and privileges of a natural person.

###### LEE V LEE’S AIR FARMING LTD.

**FACTS:** Lee is the sole SH and Director of corporation. The corporation hires Lee as an employee. Lee dies in a workplace accident. WCB normally pays compensation to families of workers who are killed by a workplace accident. But, WCB takes the position that Lee is not an employee and, therefore, not entitled.

**RULES:** Due to the fact that a corporation is a separate legal entity, an individual shareholder can be hired as an employee of that corporation. One man companies are perfectly acceptable.

**CONCLUSION:** Decided for wife. He is an employee of the corporation.

**SPECIAL SITUATION**

*Legal Profession Act*, **Section 106:** specifies that no person shall provide legal services in Alberta unless they are an active lawyer or one of the “exceptions”: a person who acts on the person’s own behalf in an action, matter, or proceeding to which the person is a party. If a corporation is sued and 1 individual is the sole director/SH of the corporation. The Director cannot represent the corp. in Court.

## GROUNDS FOR LIABILITY OF THOSE BEHIND THE CORPORATION

**Liability Based on:** fault/improper conduct, thin capitalization, or failure to use a corporate name. **Other Avenues to Liability:** Contract, trust, tort law, and oppression remedy.

### LIABILITY BASED ON LIFTING THE CORPORATE VEIL

Lifting the Corporate Veil: removing the veil of the corporation to hold those behind the corporation liable. Can be SH and directors.

* “Separate Corporate Personality” = corp. is a legal entity distinct from SH. **Section 46(1):** protects SH through limited liability.
* Court can disregard principles by regarding the corporation as merely a puppet/agent for its controlling SH or parent corporation.
* Court has not applied a consistent principle for when to lift the veil.
* The best that can be said is that the “separate entitles/corporate personality” principle is not enforced when it would yield a result “too fragrantly opposed to justice, convenience, or interests of Revenue.”

**When Veil will be Pierced?**

1. Control; (2) Improper Conduct; (3) Interests of Justice; (4) Single Economic Unit.

###### BIG BEND HOTEL LTD. V SECURITY MUTUAL CAUSALTY CO.

**FACTS:** Hotel operated by Kumar was destroyed by fire. Kumar applies for insurance on behalf of Big Bend, does not disclose a previous fire. Hotel operated by Big Bend is destroyed by fire. P (Big Bend) is suing IC because they refuse to pay for a fire. IC claims P did not truthfully disclose the previous fire. P responded that it was not a misrepresentation because the fire was for a different hotel, under a different corporation, and, therefore, it is accurate to say THIS CORPORATION (Big Bend) had no previous claim.

**RULES:** The corporate veil can be lifted when there is fraud or improper conduct.

**CONCLUSION:** Due to the fact that this was an insurance contract, Mr. Kumar was held to a very high standard to disclose information. His failure to disclose information that was material to the risk = material misrepresentation = deception and the corporate veil can be lifted because he was using the new corporation as a “sham and a cloak.”

###### PERFORMANCE INDUSTRIES LTD. V SYLVAN LAKE GOLF & TENNIS CLUB LTD.

**FACTS:** Sylvan Ltd. and Performance Ltd. enter into a contract to purchase a golf course. Terms were negotiated verbally by Bell & O’Connor. O’Connor has a written contract drafted that differs substantially from the oral agreement. Mr. Bell sues for rectification/damages for not being able to develop his housing development.

**ISSUES:** Is O’Connor personally liable for damages?

**RULES:** The corporate veil can be lifted when there is improper conduct. The closer an individual is to the company, the more the courts will consider piercing the corporate veil and the farther away an individual is to the company, the less the court will consider it.

**CONCLUSION:** O’Connor knew that Bell was mistaken and intended to rely on that mistake, which is fraud. The veil was lifted, so O’Connor was personally liable both jointly and severally with the corporation w/ respect to the fraud.

###### JIN V REN

**FACTS:** Ren (told he is a Director) convinces Jin to invest $300K in Hart Fibre Trade Company Ltd. on the representation that Jin will get a controlling interest in the company. Jin never gets a proof of that interest, so Jin sues for return of investment (unjust enrichment).

**RULES:** The corporate veil can be lifted when there is improper conduct. When there is an unjust enrichment claim, this can lead to a piercing of the corporate veil.

**CONCLUSION:** Ren can be held personally liable for the claim. Evidence at trial showed that R agreed to return J’s investment, but needed three months to do so. Further, R proposed to return J’s investment if they had agreed to specific terms, which J refused.

###### wildman v wildman

**FACTS:** The husband owes money for spousal support, child support, and matrimonial property division. She received a judgment that granted her a security interest in Wildman’s corporation and the assets of his corporation. Therefore, she became a secured creditor in the corporation. He appealed.

**RULE:** A corporate veil can be lifted to hold a corporation liable for its controlling individual’s liabilities for spousal and child support. Courts are more likely to pierce the veil in family law situations.

**CONCLUSION:** Court lifted the corporate veil.

**NOTES:** This is a different case because, typically, someone has a claim against the corporation, so they try to hold a SH directly liable. In this situation, there is a claim against a SH, and someone wants to hold the corporation personally liable.

###### ROCKWELL DEVELOPMENTS LTD. V NEWTONBROOK PLAZA LTD.

**FACTS:** Mr. Kelner (active property developer). He incorporates Rockwell Developments, who enters into a purchase contract w/ Newtonbrook Plaza. Rockwell sues Newtownbrook for specific performance on the contract. Rockwell is unsuccessful, and costs are awarded against Rockwell. As it turns out, they have no assets, so Newtownbrook wants Kelner to be held personally liable because he had not done things w/ the proper authorization.

**RULES:** The corporate veil will not be lifted for mere sloppiness, there must be actual misconduct.

**CONCLUSION:** Court does not pierce the corporate veil. This situation does not amount to the improper conduct/fraud that is necessary to pierce the corporate veil.

###### SUN SUNDAN OIL CO. V METHANEX CORP.

**FACTS:** Two parent companies, Sunmark and Methanex, want to carry out oil exploration in South Sudan. They enter into a joint venture agreement where they both incorporate subsidiaries: Ocelot Sudan and Sun Sudan. Things don’t go as planned, and Ocelot owes money to Sun Sudan. Sun Sudan tries to get the money from the parent company, Methanex by raising two arguments: (1) Industry practice implies that the parent company is going to be on the hook for subsidiary debts; or (2) The Corporate Veil should be pierced.

**RULES:** Framework for analyzing whether or not to pierce the corporate veil:

1. Were the profits treated as profits of the company?
2. Were the persons controlling the subsidiary appointed by the parent company?
3. Was the parent company the head and brain of the trading venture?
4. Did the parent company govern the adventure, decide what should be done, and what capital should be embarked on?
5. Did the parent company make the profits by its skill and direction?
6. Was the parent company in constant and effectual control?

**CONCLUSION:** Re: industry practice argument, there was mixed evidence from the experts and not enough to add an implied term into the contract. Re: corporate veil argument, there was no fraud and using the subsidiary is part of a legitimate business to shield the assets of the parent company.

### LIABILITY BASED ON THIN CAPITALIZATION

Thin Capitalization: refers to a situation where the company has a high debt to credit ration. Thin Capitalization alone will not result in the lifting of the corporate veil.

###### WALKOvSKY V CARLTON

**FACTS:** Carlton is a shareholder in 10 cab corporations and each cab corporation carried only the minimum $10K required third party liability insurance. The plaintiff was injured by 1 company and sued all 10 companies and Carlton as an individual.

**ISSUE:** Should the corporate veil be pierced and have liability attach to Carter personally?

**RULES:** Thin capitalization is not a way to establish liability of an individual behind a corporation.

**CONCLUSION:** Carlton is not liable. First of all, the corporation has the minimum insurance, which is set by the government, so if that’s unacceptable, the government should change the minimum. There was no sign of fraudulent behavior or activity. Thin capitalization isn’t admirable, but it’s not fraudulent in itself. Setting up corporations to limit liability is the point of having a corporation, so he shouldn’t be held liable for setting up 10 corporations.

**DISSENT:** These corporations were intentionally undercapitalized to avoid responsibility for acts bound to arise in the operation of a taxi corporation. All of the income was drained from the corporations for the same purpose of avoiding the payment of liabilities that would arise. SH should be held individually liable in these situations where the corporations are designed solely to abuse the corporate privilege at the expense of the public interest.

### LIABILITY BASED ON TRUST LAW VIOLATIONS

Knowingly Assistance: the defendant must have actual knowledge, recklessness, or be willfully blind to be held liable; constructive knowledge is not sufficient.

* There must be a higher standard of culpability here because you are assisting and not receiving the benefit yourself. Actual knowledge is required.

Knowingly Receipt: receipt of trust property for one’s own benefit. The Plaintiff must prove: (1) Either of the following: (a) The trustee took the trust property for their own use and benefit; OR (b) The trustee had constructive knowledge that the subject of the trust was misappropriated; and (2) An unjust enrichment.

* The mental state is less culpable than for knowing assistance because you are receiving the benefit of your wrongful actions, so there is a lower standard to find you guilty of the tort.

Constructive Knowledge: knowledge of facts sufficient to put a reasonable person on notice or inquiry.

###### CITADEL ASSURANCE CO. V LLOYDS BANK CANADA

**FACTS:** Citadel is the beneficiary of a trust. Insurance Agent Co. is the trustee and sells/collects insurance premiums on behalf of the insurer, Citadel General. Insurance Agent Co. has a bank account at Lloyd’s Bank (D). D accepted instructions from the parent of Insurance Co. to transfer funds from the account to another account of the parent. D knew this money was being held in trust for Citadel.

**RULES:** A distinct lack of curiosity amounts to constructive knowledge. Liability can be imposed by proving either knowing assistance or knowing receipt of trust property.

**CONCLUSION:** D held liable for breach of trust through knowingly receipt. The bank knew that the money in the account was being held in trust for P, and by reducing the overdraft of the parent corporation (by moving the money), the bank became enriched.

###### AIR CANADA V M&L TRAVEL LTD.

**FACTS:** M&V were 2 SH and Directors of M&L Travel. Their agency was in a trust relationship w/ AC where they sold AC tickets, held the fares in trust for AC, and paid AC the collected funds 2x a month. The funds were deposited in a general bank account, not a trust account. M&L were operating a line of credit with the bank, which allowed the bank to withdraw funds from a general account to cover any shortfall on LOC. M&V gave bank conflicting instructions and they withdrew money from the general account owed to AC.

**RULES:** Individuals who knowingly assist in the movement of trust property will be in breach of trust. Knowledge requires both an actual knowledge of the trust’s existence and knowledge that what is being done is improperly in breach of that trust.

**CONCLUSION:** There was a trust relationship that existed between M&L and AC. M&L were in breach by not putting the money into a trust account. Martin was aware, or at least recklessly blind, to the fact that the bank could seize the funds. V knowingly assisted his company in breaching their trust agreement w/ AC.

# CHAPTER FIVE: TORTIOUS, CRIMINAL, REGULATORY, AND CONTRACTUAL LIABILITY OF THE CORPORATION

## CRIMINAL AND TORTIOUS LIABILITY

### TORTIOUS LIABILITY

**Two ways to hold a corporation liable in tort:**

1. Vicarious Liability: Employers are vicariously liable for the negligent and intentional tort of their employees, while the employees are acting in the course of their employment.
2. Direct Liability – Identity Doctrine: the acts of the “higher up” individual are seen as the acts of the corporation. The Directing Mind’s torts are going to be the torts of the corporation.

###### the rhone v the peter ab widener

**FACTS:** Two vessels collide. The collision is caused by the negligence of Tugmaster Kelch. P sues the corporation that owns the tugboats. In the context of ships, different rules apply. Under the *Canada Shipping Act*, vicarious liability is done away with and the corporation will only be held liable through Direct Liability. P must show Tugmaster Kelch is the “Directing Mind” of the corporation.

**RULES: Test for a Directing Mind:** whether the impugned individual has been delegated, by the governing executive, authority of the corporation. The individual must have the capacity to exercise decision-making authority through **setting** corporate policy, rather than **implementing** corporate policy.

**CONCLUSION:** Captain K is not a Directing Mind as he trains individuals, but he does not set corporate policy. He is also subject to Captain Lloyd, who makes the decisions and sets corporate policy. Therefore, the corporation is not directly liable because Captain K is not a directing mind.

###### R V CANADIAN DREDGE & DOCK CO.

**FACTS:** The Gov. of Canada issued a series of tenders for dredging operations performed in the Saint Lawrence River and several of the Great Lakes, for which contracts were granted. It was later discovered that a process of bid rigging had occurred. Four corporations, including CD&D, were convicted of w/ the offences of fraud and conspiracy under the *CC*.

**RULES:** The Identification Doctrine only operates where the Crown demonstrates that the action taken by the Directing Mind:

* 1. Was within the scope of their duties.
  2. Was not totally in fraud of the corporation; and
  3. Was by design or result partly for the benefit of the company.

**CONCLUSION:** The companies want to argue certain defences:

The individuals were acted contrary to explicit instructions from their company. 🡪 Court says no, if we allow this, then the Court can never find a corporation liable. The individuals were acting on their own interest and committed fraud against the company. 🡪 Court says no, not against. The individuals were only acting to benefit themselves and not the company. 🡪 Court says no, corp. benefitted.

### CRIMINAL LIABILITY OFFENCES

1. **Absolute Liability:** The Crown must establish the *actus reus* (the guilty act).
   1. The Court will assume the offence is not an absolute liability offence unless the legislation is clear.
2. **Strict Liability:** The Crown must establish the *actus reus* (the guilty act). The accused can avoid a finding of guilt by establishing: (1) Reasonable Mistake of Fact; or (2) Due Diligence.
   1. Most regulatory offences are strict liability offences.
3. **Full *Mens Rea* Offences:** The Crown must establish both the *actus reus* (the guilty act) and the *mens rea* (the guilty mind).
   1. Required proof beyond a reasonable doubt.

**WESTRAY MINE DISASTER: MAY 9, 1992**

The disaster was the result of incompetence/mismanagement/bureaucratic bungling/deceit/ruthlessness/cynical indifference. There were a number of issues with how the mine was being run and criminal charges were brought against the mine owners. The Crown stayed the charges because they weren’t able to determine who was the Directing Mind of the company who committed both MR and AR.

Before 2004, you have to show that there is a DM both with a guilty mind and they had committed the prohibited act. 2004 amendments:

* **Section 22.1:** Negligence offences for organizations.
* **Sections 22.2.2:** Fault offences for organizations.
* **Section 718.21:** Sentencing principles for organizations.
  + The Court considers: whether there was an advantage to the corporation as a result of the crime that was committed, whether there was any planning or complexity w/ the criminal act, is the corporation “judgment proofing”, what impact will the penalty have on the economic viability of the corporation, and what will the cost to the public be?

These amendments allowed for the aggregation of the *actus reus* and the *mens rea* of the offence and changed the “Directing Mind” w/ “Representative” and “Senior Officer”.

**Representative:** A director, partner, employee, member, agent, or contractor of the organization.

**Senior Officer:** A representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer, and its chief financial officer.

**Negligence Offences, Section 22.1**

In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if:

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

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

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

**Fault Offences, Section 22.2**

In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, **with the intent at least in part to benefit the organization**, one of its **senior officers:**

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

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

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

###### r v metron construction corporation

**FACTS:** There was an accident at a construction site where a swing stage collapsed. Four workers died, including one site supervisor, and one worker was seriously injured.

**CONCLUSION:** $750K is imposed and a formal apology. Metron pleads guilty to criminal negligence causing death. As part of the GP, they agree that the site supervisor counted as a senior officer. They find the site supervisor (he is an independent contractor who is overseeing the work of the representatives) had the *mens rea* (markedly departed from the standard of care expected of him) and *actus rea* (failed to make sure they were wearing the life lines)*.* The site supervisor was actually one of the people who died. The sentence is contested by the accused corporation and the Crown. Re: sentencing, the Court placed an emphasis on the economic viability of the company and the result that would have on the employees of the company.

## REGULATORY OFFENCES

### DEFENCES TO STRICT LIABILITY OFFENCES

Mistake of Fact:An honest and reasonable belief in a state of facts which, if they existed, would make the defendant’s act innocent.

Due Diligence: An organization needs to show that they established a system to prevent the commission of the offence and took reasonable steps to ensure the effective operation of the system.

🡪 The onus is on the corporation to show that they took reasonable steps to avoid committing an offence.

🡪 This must be established on a balance of probabilities.

Offences established under regulatory legislation are presumed to be strict liability offences unless:

* (1) Due diligence defence excluded (absolute liability); or (2) The *mens rea* element incorporated into the provision. Example) Highway Traffic Act, section 84.1.

###### R V BATA INDUSTRIES LTD. (ONT PROV COURT)

**FACTS:** Toxic chemicals were stored outside a factory in barrels. The barrels rusted and the toxic chemicals leaks out. The corporation and three individuals were charged under the *Ontario Water Act* and *Environment Protection Act*. They tried to take advantage of the due diligence defence.

**RULES:** The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the Directing Mind and will of the corporation, whose acts are, therefore, in law the acts of the corporation itself. With the due diligence defence, the onus is on the accused to establish their due diligence because they have all of the knowledge.

**CONCLUSION:** Mr. Bata escapes liability. Mr. Bata took active steps to avoid this environmental catastrophe, he would make surprise visits to the factories to catch misfeasance, and he actively set up money to fight pollution. His actions were in stark contrast to the other two individuals (Marchant and Weston) who were found liable. Weston knew that the toxic chemicals were being used and he should have been aware that there was a problem. As Marchant and Weston were the “Directing Minds” of the corporation, Bata Industries was also found to be liable.

**NOTES:** What a Director should do: establish a pollution prevention system, instruct Officers to set up a system that meets industry and regulatory standards and require them to report back to the Directors, review environmental compliance reports, confirm that Officers are responding to any environmental concerns that are brought to the Director’s attention, be aware of industry standards, and immediately react when the system fails.

###### R V SYNCRUDE CANADA LTD.

**FACTS:** Syncrude stores tailings from their oilsands operation in a large pond. Usually deterrents are used to keep birds from landing on the ponds. In the spring of 2008, the Syncrude’s staff were delayed in deploying the deterrents due to a storm and the long snow season. An estimated 1600 birds land on the pond, get stuck in the bitumen, and drown. Syncrude is charged under the *Environmental Protection and Enhancement Act* and *Migratory Birds Convention Act*.

**RULES:** To meet the onus of demonstrating due diligence, it is not required to show the company took all possible or imaginable steps to avoid liability. To meet the onus, it is required that the company show the existence of reasonable steps. Various steps should be taken into account to determine whether the defence has established reasonable care, such as:

* The nature and gravity of the adverse effect.
* The complexities involved.
* A preventative system.
* The foreseeability of the effect, including abnormal sensitivities.
* The alternative solutions available.
* \*Continued on page 205\*

**CONCLUSION:** There was creative sentencing in this case in which the $3M Syncrude was ordered to pay included to researchers at the U of A to look into migration patterns of birds as well as money to purchase a conservation area in Fort Mac.

Re: Nature and Gravity of the Adverse Effect: it was bad, but there wasn’t a sig. impact on the totality of the bird population. Re: Complexities Involved: the employees were clearly not properly trained to deal w/ complex bird migration systems. Re: Preventative Systems: they did have procedure documents, but they were not extensive, compared to other companies they were very far behind, and they had cut a lot of money from preventative systems. Re: Alternative Solutions: the Court felt like it wasn’t that hard to do a better job such as properly training their employees or having more complex procedures. Re: Foreseeability: Syncrude tried to argue that, if there wasn’t a big snowfall, then this would not have happened (unforeseeable snow fall). The Court did not agree.

## CONTRACTUAL LIABILITY

### DOCTRINE OF ULTRA VIRES

A corporation cannot exist outside of the bounds of what creates it. If it goes outside the capacity that is *ultra vires* and what that corporation is purporting to do is meaningless. **Purpose:** to protect creditors by ensuring that the company’s funds were not dissipated in unauthorized activities; and to protect investors by allowing them to know the objects for which their money was to be used.

In the Articles of Incorporation, one of the things included is **Business Restrictions**. Often there is nothing, but sometimes there are restrictions. If the corporation were to then act within the restriction, this would be *ultra vires*.

###### JON BEAUFORTE LTD. RE

**FACTS:** The memo of association for the corporation stated that the object of the company was to carry on business as gown makers/related activities. They started to make veneered panels w/o amending its object clause. One of the creditors supplied fuel to the company. The company liquidates and the creditors file for proof of claim for debts owed. The liquidator rejects them on the basis that the agreement was *ultra vires* and unenforceable. The creditors appeal.

**RULES: Doctrine of Constructive Notice:** states that all persons dealing with a corporation are deemed to have knowledge of the company’s internal incorporating documents such as their articles of incorporation, memorandum of association, or letters patent.

**CONCLUSION:** Decided for Beauforte. The fuel supplier was deemed to know: the fuel is going towards making of veneered panels; and that making veneered panels it *ultra vires* because it is outside of the company’s memorandum (a public document).

###### COMMUNITIES EC. DEVELOPMENT FUND V CANADIAN PICKLES CORP.

**FACTS:** The Communities Economic Development Fund (CEDF) is a lending institution created by statute to encourage the economic development of “remote and isolated communities” in Manitoba. The Canadian Pickles Corporation, located 20KM outside Winnipeg (in Stony Mountain), was approved for a $150K loan w/ a personal guarantee by the directors. The CPC defaulted on the loan and the CEDF sued the company and the guarantor for repayment. CPC argued the CEDF could only get its power from the statute and, thus, the loan was *ultra vires* because Stony Mountain was neither remote, nor isolated.

**CONCLUSION:** In this case, the company was created for the specific purpose by the legislation and, therefore, the loan was *ultra vires* and invalid. The guarantor is not liable. This town is not small or remote enough, so there is no authorization to make the loan.

**NOTES:** If they wanted the guarantee to be valid despite the fact that there might not be an enforceable contract, the wording of the guarantee could have allowed for that. The guarantee did not contemplate the invalidity of the underlying contract.

**STATUTORY REVISIONS**

**Section 17(3):** No act of a corporation, including any transfer of property to, or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this *Act*.

**Section 18 (*ABCA*):** No person is affected by, or is deemed to have, notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed by the Registrar or is available for inspection at an office of the corporation.

**How to Enforce Restrictions in a Corporate Constitution?**

1. Use the oppression remedy, **section 242**.
2. Apply for an order to compel them to act or a restraining order, **section 248**.

## AGENCY

Agency: the fiduciary relationship which exists between two persons, when one (agent) is considered to represent the other (principle) in such a way as to be able to affect the principle’s legal position in respect of strangers to the relationship by the making of contracts.

Principle: the one on whose behalf the act/acts are to be done.

Agent: the one who acts.

**Types of Authority that may Empower Agent to Act:**

1. **Actual Authority –** authority that has been given by the principle.
   1. **Express Authority** – authority that flows from the authorization of the other partners.
   2. **Implied Authority –** authority that flows from acts done in the ordinary course of the business.
2. **Apparent Authority** – authority that flows from a consideration of whether a person dealing with the agent would reasonably regard the agent as acting on behalf of the principle; has the principle acted in such a way to suggest to other people that the agent had the authority to act on their behalf?

###### mcdonic estate v hetherington (litigation guardian of)

**FACTS:** A lawyer (Watt) badly invests his client’s money and losses all of his client’s money, so the client goes after the lawyer’s firm.

**ISSUES:** Did Watt have express, implied, or apparent authority? Was Watt an agent for the firm?

**RULES:** Each partner is an agent of the firm/other partners when he has actual or apparent authority. Definitions as set out above.

**CONCLUSION:** Evidence of implied authority and apparent authority. Implied: this was a firm where the lawyers were regularly investing money on behalf of their clients, so this was the ‘ordinary course of business’. Apparent: other firm partners acted in a way that suggested to clients that he was entering into the loans under the authority of the other firm partners. Evidence of Apparent: the bad lawyer used the law firm’s letterhead, he sent bills on behalf of the firm, the firm was keeping the records of the investment, and the bad lawyer was meeting with the clients inside of the office.

###### PANORAMA DEVELOPMENTS (GUILDFORD) LTD. V FIDELIS FURNISHING FABRICS LTD.

**FACTS:** Bayne = corporate secretary/agent of FFF and rented cars from Panorama w/o paying and based on being required for the company business. Panorama sued FFF based on agency.

**RULES:** Corporations are generally liable for contracts of higher ranking officers. The higher up an individual is, the more actual authority the individual has to do anything on behalf of the company.

**CONCLUSION:** Bayne had apparent authority because he is an officer of the corporation and the nature of the officer position comes with extensive responsibilities, including agreements to lease vehicles. Therefore, the principle clothed Bayne as someone with authority by giving him the “corporate secretary” name. As well, Bayne made all of his correspondence on Fidelis letterhead and used business cards, which gave Panorama reason to think that he had authority.

###### FREEMAN AND LOCKYER V BUCKHURST PARK PROPERTIES (MANGAL) LTD.

**FACTS:** Freeman are achitects who perform work for Buckhurst. Buckhurst has a rogue agent, Kapoor, who acts as a Managing Director of the corporation. However, Kapoor was never appointed to that position because he never completed the paperwork to finish his promotion. P does work on Kapoor’s instructions and never gets paid. Freeman sues Buckhurst.

**RULES: Apparent Authority Test requires:**

1. Representation that an agent had authority to enter into the contract on behalf of the corporation.
2. Representation made by someone who had actual authority.
3. Contractor relied on the representation.
4. That constitutional documents of corporation (articles of incorporation, bylaws, USA) do not deprive the corporation of capacity.
   1. To enter into that kind of contract.
   2. To delegate that authority to an agent.
   3. This only applies against statutory corporations.

**CONCLUSION:** The Court found K did not have actual or implied authority because he wasn’t ever properly appointed as Managing Director. However, K did have apparent authority. The Board knew that K was acting as the Managing Director, even though there was no resolution giving him such power.

###### DOIRON V MANUFACTURERS LIFE INSURANCE CO. (COB) (ALTA CA)

**FACTS:** An insurance agent for Manufacturers Life Insurance sold clients investment packages that lost all of their money. P sued the investment company (bankrupt), the insurance agent (bankrupt), and the insurance company Manulife.

**RULE:** A principle is liable for the acts of an agent, so long as the agent is acting w/n the scope of their actual/apparent authority.

**CONCLUSION:** The insurance agent did not have actual authority. There was a very clear independent contracting agreement, which indicated that he was not their agent to bind them to these types of contracts.

**RATIONAL:** The insurance agent did have apparent authority through Manulife’s conduct and, therefore, Manulife was held to be liable. Evidence of Apparent Authority: his office was within the Manulife office, when someone called for him, they called through the Manulife switchboard, he had Manulife promotional material, he used Manulife letterhead, and there were newspaper ads running that associated them.

###### CANADIAN LABORATORY SUPPLIES LTD. V ENGELHARD INDUSTRIES OF CANADA LTD.

**FACTS:** Canlab bought platinum from Engelhard and would sell the scrap metal back to them. Cook contacted Engelhard and said that Canlab was doing “secret experiments” to be carried out by Giles. Giles is purportedly a secret scientist working with platinum; in actuality, he is a fictitious person being used for Cook’s personal benefit. Engelhard agreed to ship the platinum ordered by Canlab, accept scrap returns directly from Giles, and pay Giles (actually Cook) directly. This had continued since 1962 and in 1966, Engelhard spoke to a purchasing agent, Snook, who held out that Cook was an agent for Canlab and who should be dealt with when addressing the ‘Giles’ customer. In 1968, Engelhard called the VP of Canlab to ask about the work of the scientist. Canlab sued Engelhard, claiming the platinum retuned by Cook still belongs to them.

**CONCLUSION:** Englehard was held liable for conversion up until 1966, when Cook was held out as having authorization to purchase by another employee, after which Cook had apparent authority to carry out the transaction. Cook was given apparent authority when Snook, an individual who had actually authority, represented to Engelhard that Cook should be the one dealt with.

# CHAPTER SIX: CORPORATE SOCIAL RESPONSIBILITY

## INTRODUCTION

Corporate Social Responsibility: Calls for accountability in the context of a corporation’s economic, social, and environmental actions.

* Corporations must assess obligations to a broader range of shakeholders other than just shareholder profits.
* It is generally understood to be the way a company achieves balance/integration of economic, environmental, and social imperatives while, at the same time, addressing shareholder expectations.

Enlighted Self-Interest: Belief that ppl can advance their own interests by taking steps that advance the interests of others/the community. Sometimes they are not in conflict because a Director acts in an ethical way, which ^ the value of the corp. and SH want to invest in the corp.

**Triple Bottom Line:** An accounting framework with three parts: social, environmental, and financial. Some organizations have adopted the TBL framework to evaluate their performance in a broader perspective to create greater business value.

**Pressure to Behave Ethically**

1. **Shareholders** – if there are a group of SH that don’t want to invest because you are unethical, the value of the shares drop.
2. **Consumers** – more products can be sold if you are a more ethical company.
3. **Government** – might step in and regulate if you’re unethical.
4. **Social License** – when you do have expansionary plans that require a buy-in from the community, if you have ethical conduct, the community is more likely to invest and be supportive.

###### dodge v ford motor company

**FACTS:** Ford Motor = profitable. Instead of paying dividends to SH, Directors want to reinvest $ in expanding the car plant/drop the price of cars. SH sue to force Directors to issue dividends and to prevent the Directors from pursuing expansion/price reduction plans.

**ISSUES:** Can Ford stop paying dividends to fulfill a public purpose?

**CONCLUSION:** No, Ford cannot stop paying dividends to fulfill a public purpose. The Court decides that some of the profit needs to be paid through dividends, but not all of it. This is because, while this decision is not in the immediate interest of the SH, it is w/n their long-term interest: if they expand, they can be profitable in the future and, if they drop the price of cars, then more people can purchase the cars, which will make them more money.

Shareholder Primacy: A business is organized and carried on primarily for the profit of the SH. Directors employed for that end.

**Arguments For:**

* SH have more of an interest in the success of a corporation than the holder of a fixed claim because they get a residual value of the corporation after creditors are paid out.
* SH have difficulty protecting this interest (collective action problems).
* Promotes Director accountability.

**Arguments against:**

* Other parties have an interest in the success of the corporation: employees, suppliers, community.
* SH have tools to protect their interest: elect Directors, access to information, remedies (oppression).
* Other stakeholders face additional holders (lack of bargaining power and lack of information).

Shareholder Proposals: SH can submit these proposals to be put on the agenda at the next SH meeting.

* SH making the proposal must have at least 1% of the voting shares or their shares must be worth $2,000.00, they must have held the shares for at least 6 months, and they must have support from SH holding at least 5% of voting shares.
* **Section 136**, *ABCA* allows SH to bring a SH proposal.

Directors of public organizations must distribute the SH proposal to all SH prior to the meeting, unless:

* SH do not submit the proposal early enough.
* SH had a proposal circulated in previous 2 years and then did not show up to present it or it has already been voted against.
* Proposal is being submitted just to secure publicity.
* Proposal is primarily about a personal grievance.
* Proposal is primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes.

*ABCA* (**section 136(5)(b)**): A corporation is not required to circulate a shareholder proposal if it clearly appears that the proposal has been submitted by the registered holder or beneficial owner of shares primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the corporations, its directors, officers, or security holders or any of them, or primarily for the purpose of promoting general, economic, political, racial, religious, social, or other similar causes.

*CBCA* (**section 137 (5)(b.1)**): Corporation is not required to circulate proposal if it is: clear that the proposal does not relate, in any sig way, to the business or affairs of the corporation.

###### TALISMAN ENERGY INC.

**FACTS:** Talisman was subject to strong international criticism because it was drilling oil in the Sudan. Through royalties paid to the Sudan gov. on extracted oil and gas = fueling the civil war by allowing the military gov. to keep fighting w/ rebel forces. Various groups asserted that Talisman was involved and turned a blind eye to HR violations.

**RULES:** If a SH doesn’t like what management is doing, they can bring a SH proposal to complain about anything in the organization.

**CONCLUSION:** SH are concerned and brought a proposal to require Talisman to have an independent audit done. It didn’t succeed, but the proposal required Talisman to do their own audit. Talisman took a bunch of steps, but they were viewed so negatively. Eventually, the company is subject to so much pressure from their SH that they sell their assets of the joint venture and leave.

###### RE VARIETY CORP. AND JESUIT FATHERS OF UPPER CANADA ET. AL. (ONT HCJ)

**FACTS:** Variety applies for a court order so that it didn’t have to circulate a shareholder proposal about ending investments in Apartheid, South Africa. Jesuit Fathers of Upper Canada put forward the proposal. **Section 131(3)(b)** *CBCA* says that a corporation is not required to comply w/ the shareholder’s request to circulate a proposal if the proposal is primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes.

**CONCLUSION:** Yes, the order that relieves Variety of the requirement to distribute the minority proposal was granted under *CBCA* **section 131(5)(b)** and the decision was affirmed by the ONCA on appeal. The primary purpose of the proposal was a purpose listed in *CBCA* provisions and NOT for another business purpose, like they tried to argue.

# CHAPTER SEVEN: CORPORATE GOVERNANCE

## INTRODUCTION

**Directors**

**Section 101(1)** *ABCA*: Subject to any unanimous shareholder agreement, the Directors shall manage or supervise the management of the business and affairs of a corporation.

**Section 101(2)** *ABCA*: A corporation shall have one or more Directors, but a distributing corporation whose shares are held by more than one person shall have not fewer than 3 Directors, at least 2 of whom are not officers or employees of the corporation or its affiliates.

**Managing the business can include:** strategic planning, risk identification and management, ensuring accurate financial reporting, developing fair compensation reporting, developing fair compensation policies, engage with SH, and deal fairly w/ stakeholders.

**Qualifications of Directors**

* A Director cannot be a corporation, a minor, a bankrupt, of unsound mind, etc (set out in **section 105(1)** of the *ABCA*).
* A Director must be a “Individual” – a flesh and blood person.
* 25% of the Directors must be Canadian residents (**section 105(3)**).
  + This a higher requirement under *CBCA* **section 105(3.1)** for uranium mining, book publishing, book sales and distribution, or film and video distribution.
* Must consent to be a Director.
* A similar “Qualification” section isn’t applicable to SH; it’s a lot easier to be a SH than a Director. This is because Directors are actively engaged in managing the corporation.

**Section 105(2)** *ABCA*: Unless the articles otherwise provide, a Director of a corporation is not required to hold shares issued by the corporation.

**Number of Directors**

* The number, or range, is set out in the Articles of Incorporation.
* “Distributing Corporation” must have at least three Directors, and two must not be Officers or Employees (**section 101(2)**).

**Appointment/Election**

* Directors are initially appointed by inclusion in the Notice of Directors (an Incorporating Document)(**section 106(2)**).
* After that, the Directors are elected by shareholders (**section 106(3)**).

**Ceasing to Hold Office (Removal)**

**Section 108(1):** A Director of a corporation ceases to hold office when: **(a)** The Director dies/resigns; **(b)** The Director is removed in accordance w/ **section 109**; or **(c)** The Director becomes disqualified under **section 105(1)**.

**Section 108(2):** A resignation of a Director becomes effective at the time of a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

This also includes their term ending, becoming disqualified through losing their mental stability or through entering into bankruptcy, or they’re removed by ordinary resolution of their SH.

**Directors May be Able to:** Appoint additional Directors IF empowered by the Articles, **section 106(4)**. Directors also can fill vacancies UNLESS restricted by USA, **section 111**.

**Directors can Delegate Powers**

* To Managing Directors, Committee of Directors, Officers.
* But some powers cannot be delegated: declaring dividends, appointing additional Directors, adopting, amending, or repealing bylaws.

**Directors Act:** Through resolutions voted on at meetings, or through written resolutions, **section 117**.

**Directors Dissent:** The Director, if they don’t agree, **MUST** actively have that dissent recorded or they are presumed to have consented to it (this is under **section 123**). Once they have consented, they cannot later go back and change it to a dissent.

**Director’s (and Officers’) Duties: Key Sources**

**Fiduciary Duty:** Duty to act honestly and in good faith, with a view to the best interests of the corporation (**Section 122(1)(a)**).

* The Court rejects a shareholder primacy model of the fiduciary duty.
* The Duty is owed to the corporations – Directors, Officers, SH, or other “proper persons” can get permission from the Court to sue in the corporation’s name. This is called a **derivative action**, **section 240**.

**Duty of Care:** Duty to exercise the care, diligence, and skill that a reasonable prudent person would exercise in comparable circumstances (**Section 122(1)(b)**).

* This is owed to people other than the corporation such as shareholders, creditors, and employees.
* It is an objective, contextual threshold: what would a reasonable person do if they found themselves in the similar situation?

**Reasonable Reliance**

* Applies to both Fiduciary Duty and Duty of Care.
* In fulfilling their duties under **section 122**, a Director is entitled to rely reasonably on **section 123(3):** 
  + Financial statements provided by an Officer or Auditor.
  + “An opinion or report of a lawyer, accountant, engineer, appraiser, or other person whose profession lends credibility to a statement made by that person..”
* Expanded protection in Ontario, includes reasonable reliance on a report or advice of an Officer or Employee of the corporation, where it is reasonable in the circumstances to rely on the report or advice.

###### PEOPLES DEPARTMENT STORES INC. (TRUSTEE OF) V WISE

**FACTS:** Wise Co. and Peoples Co. are both clothing retailers. Wise Co. acquires Peoples. Lionel, Ralph, and Harold Wise are SH in Wise Co., Directors in Wise Co., and Directors in Peoples Co. Both the companies experience inventory issues and there is a lot of confusion because both companies are operating from the same warehouse. Due to the confusion, Lionel, Ralph, and Harold vote to adopt an inventory plan. The inventory plan required Wise Co. to buy merchandise from oversee suppliers and Peoples Co. buys merchandise from NA suppliers. As a result, Wise Co. owes Peoples Co. a large debt. Both companies went bankrupt. The trustee of Peoples Co. sues Lionel, Ralph, and Harold for breach of fiduciary duty **and** breach of duty of care.

**ISSUES:** Did the Wise Brothers breach their duty under **section 122(1)** and, if so, are they liable for loss?

**RULES: Business Judgment Rule:** The Court should defer to the business decisions made by the Directors and shouldn’t second guess the substance of the business decisions made. This test is relevant when assessing if Directors have breached their fiduciary duty or a duty of care. **Two Part Test:**

1. **Was the Process Reasonable?** Did the Directors seek sufficient information? Did they act prudently?
2. **Was the outcome w/n the reasonable range of alternatives?** Was there another, clearly more beneficial alternative?

**CONCLUSION:** Decided for the brothers based on the BJR. The brothers made an honest, good faith effort to redress the corporation’s financial difficulties. They acted w/ reasonable prudence in exercising their judgment. The Directors had, therefore, not breached **section 122** of their duties and their decision was protected by the Business Judgment Rule.

###### BCE INC. V 1979 DEBENTUREHOLDERS

**FACTS:** There was a proposed leveraged buyout of all BCE shares (leveraged buyout = borrowing money for the purchase). Bell Canada, a wholly-owned subsidiary of BCE, agreed to guarantee the $30B of the debt BCE would incur to support the purchase. Bell’s debentureholders (D) resisted because, they argued, Bell Canada’s increased liability would downgrade the value of their debentures, while conferring a benefit on the SH by way of an increased premium. The Debentureholders claim that the Director’s breached their fiduciary duty to Bell Canada by approving the sale.

**ISSUES:** Did the Directors breach their fiduciary duty?

**RULES:** Under the BJR, deference should be given to Directors’ business decisions taken in good faith and in the performance of the functions they were elected to perform. Although Directors must consider the best interest of the corporation, it may also be appropriate, to consider the impact of corporate decisions on SH or particular groups of stakeholders, but this is not mandatory.

**CONCLUSION:** Decided for the Directors. The Debentureholders failed to establish grounds to have the arrangement reversed. BCE did nothing wrong just because the SH benefitted while other stakeholders stood to lose from the transaction. Directors must consider the best interests of the corporation and it may also be appropriate to consider the impact of corporate decisions on particular groups. In this case, TJ recognized that the Directors have a fiduciary duty to act in the best interests of the corporation.

###### SMITH V VAN GORKAM

**FACTS:** Van Gorkom called a meeting of TransUnion Directors to discuss an offer from Marmon. The offer was tie limited. The Board voted to put the offer to SH w/o: asking about how the price was reached ($55/share or investing value of TransUnion) OR reading the merger agreement. The majority of SH vote in favor of accepting the offer. SH sue to rescind the agreement.

**ISSUES:** Did the Directors breach their fiduciary duty? Was the decision of the Directors protected by the BJR?

**RULES:** Directors must show the care/diligence/skill of a reasonably prudent person. Business Judgment Rule does not protect against those who have failed to inform themselves.

**CONCLUSION:** No, the Directors’ decision was not protected by the BJR because the Directors did not act in an informed manner, which is required by the BJR. In this case, there was no report by a professional that the Directors relied on, they only had a two-hour meeting, only a 20-minute presentation was given to describe the sale, the Board didn’t read the agreement, the Board didn’t question VG on how he came up with the price, there was a time restriction, and they didn’t know the true value of the corporation.

**NOTES:** There was a strong dissent:

* There should have been a consideration of the expertise around the table. A lot of people were present w/ a lot of experience and education, so that should have been considered.
* They had a lot of information with which they could have made an informed decision re: share price.

## FIDUCIARY DUTIES

Fiduciary: an individual who stands in position of trust to another person. Fiduciaries are expected to put the person’s interest ahead of their own. Example) Lawyer to client, Doctor to patient, Parent to child, and Director to corporation.

* A fiduciary cannot benefit at the expense of that person and avoid putting themselves in a conflict of interest situation.
* Directors are always fiduciaries of the corporation, even if they are not properly elected as a Director.

**Director’s Remuneration; Section 125(1)** is not a breach of a fiduciary duty: Subject to the articles, the bylaws, or any USA, the Directors of a corporation may fix the remuneration of the Directors, Officers, and employees of the corporation.

**Section 120(6)(b)** (*ABCA*)**:** Directors can vote on their own remuneration contracts unless the constitutional documents say otherwise.

🡪 If a Director pays themselves too much, they can be held liable.

🡪 This is not typically an issue w/ SH because they are receiving dividends.

🡪 This issue becomes more of a concern when the Director is different than the SH.

### TAKING CORPORATE OPPORTUNITIES

Fraud of the Minority:Majority SH are directly/indirectly taking for themselves money, or other forms of opportunity, that rightly belong to the corporation or that all the SH should participate in.

###### cook v deeks

**FACTS:** There are 4 Directors of TCC. They were trying to get rid of Cook (1/4 of the Directors). They prevent TCC from bidding for a contract and, instead, they bid successfully for the contract themselves. Cook finds out and sues for a declaration that any benefit the Directors receive should be held in trust for TCC. Directors who did this were the major SH, and held a SH meeting saying it was OK.

**ISSUES:** Were the Directors’ actions wrong? Did the SH meeting insulate them from liability?

**RULES:** Directors cannot pursue interests of their own at the expense of the corporation. Subsequent ratification by a vote of the SH will not validate a breach of this fiduciary duty. Directors must disclose their interest and receive proper approval from the Board in order to take a maturing corporate opportunity.

**CONCLUSION:** Yes, their actions were wrong; all profits directed to be paid to TCC. They breached their fiduciary duty by giving a business opportunity that belonged to the corporation to their new company. The vote itself was a fraud on the minority; the Court found that the vote could not be saved because it was oppressing Cook and was a gift to themselves.

###### canadian aero service ltd. v o’malley

**FACTS:** Can Aero Service Ltd. does a mapping project. O’Malley and Zarzycki are Directors and Officers of CA. CA sends Z to Guyana to do background work in preparation for the bid. OM and Z resign from CA and set up Terra Developments. TD and CA both bid for the mapping contract and TD wins. CA sues OM and Z for breach of fiduciary obligation.

**ISSUES:** Did OM and Z owe a fiduciary duty to CA? If so, did they breach their fiduciary duty to CA?

**RULES:** Fiduciary duties of senior Officers and Directors survive resignation from a company when the resignation is prompted or influenced by a wish to acquire for themselves the opportunity sought by the company.

**Test:** Does the opportunity belong to the corporation, having regard for:

1. **Nature or Strength of Corporation’s Interest:**

* **Maturity** – how much did the corporation invest into the opportunity?
* **Specificity** – was this something the corporation was going after, or was it a general opportunity?
* **Significance of the Opportunity** – not a big project, less likely to find a breach.
* **Public or Private Opportunity** – is the opportunity publicly available?
* **Rejection** – was their bid already rejected?

1. **Relationship of Fiduciary to the Opportunity:**

* **Position of Fiduciary** – the higher up the corporate chain you are, the more likely the court will find you breached your FD.
* **Relationship between Fiduciary and Opportunity** – was this in an area they were responsible for?
* **Knowledge as a Fiduciary** – how much did they learn from the opportunity because of their role w/ the company?
* **Use of Position** – did they build a knowledge base and transfer it over?
* **Time After and Circumstances of Termination** – why did they leave and how long ago? Years ago 🡪 less likely to find breach of FD.

**CONCLUSION:** OM and Z held liable and ordered to pay $125K in damages, which was equal to the value of the contract. They owed a fiduciary duty. **Maturity:** CA put a lot of work and effort into the project. **Specificity:** CA specifically identified this contract as something they wanted to go after. **Public/Private:** this was a public opportunity, which weighed against CA. **Position of Fiduciary:** these individuals were Directors and VPs. **Relationship b/w Fiduciary and Opportunity:** With Z, absolutely. He was responsible w/ CA to go down there and do this role, and then immediately stepped into the same rule under his new company. **Time After and Circumstances of Termination:** they left for the sole purpose of using this opportunity to start their business.

###### black v hollinger international

**FACTS:** Hollinger International Inc. is suing Hollinger Inc. and Conrad Black for breach of FD. International is controlled by Hollinger. Black owns and controls Hollinger and serves as CEO and Chairman. In 2003, $70M was paid to Black in connection w/ non-compete covenants, which were challenged by another SH who said these violated the duty of loyalty owed by the Directors, and they were hidden from the Board (therefore not properly approved). Realizing the problems a full investigation would present, Black agreed to repay the $70, resign from CEO, and agree to a restructure that would see independent Directors take a solid maj of the Board. As soon as the restructure was complete, he violated is by encouraging purchasers to purchase his controlling interest INSTEAD of buying a shareholder interest from International directly.

**ISSUE:** Did Black violate his fiduciary duty by taking a corporate opportunity?

**CONCLUSION:** Black was found to have breached his fiduciary duty by taking a corporate opportunity and diverting it to himself. He also breached: (1) He used confidential information in other to further his personal interests, which he would not have had access to w/o his position within the company; and (2) He took a private opportunity belonging to International, which he wouldn’t have had access to w/o his position w/n the company.

### OTHER RESTRAINTS ON EMPLOYEES

*Torcana Valve Services Inc. v Anderson*: employees may be fiduciaries of their corporate employer if they have a unique position of trust and power within the company that leaves the company vulnerable to the employee’s actions.

Other restraints may arise in contract: non-competition agreements/clauses and non-solicitation agreements/clauses.

### SELF DEALING TRANSACTIONS

When an individual is on both sides of the transaction, which puts you in a conflict position; as a purchaser, you want to spend the least money possible. As a vendor, you want to receive the most money possible. **CL:** All self-dealing transactions are going to be invalid.

###### ABERDEEN RAILWAY V BLAIKIE BROS

**FACTS:** Mr. Blaikie is the Director of Aberdeen Co. and a member of the Blaikie Bros. Partnership. AC enters into a contract to buy shares from Blaikie Bros. Therefore, he’s self-dealing (on both sides of the transaction). Someone brings a law suit to have the contract declared unenforceable.

**ISSUE:** Is being on both sides of the contract impermissible?

**RULES:** All self-dealing transactions are going to be invalid. An individual cannot be on both sides of the contract. When a particular transaction lead to a conflict in interest, the Director who has the conflict should recuse themselves from participating in that decision.

**CONCLUSION:** The contract was set aside on the grounds that B was self-dealing, which was a conflict of interests between B’s personal interests and the interests of AC.

###### north-west transportation company ltd. v beatty

**FACTS:** James is a SH and Director w/ NWT and sells a steamer to NWT. James then used his SH votes to ratify the sale. Henry Beatty, a SH at NWT, sued on behalf of all the other SH to set aside the sale made to the company.

**ISSUE:** Is the self-dealing contract voidable or insulated by ratification? Did selling the steamer violate the FD owed to the corporation?

**RULES:** A Director may acquire a majority of the shares and use the SH vote to ratify a transaction that would violate a fiduciary duty only if the Director does not act in an unfair and improper manner.

**CONCLUSION:** Contract for sale held valid and enforceable because it was ratified by a SH vote that was not unfair or improper.

**LEGISLATIVE RESPONSE**

**Section 120** (*ABCA*)**:** A Director or an Officer who is a party to, or has a material interest in a person who is party to a material contract w/ the corporation, must provide disclosure of that interest to the Corporation.

Self-dealing contracts are enforceable, as long as three criteria in **section 120** are met:

1. The contract and director’s interest must be disclosed (in writing or entry into the minutes)(**section 120(1)**);
2. The appropriate body must approve the contract.
   1. If the body is the Board, the self-dealing Director cannot vote.
   2. If the body is a SH, the self-interested party can vote.
3. The contract must be fair and reasonable at the time it was approved.

**Section 243** (*ABCA*)**:** An application made, or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been, or may be, approved by the SH of the corp. or the subsidiary, **but evidence of approval by the SH may be taken into account by the Court** in making an order under **section 215**, **241**, or **242**.

**The contract will not be invalid despite a material interest if:** disclosure is made and the contract is reasonable and fair. They have to give this disclosure before or when the contract is being considered. A Court’s ability to set aside the contract is discretionary.

###### dimo holdings ltd. v jager developments inc.

**FACTS:** Henry Moeller is a Director of Jager. Jager borrows from Dimo Holdings, whose sole Director, Officer, and SH is Diane Moeller (HM’s wife). Dimo loaned Jager $50K to put on a concert, but it remained unpaid. Dimo sued Jager to recover. No disclosure was made by HM that there may have been a material interest involved. Jager defaulted on the loan and fights the summery judgment by arguing that HM should have disclosed the interest under **section 120**.

**ISSUES:** Is the husband’s relationship with his wife a “material interest”, and should the contract be unenforceable?

**RULES: Material Interest:** denotes a personal, financial interest and it must be significant. Any dealings between a Director’s corp. and another corp. controlled by a family member of the Director does not constitute a “material interest” that requires disclosure.

**CONCLUSION:** The loan was upheld as enforceable. There was no material interests and the contract was reasonable and fair. The Court specifically held to uphold the contract because Jager needed the money, they were desperate for it, and there was no duress or unconscionability. They now owe the money and the contract is fair and reasonable.

**WHEN IS AN INTEREST “MATERIAL”?**

*Dimo Holdings*: it denotes a financial interest, but to be material, it must be more than insignificant.

*Zysko v Thorarinson*: there should be disclosure whenever the Director’s or Officer’s involvement might be relevant to the corporation’s decision making process… if the corporation would undertake additional due diligence to determine whether the contract, or any of its terms, is truly in its best interest.

*McAteer v Devoncroft Development*: it seems clear that the statute addresses the problem of a Director or Officer who has no monetary interest in a person on the other side, yet who is likely to have an emotional involvement. Thus, a deal in which the corporation is negotiating with a close relative, or even a close personal friend, of one of the Directors ought to be suspect.

**\*apply any of these. Say: the Court has expressed differing views with respect to Material Interest.**

### COMPETING DIRECTOR

A balance is sought between not allowing individuals to be Directors of two companies at once as to protect the risk that the Director will do something to harm one of the companies. However, this principle shouldn’t be applied too broad to prevent business engagement.

###### london and mashonaland exploration co. ltd. v new mashonaland exploration co.

**FACTS:** Lord Mayo agrees to be Director of Company 1. Company 1 solicits investment (sells shares) on that basis. Company 2 advertises that Lord Mayo is a Director. Company 1 applies for an injunction to prevent: Lord Mayo from acting as DIR for Company 2 and Company 2 from advertising that Lord Mayo is its Director.

**ISSUES:** Can a Director of one corporation be restrained from acting as a Director for a competing corporation?

**RULES:** There is nothing wrong w/ a Director of one company being the Director of another company in the same line of business if:

1. Not in breach of an express restrictive agreement; and
2. Not using confidential information that belongs to Company 1 in work with Company 2.

**CONCLUSION:** No, a Director will not be removed from an opposing company’s Board of Directors if there is no evidence of damage to the corporation (no sufficient damage was shown in this case).

**NOTES:** This is no longer the case. However, it would be relevant to raise this case to say that we used to use lower standards, so if there is an older case, it might be relevant to say the lower standards are applicable.

###### sports villas resort inc.

**FACTS:** Sports Villas Inc. operates a golf course in Port Blandford. Basil is the Director of Sports Villas and incorporates Clovelly Inc. in St. Johns. Bruce applies for a declaration that Basil cannot be a Director of SV and Clovelly. Basil argues = courses are far apart and not competing w/ each other.

**RULES:** A Director may engage in a competing business, but their fiduciary obligations require avoidance of actions which would come into conflict w/ the interests of the business. If there is no evidence that another corp. is in direct competition w/ an existing business, then no breach of FD can be found. The court considers whether there is actually the presence of a competition.

**CONCLUSION:** Decided for Basil. There was no evidence that Basil did anything improper that would reflect a breach of his fiduciary duty. He had not used any confidential information, there was no evidence of direct competition, and the distance between the two courses was large. Therefore, there would be no negative impact of opening a new course and no direct competition. Further, Basil found out about this opportunity through a private channel and not through his employment as a Director.

### TAKEOVER BIDS AND DEFENSIVE TACTICS BY MANAGEMENT

If a public company wants to purchase a company, they can do so by asking to purchase the SH’s shares. This can get the SH more money. Directors might not be happy if they’re worried the acquired company might not have the company’s best interest in mind.

Hostile Takeover: an acquiring company is trying to take over the company, but the Board of Directors is unhappy about it.

Poison Pill: a tactic utilized by companies to prevent or discourage hostile takeovers. A company targeted for a takeover uses a poison pill strategy to make shares of the company’s stock unfavorable to the acquiring firm.

###### maple leaf foods v schneider corp.

**FACTS:** Schneider establishes a Special Committee of Independent Directors to advise the Board of Directors about the takeover deal and whether or not the SH should accept the offer. The Committee solicits more bids (Maple Leaf = $22/share, Smithfield = $25/share and some other tax benefits to the SH). The Schneider family says it will not accept the Maple Leaf Bid and that they don’t want a takeover at all. The Committee recommends the Board accept the Smithfield offer and they take steps to initiate the process. Leaf then offers $29/share **cash**; this becomes a better deal. Maple Leaf and minority SH of Schneider bring an action against the Directors.

**ISSUE:** Did the special committee act in the best interests of the corporation? Were they truly independent?

**RULES:** When a corporation is in the process of an unsolicited takeover bid, Directors must act in the best interests of the corporation and this requires specific duties. **ASK:** Did the Directors take the steps necessary to avoid a conflict of interests?

**CONCLUSION:** Decision for the Committee. The Directors acted on the advice of the Committee that was comprised of persons having no conflict of interest. The Committee acted independently, in good faith, and made an honest and informed recommendation. Maple Leaf simply did not bid enough money initially and, had they really wanted the opportunity, they should have bid more money; the fact that the Committee didn’t go back to Maple Leaf wasn’t considered an issue.

**NOTES:** There is a danger of sitting on the corporate board of a corporate client if you are a lawyer. There are benefits, but there are risks: it becomes unclear when you’re acting as a lawyer vs. a Director, you might inadvertently wave solicitor/client privilege, or you might put yourself in a conflict position.

### OTHER SOURCES OF FIDUCIARY OBLIGATION

###### TONGUE V VENCAP EQUITIES ALBERTA LTD.

**FACTS:** Negin is a Director who is soliciting offers to purchase Synerlogic. Arthur Anderson offers to buy shares at $1.97/shares. Negin doesn’t tell Tongue (shareholder) about the offer and, instead, arranges for Vencap to buy Tongue’s shares at $0.60/share. Tongue finds out that he has lost money, so he sues Negin for breach of fiduciary duty.

**ISSUES:** Do the Directors owe the Shareholders a fiduciary duty here?

**RULES:** A fiduciary duty also arises when Directors act outside of their ordinary duties such as when Directors purchase shares from shareholders (an Ad Hoc Fiduciary Duty) and in various other circumstances (the category is never closed). A Director can owe a fiduciary duty to others than the corporation.

**CONCLUSION:** The Directors are liable for a breach of their fiduciary duty. The defendants had information that the plaintiff required to make an informed decision, which they should have disclosed to the shareholder.

### DIRECTORS LIABILITIES UNDER OTHER STATUTES

* Tax legislation; *Income Tax Act*, **section 227.1**.
* Employee wages; *Employment Standards Code*, **section 112**.
* Pension contributions.
* Environmental liabilities.

## DIRECTORS’ AND OFFICERS’ LIABILITY IN TORT TO THIRD PARTIES

**Corporate Law Values:** separate corporate personality, limited liability, don’t want to discourage people from being Directors for fear of personal liability.

**Tort Law Values:** provide compensation to people harmed by tortious conduct, holds individuals engaged in tortious conduct accountable for their actions, and deters tortious conduct.

### WRONGFUL CONDUCT, INTENTIONAL TORTS

Wrongful conduct/intentional torts include fraud, deceit, dishonest conduct, or want of authority. The seriousness of the conduct tips the scales in favor of the tort law principles and not corporate law principles. *O’Bryne et al*: Directors and Officers will have liability for their intentional torts, subject to the defence of *Said*, which applies only to the tort of inducing breach of contract.

**INDUCING BREACH OF CONTRACT**

When you know a contract exist, so you act in a way that causes the party to breach that contract, which subsequently causes a loss to a third party. That third party can sue you for inducing a breach of contract.

**Test for Inducing Breach of Contract** (*1369413 Alberta Ltd. v Pocklington*)**:**

1. Existence of a contract;
2. Knowledge or awareness by the defendant of the contract;
3. A breach of the contract by a contracting party;
4. The defendant induced the breach;
5. The defendant, by his conduct, intended to cause the breach;
6. The defendant acted without justification; and
7. The plaintiff suffered damages.

**Rule in *Said v Butt*:** If a servant acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.

###### mcfadden v 4817282 ontario ltd.

**FACTS:** James (McFadden) is employed by a # company. Norman and Mary decide to sell the # company’s assets. Norman and Mary terminate James w/o cause and pay funds of the # company out to themselves as SH. James sues the # company for wrongful dismissal and Norman and Mary for inducing breach of contract.

**ISSUE:** Are Norman and Mary personally liable for inducing a breach of contract? Were they acting “*bona fide*” in the best interest of the company?

**RULE:** If a Director commits a tort, then they can be held personally liable.

**CONCLUSION:** The defendants are personally liable for inducing breach of contract. They were trying to drain their corporation of all its assets, so there would be nothing for McFadden to sue the corporation for. In this case, they were not acting w/n the scope of their duty to do what is best for the corporation – instead, they were acting to secure the transfer of the greatest amount of funds to shield those funds from an obligation to McFadden.

###### ADGA SYSTEMS INTERNATIONAL V VALCOM

**FACTS:** ADGA and Valcom are competitors. ADGA has had a lucrative contract with the federal government that was ending, so the bidding process was opening up. There was a rule in the bidding process that at least 25% of the employees must have certain certification; ADGA had all of these employees, but Valcom didn’t. Valcom “raided” ADGA’s employees to get them to join their company for the bidding process. ADGA starts a lawsuit, including a claim against MacPherson, for inducing breach of contract.

**ISSUE:** Is there tort liability for inducing a breach of contract?

**RULE:** In all events, Officers, Directors, and employees of a corporation are responsible for their tortious conduct, which is subject to the narrow exception in *Said v Butt*.

**CONCLUSION:** The company is liable and the individual Directors are also liable for their own tort. When looking at this type of scenario, there was no voluntary assumption of relationship with Valcom, no voluntary decision to do business w/ a limited liability company, and they had no contract with Valcom.

### NEGLIGENCE BASICS

For Party B to hold Party A liable in negligence, Party B must show that:

* Party A owed Party B a duty of care.
* Party A breached the standard of care.
* Party B suffered harm.
* Party’s A breach of the standard of care caused Party B’s harm.

The question becomes: Have the Courts already recognized that a proximate relationship exists in this, or an analogous relationship? If not, apply the *Anns* Test, as modified in *Cooper v Hobart* and, for a negligent misrepresentation claim, *Deloitte & Touche v Livent*.

**Duty of Care under** ABCA’s **section 122(1)(b):** Every Director of Officer shall exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. **Section 122**:

* Sets out that a duty of care is owed to a corporation and can be owed to stakeholders other than the corporation – *Peoples*.
* Sets out that the standard of care that should be applied – “reasonably prudent person in comparable circumstances.”

###### MONTREAL TRUST CO. OF CANADA V SCOTIAMCLEOD INC.

**FACTS:** Montreal Trust and Credit Lyonnais loan money to Peoples Jewelers on the basis of financial information provided by Peoples. Peoples omits to mention their liabilities on their subsidiaries’ debts. This financial information was provided by Irving (CEO and president of Peoples) and Charles (VP of Peoples). Montreal and Credit find out about the liabilities, sue Peoples, their lawyers, and their underwriters. All the Directors apply to have the claims against them dismissed.

**ISSUE:** Does a tort misrepresentation give rise to personal liability for Officers and Directors?

**RULES:** Absent a finding of fraud, deceit, dishonesty, or want of authority, Directors and Officers, as the Directing Minds of the corporation, will rarely be held liable for their torts unless their actions are outside the scope of their duties. The tortious conduct itself must exhibit a separate identity to take them outside of their role as Directing Mind of the corporation for there to be liability.

**CONCLUSION:** Court allowed claim to be summarily dismissed for the Directors who were not intimately involved. The Court disallowed summary dismissal for Irving and Charles, who were more involved in the misrepresentation.

With respect to the other Directors not intimately involved, the Court says that just because the “Directing Mind” did something unsavoury, doesn’t mean you can pierce the corporate veil absent a finding of fraud, deceit, or dishonesty. The Officers and Directors are shielded from personal liability unless it can be shown that their actions were themselves tortious or exhibit a separate identify from that of the company; their actions were not sufficient to demonstrate this.

###### adga systems international ltd. v valcom ltd.

**RULE:** In all events, Officers, Directors, and employees of a corporation are responsible for their tortious conduct, which is subject to the narrow exception in *Said v Butt*.

**CONSLUSION:** The Court refuses to summarily dismiss the claims for inducing breach of contract against MacPherson, EE1/2.

**NOTES:** This case was not that ONCA case cited in *Hogarth*, and their statement of law is a very broad statement. Further, this case is about inducing breach of contract and is not about negligence broadly.

###### NBD BANK, CANADA V DOFASCO INC.

**FACTS:** NBD Bank loans money to Algoma Steel based on representations made by Percival (Officer of Dofasco) and James (Algoma’s VP Finance, Secretary, and Treasurer). Algoma starts an insolvency proceeding. NBD Bank sues Dofasco and James for negligent misrepresentation. Dofasco and James are held liable and appeal.

**ISSUES:** Can the Directors be held personally liable for misrepresentations they made on behalf of the corporation?

**CONCLUSION:** Appeal dismissed. The Court applies the *Anns* test to determine if James owed a duty of care to NBD Bank.

**Proximity; (1) D ought reasonably to foresee that the P will rely on their representation:** It is reasonably foreseeable that NBD would rely on his representation because he was a senior officer of Algoma, he was the bank’s primary contact, and he held himself out as capable of making decisions on Algoma’s behalf.

**Foreseeable; (2) Reliance by P would by reasonable in the circumstance:** Reliance by NBD Bank upon James was reasonable.

***Prima Facie* duty of care established.**

**Policy reasons for not attributing personal liability; (1) The Impact of the CCAA (insolvency proceedings):** It is unfair that you can go after the principle here when you are no longer able to go after the corporation due to their insolvency proceedings; holding an individual liable here is inconsistent with CCAA. **(2) Allocation of Risk:** Contracts should govern. NBD entered into a contract w/ Algoma and knew they were dealing w/ a limited liability enterprise and that they want to ignore that and go after the individuals. However, James was supposed to do certain things under his contract that would have protected NBD, which they were not able to take advantage of because of James’ actions. Therefore, it’s not fair for James to say that they should be held to the contract, when his conduct prevented them from benefitting from the safeguards in the contract. **(3) Indeterminate Liability:** Not an issue here because James’ statements were used for the very purpose and transaction for which they were made and it wasn’t given to everyone.

**Test from *Cooper v Hobart* (as modified by *Deloitte & Touche v Livent*)**

**Stage One: Consider Proximity and Foreseeability**

1. **Proximity** = the closeness of the relationship
   1. Has this category been previously recognized as proximate (case where this relationship has been proximate enough to establish a duty of care)? If so 🡪 there is a duty of care.
   2. If not 🡪 Did the defendant give an undertaking that invited the plaintiff’s reasonable reliance, and the plaintiff relied on the undertaking to their detriment?
   3. Reasonableness of Reliance considered here.
2. **Foreseeability** = likelihood of harm
   1. Should the defendant have reasonably foreseen that the plaintiff would rely on its representation and was it reasonable for the plaintiff to rely on it?
   2. Reasonableness of Reliance considered here.

**Reasonableness of Reliance**

* Consider the purpose for which the representation was made and the purpose for which it was used. If these do not match, then the reliance will not be reasonable.
* See also criteria from *Hercules*.
* Hogarth: Separate Corporate Personality.
  + When P gets a representation from a company, they may be entitled to rely on that company’s representation.
  + However, the question is: is it reliable to expect that all individuals of the corporation spoken to can be held individually liable for reprentations? **No. It is not reasonable for a plaintiff to rely on a representation as engaging individual liability.**

*Hercules* – **Indicia of Reasonable Reliance**

* The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
* The defendant was a professional, or someone who possessed special skill, judgment, or knowledge.
* The advice or information was provided in the course of the defendant’s business.
* The information or advice was given deliberately and not on a social occasion.
* The information or advice was given in response to a specific enquiry or request.

**Stage Two: Residual Policy Considerations**

1. **Policy considerations at this stage include:**
   1. Whether there are other remedies available at law.
   2. Indeterminate liability.
   3. Other policy considerations. E.g., *Hogarth*: separate corporate personality; it’s important to the Canadian economy, we don’t want to make Directors and Officers the guarantors for the corporation’s debt, especially where someone voluntarily chooses to do business with the corporation.

###### HOGARTH V ROCKY MOUNTAIN SLATE INC.

**FACTS:** Suhan, Simonson, and Powell want to operate a quarry (pulling rocks and selling them). They set up a limited partnership and prepare financial documents to solicit investors. These financial documents included a “future oriented financial information” document, which included forecasts and projections of business opportunities. They also represented that they would follow with all of the regulatory requirements. They have investors invest in the limited partnership, the quarry operates for a short time, lose all of their money, and cease operations. The Investors sue Suhan, Simonson, and Powel for negligent misrepresentation. They’re held liable at trial, and Simonson appeals.

**RULE:** Negligent Misrepresentation Test:

* \*There must be a duty of care based on a “special relationship” between the representor and the representee;
* The representation in question must be untrue, inaccurate, or misleading;
* The representor must have acted negligently in making the representation;
* \*The representee must have relied, in a reasonable manner, on the negligent misrepresentation;
* The reliance must have been detrimental to the representee in the sense that damage resulted.

Places where \* = separate corporate personality may factor in when assessing if a Director owes a duty of are to a stakeholder, other than the corporation.

**CONCLUSION:** The majority says: “We are not satisfied that the conduct of Simonson was tortious in itself or exhibited a separate identity or interest” (aka *Scotia McLeod*). The appeal is allowed and Simonson is not liable.

**RATIONAL:** Re: the representation in question must be untrue, inaccurate, or misleading, the Court was not convinced that all of the misrepresentations were untrue. The Directors also did not misrepresent their expertise or background; making representations about their skill in management does not create personal liability if mistakes are made in the management of the corporations. The representations were based on future events, not representations of facts how they exist now.

Re: the representor must have acted negligently in making the representation, the Investors have to show that, but-for the misrepresentation, they would not have lost their money, which they could not demonstrate – there was no causation flowing from the statement. Therefore, there was no duty of care.

**NOTES:** The *ScotiaMcLeod* test is applicable in AB through its use in this case.

###### KENT V POSTMEDIA NETWORK INC.

**FACTS:** Arthur Kent was running in a Provincial Election. Don Martin writes a critical column re: Arthur Kent in National Post: “characterized him as an egotistical, politically naïve, arrogant candidate whose campaign was in disarray.” Arthur sues Don (corporate employer), Gordon (publisher of National Post), and Paul (CEO/President of National Post). Paul and Gordon apply to have the claims against them summarily dismissed.

**RULES:** Defamation requires: (1) A publication by the defendant to a third party; (2) Of a statement about the plaintiff that; (3) Lowers the reputation of the plaintiff in the eyes of a reasonable person. **Reiteration of *Scotia MacLeod*.**

**CONCLUSION:** Application for summary dismissal/judgment granted. No personal liability of the Directors. There was no evidence of any action on the part of Paul or Gordon that would make publication/republication of the Article their own deed, rather than an act of Postmedia or National Post. Neither Paul or Gordon’s role within Postmedia/NP was such as to charge them w/ control over the editorial content/the content published on PM websites. As such, their failure to take independent active steps to remove the Article from PM’s website is not a sufficiently separate act to make publication of the Article their own defamatory act (*Scotia MacLeod*).

### INDEMNIFICATION BY THE CORPORATION

Indemnification is under **section 118** and **124** of the Alberta *Business Corporations Act*.

The corporation may indemnify a Director/Officer for costs and expenses arising from a civil, criminal, or administrative procedure if:

* The Director or Officer “acted honestly and in good faith with a view to the best interests of the corporation” AND
* For criminal and administrative offences, the Director or Officers “had reasonable grounds for believing that the director’s or officer’s conduct was lawful.
* Even if an individual is already convicted, that does not prohibit the corporation from indemnifying the individual.

The corporation must indemnify the Director/Officer for costs/expenses arising from defending a civil, criminal, or admin procedure if:

* Two criteria above are satisfied; AND
* Director or Officer substantially successful in defence; AND
* “Fair and reasonable” to indemnify.

If the corporation indemnifies in other situations:

* The Director who voted for indemnification are personally liable to repay the corporation; and
* Receipt or indemnification can be required to repay the corporation.

###### BLAIR V CONSOLIDATED ENFIELD CORP.

**FACTS:** Michael is Director of CE and he holds a SH meeting to vote on a new Director. Two SH w/ substantial holding vote by proxy (appointing someone). Their proxy sets out a list of Directors that the Board recommends each SH can vote for, including Michael. However, some of the proxies contain a written in name not originally included. **There is a Q whether this is allowed**. At the meeting, this results in Michael not getting elected. He seeks legal advice and is told that this is invalid, so he continues on as the Director. SH start a litigation, seeking a declaration that the proxies were valid. Michael appeals and looks to CE to indemnify him for costs. The company says no. He seeks a court order requiring the corporation to indemnify him.

**ISSUES:** Whether Michael can be indemnified. Was he acting “honestly in good faith with a view of the best interest of the corporation”?

**CONCLUSION:** Decided for Michael. The fact that he relied on legal advice is not a determinative factor, but there needs to be a consideration of whether it was reasonable to rely on legal advice AND if he acted in good faith. Following the advice (that he asked for three times) was not acting in bad faith, even if there was a tinge of self-interest. The Court finds this is the best that Michael could do because they needed to elect a Director.

###### r v bata industries ltd.

**FACTS:** Marchant, Weston, and Bata Industries are fined at their sentencing hearing. The Court also imposes a term of probation: the corporation cannot indemnify any of the Directors (Weston or Marchant).

**ISSUE:** Can a corporation be prevented from indemnifying Directors as a term of the corporation’s probation?

**CONCLUSION:** They can be indemnified because these rules are set out in the *ABCA*. Indemnification limits are already set out, and they cannot be added to by probation orders.

# CHAPTER EIGHT: SHAREHOLDER RIGHTS AND REMEDIES

## INTRODUCTION TO CERTAIN SHAREHOLDER RIGHTS

* Vote at SH meetings.
  + Can by modified by the Articles of Incorporation.

##### Example) A corporation may have one or more classes of “non-voting shares.”

* + All SH have a right to vote on some fundamental change to the corporation.
    - An amalgamation w/ another corporation (**section 183(3)**).
    - Sale of all, or substantially all, of the corporation’s property (**section 190(4)**).
    - Removing a Director is not considered to be a “major change” in the corporation.
* Other Rights
  + Requisition (call) a SH meeting (**section 142**).
  + SH can put items on the SH meeting agenda.
  + Shareholder proposal (**section 136**).
  + Suggest a change in bylaws (**section 102(5)**).

**Shareholder Remedies**

1. **Oppression Action:** if you bring this action as a SH, you are saying that you have been treated unfairly and you want a remedy.
2. **Derivative Action:** when something has happened to the corporation, you can sue in the corporation’s name.
3. **Compliance & Restraining Orders:** where a SH is not complying w/ a USA or the Articles (what the business is restricted to), someone can get a Compliance/Restraining Order to shut down what is being done.
4. **Dissent and Appraisal:** if you’re a SH that has voted against a major change in the corporation, you can force the corporation to buy your shares (only available to SH).
5. **Class Veto:** when there are certain changes that will affect a class of shares, that class can vote. If they vote against the change, the change cannot be accepted (only available to SH).
6. **Investigations:** powers under the *ABCA* allow for corporations to collect information re: what’s going on, including having an inspector investigate the books. Most useful w/ Director fraud.

###### HERCULES MANAGEMENTS V ERNST & YOUNG

**FACTS:** Ernst and Young prepare audited financial statements for NGA/NGH companies. SH receive and review the reports at AGM. SH make additional investments in NGA/NGH companies on the basis of the reports. NGA/NGH go into receivership. SH sue Ernst and Young for negligent misrepresentation. Ernst and Young apply for summary judgment.

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

**CONCLUSION:** Action dismissed. There was a prima facie DC based on the special relationship b/w Ernst and Hercules, but policy reasons obviated a finding of DOC owed to individual SH. There is a real danger of indeterminate liability for a finding of a DOC because the SH here were not using the audited statements for the precise purpose for which they were prepared. They were prepared to provide financials for the corporation, not for information to invest. However, Ernest and Young did owe a DOC to the corporation, so the SH should have got permission to bring a derivative action in the corporation’s name, which would have resulted in liability. Here, the SH are suing for their individual losses, so no DOC.

###### deloitte & touche v livent

**FACTS:** Livent stages Broadway shows. The Directors (Gottlieb and Drabinsky) were “cooking the books.” Two auditors (Ddiscovers the irregularities, but were convinced to issue documents saying there were no irregularities. The first document was prepared to solicit new investments and the second document was a statutory audit provided to shareholders at their meeting so they can carry out an oversight function. Both documents say everything is fine (even tho it’s not). The fraud was eventually discovered and the company was placed into receivership and bankruptcy. The receiver sues the auditors in the corporation’s name for negligence re: provision of Document 1 and Document 2; had they prepared the documents properly, the SH would have been able to carry out their oversight function, discovered the fraud, and wound down the corporation when it was less insolvent.

**ISSUES:** Did the auditors owe a duty of care to Livent through these documents?

**RULES:** Change to the *Cooper v Hobart* test – “purpose” should be considered in the proximity stage of the duty of care analysis, instead of only looking at it in considering indeterminate liability in the residual policy consideration stage.

Even when you have satisfied the three criteria in *Canadian Dredge Co.*, you don’t have to attribute the tortious conduct of the Directing Mind to the corporation of which they are the Directing Mind if it would go against policy considerations to do so.

**CONCLUSION:** Document 1 = no duty of care. Document 2 = Duty of care/negligence. The Court looked at the purpose for which the documents were prepared. Document 1 = purpose of soliciting investments; it was not provided to the SH to help them oversee corporate actions. Document 2 = purpose to allow the SH to oversee the Directors. The fact that it was provided negligently prevented the SH from overseeing the Directors = duty of care.

**NOTES:** SCC considers the factors in *Canadian Dredge Co.* and finds that the Directors (“Directing Mind”) were acting in some benefit for the corporation and within the scope of their authority. Benefit = by lying, they allowed the corporation to service for a little longer. Re: principle above, the SCC said it would go against the public interest to allow them not to attribute fault because the Directors would get away with their tortious conduct (Lund thinks this is too messy).

### OPPRESSION REMEDIES

###### DELUCE HOLDINGS INC. V AIR CANADA

**FACTS:** Air Canada buys 75% interest in Air Ontario. Deluce Holdings owns 25%. Deluce and Air Canada sign a USA: If the principles behind Deluce Holdings (Williams) have all been terminated, AC has a right to buy out all of Deluce’s shares; if there is any debate about the price of shares, there is a binding aribitration clause. Air Canada decides it wants to own 100% of all subsidiaries and get rid of all the minority SH. AC elects nominees to the Board of Directors of Air Ontario and directs them to fire Williams. AC starts process to purchase Deluce’s shares. Deluce Holdings starts an oppression action and seeks to stay AC’s share purchase. AC seeks to stay the oppression action (on the basis of the USA).

**RULES:** The oppression remedy protects expectations from corporate stakeholders if those stakeholders’ expectations are reasonable. Breach of fiduciary duty is a separate question from oppressive conduct.

**CONCLUSION:** Deluce’s motion to stay the arbitration proceeding was allowed. AC’s conduct = oppressive to Deluce. **Deluce:** their expectation when they entered into the USA was that William would only be terminated in the interests of Air Ontario, not so that AC could exercise their right to buy out all the shares. **AC:** William was terminated because he was doing a bad job. **COURT:** Does not believe AC because they repeatedly asked William to step down in order to buy Air Ontario’s shares (he had a letter of proof) and, minutes before terminating him, there were minutes from a meeting where Air Ontario was praising William’s work.

### SOME COST BENEFITS TO OPPRESSION AND DERIVATIVE ACTIONS

**Benefit #1:** Interim Costs Available

In civil litigation in Alberta, each party has to bear its own costs during the litigation (lawyer’s fees, mailing expenses). At the end of a lawsuit/application, the losing party is ordered to pay some portion of the winning parties’ costs. This is called a “loser pays” regime.

In a derivative or oppression action, the complainant can get a court order requiring the corporation to pay its costs on an interim basis (**section 243(4)** of the Alberta *Business Corporations Act*). Note, in Ontario, interim costs are only contemplated in derivate actions (**section 247(d)** *OBCA*).

**Benefit #2:** No Security for Costs

Security for Costs: *Alberta Rules of Court* **section 4.22, 4.23** and *ABCA* **section 254**.

The party (usually a defendant) can be worried that their adverse party is judgment proofing because: (1) They have no assets; or (@) They have no assets in Alberta. The party can make the ability to continue the litigation contingent on the party providing security. If the party providing the security is successful = get it back. If they’re unsuccessful = the other side uses the security to pay the costs. If he party fails to provide security for costs by the date specified, a claim or defence can be dismissed or struck.

In a derivative or oppression action, the complainant cannot have security for costs ordered against them by the defendant (*ABCA* **section 243(3)**).

### JUDICIAL INTERPRETATION

**Section 242(1):** A **complainant** may apply to the Court for an order under this section.

**Section 242(2):** If, on an application under subsection 1, the Court is satisfied that, in respect of a corporation or any of its affiliates:

1. Any act or omission of the corporation or any of its affiliates effects a result,
2. The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner or,
3. The powers of the directors of the corporation or any of its affiliates are, or have been, exercised in a manner

that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of any security holder, creditor, director, of officer, the Court may make an order to rectify the matters complained of.

**Section 239(b):** “Complainant” means:

1. A registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
2. A director or an officer or a former director or officer of a corporation or of any of its affiliates,
3. A creditor in respect of an application under **section 242**, if the court exercises its discretion under **sub-clause (iv)** or,
4. Any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

Oppression: carries the sense of conduct that is coercive and abusive, and suggests bad faith (more serious)

Unfair Prejudice: may admit of a less culpable state of mind, that nevertheless has unfair consequences.

Unfair Disregard: of interests extends the remedy to ignoring an interest as being of no importance, contrary to the shareholders’ reasonable expectation (less serious).

**WHAT IS OPPRESSIVE OR UNFAIR CONDUCT**

###### BCE INC. V 1979 DEBENTUREHOLDERS

**ISSUES:** Was the decision by BCE oppressive to the debentureholders?

**RULES: Two Step Test for Establishing Oppression (once standing exists):**

1. **Does the evidence support the reasonable expectations of the claimant? Reasonable Expectation factors:**

* General commercial practice.
* The nature of the corporation.
* The relationship b/w the parties.
* Past practice.
* Steps the claimant could have taken to protect themselves.
* Representations and agreements.
* Fair resolution of conflicting interests b/w corporate stakeholders.

1. **Does evidence establish that the reasonable expectation was:**
   1. Violated by conduct, and
   2. Falls within the terms “oppression,” “unfair prejudice,” or “unfair disregard” or relevant interest?

**CONCLUSION:** Debentureholders failed to establish oppression under **section 242**. They had reasonable expectations that their interests would be considered by the Directors in making their decision, but those expectations were fulfilled.

**First Step:** Establish that an individual has ***standing*** as a claimant to bring an oppressive action, under **section 239(b)** of the *ABCA*.

**Second Step: Two Step Oppression Analysis:**

1. **What are the claimed breaches of the debentureholders’ reasonable expectations? Do they fall w/n section 242?**

* **Debentureholders:** expectation that they would maintain the investment grade rating of the debentures. By putting Bell Canada in such a bad situation, the debentures lost a rating that made them a more attractive investment.
* **Court:** This was an unreasonable expectation because, in every investment that was provided to them, it was made clear that there were risks to the debentures, including the risk of the loss of the rating.
  + To protect themselves, the court believes they could have made that part of their contract w/ the debentures.
  + There are a lot of conflicting interests in a corporation, so as long as they’ve been considered, they are satisfying this requirement.
  + Past practice is a consideration, but when it’s weighed here against the representations made/other interests the directors had to take into account, it’s not enough to make a reasonable expectation.
* **Debentureholders:** expectation that the directors of BCE and Bell Canada would take into account their economic interests before deciding to adopt the takeover bid.
* **Court:** This is a reasonable expectation, but this has not been violated here. On to **#2:** the directors took into consideration their interests. They did what was in the best interests of the corporation.

1. **The Court does not get into the second part because the first argument for expectations was not reasonable.**

###### RE FERGUSON AND IMAX SYSTEMS CORP.

**FACTS:** IMAX Systems Corp. was set up: 700 Class A Shares (each to Mr. Ferguson, Mr. Kerr, and Mr. Kroiter), 700 Class B Shares (each Ms. Gerfuson, Ms. Kerr, and Ms. Kroiter). Ms. Ferguson works for and contributes to the company (unlike the other two). Mr. Ferguson and Ms. Ferguson split up. He terminates her employment, pays no dividends, and plans to change the articles to allow for redemption of all Class B Shares. Ms. Ferguson brings an oppression claim and seeks an injunction preventing the corporation from changing the articles of incorporation (considered before *BCE*).

**RULES:** If the majority SH deliberately make a business decision that is intended to disadvantage a minority SH, then the minority SH can sue for oppression.

**CONCLUSION:** Court found that there was oppression by the majority SH and ordered that the resolution not be implemented (remedy under **section 242(3)**).

**First Step:** Establish that an individual has ***standing*** as a claimant to bring an oppressive action, under **section 239(b)** of the *ABCA*.

**Second Step: Two Step Oppression Analysis:**

1. **What are the claimed breaches of the Ms. Ferguson’s reasonable expectations? Do they fall w/n section 242?**

* **Expectation:** That she contributed to the company and wanted to share in its success.

1. **Does evidence establish that the reasonable expectation was: (a) Violated by their conduct; or (b) Falls w/n 1-3?**

* Her reasonable expectation was violated. The entire conduct of Mr. Ferguson: wrongful dismissal, not declaring dividends, and reorganization to redeem Class B shares = oppressive. The corp. was acting to deny her the profits in the company. She had a reasonable expectation to share in the growth of the corporation especially given all the unpaid work she did and how strong her role was in the company.

###### DOWNTOWN EATERY (1993) LTD. V ONTARIO

**FACTS:** This is an oppression action brought by a creditor (need Court approval) and not a SH. Grad and Grossman control a group of companies that operates nightclubs in TO, including “For Your Eyes Only.” Grade hires Alouche to work at FYEO and Alouche is paid by Best Beaver. Alouche is fired and sued for wrongful dismissal. Grad and Grossman restructure the companies. Best Beaver ceases doing business and all assets are transferred to other companies. Alouche wins at trial and seizes money at FYEO. Downtown Eatery starts a proceeding, claiming seized money belongs to them. Alouche counterclaims in oppression.

**ISSUES:** Was reorganization while a lawsuit was pending oppressive?

**CONCLUSION:** Decided for Alouche. **Alouche:** Reasonable expectation that there would be some money retained in a reserve to satisfy his judgment. Re: *BCE*, he had no ability to take stapes to protect themselves. **Grad and Grossman:** Stated they weren’t trying to move the money against Alouche, but that they had legitimate reasons for doing this. **Court:** It unfairly disregarded Alouche’s interests as a potential creditor to move all of the assets out of Best Beaver. The oppression action could still proceed regardless of G&G’s intention, as they should have maintained money to satisfy his claim.

###### SHEFSKY V CALIFORNIA GOLD MINING INC.

**FACTS:** Shefsky enters into a contract to raise money for CGMI: if $5M is raised by the deadline, Shefsky is entitled to replace 3/5 Directors with himself and his nominees. Shefsky does not meet the deadline (the deadline is extended, misses again, and there is a dispute over whether he raised the $5M). Shefsky is appointed as Director and CEO, the Directors issue shares to people other than Shefsky, diluting his voting power. Shefsky is terminated from their CEO position. Shefksy brings a claim in oppression.

**ISSUES:** Did the corporation act oppressively when it issued the shares, thereby violating Shefsky’s expectation that he would have an opportunity to gain control of CGMI?

**RULES:** When there is another avenue for bringing forward your claim (breach of contract), an oppressive action cannot be pursued.

**CONCLUSION:** S’s claim falls outside the legal and jurisdictional boundaries of an oppression remedy.

1. **Expectation:** He believed the term sheet would be honored if he completed it. **Court:** Oppression is a useful remedy, but this does not mean you can turn any conduct into an oppression claim; this is actually a breach in contract.
2. **Expectation:** Would receive the opportunity to take control over the company, which was foiled by the private placement. **Court:** This expectation is not reasonable. There are insufficient grounds to show he had a reasonable expectation (he had a hope instead). Even if there was a reasonable expectation that was violated by the private placement, the private placement wasn’t oppressive because there was evidence that the corporation needed money. They needed an injection of cash and the Directors said they would issue new shares in order to raise money, which is a decision protected by the BJR.

**OPPRESSION REMEDY VS DERIVATIVE ACTION**

When starting an **oppression action,** some complainants do not need prior approval of the court (shareholders and other security holders, directors, officers, former directors, former officers) and some complainants do need prior approval of the court; they must convince the court that they are a proper party.

When starting a **derivative action,** a complainant must always apply to the Court for permission and must satisfy the court under **section 240(1). Section 240(1):** Subject to subsection **(2)**, a complainant must apply to the Court for permission to **(a)** Bring an action in the name and on behalf of a corporation or any of its subsidiaries, or **(b)** Intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending, or discontinuing the action on behalf of the corporation or subsidiary.

**Section 240(2):** No permission may be granted under **(1)** unless the Court is satisfied that: **(a)** The complainant has given reasonable notice to the directors of the corporation; **(b)** The complainant is acting in good faith; and **(c)** It appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended, or discontinued.

**Court oversight of a derivative action is important to:** prevent multiplicity of proceedings, prevent frivolous actions, or prevent strike suits (lawsuits intended to force the company to settle with the plaintiffs).

###### PAPPAS V ACAN WINDOWS INC.

**FACTS:** Pappas holds 30% shares in Acan Windows. The Defendants hold 70% shares in Acan Windows. Pappas alleges: (1) Defendants or Acan owe him $250K; (2) Defendants and Pappas entered into a JV prior to incorporating Acan that set out price ceilings. Defendants have breached this term of JV; and (3) Defendants have overspent on purchasing and renovating property. Pappas sues in oppression and the defendants apply to strike the SOC.

**ISSUES:** Is the action an oppression action (wrongful appropriation of corporate funds), or a derivative action?

**RULES:** There is no clear dividing line b/w cases where there is a remedy for relief from oppression and where a derivative action will be available and appropriate. There is a middle ground where both will be available and the aggrieved person will be able to select the remedy which best resolved their problem. The objective of a derivative action is to remedy a wrong done to the corporation. The usual object of an oppression is to remedy a wrong done to a minority shareholder or other aggrieved person.

**CONCLUSION:** P’s action dismissed. **Owed $250K:** This is a personal action for breach of a legal right. He can sue in debt and he should not be bringing it as an oppressive claim. **Agreements the Defendants entered into violates their JV:** This is not oppressive, it is not derivative, it is a breach of contract claim. P must amend the pleadings to say he’s suing in breach of contract and not oppression. **Defendant’s misappropriated corporate funds:** This harms the company because Acan’s funds have decreased through the improper contracts, which makes them worth less. This was brought improperly as an oppressive action and should have been a derivative action.

1. **Example 1: Derivative Action, Diversion of Corporate Profits to a Director**

* Directors have stolen money from the company. The company is harmed because of this. The SH might also be harmed because there would be less money for them if the corporation is wound up; the court would find that the harm to the SH is indirect. Therefore, SH would not have an oppression claim.

1. **Example 2: Oppressive Action, Refusing to Declare Dividends to Squeeze out Minority SH**

* Directors are refusing to declare the dividends because they want to push out a SH. The company is still making money here and aren’t harmed. The SH are being harmed and, if they can show they have a reasonable expectation that has been violated, which is oppressive, they can succeed on an oppression claim.

1. **Example 3: Mixed, Paying Excessive Salary to Dominant SH who is also an Officer**

* SH who appoints himself at an Officer and pays himself a large salary. This harms the company because the SH is misappropriating funds from the company. This harms the other SH; if they had paid themselves a normal salary, the rest of the money would have gotten paid out through dividends to the SH.
  + **Where there is overlap, the Court must determine if:**
    - “The statement of claim is… saturated by derivative claims… it cannot be allowed to stand.”
    - “The derivative claims are merely incidental to, and clearly of secondary important,” it can be allowed to stand.
    - “The personal claims can be… clearly separated from the derivative claims” the former should be continued and the latter struck.

###### MALATA GROUP (HK) LTD. V JUNG

**FACTS:** In addition to being a SH of Malata Canada, Malata HK is also a creditor. Malata HK alleges Jung (SH, Director, and Officer): (1) Misappropriated corporate funds ($1.5M); (2) Breached USA; and (3) Breached his fiduciary duty to the corporation. MHK sues in oppression and Jung applies to have the claims dismissed. TJ refuses to strike the claim and Jung appealed.

**RULES:** In some situations, such as when the corporation is closely held and has few shareholders, there isn’t a need to draw a distinction between an oppression and derivative action, so the claim can continue under an oppression remedy, without seeking leave for a derivative action.

**CONCLUSION:** Appeal dismissed. Oppression action successful. Leave for a derivative action is not required because Malta was both a SH and creditor of the corporation and the corporation was closely held, meaning that there wasn’t the same risk of frivolous law suits. **Breach of USA:** Should this be a breach of contract claim? The Court does generally not think so because USA is different than other contracts – they are fundamentally important to how businesses are run.

###### REA V WILDEBOER

**FACTS:** Rea alleges: **(1)** Defendants purchased property for Martinrea at inflated prices and were paid kickbacks by vendors; and **(2)** Defendants sold Martinrea property to a company they controlled at below a market price. Rea sues in oppression and the defendants apply to strike the SOC.

**ISSUES:** Should the proceeding be an oppression action or a derivative action?

**CONCLUSION:** Claims should have been brought as a derivative claim and not an oppressive action. There is a difference between private (difference doesn’t matter much) and public companies (worry about multiplicity of claims). There is no overlap between the remedies; P is not asserting that their personal interests as a SH have been adversely affected in any way other than the type of harm that has been suffered by all SH as a collective 🡪 No type of personal wrong is evidence.

**Did the Plaintiff’s suffer harm that was separate and distinct from the other SH? Plaintiff:** We haven’t been able to properly oversee the company because we haven’t been provided information about the different contracts being entered into. **Court:** This is harm done to the company and needs to be brought as a derivative claim.

The Court considered *Malata* and said it was a different set of circumstances:

1. It was a small, closely held corporation. When Jung was enriching himself, it was at the expense of the other 2 SH. Here, there is someone enriching themselves, but all of the SH are affected.
2. Malata was the creditor of Malta Canada. Creditors can sue and Malata was NOT JUST suing as a SH, but as a creditor. One of the harms was that Malata could not pay its debt back because Jung stole all the money, which is an additional identifiable harm.

###### 1043325 ONTARIO LTD. V CSA BUILDING SCIENCES WESTERN LTD.

**FACTS:** The business provides engineering services, Skene is an engineer, and Jeck is not. Jeck forges Skene’s signature on documents requiring an engineer’s signature, forged Skene’s signatures on corporate documents requiring SH approval, and pays himself a significant salary. Skene sues in oppression. **The TJ finds:** Skene’s claim for use of his signature on engineer documents = personal and not oppressive. Jeck’s forging the signature on corporate documents = oppressive. Jeck’s salary decision = oppressive course of conduct, but the remedy does not provide any relief related to salary. Skene appeals re: the forgery on the engineer documents and management fees/salary.

**CONCLUSION:** The Court calculates that amount he should have been paid vs what he paid himself and pays it out to Skene. The forgery on the engineering documents is not oppressive. The management fees/salary is oppressive. Jeck’s action was unfair to Skene who was a SH. If Jeck didn’t pay himself those fees = it would have gone to the company and paid out as dividends.

###### WOLFE V SHAWCOR LTD.

**FACTS:** Wolfe develops composite pipe technology, held by CTI. CTI transfers the interest in composite pipe technology to Proflex. Proflex dissolves (struck from the Registry), Wolfe discovers another company using similar technology and believes it has been misappropriated from Proflex. Wolfe, CTI, and Proflex sue for breach of confidentiality agreements, wrongful use of confidential information.

**CONCLUSION:** Master strikes the claims: Proflex is no longer a legal entity and cannot sue (**section 208, 210**), CTI transferred all of its interest in technology to Proflex, and Wolfe has no independent/separate cause of action.

### OPPRESSION REMEDIES

**Section 242(3):** In connection with an application under this section, the court may make any interim or final order it thinks fit, including, without limiting the generality of the foregoing, any or all of the following: **(a)** An order restraining the conduct complained of; **(b)** An order appointing a receiver or receiver-manager; **(c)** An order to regulate a corporation’s affairs by amending the articles or bylaws; **(d)** An order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any USA made before/after the date of the order, until the Court otherwise orders; **(e)** An order directing an issue or exchange of securities; **(f)** – **(q)**.

A list of 17 possibilities, including: appointing/replacing directors, requiring payment of dividends, requiring the party to purchase shareholder’s shares, requiring document disclosure, appointing an inspector, or “compensating an aggrieved person (can be a wide range of people, including someone who has been harmed and not just the complainant).”

**Limits on court’s discretion:** when granting a remedy for oppression, courts cannot revoke a certificate of amalgamation (**section 242(4)**). The Court must:

1. *Only* provide a remedy so far as is necessary to rectify the oppressive conduct (not intended to give a windfall); and
2. *Only* protect a complainant’s interest as a shareholder, director, officer, ect., but not other interests that they may hold.

###### NANEFF V CON-CRETE HOLDINGS LTD. (ONT CA) 1994

**FACTS:** Nick builds up a family business over 40 years and sons, Alex and Borris work in the business. They both worked fulltime at the concrete company. Their entire life/careers have been their father’s business. Nick does not want to be in the business anymore and goes to see a tax accountant about an estate freeze. At the time of the estate freeze, Alex and Borris have 50% common shares and Nick retains special “twilight” voting shares, which lose their ability when he dies. Alex has a falling out w/ his parents in 1990. After this: the articles are amended to remove the twilight provision, which allows Nick to transfer his shares to Borris, they terminate Alex’s employment, they suspend his loan repayments, and they exclude him from management decisions. Alex sues in oppression.

**Expectation (at trial):** Alex had a reasonable expectation that he would, one day, be an owner of the company or, if he left, that he would have his interest bought out. **Court:** Course of conduct has violated this expectation. His termination of employment was so tied up with the other acts that it properly constitutes part of an oppression claim.

**What to do about Alex’s equity in Co-Crete Holdings Ltd. (trial level)?** Option 1 = Kick Nick out of the business, reinstate Alex to his previous positions, allow Alex and Borris to run the business. Option 2 = Allow Nick and Borris to purchase Alex’s shares. Option 3 = Sell the business through a public process so Nick & Borris, Alex, or a stranger can purchase the business.

**CONCLUSION (ONCA):** The Court allowed for the “twilight” voting shares to be returned and ordered to allow Nick and Borris to purchase Alex’s shares. The ONCA characterized Alex’s expectation as that, one day, he would be the owner of the company, but he knew that this was limited by the knowledge that he would never acquire control until his father retired or died. If they went with #3, then Alex would get **more** than he was actually entitled to.

**A BENEFIT TO OPPRESSION**

There can be a judgment against the people behind a corporation such as directors and officers. The authority for getting a monetary judgment is: “an order compensating an aggrieved person” – **section 242(3)(I)**. However, this is not available in all cases because this challenges a fundamental principle of corporate law: the separate corporate personality.

###### WILSON V ALHARAYERI

**FACTS:** Alharayeri owns Class A and B (convertible preferred shares) and is a director and CEO. The preferred shares have extra rights/upsides, but can be converted if a contingency has been fulfilled (company met certain financial thresholds). Wilson owns Class C (convertible preferred shares) and is a Director. The corporation was in the middle of a sale and A knew about his and got the company to buy his shares, too. A is forced to resign as a result and W becomes CEO. Company needs money, so they issue new shares through private placement. The corporation allows W to convert his preferred shares to common shares. A wants this as well (the financial thresholds met), but W and the other Directors prevent him from doing this. A starts an oppression claim against W and the Directors.

**RULES: The Budd Test (finding Directors personally liable):**

1. **Director or Officer must be implicated in the oppressive conduct.** 
   1. They have to exercise their powers or fail to exercise their powers in a way that was oppressive.
2. **The order must be fit in all the circumstances.** 
   1. The Court looks to a number of cases.
   * Director obtained personal benefit through oppressive conduct.
   * Director increased control of company through oppressive conduct.
   * Director breached personal duty they have as Director.
   * Director misused corporate power.
   * Remedy against corporation would prejudice other security holders.
   * Director or Officer has virtually all control over a closely held corporation.

An individual’s control over the company, an individual’s bad faith, and an individual’s receipt of a personal benefit all militate strongly in favor of personal liability, but none of these elements are a necessary condition.

**CONCLUSION:** They order Wilson and one other Director to pay A $650K each, which they appeal, and the CA dismisses.

**Expectation:** that, had A met the financial targets, he would be allowed to convert his shares. **Expectation:** The Directors would consider his rights in any transactions, including this private placement transaction. **Court:** This were reasonable expectations that were violated by the conduct.

**Budd Test:** Director or Officer must be implicated in the oppressive conduct:Wilson and Black were found to be implicated in the oppressive conduct because they made the decision to not convert A’s shares. The order must be fit in all the circumstances: W received a benefit by allowing his shares to convert, but not A’s shares. As a result of this, W had more common shares, which he could rely on to buy more shares during the private placement and increase his control on the company. **Therefore:** Wilson was held personally liable.

## DERIVATIVE ACTIONS

Typically, if a wrong is committed against a corporation, the Directors can bring a “Directors Resolution” where they agree to bring an action on behalf of the corporation. If not, a derivative action can be brought in the corporation’s name by someone else.

A complainant (**section 239**) can apply for leave to bring a derivative action. The court must be satisfied (**section 240**): (1) The directors of the corporation have been given notice and a chance to bring an action themselves (unless they’re all defendants in the action, then you don’t have to give them notice); (2) The complainant is acting in good faith; (3) The complainant is bringing the action in the interest of the company; AND (4) The complainant must show a *prima face* case (*Pathak v Maloo*).

###### PATHAK V MOLOO

**FACTS:** Tecsteel Inc. and Conquest Steel Inc. provide similar product, but they operate in different geographic areas. Mr. Moloo and P are 50% SH of Tecsteel. Ms. Moloo is SH of Conquest. P and M had a falling out and P finds that M was doing things that were harmful to Tecsteel. P alleges M: (1) Diverted customers to Conquest Steel Inc. using confidential information from TecSteel; (2) Improperly received a salary from Tecsteel while working to their detriment; and (3) Improperly cut himself a cheque for $50L from Tecsteel funds. AND Conquest owes Tecsteel $100K for a loan. P applies for leave to bring a derivative action on behalf of Tecsteel.

**CONCLUSION:** The Court recognized there was a *prima facie* action and granted P leave to bring a derivative action against M&C. Provided Notice: The Court found that P gave M notice early enough (just in case that M wanted to bring an action, which they didn’t).

Acting in Good Faith: His decision to start the law suit was in good faith. There were negotiations prior to and, just because the negotiations fell through and he threatened a lawsuit does not mean he was acting in bad faith.

Interest of the Corporation: There must be some basis to go ahead on the claims. P submitted an affidavit and M did not, although he was provided an opportunity to, so P’s assertions were uncontested.

**$100K:** *Prima facie* claim in debt; this is an appropriate claim to advance on Tecsteel’s behalf. **Diverting Customers:** *Prima facie* claim in conspiracy; this is an appropriate claim to advance on Tecsteel’s behalf. **Improper Thieft of $50:** *Prima facie* claim. P is therefore granted leave to start his derivative action.

## COMPLIANCE AND RESTRAINING ORDERS

**Section 248:** If a corporation, or any shareholder, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager, or liquidator of a corporation contravenes this *Act*, the regulations, the articles, or bylaws, or a USA, a complainant or a creditor of the corporation may, in addition to any other right the complainant or creditor has, apply to the court for an order directing that person to comply with, or restraining that person from contravening any of those things, and on the application the Court may so order and make further order it thinks fit.

###### CALERON PROPERTIES LTD. V 510207 ALBERTA LTD.

**FACTS:** Namo and Caleron initially the only SH in a #Co. New shares were issued and the articles were amended: Class A SH elect 4/5 Directors, Class B SH elect 1/5 Directors, and Directors act by majority vote (means Class A controls what the company does). **Bylaws passed at the meeting:** 10D notice required for DIR meeting, DIR meeting must take place at a registered office, DIRS must attend in person, and a Quorum = Slater + 2 other DIRS. Slater = Signing authority. **DIRS hold meeting without:** 10D notice, holding it at a registered officer, and Slater was not present. Caleron brings an application requiring Directors comply w/ bylaws.

**ISSUES:** Are the bylaws valid? Can the court force the Directors to comply with them?

**CONCLUSION:** Required the Directors to comply with the valid bylaws. Re: Non-compliant meetings they held = No force. The Directors admitted that they breached the bylaws, but they claim bylaws were invalid because they conflicted w/ the Article. Some of the bylaws are invalid because they conflict w/ the Articles. By requiring Slater’s present at every meeting and making him a signing authority for the company = in conflict with the Articles that set out Class A shares should have the majority vote. 10D notice and where a meeting can be carried out = not in conflict and valid.

## ALL SHARES VOTE

All SH have a right to vote on fundamental changes (regardless of whether or not their shares = voting shares). **Fundamental Change:**

* Amalgamation (**section 183(3)**).
* Continuance of corporation in another jurisdiction (**section 189(3)**).
* Sale, lease, exchange of all, or substantially all, of the corporation’s property (**section 190(4)**).
* The voluntary liquidation and dissolution (**section 212**).

## CLASS VETO

Applicable whenever the corporation is trying to change a class of shares. Some resolutions will not be adopted unless each class of shareholders or each class of affected shareholders votes in favor. Example:

* Amendments to the rights and privileges of a class of SH as set out in the articles of incorporation (**section 176**).
* Amalgamation that impacts the rights and privileges of a class of SH (**section 183**).
* Sale, lease, exchange of all or substantially all of the corporation’s property (**section 190(4)**). Applicable only if you can show that a class of shares is particularly affected by the sale.
* Voluntary liquidation and dissolution (**section 212**).

## DISSENT & APPRAISAL REMEDY

SH who dissent **from some types of resolutions** (fundamental changes as listed above) have the right to have their shares brought by the corporation for “fair value” assessed as of the day before the vote. Resolutions to which the right of dissent applies include:

* Putting or removing restrictions on the transferability of your shares or issuance of new shares.
* Change restrictions on types of business the corporation can carry on.
* Amalgamation.
* Continuance into another jurisdiction.
* Sale, lease, or exchange of substantially all of the corporation’s property.

## INVESTIGATIONS

Can apply to have an inspector appointed to investigate the business affairs of a corporation: (1) Standalone application by a SH (**section 231**); (2) Remedy for oppression (**section 242(3)(o)**); or (3) When the Court orders the dissolution (**section 218**).

The purpose of appointing under **section 231:** to allow an application to determine if the corporation has defrauded someone, whether oppressive conduct has occurred, whether the corporation was formed for an unlawful or fraudulent purpose, or whether a person involved in a business was acting fraudulently.

The Court can grant an inspector broad powers to compel the production of documents, examine witnesses, or report to the court. The costs are usually paid by the corporation.

## DISSOLUTION & LIQUIDATIONS

SH can vote to dissolve the company (**section 212**). It requires a special resolution from every class of SHs. SH can apply to the Court for an order dissolving the company under **section 215** if:

* Oppression, unfair prejudice, or unfair disregard.
* USA provides for dissolution.
* When it’s otherwise just and equitable.
* Other circumstances – **section 211**, **section 213-214**.

###### SCOZZAFAVA V PROSPERI

**FACTS:** Henri Studio Ltd. set up to produce and sell garden statutory under license. Mario, Dennis, and Angelo = DIRS and Angelo’s daughter Maria = Managing DIR. Mario and Dennis have a falling out w/ Angelo. Henri Ltd.’s licensing agreement was terminated (required to operate the business). Mario and Dennis apply under **section 215** for a Court order that Henri Ltd. be dissolved.

**ISSUES:** When is it just and equitable to dissolve a company under **section 215(1)(b)(ii)**?

**RULES:** **“Just and Equitable” to dissolve a company when:**

1. **Deadlock in Management**
2. **Business Akin to a Partnership**
3. **Loss of Substratum**
4. **Loss of Confidence in Management**

Is there another remedy possible? Court should not order dissolution where equity can be achieved by some other means.

**RATIONAL:** The Court finds it is just and equitable to dissolve the company.There was evidence that the individuals were at odds, so they were satisfied there was a breakdown (deadlock). A deadlock can be avoided by including the dispute resolution process in the USA. There was a loss of substratum; this was a business set up to operate under a license, which they can no longer due because of the loss of the license.