Corporations 1 CAN

[General Notes on Shareholder 8](#_Toc299303956)

[Common Law Provisions 8](#_Toc299303957)

[Lifting the Corporate Veil 8](#_Toc299303958)

[De Salaberry Realties Ltd. v. Minister of National Revenue [1974] FedTD 9](#_Toc299303959)

[Process of Incorporation 9](#_Toc299303960)

[BC Incorporation 10](#_Toc299303961)

[Continuance 10](#_Toc299303962)

[Extra-Provincial Licencing 10](#_Toc299303963)

[Mergers 10](#_Toc299303964)

[Incorporation Technique 11](#_Toc299303965)

[Corporate Names 11](#_Toc299303966)

[Management and Control of Corporation 12](#_Toc299303967)

[Introduction 12](#_Toc299303968)

[Deadlock Doctrine 12](#_Toc299303969)

[Board of Directors 13](#_Toc299303970)

[Shareholder Rights 13](#_Toc299303971)

[Voting 14](#_Toc299303972)

[Shareholder Meetings 14](#_Toc299303973)

[Shareholder Proposals 15](#_Toc299303974)

[Removing Directors 15](#_Toc299303975)

[Derivative Actions 16](#_Toc299303976)

[Common Law (Foss v Harbottle) 16](#_Toc299303977)

[Statutory 16](#_Toc299303978)

[Procedure for Getting Leave for Derivative Action 17](#_Toc299303979)

[Costs for Derivative Suits 17](#_Toc299303980)

[Negligence of Directors 18](#_Toc299303981)

[Current Standard 18](#_Toc299303982)

[People’s Case 18](#_Toc299303983)

[Fiduciary Duties 19](#_Toc299303984)

[Self-Dealing 19](#_Toc299303985)

[Common Law Position (still applies to officers) 19](#_Toc299303986)

[The differences between provisions and common law are: 20](#_Toc299303987)

[Corporate Opportunity 20](#_Toc299303988)

[Case Law 20](#_Toc299303989)

[US Jurisprudence 22](#_Toc299303990)

[Competition 22](#_Toc299303991)

[Hostile Takeovers 23](#_Toc299303992)

[Case Law 23](#_Toc299303993)

[Fiduciary Duties vs Negligence 24](#_Toc299303994)

[Oppression Remedy 25](#_Toc299303995)

[Fiduciary Duties vs Oppression 26](#_Toc299303996)

[Part 1 — Interpretation and Application 27](#_Toc299303997)

[Division 1 — Interpretation 27](#_Toc299303998)

[1 Definitions 27](#_Toc299303999)

[2 Corporate relationships 34](#_Toc299304000)

[3 When a company is recognized 34](#_Toc299304001)

[Division 2 — Application 35](#_Toc299304002)

[4 Special Act corporations 35](#_Toc299304003)

[Part 2 — Incorporation 36](#_Toc299304004)

[Division 1 — Formation of Companies 36](#_Toc299304005)

[10 Formation of company 36](#_Toc299304006)

[11 Notice of articles 37](#_Toc299304007)

[12 Articles 37](#_Toc299304008)

[13 Incorporation 38](#_Toc299304009)

[14 Withdrawal of application for incorporation 39](#_Toc299304010)

[15 Obligations of completing party 39](#_Toc299304011)

[16 Articles on incorporation 40](#_Toc299304012)

[17 Effect of incorporation 40](#_Toc299304013)

[18 Evidence of incorporation 40](#_Toc299304014)

[19 Effect of notice of articles and articles 40](#_Toc299304015)

[20 Pre-incorporation contracts 42](#_Toc299304016)

[Division 2 — Corporate Names 44](#_Toc299304017)

[21 Name of company 44](#_Toc299304018)

[22 Reservation of name 45](#_Toc299304019)

[23 Form of name of a company 45](#_Toc299304020)

[24 Restrictions on use of name 46](#_Toc299304021)

[25 Multilingual names 46](#_Toc299304022)

[26 Assumed names 47](#_Toc299304023)

[27 Name to be displayed 47](#_Toc299304024)

[28 Registrar may order change of name 48](#_Toc299304025)

[29 Other changes of name 48](#_Toc299304026)

[Division 3 — Capacity and Powers 49](#_Toc299304027)

[30 Capacity and powers of company 49](#_Toc299304028)

[31 Joint tenancy in property 49](#_Toc299304029)

[32 Extraterritorial capacity 49](#_Toc299304030)

[33 Restricted businesses and powers 50](#_Toc299304031)

[Part 3 — Finance 51](#_Toc299304032)

[Division 7 — Liability of Shareholders 51](#_Toc299304033)

[87 Liability of shareholders 51](#_Toc299304034)

[Part 5 — Management 52](#_Toc299304035)

[Division 1 — Directors 52](#_Toc299304036)

[124 Persons disqualified as directors 52](#_Toc299304037)

[128 When directors cease to hold office 52](#_Toc299304038)

[131 Vacancies among directors 54](#_Toc299304039)

[135 If no directors in office 54](#_Toc299304040)

[Division 2 — Powers and Duties of Directors, Officers, Attorneys, Representatives and Agents 55](#_Toc299304041)

[136 Powers and functions of directors 55](#_Toc299304042)

[137 Powers of directors may be transferred 55](#_Toc299304043)

[138 Application of this Act to persons performing functions of a director 56](#_Toc299304044)

[139 Revocation of resolutions 57](#_Toc299304045)

[141 Officers 57](#_Toc299304046)

[142 Duties of directors and officers 58](#_Toc299304047)

[143 Validity of acts of directors and officers 59](#_Toc299304048)

[Division 3 — Conflicts of Interest 59](#_Toc299304049)

[147 Disclosable interests 59](#_Toc299304050)

[148 Obligation to account for profits 60](#_Toc299304051)

[149 Approval of contracts and transactions 62](#_Toc299304052)

[150 Powers of court 62](#_Toc299304053)

[151 Validity of contracts and transactions 63](#_Toc299304054)

[152 Limitation of obligations of directors and senior officers 63](#_Toc299304055)

[153 Disclosure of conflict of office or property 63](#_Toc299304056)

[Division 4 — Liability of Directors 64](#_Toc299304057)

[154 Directors' liability 64](#_Toc299304058)

[157 Limitations on liability 66](#_Toc299304059)

[Division 5 — Indemnification of Directors and Officers and Payment of Expenses 67](#_Toc299304060)

[159 Definitions 67](#_Toc299304061)

[160 Indemnification and payment permitted 68](#_Toc299304062)

[161 Mandatory payment of expenses 68](#_Toc299304063)

[162 Authority to advance expenses 68](#_Toc299304064)

[163 Indemnification prohibited 68](#_Toc299304065)

[164 Court ordered indemnification 69](#_Toc299304066)

[165 Insurance 70](#_Toc299304067)

[Division 6 — Meetings of Shareholders 70](#_Toc299304068)

[166 Location of general meetings 70](#_Toc299304069)

[167 Requisitions for general meetings 70](#_Toc299304070)

[168 No liability 72](#_Toc299304071)

[169 Notice of general meetings 72](#_Toc299304072)

[170 Waiver of notice 73](#_Toc299304073)

[171 Setting record dates 73](#_Toc299304074)

[172 Quorum for shareholders' meetings 74](#_Toc299304075)

[173 Voting 74](#_Toc299304076)

[174 Participation at meetings of shareholders 75](#_Toc299304077)

[175 Pooling agreements 76](#_Toc299304078)

[176 Date of resolution 76](#_Toc299304079)

[177 Subsidiary not to vote 76](#_Toc299304080)

[178 Election of chair 76](#_Toc299304081)

[179 Minutes 76](#_Toc299304082)

[180 Consent resolutions of shareholders 76](#_Toc299304083)

[181 Rules applicable to general meetings apply to other shareholders' meetings 77](#_Toc299304084)

[182 Annual general meetings 77](#_Toc299304085)

[183 First annual reference date for pre-existing companies 78](#_Toc299304086)

[184 Pre-existing reporting company meetings 78](#_Toc299304087)

[185 Information for shareholders 78](#_Toc299304088)

[186 Powers of court 79](#_Toc299304089)

[Division 7 — Shareholders' Proposals 79](#_Toc299304090)

[187 Definitions and application 80](#_Toc299304091)

[188 Requirements for valid proposals 80](#_Toc299304092)

[189 Rights and obligations arising from proposal 81](#_Toc299304093)

[190 No liability 82](#_Toc299304094)

[191 Refusal to process proposal 82](#_Toc299304095)

[Part 7 — Audits 84](#_Toc299304096)

[Division 5 — Audit Committee 84](#_Toc299304097)

[223 Application 84](#_Toc299304098)

[224 Appointment and procedures of audit committee 84](#_Toc299304099)

[225 Duties of audit committee 85](#_Toc299304100)

[226 Provision of financial statements to audit committee 85](#_Toc299304101)

[Part 8 — Proceedings 86](#_Toc299304102)

[Division 1 — Court Proceedings 86](#_Toc299304103)

[227 Complaints by shareholder 86](#_Toc299304104)

[228 Compliance or restraining orders 89](#_Toc299304105)

[229 Remedying corporate mistakes 89](#_Toc299304106)

[232 Derivative actions 90](#_Toc299304107)

[233 Powers of court in relation to derivative actions 90](#_Toc299304108)

[234 Relief in legal proceedings 92](#_Toc299304109)

[Division 2 — Dissent Proceedings 92](#_Toc299304110)

[237 Definitions and application 92](#_Toc299304111)

[238 Right to dissent 93](#_Toc299304112)

[239 Waiver of right to dissent 94](#_Toc299304113)

[240 Notice of resolution 95](#_Toc299304114)

[241 Notice of court orders 95](#_Toc299304115)

[242 Notice of dissent 96](#_Toc299304116)

[243 Notice of intention to proceed 97](#_Toc299304117)

[244 Completion of dissent 97](#_Toc299304118)

[245 Payment for notice shares 98](#_Toc299304119)

[246 Loss of right to dissent 100](#_Toc299304120)

[247 Shareholders entitled to return of shares and rights 100](#_Toc299304121)

[Part 9 — Company Alterations 102](#_Toc299304122)

[Division 1 — Memorandum, Notice of Articles and Articles 102](#_Toc299304123)

[259 Alteration to articles 102](#_Toc299304124)

[260 Shareholders may dissent 103](#_Toc299304125)

[Division 7 — Disposal of Undertaking 103](#_Toc299304126)

[301 Power to dispose of undertaking 103](#_Toc299304127)

[Part 10 — Liquidation, Dissolution, Restoration and Reinstatement 106](#_Toc299304128)

[Division 4 — Powers and Duties of the Court 106](#_Toc299304129)

[324 Court may order company be liquidated and dissolved 106](#_Toc299304130)

[Part 11 — Extraprovincial Companies 108](#_Toc299304131)

[Division 1 — Registration 108](#_Toc299304132)

[374 Definitions 108](#_Toc299304133)

[375 Foreign entities required to be registered 108](#_Toc299304134)

[376 Application for registration 109](#_Toc299304135)

[377 Registration as an extraprovincial company 110](#_Toc299304136)

[378 Effect of registration 111](#_Toc299304137)

[379 Amalgamation of extraprovincial company 111](#_Toc299304138)

[380 Extraprovincial companies to file annual report 113](#_Toc299304139)

[381 Extraprovincial companies to notify registrar of changes 113](#_Toc299304140)

[382 Change of name of extraprovincial companies 113](#_Toc299304141)

[383 Cancellation or change of assumed name of extraprovincial company 114](#_Toc299304142)

[384 Liability if name of extraprovincial company not displayed 114](#_Toc299304143)

[385 Enforcement of duty to file records 115](#_Toc299304144)

[Division 2 — Attorneys for Extraprovincial Companies 115](#_Toc299304145)

[386 Attorneys to be appointed 115](#_Toc299304146)

[387 First attorneys 116](#_Toc299304147)

[388 Authorization of attorneys 116](#_Toc299304148)

[389 Appointment of attorneys 116](#_Toc299304149)

[390 Withdrawal of appointment 117](#_Toc299304150)

[391 Change of address of attorneys 117](#_Toc299304151)

[392 Withdrawal of notice of change of address 117](#_Toc299304152)

[393 Revocation of appointments of attorneys 117](#_Toc299304153)

[394 Withdrawal of revocation of appointment 118](#_Toc299304154)

[395 Resignations of attorneys 118](#_Toc299304155)

[396 Obligation to maintain head office or attorney 119](#_Toc299304156)

[Division 3 — Cancellation of Registration of Extraprovincial Companies 119](#_Toc299304157)

[397 Registrar may cancel registration of defunct extraprovincial companies 119](#_Toc299304158)

[398 Lieutenant Governor in Council may cancel registration of extraprovincial companies 119](#_Toc299304159)

[399 Registrar's duties on cancellation of registration 119](#_Toc299304160)

[Part 12 — Administration 120](#_Toc299304161)

[Division 2 — Records Filed with or Issued by the Registrar 120](#_Toc299304162)

[421 No constructive notice 120](#_Toc299304163)

[Division 3 — Powers of Dissolution and Cancellation 120](#_Toc299304164)

[422 Dissolutions and cancellations of registration by registrar 120](#_Toc299304165)

[423 Lieutenant Governor in Council may cancel incorporation of company 121](#_Toc299304166)

# General Notes on Shareholder

How to Become a Shareholder

1. Subscribe for shares upon incorporation of private CO or IPO of public CO.

2. Allotment: purchasing shares later out of un-issued capital.

3. Transfer: purchasing shares from an existing SH.

4. Transmission: transfer upon the death of a SH by operation of law under their will.

Liability of Shareholders

* Addressed under Section 87

Shareholders have right to participate in:

1. Vote at meetings
2. Collect dividends (if and when declared)
3. Right to a return of the share (if capital remains)

# Common Law Provisions

## Lifting the Corporate Veil

* In the US there is an **instrumentality doctrine**, whereby if a CO is set up with dubious motives, then it loses some benefits of it being separate legal entities principle.
* There are four general exceptions. These are not clear categories, but only situations when courts may be flexible with the doctrine. There are no clear-cut rules.
1. Agency: Where the court thinks the CO is obviously (only in the most fragrant cases) an agent of its principle SH. (*Clarkson*)
	* Salomon keeps this door open because law of agency has a principle that the principal has an obligation to indemnify the agent
	* Possible to make this argument but no cases of success so far
2. Fraudulent Purpose: Courts may be convinced on the facts the purpose for which the CO is engaged is *fraudulent*. When a CO since its inception has been designed to commit fraud or to avoid legislation, it will be seen as sham.
	* Ie. creating a company to circumvent one’s own contractual obligations
	* Not treating it as an agency relationship
	* Contracts and torts may differ
		+ Minimizing tort exposure is more acceptable than circumventing contract obligations
3. Avoidance of Regulatory Legislation: When a CO is set up for purposes of avoidance. This is primarily used in tax legislation. When courts interpret securities and tax law, they tend to defer to clear **statutory purpose behind regulatory legislation** and let it override strict separation. (*Da Salaberry details below)*
4. Inactivity: The power of the registrar to strike COs from existence because he thinks they are inactive. This is outlined in s.422/423.
	* Shareholder can go to court to ask for a declaration to dissolute
	* Company can also wind itself up
	* Government can also intervene to wind-up a company (s.423)

other examples listed in the text are:

* Where a CO is clearly undercapitalized to meet foreseeable financial needs;
* Cases involving tort claims against the CO;
* Non-arm’s length transactions between parent and subsidiary CO.
* Cases where the company was not incorporated for bona fide business reasons

### De Salaberry Realties Ltd. v. Minister of National Revenue [1974] FedTD

* **Section 2 of the Act** defines relationships between subsidiaries/holding companies
	+ **De jure control**: 51% of the shares
	+ **De facto control**: section 2(3) – ability to elect the majority of the board, no need for 50% of voting shares
* Complete examination of the CO as a whole is needed to determine if the corporate veil should be lifted - especially in the case of pyramid structure of corporate ownership
* Courts more likely to lift corporate veil when:
	+ The shareholder is a corporation rather than individual
	+ When used to circumvent legislation/regulation rather than protecting individual creditors
* Some factors that the court considers:
	+ Approaching parent company instead
	+ Lack of financial viability of the child corporation
	+ Horizontal interaction of child corporations, if applicable
	+ All of the boards of directors of the COs were appointed by the parent COs.
	+ They were not engaged on daily basis in commercial operations, but were simply engaged in holding property.
* Was the subsidiary carrying on business of the parent?
	+ Were the profits treated as profits of the parent?
	+ Were the persons conducting business appointed by the parent company?
	+ Was the parent the head and brain of the venture?
	+ Did the company govern the adventure (capital, policy, etc)?
	+ Did parent make profit by its skill and direction?
	+ Was the company in effectual and constant control?
* Key is whether the parent reaches through the corporate façade to do its business

## Process of Incorporation

* Letters patent jurisdictions vs registration jurisdictions
	+ BC is considered a registration jurisdiction
	+ Letter patent jurisdiction does not have an ultra vire provision, registration jurisdictions do
		- Ultra vire = the corporation must set out its power in its constitution to avoid being deemed as acting outside its power. (ie. presumption that a corporation has 0 capacity unless otherwise given the capacity in the constitution)
* **Letters Patent**: A form of an open letter issued by the monarch that grant an office, status, or a right to an individual, or to a CO. These are a residual carryover from when only Crown could incorporate COs. Letters Patent jurisdictions are Federal, ON, and QB. There are two constitutional documents: “Articles of Incorporation” (public) and “By-laws” (not public).

## BC Incorporation

* Company = corporation established under this Act or its predecessors
* Corporation = company (above) + companies incorporated in other jurisdictions
	+ any legal entity that has corporate personality, a body corporate, a body politic and corporate, and incorporated association or a society, however and wherever incorporated, but not a municipal or a corporation sole
* Provinces can regulate corporations that “*carry on business in the province*” (a common law doctrine with plenty of case law in relation to “carry on business in the province”)
	+ Jurisdiction can be established by referring to the registration provisions/tests in s375 to determine if a corporation is *carrying on business in the province*
	+ **Weight Watcher’s** case (common law case for “carry on business”)
		- There is a continuity element to “carry on business”
		- Therefore a mere agreement between a foreign party and a local company does not make the foreign party fall under “carry on business”
	+ Key is “present on a continuing/ongoing basis”
	+ 375(2) expands the common law definition of “carrying on business”
* Consequences for not registering an extra-provincial company
	+ Cannot sue others in court (this limitation has been removed)
	+ $50/day fine (s 426)
	+ Non-compliance with the Act will hold the corporate directors *personally* liable and also the corporation will be liable as well
		- Akin to lifting the corporate veil for non-compliance

## Continuance

* S302-311 in the BCCA
* Emigration of a corporation from a foreign jurisdiction into a different jurisdiction
* A corporation cannot have dual citizenship, but it is possible for the foreign corporation to incorporate locally and then make them affiliates

## Extra-Provincial Licencing

* Extra-provincial corporations are required to provide a BC address (375) + appoint a local agent (375) + display company name (384)
	+ Purpose is to identify a party to serve in the event of a court dispute
* S375 requires that foreign entities who “carry on business” in BC to register
* 374-499 is a detailed statute for extra-provincial companies

## Mergers

* There has to be a special resolution of SHs of both COs that they want to merge. And dissenting SHs can appeal this before the judge.
* Continuance facilitates merger in these situations without having to start from the ground up, but there must be matching provisions in both jurisdictions.

## Incorporation Technique

* Notice of articles (Form IV)
	+ public record and can be viewed by members of the public
	+ company name + directors + office addresses (ie. accountant and lawyer’s addresses)
	+ share structure
	+ shareholders do not necessarily have rights to access director meeting notes
	+ share structure of the company, including authorized capital (issued or unissued shares)
		- has to define capital by the number of shares
		- not all the shares have to be sold, shares can be sold at a later time to raise more $$
		- two different types of shares: par value and no-par value shares (no-par value did not exist pre-1970)
			* **par-value** = nominal value stated in terms of the amount of money
				+ ie. the capital consists of 100 shares of $20 each
			* **no-par value** = no nominal value stated
* Articles (Table 1)
	+ non-public
	+ by-laws of the company
* articles and notice of articles can be changed at anytime (s259)
* special resolutions vs ordinary resolutions
	+ fundamental changes usually require special resolutions (ie. change of share structure)
		- American thinking suggests that if a shareholder is not happy with a fundamental change they can “demand” the company buy back the shares (appraisal/dissent remedy)
	+ **special resolutions** (defined in the Act, must look carefully): 2/3 or more of shareholder present at the meeting or via proxy, unless a higher amount is defined by the articles(but cannot exceed 3/4)
	+ **ordinary resolutions**:
* s19(3) gives shareholders standing to sue for breach of the articles/notice of articles, but this is not really useful anymore because there are statutory remedies available

## Corporate Names

* Prevents similar names once it is registered, but no protection beyond provincial borders
* Remedies for name being used
	+ Common law tort of passing off
	+ Trademark infringement
	+ Statutory remedy under BCCA (406)
* Registrar has discretion to refuse a name for **good and valid reasons**
	+ offensive and immoral
	+ likely to deceive (probably will mislead or confuse in the circumstances)
* Name cannot suggest government affiliation
* Foreign language names are not acceptable (translations are ok)
* Change of names goes through same process as new names, but also require a change to notice of articles
* Statutory provisions
	+ s.22: A name can be **reserved** by applying to registrar for a period of 56 days.
	+ s.23: The name must have Ltd., Inc., or Co., as part of name. You can have numbered name: “23443 BC Ltd.”
	+ s.25: Prohibits the use of non-English or French names. You can use English/French translation of foreign names.
	+ s.26: Foreign COs carrying business in BC must use an English translation of their name.
	+ s.27: The name has to be displayed at the place of business.
	+ s.263: Name change requires an amendment to the Notice of Articles. This action requires a special SH resolution because it is constitutional change.

# Management and Control of Corporation

## Introduction

* Berle and Means were the theorists that have reshaped the approach to modern corporate governments following in the wake of the Great Depression. Their theories defined the corporate structure of our time:
* The power in COs lies with the Board, not with SHs
* Managers enjoyed so much discretion because of separation of ownership and control in US
* Dispersion of share ownership meant that no one SH had incentive to assume responsibility, so control was held by Board who only had minor interests in capital of CO, and no motivation to act in concern for CO.
* Nexus of contractual relationships

**Theory of Market for Corporate Control**: (H. Manne, 1970s): Any badly managed CO would not generate profits and have its shares go down. As shares go down, people would pay more attention to the CO being a target of a takeover bid. They would have to involve premium (sometimes called the premium for control) in order to get takeover bid, which would spark further interest. Once a more apt offeror got control of the CO, the offeror would replace the incumbent management, puts his board in control, and run the CO properly, because of which shares go up. Management is usually resistant to takeovers as they risk losing their positions.

* The law plays a peripheral role in regulating the management and control, and it doesn’t offer much assistance in the way of maximizing economic efficiency.
* The best that it can do is stay out of making business decisions, and this is usually implemented through the business judgment rule.
* If the Theory of Market is perfect, there still would be two ways in which the law may have an important role:
	+ Markets may not work properly, that is shares may not be valued in tandem with mismanagement
	+ Statutes are like standard form contracts, which can save COs enormous costs and a whole lot of time.

## Deadlock Doctrine

If for some reason the Board cannot function as it is meant to, then the court can recognize the residual powers of the SHs to have control and management of the CO. This is exemplified in (*Barron v. Potter*).

* A competing of powers between SHs and the Board
* Powers revert to SHs at a general meeting in a deadlock situation
* This common law theory may not be necessary because SHs can ask the court to order a SH meeting under statute

## Board of Directors

* **Outside Director**: Member of the Board of directors who does not form part of the executive management team. He is not an employee of the CO, nor is he affiliated with it in any other way. His only function is to go to Directors’ meetings.
* **Inside Director**: Member of the Board who is also a member of CO’s management, almost always a corporate officer. So, a CEO who is also a Chairman of the Board would be considered an inside director. They are also employees of the CO and often hold equity in the CO.
* **Corporate Officer**: An official who had corporate title conferred upon him a means of identifying their function in the organization.
	+ **Senior Officer: defined in the Act**
	+ **Officer: not defined in the Act**
* to consensus from disparate point of view of its members. In US this is often interchangeable with the term “President”.
* Management has strong control of procedural issues in the election:
	+ Sending out notices
	+ Nominating candidates
	+ Sending out proxies

# Shareholder Rights

* Directors are only legally obligated to call an AGM
* Shareholder have the following rights only
	+ Right to vote at SH meetings (if their shares have voting rights)
	+ Right to dividends (if the class of shares allow and declared)
	+ Return of assets on wind-up
* Origin of Shareholder Rights:
	+ CO’s articles
	+ Common law rights (including fiduciary duties)
	+ Statutory rights including
		- S227 (oppression)
		- S237 (appraisal remedy/right to dissent)
		- S301 (right to veto sale of undertaking)
		- S19/s228 (gives SHs privity to the articles and able to sue for technical breaches)
		- S150 (conflict of interest)
		- Derivative action under s232/233
			* Breach of fiduciary duties/negligence under s142
			* Personal liability of directors under s154
	+ Shareholder agreements which are binding
		- S175 (pooling agreements) fall under this as well

## Voting

* Company can issue voting and non-voting shares
* Can vote by proxy
* Each share **presumed** to have one vote unless otherwise stated in articles
* SHs are under no obligation to vote

## Shareholder Meetings

* Four different types of meetings:
	1. Annual General Meeting
		+ Required by s182(1) of statute
		+ Every 15 months
		+ Usually includes the following businesses
			- Election of directors
			- Financial reporting
			- Appointment of auditors (for public companies)
		+ **SHs** can unanimously waive the AGM requirement (s182(5))
	2. Extraordinary General Meeting
		+ Any other meeting called by the board that is NOT an AGM
		+ **Usually to deal with special business**
		+ AGM procedures apply to this as well (s181)
	3. Court Ordered Meetings
		+ Section s186 of statute
		+ SH (with voting rights), director, company can ask court to order a meeting
		+ **SH has personal standing to seek court assistance**
		+ Court can vary quorum and notice requirements
		+ **Court reluctant to order a meeting when requisition meeting is possible** (*Air Canada)*
		+ **Usually appropriate before using other tools (ie. s227)**
	4. Requisitioned Meetings (requested by a SH)
		+ Section s167 of statute
		+ Usually called for takeover bids
		+ SH holding at least 5% of voting shares
		+ Personal remedy, no standing required
		+ Must state cause in 1000 words or less (s167(3))
		+ Directors must hold meeting within 4 months (s167(5))
		+ Directors can decline holding of meeting and has the onus of establishing this (s167(5))
			- General meeting already called
				* But must be sure that there is some chance that the stated business will be heard(*Air Canada*)
			- Substantially same business was submitted at AGM
			- Business stated in requisition clearly does not relate significantly to the affairs of the company
				* What is “clearly” and “significantly”?
			- Purpose of the meeting is clearly to gain publicity or a personal claim
			- Business has already been substantially implemented
			- Business stated in requisition causes company to commit and offense
			- Requisition deals with matters beyond the company’s power to implement
		+ SHs with 2.5% voting shares can go ahead and hold meeting if directors don’t respond in 21 days (s167(8))
			- Company can reimburse later (s168)

Sections 166-172 deal with the formalities prior to the AGM

* s.166 AGM must be held in BC, unless if the location is provided by the articles
* s.167 SHs who holds at least 5% of voting shares may requisition an AGM
* s.169 CO has to send out notice of the AGM, but can be waived under s.170
* s.172 The quorum is usually established by the Articles, otherwise it is 2 SHs. If the quorum is not met, then the AGM can be adjourned.

Sections 176-185 deal with the procedural aspects of AGM

* s.177 A subsidiary is not entitled to a vote.
* s.179 Minutes of a meeting must be kept.
* s.181 The rules outlined for AGMs are applicable to Extraordinary (Special General) Meeting.
* s.182 AGMs are to be held within 18 month of incorporation, and at least every 15 months after that.
* s.185 The annual financial statement is to be presented at the AGM.
* s.186 The court has power to order a meeting of SHs based on a request by a director or a SH.

## Shareholder Proposals

* requires majority vote to pass
* **shareholder proposals are not binding if it relates to management of the company (unless articles say otherwise)**
* company bears cost of distributing proposals
* **must be a qualified SH**
	+ **carry right to vote AND**
	+ **held shares for at least 2 years**
* Types of Proposals (four)
	+ Proposal to amend articles (requires special resolution)
	+ Propose a by-law be made, amended or repealed
	+ SHs holding at least 5% nominate directors
	+ Residual category proposals that are not relating to the business or affairs of company
* Procedure
	+ Qualified SH must have at least 1% voting shares or fair market value > $2000 (s188(1)(a))
	+ Submit the proposal at least 3 months before AGM
	+ Must describe in less than 1000 words (s188(2))
	+ Company must send out notice to all SHs (s189(1))
	+ SH is allowed to present proposal in person or proxy (s189(3))
	+ Proposal can be ignored in limited cases (s189(5)) – exceptions are the same as s167(5)
		- Company not obliged to advance environmental causes (*Greenpeace Canada & Inco)*
		- If primary purpose of proposal is political/social cause, no need to distribute (*Varity*)
		- Moral concerns (*Medical Committee Case)*

## Removing Directors

* Directors do not hold office when (s128):
	+ Term expires
	+ Person dies or resigns
	+ Removed
		- By special resolution OR
		- Removed by a resolution authorized by the articles

# Derivative Actions

## Common Law (Foss v Harbottle)

* No longer applicable in Canada
* Foss v. Harbottle [1843] was the leading English case followed in Canada until 1970s.
* In any breach of duty owed to CO, the CO itself was the only proper plaintiff to act on that claim.
* Courts in Canada have ousted common law all together, so nothing in this section is relevant to the course. But this is likely good law in other Commonwealth jurisdictions that are so backward that they do not have statutory provisions.
* The underlying principles behind the Foss v. Harbottle rule are:
	+ **Theoretical**: This is premised on separate legal personality of CO and on majority rule in internal corporate affairs.
	+ **Substantive**: Even if we were to allow action by SH, during trial, other SHs may meet and choose to ratify the wrongdoing at anytime.
		- Majority SHs might attempt to eliminate the breach by ratification and let the minority SHs hanging
		- Ratification was seen as a justification for not letting the SHs sue
			* Next question is, is there anything that cannot be ratified? Exceptions mentioned below
	+ **Procedural**: One still had to prove to court that he asked directors to refrain from acting before going to court.
		- Need to exercise reasonable efforts to have the company itself to sue
		- Requirement would be relaxed if the decision makers were the ones that are to be sued
	+ **Ratification**: If things can be ratified, we should not allow other persons besides CO to sue.
* Four exceptions to Foss:
	1. Ultra vires actions that are contrary to the Articles, because they could not be ratified
		+ No longer an issue, fixed by statute
	2. **Fraud on Minority**: a blanket exception where the court would prosecute directors who do things so heinous and despicable that all decent men would be shamed and terrified. Something like this would never be ratified by SH, without them becoming parties to the fraud.
	3. Matters requiring a special resolution at a 75% of the vote, since ratification is based on simple majority
	4. SH claims of breach of contract under s.19 and similar provisions
* There are also implicit practical problems:
	+ Naturally, this leads to issues where SHs are at odds with the directors.
	+ Expensive litigation can deter many SHs from trying.
	+ Evidence can be sparse, as claimants are often shut out of corporate environment, and have no access to minutes, financial info, etc.

## Statutory

* Sections 232/233
* Leave of the court is required to sue derivatively (even for SHs)
	+ Creditors can apply too but not likely to succeed
* Court considers the following factors when granting leave (s233(1))
	+ **Reasonable efforts to cause the company to proceed themselves**
	+ **Notice of application for leave provided to the company**
	+ **Good faith of applicant**
	+ **Appears to be best interest of the company**
* **Cannot end a derivative action without approval of court (s233(5) –strike suits avoided)**
* s.233(6) is based on the common law concept that there could be certain wrongs that can be committed by corporate agents which can be ratified by a majority of SHs. In England, ratification has much more power, whereas in Canada, it is merely one of the points for the court to consider when granting leave to pursue derivative action.
	+ Scope of this section not definitively defined by the courts
	+ Provision reintroduces ratification on a discretionary basis
	+ Uncertain if this applies to the leave application or the actual trial
		- But courts seem to assume it applies to both
	+ Classic case of ignoring ratification: the directors are SHs that participated in the ratification process
	+ Under common law, ratification required full disclosure (can be a factor for judge to consider in statutory cases)

### Procedure for Getting Leave for Derivative Action

The complainant must go to judge and seek leave through a chambers application to commence the trial

1. Complainant must prove to judge they went to reasonable efforts to get the directors to sue as a CO.
	1. An affidavit would be sufficient.
2. There has to be formal notice of the application given to CO.
	1. Very liberally construed (*Northwest Forest Products)*
3. Complainant must be acting in good faith. Acting in the best interest of the CO is presumed to be in good faith.
4. Complainant must show that the action is in best interest of the CO (most important point). This part turns on the merits of the case.
	* Prima facie case that it is in the company’s best interest
		+ Sufficient to show that the action sought was prima facie in the interests of the CO without asking SH to prove a prima facie case (*Northwest Forest Products*)
	* Sufficient to show an arguable case (*Bellman)*
		+ If company decided it was not in its best interest to sue the process MUST NOT BE FLAWED
			- If process is flawed 🡪 court will grant standing
			- Even if process is not flawed 🡪 uncertain if court will give standing
				1. Business judgment rule (*Auerbach*) or
				2. Usurp the court’s role (*Zapata*)
				* Not sure which of the 2 courses the judge will pick
	* Very high approval not to sue is evidence it might not be in best interests (*Schadegg*)
	* Person can sue even if they got the shares after the wrongdoing (*Richardson*)

### Costs for Derivative Suits

* s.233(3)(b) The complainant(s) can get interim costs reimbursed, such as legal fees and disbursements, but under s.233(4), they may have to pay back if they lose.
* S.233(3) allows court to appoint a representative to deal with all the SHs
* s.233(4) The courts can order CO or any party to proceeding to indemnify the complainant for all costs incurred.
	+ Reason behind this is that presumably all SHs would stand to benefit from the action and the costs are best distributed proportionately amongst all.
* s.233(4)(b) Court may order recovery of costs against SHs if they lose under (4)b,c.
* s.233(5) proceeding cannot be settled without court approval
	+ deals with “strike suits” where plaintiffs are using this as leverage to blackmail directors to settle
* s.234 If a director found guilty but acted honestly, court may relieve person from liability.

# Negligence of Directors

* Directors are somewhat analogous to trustees. But trustees have special responsibilities by operation of law and their standards of care are very high.

**Business Judgment Rule**: Directors are presumed to be motivated by the interests of the CO, and the court will refuse to review the actions of the directors unless there is some allegation that the directors violated their duty of care to manage the CO to the best of their ability. The burden is on the party challenging the decision to establish facts rebutting the presumption. Courts are not in a position to 2nd guess.

* *City Equitable* gives a lax standard of care (no longer applicable)
	1. Director has a greater degree of skill than may reasonably be expected from a person of his knowledge and experience
	2. Director not bound to give continuous attention to company affairs, intermittently is enough
		+ *Selangor United Rubber v. Craddock* [1968] UK Court was unwilling to tolerate Board’s blatant disregard. Directors who blindly do all that they are asked to do will be held to account.
	3. Director can rely on management and no need to doubt them unless put on inquiry
	+ So long as a director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense.

## Current Standard

* + the skillset argument may excuse the person from being negligent, but at the same time if the director has the skillset they are likely held to a higher standard (no authority) (inherent expertise)
	+ If directors are involved in management, actual level of involvement should bring about more knowledge and raise the standard of care (learnt expertise)

### People’s Case

* Statute imposes higher standard of care than common law.
* “exercise in comparable circumstances” does not mean it is subjective rather it is objective
	+ It introduces a contextual element into the statutory standard of care
	+ **Factual aspects of the circumstances surrounding the actions of the director or officer are important AS OPPOSED TO considering the subjective motivation of the director/officer**
* Duty is arguably owed to a wider class of persons after this case
	+ **Ontario**, after this case, clarified that the duty is only owed to the company
	+ **Patterson**: Scope of 142 (BC) is a duty owed to the company and company itself must sue (or derivatively)
		- Probably because of the difference between civil code in Quebec vs BC laws
		- Might be a good case for the courts to open to review who the duty is owed to
			* Apply the Cooper case from Tort class (negligence)
				+ SHs should be close enough to the directors for them to have them in contemplation
* Omissions can also be an act of negligence, but evidentiary wise will be much more difficult to prove

# Fiduciary Duties

**Fiduciary Duty of the Directors**: overriding duty to act honestly and in good faith with a view to the best interest of the company. A duty that prevents the risk of harm. It is not meant to prevent harm (that is the role of negligence). A breach of fiduciary duty does not need to disadvantage the company (it could have benefited it). This gives courts flexibility, for if they were to define the duty in more concrete terms, they would invite creative avoidance.

Directors have a fiduciary duty regarding two things:

1. Control of the company’s assets
2. exercise managerial powers under s.136.

Fiduciary obligations of directors and officers are similar to obligations of trustees but also different. Trustees have no or little discretion to take risks with property they hold, whereas directors are by nature entitled to take risks.

Generally any actions by directors that are not done in good faith or ignore the best interest of the CO will be in violation of the fiduciary duty.

Usually only equitable remedies available but court can be persuaded otherwise.

* fiduciary duty is owed to CO, there are situations at common law where directors could owe fiduciary duty to SH:
	+ *Allen v. Hyatt PC:* Where a director takes a SH in confidence and offer to purchase shares without telling SH some important info, then he D owes them a fiduciary duty because of the circumstance.
		- A person in such circumstances can probably put in a waiver of liability and be contracted out of it. There is nothing in s.142(3) excludes that possibility, but it may be against public policy.

## Self-Dealing

* A situation when a director of a CO also has an interest in the party that is on the other side of a business transaction
* Under common law, if a director has a conflict of interest in dealings with another CO by being involved with both sides, then any Ks between the two COs would be voidable by the SHs.
	+ But this can be circumvented by shareholders who can ratify the K by a vote.
* **This was codified by ss.147-153 of BCBCA.**
	+ **Applies to director and senior officers**
	+ **A complete codification of self-dealing, common law no longer applies, s142 cannot extend liability**
	+ Cannot otherwise establish liability under s.142 if s147-153 fails because this is a complete codification of self-dealing issues

### Common Law Position (still applies to officers)

* **Must sue derivatively**
* Non-disclosure may lead to voidable contracts in equity but there is no positive duty to disclose conflicts
* Company contracting with the following will give rise to a conflict under common law:
	+ Sole proprietor
	+ Partnership
	+ Director
	+ Trust
	+ Shareholder
* The fiduciary duty is owed to the company only
	+ In rare cases, limited to insider trading cases only, the director may owe a fiduciary duty to the SH
		- This occurs when the director holds key information but does not disclose and rather exploit it by buying the shares from the SH at a lower price
* *Aberdeen case (*extent of the duty to disclose)
	+ **No one having fiduciary duties can enter into engagements that can lead to personal interest conflicts or which can conflict with the interests of those whom he is bound to protect.**
	+ **Whether transaction is beneficial or not for the corporation is irrelevant. Potential harm is good enough**
	+ **Contract is voidable and company has right to rescind.**
* *Porcupine Mines* (ratification of a self-deal)
	+ Can only be done with SH’s full extent and knowledge of the conflict
* *Northwest Transportation (*directors ratifying at a SH meeting)
	+ Directors can vote @ SH meetings to ratify the deals, in those cases they are acting as SHs.

### The differences between provisions and common law are:

* Whereas common law has no obligation to disclose, s.153 makes disclosure of potential conflicting offices and property ownership mandatory.
* It is now possible for the Board to ratify the interest under s.149, without having to go to SHs.
* A CO can no longer create automatic ratification clause in their Articles as per s.142(3).
* SH are given standing as right to seek relief in respect of liability under s.150.
* Directors and SHs have standing to ask courts to set aside such K under s.150.

## Corporate Opportunity

* mostly in the common law
	+ fiduciary duty is mostly in common law so there is greater freedom and discourages people slipping through “loopholes”
* ratification is the only defense (which pretty much means that there is a breach of fiduciary duty in the first place)
* proof of damage not required, it is strict liability
* Situations where directors and officers in performance of their duties, come across opportunities which they would like to explore for their own benefit.
* The issue is whether the director has usurped the authority in order to acquire a personal benefit.
* Breach of FD arises when a fiduciary takes something belonging to the CO, putting his personal interests ahead of his duty to act in the best interests of the CO.
* Any financial benefit from engaging in behavior must be turned over to CO.

### Case Law

* *Cook v Deeks* (Basis for corporate opportunities)
	+ **Directors breach their fiduciary duty when they use their position to actively promote their own interests at the expense of the corporation.**
	+ The deal must have been “mature” enough that the company has an interest in
	+ Directors become constructive trustees and must pay over profits
	+ **only defense to corporate opportunities is ratification**
		- **ratification (by the board) is ineffective because the ratification itself will be part of the breach of fiduciary duty (it was an appropriation of property thus cannot be ratified)**
* *Regal Hastings* (defenses + standing)
	+ Good faith is not a defense, only defense is ratification
	+ If suing derivatively, ratification can be considered under s233(6)
	+ If not suing derivatively (ie corporation itself suing), ratification is a non-issue because corporation won’t ratify and turn around to sue
	+ **Profit Rule**: breach of fiduciary duties at anytime that a director made a profit because of their position as a director
		- The net will be casted way too wide and even have to pay over profits when the company benefited. Only way out is to ensure it is ratified before leaving office.
	+ **Conflict Rule:** only a breach when a director uses his position as a director to make a profit
		- Must be some connection between directorship and profit making (causation)
		- If company decided it was not viable to pursue it then directors are free to take the opportunity
			* Issue would be….how can we trust the directors on this?
* *Peso* (application of conflict rule in BC)
	+ Is there a situation present where your personal interest I making money is in conflict with your fiduciary duty at the time?
	+ Directors must have made a bona fide decision before exploiting the opportunity themselves
		- Cannot use capacity as director to steer the deal away
* *Canero* (the current test to apply)
	+ Profit rule and conflicts rule should not be used to limit the court’s discretion, take a contextual approach (**no strict rule**)
		- Perhaps conflict rule should still be considered as a possible defense for the director but it would be important how much was disclosed to the decision makers, etc
		- Balance strictness of the director’s accountability with business judgment
	+ Courts will **not** enquire into whether CO would have obtained opportunity because focus is not on damages but the actions of the director (just like how it’s a guy’s rule to ask for permission before dating a friend’s ex)
1. Does the opportunity belong to the CO?
* **Maturity**: Has the CO done anything to develop opportunity? How close was it to acquiring it?
* **Specificity**: Was opportunity defined by the CO? How precisely? Was it only in the same general business area? How closely does the appropriated opportunity resemble the opportunity that the CO was working on?
* **Significance**: Would opportunity represent major component of CO’s business if acquired? Was it unique or one of many?
	+ CO has burden to show there is a possibility that the opportunity is beneficial (*Peso*) but US is different and the directors have onus to show there is no possible benefit to the company
* **Public or Private**: Was the opportunity publicly advertised or widely known? Was it one to which fiduciaries had access only by virtue of their positions?
* **Rejection**: Had the opportunity been rejected in good faith by the CO before the fiduciary acquired it?
	+ Unless fiduciary did what was reasonably possible to get the Board to accept it and was not in a position to determine the outcome of the Board’s vote, the rejection may not be sufficient. [K.P. McGuiness].
1. What is the relationship of the fiduciaries to the opportunity?
* **Position**: The higher up in organization the fiduciary stands, the higher is level of duty imposed.
* **Relationship between Fiduciary and Opportunity**: Was opportunity in an area of his responsibility? Did he negotiate for it on behalf of CO?
* **Knowledge as a Fiduciary**: How much knowledge did the fiduciary acquire about the opportunity through his position?
* **Involvement in Competing Business**: Did fiduciary acquire the opportunity through an existing business that was similar to or even competed with the business of the CO and in which the fiduciary was involved?
* **Use of Position**: To what extent did the fiduciary accomplish the appropriation of the opportunity through his position?
* **Time after Termination**: If fiduciary took the opportunity after he terminated his relationship with the CO, how long was it after termination? Did he leave voluntarily or was he fired? Did he leave for purpose or under inducement of pursing the opportunity?

### US Jurisprudence

* Can be used in the appropriate cases to persuade a Canadian court to consider
* **Burg v. Horn Fairness Test**: Balances interests of CO in getting the opportunity for its own profit against fairness for individual director. Directors should not profit in situations where actual harm occurs.
* **Interest/Expectancy Test**: Along Peso lines, asking whether the CO was in need of the opportunity. Was it connected with CO? What were this CO’s needs and was profit-taking at odds with best interests of CO?
* **Restrictive Approach**: Line of Business Test: Defines the core of opportunities that the CO has an interest in, allowing the director to pursue anything outside of this core. This is a common sense approach based on the relevance of opportunity to the CO.
	+ Once the CO has shown that the director has made personal profit, the onus is on him to show it is not unfair to the company

## Competition

* Common law does not require disclosing multiple directorships
* **Section 153 requires disclosing**
* Competition likely the lowest application of the fiduciary standard
* **Multiple directorships, itself, cannot amount to breach of fiduciary duties**
* Multiple directorships CAN BE restricted by statute (ie. Bank Act)
* **Fettering**: Any actions or obligations that prevent the director from exercising his s.136 powers in full. Directors cannot, without the consent of the CO, fetter their discretion in relation to the exercise of their powers, and cannot bind themselves to vote in a particular way at future board meetings. This is so even if there is no improper motive or purpose, and no personal advantage to the director.
* If any profits arise from dealings between the two, then the director would need a s.148 ratification to keep the profits.
* *Metropolitan Commercial v. Donovan [1989] NS*: It is not a breach of fiduciary duty to terminate one’s relationship with a CO and go into competition with it.
* *Bendix Home Systems v. Clayton [1978] CPR*: Fiduciary cannot use his fiduciary position and the opportunities afforded him in that position to develop a competing business, then quit to begin competing. The difference between this and the case above is subtle, and seems to be focused on intent and foresight.
* *Pizza Pizza v. Gillespie [1990] OR*: A fiduciary cannot use confidential information belonging to a CO, but it is not a breach to use skills, know-how, experience, and personal goodwill acquired by fiduciary during his service to the CO.

## Hostile Takeovers

* **Common law area**
* Classic case of conflict of interest
* Non hostile takeovers = mergers
* Take overbids are regulated by the Securities Act if a bid falls within its scope and aims for 20% or more shares
	+ Usually a premium is offered
	+ **Disclosure**: Trying to make the parties to the bid disclose information that will be valuable to participants. Any offeror making a bid for more than 20% of the shares has to provide to SHs of offeree a Takeover Bid Circular, where they identify who they are, what assets they have, what existing shares they own, and such. If target CO wants to make any recommendation for bid at all, they have to add to recommendation a Directors’ Circular, thus increasing the amount of info available.
	+ **Substantive Fairness**: Ensuring a certain level of equality as to how target SHs are treated. A bid is usually made on the basis that offeror will only be bound by arrangement if they acquire certain level of shares. As bid progresses it becomes harder to convince SHs to sell, as the fewer remaining ones may drive the price may go up.
* **Hostile Takeover Bid**: A hostile takeover allows a suitor to bypass a target CO’s management unwilling to agree to a merger or takeover. A takeover is considered "hostile" if the target CO’s board rejects the offer, but the bidder continues to pursue it, or the bidder makes the offer without informing the target CO’s Board beforehand.
* There are three kinds of takeover bids in Canada:
	+ **Circular**: Takes place outside stock exchange by offeror making direct contact with SHs.
	+ **Stock Exchange Bid**: Takes place through the facilities of a stock exchange only.
	+ **Issuer Bid**: similar to shares buyback
* **Poison Pills**: Methodologies to prevent takeover bids that are written into Articles of COs, such as automatic increases of votes attached to certain person’s shares,

### Case Law

* **Proper Purpose Doctrine**: If the purpose of issuing new shares is to defeat an offeror from taking control of CO in which case the directors will lose their jobs on the Board, then this is a breach of fiduciary duty. The issuance of shares can be set aside and no damages will be paid. (*Bonisteel)*
	+ **Test is objective**
	+ this test was too rigid as it can be possible that the best interests of the company is to avoid the takeover bid
	+ **no longer the test to apply**
* *Teck (current test to apply along with BCE)*
	+ **Proper purpose/improper purchase should be avoided**
		- Court prefers not to take a rigid approach but rather look
		- Defeating takeover bids is not determinative of an improper purpose
	+ **Key to consider:** Are the actions of the director in the “best interests of the company”?
		- Court must look at the facts to determine the “best interests of the company” and is up to counsel to argue/prove to the judge that the company would have been better/worse without the bid
		- Test to apply (originated from Mills case in Australia):
			1. What is the director’s primary purpose/motivation for issuing shares?
				* Take an **objective** approach
				* Improper purpose 🡪 consider point #2

Improper purpose includes: defeating the bid to keep the job, personal interests, etc

* + - * + Proper purpose 🡪 no need to consider any further, there is no breach of fiduciary duties

Proper purpose includes: getting better financing, it is “good” in the long run for the company to not be taken over, etc

* + - 1. The primary purpose is improper
				* Improper purpose is not determinative of whether there is a breach of fiduciary duties
				* Directors can raise **reasonable grounds** for why they exercised their powers to defeat the bid (defense/justification for exercising the powers) – refer to BCE for some possible grounds to argue reasonableness (according to Teck there is no burden on the directors. The plaintiff must show no reasonable grounds but might be different after BCE and the US cases)

Also take into account the reputation/experience/policies/etc of the offeror

Reasonable grounds is very open ended and fact based, it was not defined in the case

Example of reasonable grounds include:

The offeror will drive the company to the ground

The offeror will seek to liquidate the company and close it down

etc

* *BCE (specifies some of the factors/concerns that can be taken into account for fiduciary duties)*
	+ **Reasonable grounds** in relation to #2 in *Teck*
		- Seems that it can be possible to use the BCE case to argue that if the takeover bid was considered by a committee and the board acted with due diligence, the court will give deference and find it a “reasonable ground” for defeating the bid
			* Must have gotten advice on all aspects and made the decision
			* Deference to business judgments
	+ **Use business judgment to argue it is reasonable**
	+ Fiduciary duties contains a component of “fairness”
		- As long as the directors acted “fairly” it can be seen as a reasonable ground
		- This duty varies from situation to situation and fact-dependant
	+ **Fiduciary duty requires consider the best interests of the corporation is the key but may also consider interest of stakeholders (ie. shareholders, creditors, employees)**
		- Judges are not in a position to second guess what is “best interest”, dfer to business judgment
		- Keep in mind to treat affected stakeholders in a fair manner commensurate with corporation’s duties
* *American Case Law*
	+ When a conflict occurs the burden is shifted to the defendant to convince the court there is reasonable grounds
		- In Canada, we *can* argue that they defer to business judgment and it is up to plaintiff to establish otherwise, but *Teck* seems to shift it when they ask for “reasonable grounds”
	+ In US when a bid is inevitable the directors can consider short-term benefits over long-term benefits
	+ Proportionality test (not used in Canada): respond to takeover bids with the level of risk perceived (high risk 🡪 take drastic measures)

# Fiduciary Duties vs Negligence

* Thus the two main duties of directors and officers are:
	+ **Fiduciary** duty towards the CO
		- **Focused on the subjective motivation of the director/officer**
	+ **General duty** not to be negligent.
		- **Focused on the surrounding circumstances/consequences**
* One of the objectives of corporate law reform in Canada has been to upgrade the standard of care imposed on directors.

# Oppression Remedy

* Statute clarifies that single acts can amount to oppression
* Oppression should be interpreted broadly, focused on fairness. Majority SHs should not exercise powers contrary to expectations of minority (*Ferguson*)
* Oppression remedy is generally regarded as very facts-specific.
	+ S.227(2)(a) focus is **on the conduct itself**
		- Key is “*oppressive*”
			* *Scottish Cooperative case*
				+ Oppression must be burdensome, harsh, and wrongful, and it connotes an element of bad faith (not as far as legal fraud).
				+ will not be available where the PL cannot show any loss other than to share value
			* *Arthur v Signum* (signs of oppression)
				+ Lack of valid purpose of corporate transaction, such as excessive salaries
				+ Lack of good faith of part of Directors
				+ Discrimination among SHs, which gives benefit to majority over minority
				+ Lack of adequate financial disclosure of material info to minority SH
				+ Plan or design to eliminate minority SH
				+ Refusing dividends to SHs
	+ S.227(2)(b): if PL can’t prove level of bad faith on the part of Directors, he can argue unfair prejudice, which **focused more on effects on aggrieved party**.
		- Key is “*unfairly prejudicial*”
			* *Diligenti*
				+ Oppression = legal rights
				+ Unfair prejudice = equitable rights including expectations
			* *Embrahimi (adopted/refined in BCE)*
				+ Rights can arise through expectations and go beyond what is contracted
				+ Reasonable expectation to be a director in a closely held corporation
				+ **Unfair prejudice more liberal than oppression**
			* *BCE (questions to consider)*
				1. **Does the evidence support the “reasonable expectation” asserted by the PL that be treated a particular way?**

Useful factors from the case law in determining whether a reasonable expectation exists include:

general commercial practice;

the nature of the corporation;

the relationship between the parties;

past practice;

steps the claimant could have taken to protect itself;

cannot be used to complain about bad business deals

representations and agreements;

and the fair resolution of conflicts between corporate stakeholders.

**Closely held companies**: a SH normally has an expectation to be on the board of directors

When fired as a director, the expectations are destroyed and there is **standing** to complain for prejudice

**No reasonable expectation that economic interests (ie. share prices) are protected**

**Compliance with fiduciary duties is a reasonable expectation**

* + - * 1. **Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?**

PL must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences.

Unfair disregard is most broad of all but might not be applicable in BC

Look to the “oppression” branch for some insight on the interpretation

Unfair prejudice

Where conflicting interests arise, it falls to the directors to resolve them in accordance with their fiduciary duty to act in the best interests of the CO. This duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly.

Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one.

* + Some Canadian jurisdictions outside of BC have a third ground for oppression: “unfair disregard” of SH’s interest.
* ratification is irrelevant.
* Majority can be ordered to buy shares of minority (*Wind Ridge Farms*)
* When plaintiff is responsible for his treatment, NO OPPRESSION (*Nystad*)

# Fiduciary Duties vs Oppression

* It is common in any action alleging breach of fiduciary duty to also allege oppression.
* Derivative = focused on corporation’s interest (incidentally the SHs)
Oppression = focused on the INDIVIDUAL SH’s interest
* Then why would derivative action still be relevant?
	+ In larger public COs it may be hard to show prejudice to individual SHs, so derivative action may be the way to go.
	+ In cases of clear cut breach of fiduciary duty, where it is easier to argue and prove.
* *Furry Creek Timber Co v. Laad Ventures Ltd*. [1992] BCSC: PL SHs in oppression remedy cases must show that the breach of fiduciary duty has also affected them in manner different to or in addition to harm done to CO.
* These 2 remedies can overlap but care must be taken not to usurp derivative claims under oppression
* FD is more predictable if it fits a fact scenario from a previous case
* Oppression usually won’t be single acts
* SH can seek these remedies simultaneously at discretion of judge

# Part 1 — Interpretation and Application

## Division 1 — Interpretation

### 1 Definitions

**1**  (1) In this Act:

**"affiliate"** means a corporation that is affiliated with another corporation within the meaning of section 2;

**"alter"** includes create, add to, vary and delete;

**"articles"** means the record described in section 12, and includes

(a) the articles or articles of association of a pre-existing company,

(b) the bylaws of a company incorporated

(i)  under a former Companies Act, if that Act did not provide for articles or articles of association, or

(ii)  by a special or private Act, and

(c) any other record that under this Act constitutes the articles of a company;

**"authorized share structure"** means the kinds, classes and series of shares, and the limits, if any, on the number of shares of those kinds, classes and series of shares, that a company is authorized, by its articles, notice of articles or memorandum, to issue;

**"beneficially own"** includes own through any trustee, personal or other legal representative, agent or other intermediary;

**"British Columbia corporation"** means

(a) a company, or

(b) a corporation, other than a company or a foreign corporation, that is created in or continued into British Columbia;

**"charter"**, in relation to a corporation, includes

(a) the corporation's articles, notice of articles or memorandum, regulations, bylaws or agreement or deed of settlement, and

(b) if the corporation was incorporated, continued or converted by or under, or if the corporation resulted from an amalgamation under, an Act, statute, ordinance, letters patent, certificate, declaration or other equivalent instrument or provision of law, that record;

**"company"** means a corporation, recognized as a company under this Act or a former Companies Act, that has not, since its most recent recognition or restoration as a company, ceased to be a company;

company only includes companies recognized under this Act pursuant to section (3), narrower than corporations

**"consent resolution"** means,

(a) in the case of a resolution of shareholders that may be passed as an ordinary resolution, a resolution referred to in paragraph (b) of the definition of "ordinary resolution",

(b) in the case of any other resolution of shareholders, a unanimous resolution, or

(c) in the case of a resolution of directors or a committee of directors, a resolution passed in accordance with section 140 (3) (a);

**"corporation"** means a company, a body corporate, a body politic and corporate, an incorporated association or a society, however and wherever incorporated, but does not include a municipality or a corporation sole;

**"director"** means,

(a) in relation to a company, an individual who is a member of the board of directors of the company as a result of having been elected or appointed to that position, or

(b) in relation to a corporation other than a company, a person who is a member of the board of directors or other governing body of the corporation regardless of the title by which that person is designated;

Definition does not distinguish between inside and outside director. It may be obvious in the audit committee sections

**"extraprovincial company"** means, as the case may be,

(a) a foreign entity registered under section 377 as an extraprovincial company or under section 379 as an amalgamated extraprovincial company, or

(b) a foreign entity registered as an extraprovincial company or as an amalgamated extraprovincial company under regulations made in accordance with Division 4 of Part 11,

and includes a pre-existing extraprovincial company;

**"federal corporation"** means a corporation to which both of the following apply:

(a) the most recent of the following was effected by or under an Act of Canada:

(i)  the incorporation of the corporation;

(ii)  a continuation of the corporation or any other transfer by a similar process into the federal jurisdiction;

(iii)  an amalgamation or similar process from which the corporation resulted;

(b) the corporation has not, since that incorporation, continuation or amalgamation or similar process, been discontinued by or under an Act of Canada;

**"foreign corporation"** means a corporation that

(a) is not a company,

(b) has issued shares,

(c) is not required under the Cooperative Association Act to be registered under that Act, and

(d) was

(i)  incorporated otherwise than by or under an Act,

(ii)  continued under section 308 or otherwise transferred by a similar process into a jurisdiction other than British Columbia, or

(iii)  the result of an amalgamation under Division 4 of Part 9 or a similar process, or of an amalgamation or similar process in a jurisdiction other than British Columbia,

and includes an extraprovincial corporation within the meaning of the Financial Institutions Act;

**"foreign corporation's jurisdiction"** means, in respect of a foreign corporation,

(a) the jurisdiction in which the corporation was incorporated,

(b) if the corporation resulted from an amalgamation or similar process, the jurisdiction in which the most recent amalgamation or similar process occurred, or

(c) if the corporation has, since the later of its incorporation and any amalgamation or similar process from which the corporation resulted, been continued or otherwise transferred by a process similar to continuation, the jurisdiction into which the corporation was most recently continued or transferred;

**"foreign entity"** means

(a) a foreign corporation,

(b) a limited liability company, or

(c) an extraprovincial society, within the meaning of the Society Act, that,

(i)  under section 191 of the Financial Institutions Act, is deemed to have a business authorization, or

(ii)  under section 193 (2) of the Financial Institutions Act, is ordered by the Financial Institutions Commission to apply for a business authorization;

**"foreign entity's jurisdiction"** means,

(a) in the case of a foreign corporation, the foreign corporation's jurisdiction, or

(b) in the case of a limited liability company, the jurisdiction in which the limited liability company is organized;

**"holding corporation"** means the first of the corporations referred to in section 2 (4);

**"incorporation agreement"** means an agreement referred to in section 10;

**"incorporator"** means each person who, before an incorporation application is submitted to the registrar for filing, signs the incorporation agreement respecting the company under section 10;

**"insolvent"**, except in section 313, means, in relation to a company, unable to pay the company's debts as they become due in the ordinary course of its business;

**"limited company"** means a company that is not an unlimited liability company;

**"limited liability company"** means a business entity that

(a) was organized in a jurisdiction other than British Columbia,

(b) is recognized as a legal entity in the jurisdiction in which it was organized,

(c) is not a corporation, and

(d) is not a partnership, including, without limitation, a limited partnership or a limited liability partnership;

**"ordinary resolution"** means a resolution

(a) passed at a general meeting by a simple majority of the votes cast by shareholders voting shares that carry the right to vote at general meetings, or

(b) passed, after being submitted to all of the shareholders holding shares that carry the right to vote at general meetings, by being consented to in writing by shareholders holding shares that carry the right to vote at general meetings who, in the aggregate, hold shares carrying at least a special majority of the votes entitled to be cast on the resolution;

**"pre-existing company"** means a company that was recognized as a company under a former Companies Act;

**"pre-existing extraprovincial company"** means a foreign entity, registered as an extraprovincial company, that was licensed or registered as an extraprovincial company under a former Companies Act;

**"pre-existing reporting company"** means a corporation that was, immediately before the coming into force of this Act, a reporting company within the meaning of the Company Act, 1996, but does not include

(a) a reporting issuer,

(b) a reporting issuer equivalent, or

(c) a corporation within a prescribed class of corporations;

**"public company"** means a company that

(a) is a reporting issuer,

(b) is a reporting issuer equivalent,

(c) has registered its securities under the Securities Exchange Act of 1934 of the United States of America,

(d) has any of its securities, within the meaning of the Securities Act, traded on or through the facilities of a securities exchange, or

(e) has any of its securities, within the meaning of the Securities Act, reported through the facilities of a quotation and trade reporting system;

Also known as **widely held companies**- basically any company who issues securities (shares, promissory notes, debentures). Term “securities” is as defined in the security Act
- must have AT LEAST 3 directors and annual audit under s210 (can be waived for non-public companies)

Insider trading is governed by:
- Securities Act for public companies
- S192 for private companies

Private company (aka closely held companies) requires:
1. Limits in constitution regarding transfer of shares
2. Having less than 50 SHs. Can have 1 director only
3. Prohibition on the sales of shares to general public

**"recognized"**, in respect of a company, means recognized under section 3;

**"reporting issuer"** has the same meaning as in the Securities Act;

 means an issuer that

(a) has issued securities in respect of which

(i)  a prospectus was filed and a receipt was issued,

(ii)  a statement of material facts was filed and accepted, or

(iii)  a securities exchange take over bid circular was filed,

under a former enactment,

(b) has filed a prospectus or statement of material facts and the executive director has issued a receipt for it under this Act,

(c) has any securities that have been at any time listed and posted for trading on any exchange in British Columbia, regardless of when the listing and posting for trading began,

(d) is an issuer that has exchanged its securities with another issuer or with the holders of the securities of that other issuer in connection with an amalgamation, merger, reorganization, arrangement or similar transaction if one of the parties to the amalgamation, merger, reorganization, arrangement or similar transaction was a reporting issuer at the time of the amalgamation, merger, reorganization, arrangement or similar transaction,

(e) is designated as a reporting issuer in an order made under section 3.2,

(e.1) is a person that is within a prescribed class of persons, or

(f) has filed a securities exchange take over bid circular under this Act for the acquisition of securities of a reporting issuer and has taken up and paid for securities subject to the bid in accordance with the circular,

unless the commission orders under section 88 that the issuer has ceased to be a reporting issuer;

Considered a “reporting issuer” if either:
1. Shares listed on stock exchange for trading
2. Shares offered to public along with a prospectus. Definition of “public” is based on the “need to know test”. Does the person buying the securities need to know the information regarding the securities. (Ralston)

**Continuous Disclosure**: Any CO required to disclose information to the public is required to do so on an ongoing basis. There are more onerous financial reporting requirements for public COs under Securities Act

**"reporting issuer equivalent"** means a corporation that, under the laws of any Canadian jurisdiction other than British Columbia, is a reporting issuer or an equivalent of a reporting issuer;

**"senior officer"** means, in relation to a corporation,

(a) the chair and any vice chair of the board of directors or other governing body of the corporation, if that chair or vice chair performs the functions of the office on a full time basis,

(b) the president of the corporation,

(c) any vice president in charge of a principal business unit of the corporation, including sales, finance or production, and

(d) any officer of the corporation, whether or not the officer is also a director of the corporation, who performs a policy making function in respect of the corporation and who has the capacity to influence the direction of the corporation;

**"shareholder"**, except in section 385, means a person whose name is entered in a securities register of a company as a registered owner of a share of the company or, until such an entry is made for the company,

(a) in the case of a company incorporated before the coming into force of this Act, a subscriber,

(b) in the case of a company incorporated under this Act, an incorporator, or

(c) in the case of a company that has been recognized within the meaning of section 3 (1) (b) or (d), a person who, immediately before the corporation was recognized as a company, held one or more shares of the corporation;

**"special Act corporation"** means a corporation, incorporated by an Act, that has not been recognized as a company;

(3) An individual is appointed as a director of a company if the individual is

(a) appointed as a director of the company in accordance with

(i)  this Act, or

(ii)  the memorandum or articles of the company,

(b) designated as a director of the company on the notice of articles that applies to the company when it is recognized under this Act, or

(c) declared by the court to be a director of the company.

**"special majority"** means, in respect of a company,

(a) the majority of votes that the articles specify is required for the company to pass a special resolution at a general meeting, if that specified majority is at least 2/3 and not more than 3/4 of the votes cast on the resolution, or

(b) if the articles do not contain a provision contemplated by paragraph (a), 2/3 of the votes cast on the resolution or, if the company is a pre-existing company that has not complied with section 370 (1) (a) or 436 (1) (a) or that has a notice of articles that reflects that the Pre-existing Company Provisions apply to the company, 3/4 of the votes cast on the resolution;

**"special resolution"** means

(a) a resolution passed at a general meeting under the following circumstances:

(i)  notice of the meeting specifying the intention to propose the resolution as a special resolution is sent to all shareholders holding shares that carry the right to vote at general meetings at least the prescribed number of days before the meeting;

(ii)  the majority of the votes cast by shareholders voting shares that carry the right to vote at general meetings is cast in favour of the resolution;

(iii)  the majority of votes cast in favour of the resolution constitutes at least a special majority, or

(b) a resolution passed by being consented to in writing by all of the shareholders holding shares that carry the right to vote at general meetings;

**"unanimous resolution"** means a resolution passed by being consented to in writing by all of the shareholders entitled to vote on the resolution;

**"wholly owned subsidiary"** means a subsidiary within the meaning of section 2 (5).

(3) An individual is appointed as a director of a company if the individual is

(a) appointed as a director of the company in accordance with

(i)  this Act, or

(ii)  the memorandum or articles of the company,

(b) designated as a director of the company on the notice of articles that applies to the company when it is recognized under this Act, or

(c) declared by the court to be a director of the company.

### 2 Corporate relationships

**2**  (1) For the purposes of this Act, one corporation is affiliated with another corporation if

(a) one of them is a subsidiary of the other,

(b) both of them are subsidiaries of the same corporation, or

(c) each of them is controlled by the same person.

(2) For the purposes of this Act, a corporation is a subsidiary of another corporation if

(a) it is controlled by

(i)  that other corporation,

(ii)  that other corporation and one or more corporations controlled by that other corporation, or

(iii)  2 or more corporations controlled by that other corporation, or

(b) it is a subsidiary of a subsidiary of that other corporation.

(3) For the purposes of this section, a corporation is controlled by a person if

(a) shares of the corporation are held, other than by way of security only, by the person, or are beneficially owned, other than by way of security only, by

(i)  the person, or

(ii)  a corporation controlled by the person, and

(b) the votes carried by the shares mentioned in paragraph (a) are sufficient, if exercised, to elect or appoint a majority of the directors of the corporation.

(4) For the purposes of this Act, a corporation is the holding corporation of a corporation that is its subsidiary.

(5) For the purposes of this Act, a corporation is a wholly owned subsidiary of another corporation if all of the issued shares of the first corporation are held by one or both of

(a) that other corporation, and

(b) a wholly owned subsidiary, or wholly owned subsidiaries, of that other corporation.

### 3 When a company is recognized

**3**  (1) A company is recognized under this Act

(a) when it is incorporated under this Act,

(b) if the company results from the conversion, under this or any other Act, of a corporation into a company after the coming into force of this Act, when the conversion occurs,

(c) if the company results from an amalgamation of corporations under this Act, when the amalgamation occurs, or

(d) if the company results from the continuation into British Columbia of a foreign corporation under this Act, when the continuation occurs.

(2) A company was recognized under a former *Companies Act*

(a) when it was incorporated under that Act,

(b) if the company resulted from the conversion, under the former *Companies Act* or under any other Act, of a corporation into a company before the coming into force of this Act, when the conversion occurred,

(c) if the company resulted from the amalgamation of companies under the former *Companies Act*, when the amalgamation occurred, or

(d) if the company resulted from the continuation into British Columbia of a foreign corporation under the former *Companies Act*, when the continuation occurred.

## Division 2 — Application

### 4 Special Act corporations

 **4** (1) Unless the Act by which a special Act corporation was incorporated provides otherwise, a special Act corporation incorporated after September 30, 1973 and any other special Act corporation to which the *Company Clauses Act* applied before its repeal is subject to the following:

(a) the provisions of this Act other than sections 10 to 41, 52, 53, 228, 269 to 300 and 302 to 311 and Parts 11 and 14;

(b) the regulations made under this Act other than

(i)  regulations made in respect of sections 10 to 41, 52, 53, 228, 269 to 300 and 302 to 311 and Parts 11 and 14, and

(ii)  regulations that expressly indicate that they do not apply to special Act corporations.

# Part 2 — Incorporation

## Division 1 — Formation of Companies

### 10 Formation of company

**10**  (1) One or more persons may form a company by

(a) entering into an incorporation agreement,

(b) filing with the registrar an incorporation application, and

(c) complying with this Part.

(2) An incorporation agreement must

(a) contain the agreement of each incorporator to take, in that incorporator's name, one or more shares of the company,

(b) for each incorporator,

(i)  have a signature line with the full name of that incorporator set out legibly under the signature line, and

(ii)  set out legibly opposite the signature line of that incorporator,

(A)  the date of signing by that incorporator, and

(B)  the number of shares of each class and series of shares being taken by that incorporator, and

(c) be signed on the applicable signature line by each incorporator.

(3) An incorporation application referred to in subsection (1) (b) must

(a) be in the form established by the registrar,

(b) contain a completing party statement referred to in section 15,

(c) set out the full names and mailing addresses of the incorporators,

(d) set out

(i)  the name reserved for the company under section 22, and the reservation number given for it, or

(ii)  if a name is not reserved, a statement that the name by which the company is to be incorporated is the name created,

(A)  in the case of a limited company, by adding "B.C. Ltd." after the incorporation number of the company, or

(B)  in the case of an unlimited liability company, by adding "B.C. Unlimited Liability Company" after the incorporation number of the company, and

(e) contain a notice of articles that reflects the information that will apply to the company on its incorporation.

### 11 Notice of articles

**11**  Unless this Act provides otherwise, the notice of articles of a company must

(a) be in the form established by the registrar,

(b) set out the name of the company,

(c) set out the full name of, and prescribed address for, each of the directors,

(d) identify the registered office of the company by its mailing address and its delivery address,

(e) identify the records office of the company by its mailing address and its delivery address,

(f) set out, in the prescribed manner, any translation of the company's name that the company intends to use outside Canada,

(g) describe the authorized share structure of the company in accordance with section 53, and

(h) set out, in respect of each class and series of shares, whether there are special rights or restrictions attached to the shares of that class or series of shares and, if there are or were special rights or restrictions, set out the date of each resolution altering those special rights or restrictions that was passed on or after, and the date of each court order altering those special rights or restrictions that was made on or after,

(i)  if the company is a pre-existing company, the day on which this Act comes into force, or

(ii)  if the company is not a pre-existing company, the date on which the company is recognized under this Act.

(i) [Repealed 2003-71-2.]

### 12 Articles

**12**  (1) A company must have articles that

(a) set rules for its conduct,

(b) are mechanically or electronically produced, and

(c) are divided into consecutively numbered or lettered paragraphs.

(2) The articles of a company must

(a) set out every restriction, if any, on

(i)  the businesses that may be carried on by the company, and

(ii)  the powers that the company may exercise,

(b) set out, for each class and series of shares, all of the special rights or restrictions that are attached to the shares of that class or series of shares,

(c) subject to subsection (5),

(i)  set out the incorporation number of the company,

(ii)  set out the name of the company, and

(iii)  set out, in the prescribed manner, any translation of the company's name that the company intends to use outside Canada.

(3) Without limiting subsections (1) and (2), the first set of articles of a company incorporated under this Act must

(a) have a signature line with the full name of each incorporator set out legibly under the signature line, and

(b) be signed on the applicable signature line by each incorporator.

(4) Without limiting subsections (1) and (2), a company may, in its articles, adopt, by reference or by restatement, with or without alteration, all or any of the provisions of Table 1 and, in that case, those adopted provisions form part of the articles.

(5) After the recognition of a company, any individual may insert in the company's articles, whether or not there has been any resolution to direct or authorize that insertion,

(a) the incorporation number of the company, and

(b) the name and any translation of the name of the company.

(6) Despite any wording to the contrary in a security agreement or other record, a change to a company's articles in accordance with subsection (5) does not constitute a breach or contravention of, or a default under, the security agreement or other record, and is deemed for the purposes of the security agreement or other record not to be an alteration to the charter of the company.

### 13 Incorporation

**13**  (1) A company is incorporated

(a) on the date and time that the incorporation application applicable to it is filed with the registrar, or

(b) subject to sections 14 and 410, if the incorporation application specifies a date, or a date and time, on which the company is to be incorporated that is later than the date and time on which the incorporation application is filed with the registrar,

(i)  on the specified date and time, or

(ii)  if no time is specified, at the beginning of the specified date.

(2) After a company is incorporated under this Part, the registrar must issue a certificate of incorporation for the company and must record in that certificate the name and incorporation number of the company and the date and time of its incorporation.

(3) After a company is incorporated under this Part, the registrar must

(a) furnish to the company

(i)  the certificate of incorporation, and

(ii)  if requested to do so, a certified copy of the incorporation application and a certified copy of the notice of articles,

(b) furnish a copy of the incorporation application to the completing party, and

(c) publish in the prescribed manner a notice of the incorporation of the company.

### 14 Withdrawal of application for incorporation

**14**  At any time after an incorporation application is filed with the registrar and before a company is incorporated in accordance with that incorporation application, an incorporator or any other person who appears to the registrar to be an appropriate person to do so may withdraw the incorporation application by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the incorporation application.

### 15 Obligations of completing party

**15**  (1) A completing party must,

(a) before an incorporation application is submitted to the registrar for filing to incorporate a company,

(i)  examine the articles and incorporation agreement to ensure that both are endorsed within the meaning of subsection (2),

(ii)  designate as incorporators, in the incorporation application, all of those persons who have endorsed both the articles and the incorporation agreement and no other persons, and

(iii)  complete the completing party statement in the incorporation application, and

(b) after the company is incorporated, deliver to the delivery address of the company's records office, or mail by registered mail to the mailing address of the company's records office, the originally signed articles and incorporation agreement examined by the completing party.

(2) For the purposes of subsection (1), a record is endorsed if

(a) the record contains a signature line for each signatory with the name of that signatory set out legibly under the signature line,

(b) an original signature has been placed on each of those signature lines, and

(c) the completing party has no reason to believe that the signature placed on a signature line is not the signature of the person whose name is set out under that signature line.

### 16 Articles on incorporation

**16**  On its incorporation, a company incorporated under this Act has, as its articles, the articles that are signed by the persons designated as incorporators in the incorporation application but if, despite sections 12 and 15, articles have not been signed by all of those persons when the incorporation application is filed with the registrar to incorporate the company, the company has as its articles,

(a) if a set of articles has been signed by one or more of the persons designated as incorporators in the incorporation application, those articles, or

(b) if none of the persons designated as incorporators in the incorporation application have signed articles for the company, Table 1.

### 17 Effect of incorporation

**17**  On and after the incorporation of a company, the shareholders of the company are, for so long as they remain shareholders of the company, a company with the name set out in the notice of articles, capable of exercising the functions of an incorporated company with the powers and with the liability on the part of the shareholders provided in this Act.

###

Liability under s17 is as set out under s30 and 87

### 18 Evidence of incorporation

**18**  Whether or not the requirements precedent and incidental to incorporation have been complied with, a notation in the corporate register that a company has been incorporated is conclusive evidence for the purposes of this Act and for all other purposes that the company has been duly incorporated on the date shown and the time, if any, shown in the corporate register.

### 19 Effect of notice of articles and articles

**19**  (1) Subject to subsection (2), a company and its shareholders are bound by the company's articles and notice of articles in the manner contemplated by subsection (3) from the time at which the company is recognized.

(2) A pre-existing company and its shareholders are bound, in the manner contemplated by subsection (3),

(a) by the company's notice of articles, if any,

(b) by the company's articles, and

(c) subject to section 373 (3) or 439 (3), as the case may be, by the company's memorandum.

(3) A company and its shareholders are bound by the company's articles and notice of articles or by its memorandum and articles, as the case may be, and by any alterations made to those records under this Act or a former Companies Act, to the same extent as if those records

(a) had been signed and sealed by the company and by each shareholder, and

(b) contained covenants on the part of each shareholder and the shareholder's successors and personal or other legal representatives to observe the articles and notice of articles or memorandum and articles, as the case may be.

Shareholders and company are bounded in a contract and allows either to sue personally in the event that the articles are breached

According to Paterson, a breach of s142 (Duties of Directors) cannot be seen as a breach of K under s.19

###

### 20 Pre-incorporation contracts

Common Law on Pre-Incorporation Contracts

* 4 possible cases
	+ Facilitator is aware the company was not incorporated but not the other person
	+ Both parties are not aware (*Kelner*)
	+ Neither party knows it was not incorporated and facilitator mistakenly believes that the CO is incorporated (*Black*)
	+ Corporation was not intended to be incorporated
* Under common law, the facilitator cannot be said to act as an agent for the company, because company did not exists yet and thus authority cannot be granted. Under common law, ratifications can occur only if:
	+ The other person purported to act on behalf of the person who seeks to ratify
	+ Person who seeks to ratify must have been in existence at the time the contract entered into
	+ Person who seeks to ratify must have the capacity to do the act both at the time the agent acted and at time of ratification
* *Kelner v Baxter*
	+ Narrow ratio: liability on facilitator if 1. He knew company does not exist AND clear he intended to be personally bound
	+ Wide ratio: whenever a person contracts he will always be personally liable
		- Rule of law or rule of construction? *Black v Smallwood* confirmed Kelner should be a rule of construction approach
* *Black v Smallwood*
	+ Facilitators were bound by contracts according to the nature of the contract itself (this is how the courts interpreted Kelner)
	+ Contract is void because there was no contracting party at all
		- Facilitator only had liability when there clearly intended to be a contract and facilitator intended on being liable (ie. intended on being a party to the contract) AND knew that the CO did not exist
	+ Breach of warranty of authority is possible though

Breach of Warranty of Authority

* Where promoter purported to act on behalf of a corporation before it came into existence it is possible to be liable for a breach of warranty of authority
* Damages may be nominal
* Must have some nexus/connection between the damages suffered and the breach of warranty of authority
	+ If the CO is going downhill anyways there likely won’t be any damage

A quasi-tortious remedy which is concerned with misrepresentation by the agent of his authority in a particular matter. There must be:

* Evidence that the agent making a representation (warranty).
* Evidence that the Third Party has relied on that representation.
* Existence of provable loss.

**COMMON LAW NO LONGER APPLIES UNLESS SECTION 20 IS INAPPLICABLE BASED ON STATUTORY INTERP**

* Perhaps if the company is never incorporated?
* Uncertain if common law can apply if the person waives under 20(8)

**20**  (1) In this section:

**"facilitator"** means a person referred to in subsection (2) who, before a company is incorporated, purports to enter into a contract in the name of or on behalf of the company;

**"new company"** means a company incorporated after a pre-incorporation contract is entered into in the company's name or on the company's behalf;

Company does NOT include corporation, so it only applies to BC companies incorporated under this Act.
Reason for this is there may be a constitutional issue if this applies to federally incorporated entities although arguably contracts are under property and civil rights.

There is also an issue if the contract was concluded in another province but CO was incorporated in BC. There might be a conflict of laws issue and this might have extra-territorial issues.

**"pre-incorporation contract"** means a purported contract referred to in subsection (2).

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

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

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

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

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

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

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

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

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

“before a company is incorporated” suggests a company will eventually exist, but if it never does then arguably this statute does not apply? Then common law might kick in….

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

Adopt can be implied or express, in a reasonable time. Passage of time can be adoption and very fact specific. Common Law traditionally will not allow this.

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

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

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

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

Restitutionary remedy that protects third parties.
applies ONLY if company is incorporated

(6) Whether or not the new company adopts the pre-incorporation contract under subsection (3), the new company, the facilitator or any party to the pre-incorporation contract may apply to the court for an order

(a) setting the obligations of the new company and the facilitator under the pre-incorporation contract as joint or joint and several, or

(b) apportioning liability between the new company and the facilitator.

Any party can apply to the court to **set the obligations of the contract and appropriate liability**

(7) On an application under subsection (6), the court may, subject to subsection (8), make any order it considers appropriate.

(8) A facilitator is not liable under subsection (2) in respect of the pre-incorporation contract if the parties to the pre-incorporation contract have, in writing, expressly so agreed.

## Division 2 — Corporate Names

### 21 Name of company

**21**  (1) A company recognized under this Act has as its name, on its recognition,

(a) the name shown for the company on the application filed to effect the recognition of the company if

(i)  that name has been reserved for the company, and

(ii)  that reservation remains in effect at the date of the recognition of the company, or

(b) in any other case, the name created by adding "B.C. Ltd." after the incorporation number of the company.

(2) Subsection (1) does not apply to

(a) an unlimited liability company, or

(b) a company that is recognized as a result of an amalgamation to which section 273, 274 or 275 (2) (b) (i) (A) applies.

(3) The name of an unlimited liability company must comply with section 51.21.

### 22 Reservation of name

**22**  (1) A person wishing to reserve a name for the purposes of this Act must apply to the registrar.

(2) After receiving an application to reserve a name under subsection (1), the registrar may reserve the name for a period of 56 days from the date of reservation or any longer period that the registrar considers appropriate.

(3) After receiving a request for the extension of a reservation of a name, the registrar may, if that request is received before the expiry of that reservation, extend that reservation for the period that the registrar considers appropriate.

(4) The registrar must not reserve a name for the purposes of this section unless that name complies with the prescribed requirements and with the other requirements set out in this Division.

(5) A name that the registrar for good and valid reasons disapproves contravenes the requirements set out in this Division.

### 23 Form of name of a company

**23**  (1) Subject to section 51.21 (1), a company must have the word "Limited", "Limitée", "Incorporated", "Incorporée" or "Corporation" or the abbreviation "Ltd.", "Ltée", "Inc." or "Corp." as part of and at the end of its name.

(2) For all purposes, each of the words "Limited", "Limitée", "Incorporated", "Incorporée" and "Corporation" is interchangeable with its abbreviation "Ltd.", "Ltée", "Inc." and "Corp.", respectively.

(3) If the name of a company includes its incorporation number and if the first numeral of that incorporation number is a zero,

(a) the name may be abbreviated by removing that zero, and

(b) the abbreviated name is, for all purposes, interchangeable with the unabbreviated name.

### 24 Restrictions on use of name

**24**  (1) A person must not use in British Columbia any name of which "limited", "limitée", "incorporated", "incorporée" or "corporation", or any abbreviation of them, is a part unless

(a) the person is a corporation entitled or required to use the words, or

(b) in the case of "limited" or "limitée", the person is

(i)  a limited liability company registered under section 377 as an extraprovincial company,

(ii)  a limited partnership, within the meaning of the Partnership Act, that is entitled or required to use that word, or

(iii)  a member of a class of persons prescribed for the purposes of this section.

(2) Without limiting subsection (1), a person must not use in British Columbia any name that includes "(VCC)" unless

(a) the person is registered under the Small Business Venture Capital Act, or

(b) the person is a federal corporation entitled or required to use that inclusion.

(3) Without limiting subsection (1), a person must not use in British Columbia any name that includes "(EVCC)" unless

(a) the person is registered under Part 2 of the Employee Investment Act, or

(b) the person is a federal corporation entitled or required to use that inclusion.

### 25 Multilingual names

**25**  (1) The name of a company must be in one or both of

(a) an English form, and

(b) a French form.

(2) If the name of a company is in both an English form and a French form, the company may use, and may be legally designated by, either form or a combination of both forms for the purposes of section 27 or any other purpose.

(3) Subject to section 256, a company may translate its name into any other language and may be designated by that translation of the name outside Canada if the translation of the name is set out in

(a) the memorandum, or

(b) the notice of articles in accordance with section 11 (f) and in the articles in accordance with section 12 (2) (c) (iii).

### 26 Assumed names

**26**  (1) If the name of a foreign entity contravenes any of the prescribed requirements or any of the other requirements set out in this Division, the foreign entity must, if it wishes to be registered as an extraprovincial company, reserve an assumed name and section 22 applies.

(2) If a foreign entity reserves an assumed name, the registrar may register the foreign entity as an extraprovincial company with its own name, if the foreign entity provides an undertaking to the registrar, in form and content satisfactory to the registrar, that it will carry on all of its business in British Columbia under that assumed name, and on such registration the extraprovincial company is deemed to have adopted the assumed name.

(3) An extraprovincial company that has adopted an assumed name under this Act

(a) must acquire all property, rights and interests in British Columbia under its assumed name,

(b) is entitled to all property, rights and interests acquired, and is subject to all liabilities incurred, under its assumed name as if the property, rights and interests and the liabilities had been acquired and incurred under its own name, and

(c) may sue or be sued in its own name, its assumed name or both.

(4) No act of an extraprovincial company that has adopted an assumed name under this Act, including a transfer of property, rights or interests to or by it, is invalid merely because the act contravenes subsection (3) (a) of this section.

(5) This section does not apply to a federal corporation.

### 27 Name to be displayed

**27**  (1) A company or extraprovincial company must display its name or, in the case of an extraprovincial company that has adopted an assumed name under this Act, its assumed name, in legible English or French characters,

(a) in a conspicuous position at each place in British Columbia at which it carries on business,

(b) in all its notices and other official publications used in British Columbia,

(c) on all its contracts, business letters and orders for goods, and on all its invoices, statements of account, receipts and letters of credit used in British Columbia, and

(d) on all bills of exchange, promissory notes, endorsements, cheques and orders for money used in British Columbia and signed by it or on its behalf.

(2) If a company has a seal, the company must have its name in legible characters on that seal.

### 28 Registrar may order change of name

**28**  (1) If, for any reason, the name of a company contravenes

(a) any of the prescribed requirements,

(b) any of the other requirements set out in this Division, or

(c) any of the requirements set out in section 51.21,

the registrar may, in writing and giving reasons, order the company to change its name, and section 263 applies.

(2) If, for any reason, the name or assumed name of an extraprovincial company contravenes any of the prescribed requirements or any of the other requirements set out in this Division, the registrar may, in writing and giving reasons, order the extraprovincial company to change its name or assumed name or to adopt an assumed name, and section 382 or 383, as the case may be, applies.

(3) This section does not apply to a federal corporation.

### 29 Other changes of name

**29**  (1) If the Superintendent of Financial Institutions notifies the registrar of the superintendent's disapproval of the name of a captive insurance company, the registrar may, in writing, and giving reasons, order the company to change its name to one that meets the approval of both the registrar and the superintendent.

(2) The registrar may, in writing, and giving reasons, order a company to change its name to one that does not include the abbreviation "(VCC)" if the administrator under the Small Business Venture Capital Act informs the registrar that the company is not registered under the Small Business Venture Capital Act.

(3) [Repealed 2004-49-71.]

(4) The registrar may, in writing, and giving reasons, order a company to change its name to one that does not include the abbreviation "(EVCC)", if the administrator under the Employee Investment Act informs the registrar that the company is not registered under Part 2 of that Act.

(5) If the registrar is informed by the proper officer of a self governing professional society, institute, college or association that a corporation, or an extraprovincial company, that was permitted to practise the profession has had that permission revoked by the society, institute, college or association, the registrar must, in writing, and giving reasons, order the corporation or extraprovincial company to change its name or assumed name to one that does not imply that the corporation or extraprovincial company is authorized to practise the profession.

(6) This section does not apply to a federal corporation.

## Division 3 — Capacity and Powers

### 30 Capacity and powers of company

**30**  A company has the capacity and the rights, powers and privileges of an individual of full capacity.

*Salomon* :
CO is not alias of owner even if owned by 1 person
director can be both SH and director
SHs are not agents of the company

###

### 31 Joint tenancy in property

*Kosmopolous*:
corporate veil is lifted when “*it would yield a result too flagrantly opposed to justice, convenience or the interests of the parties*” OR “*those who have chosen the benefits of incorporation must bear the burdens so if the veil is to be lifted, it should only be done in the interests of 3rd parties who would otherwise suffer as a result of that choice*”
single person corporation allowed

Ultra Vires Doctrine abolished by s30 but reintroduced in another form in s33

**31**  (1) Every corporation is capable of acquiring and holding property, rights and interests in joint tenancy in the same manner as an individual, and, if a corporation and one or more individuals or other corporations become entitled to property, rights or interests under circumstances or by virtue of an instrument that would, if the corporation had been an individual, have created a joint tenancy, they are entitled to the property, rights or interests as joint tenants.

(2) Despite subsection (1), acquiring and holding property, rights or interests by a corporation in joint tenancy is subject to the same conditions and restrictions as attach to acquiring and holding property, rights or interests by a corporation in severalty.

(3) On the dissolution of a corporation that is a joint tenant of property, rights or interests, the property, rights or interests devolve on the other joint tenant.

### 32 Extraterritorial capacity

**32**  Unless restricted by its charter or by an Act, each British Columbia corporation has the capacity

(a) to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside British Columbia, and

(b) to accept from any lawful authority outside British Columbia powers and rights concerning the corporation's business and powers.

###

Company has capacity to operate extra-provincially unless restricted by Articles

### 33 Restricted businesses and powers

**33**  (1) A company must not

(a) carry on any business or exercise any power that it is restricted by its memorandum or articles from carrying on or exercising, or

(b) exercise any of its powers in a manner inconsistent with those restrictions in its memorandum or articles.

(2) No act of a company, including a transfer of property, rights or interests to or by the company, is invalid merely because the act contravenes subsection (1).

(1) allows a company to restrict its own business through the articles (breach can lead to personal liability under s154)
(2) but the contracts are not invalid merely because it was restricted

Constructive notice eliminated by s421, thus members of the public are not deemed to know information filed with the registrar. But notice can still be possible through other means besides public filing.

Restrictions must be intended and specific. Note the word **merely**.

# Part 3 — Finance

## Division 7 — Liability of Shareholders

### 87 Liability of shareholders

**87**  (1) No shareholder of a company is personally liable for the debts, obligations, defaults or acts of the company except as provided in Part 2.1.

(2) A shareholder is not, in respect of the shares held by that shareholder, personally liable for more than the lesser of

(a) the unpaid portion of the issue price for which those shares were issued by the company, and

(b) the unpaid portion of the amount actually agreed to be paid for those shares.

(3) Money payable by a shareholder to the company under the memorandum or articles is a debt due from the shareholder to the company as if it were a debt due or acknowledged to be due by instrument under seal.

# Part 5 — Management

## Division 1 — Directors

### 124 Persons disqualified as directors

**124**  (1) A person must not become or act as a director of a company unless that person is an individual who is qualified to do so.

(2) An individual is not qualified to become or act as a director of a company if that individual is

(a) under the age of 18 years,

(b) found by a court, in Canada or elsewhere, to be incapable of managing the individual's own affairs,

(c) an undischarged bankrupt, or

(d) convicted in or out of British Columbia of an offence in connection with the promotion, formation or management of a corporation or unincorporated business, or of an offence involving fraud, unless

(i)  the court orders otherwise,

(ii)  5 years have elapsed since the last to occur of

(A)  the expiration of the period set for suspension of the passing of sentence without a sentence having been passed,

(B)  the imposition of a fine,

(C)  the conclusion of the term of any imprisonment, and

(D)  the conclusion of the term of any probation imposed, or

(iii)  a pardon was granted or issued under the *Criminal Records Act* (Canada).

(3) A director who ceases to be qualified to act as a director of a company must promptly resign.

Directors have to be: over 18, not bankrupt and not committed white collar crimes. If director becomes unqualified they must resign

### 128 When directors cease to hold office

**128**  (1) A director ceases to hold office when

(a) the term of office of that director expires in accordance with

(i)  this Act or the memorandum or articles, or

(ii)  the terms of his or her election or appointment,

(b) the director dies or resigns, or

(c) the director is removed in accordance with subsection (3) or (4).

Director can be removed when:

1. Term of office expires
2. Person dies or resigns
3. Removed by special resolution or resolution (less than special majority) specified in the articles

(2) A resignation of a director takes effect on the later of

(a) the time that the director's written resignation is provided to the company or to a lawyer for the company, and

(b) if the written resignation specifies that the resignation is to take effect at a specified date, on a specified date and time or on the occurrence of a specified event,

(i)  if a date is specified, the beginning of the specified date,

(ii)  if a date and time is specified, the date and time specified, or

(iii)  if an event is specified, the occurrence of the event.

(3) Subject to subsection (4), a company may remove a director before the expiration of the director's term of office

(a) by a special resolution, or

(b) if the memorandum or articles provide that a director may be removed by a resolution of the shareholders entitled to vote at general meetings passed by less than a special majority or may be removed by some other method, by the resolution or method specified.

(4) If the shareholders holding shares of a class or series of shares of a company have the exclusive right to elect or appoint one or more directors, a director so elected or appointed may only be removed

(a) by a special separate resolution of those shareholders, or

(b) if the memorandum or articles provide that such a director may be removed by a separate resolution of those shareholders passed by a majority of votes that is less than the majority of votes required to pass a special separate resolution or may be removed by some other method, by the resolution or method specified.

### 131 Vacancies among directors

**131**  Subject to sections 132 and 133, a vacancy that occurs among the directors

(a) may, if the vacancy occurs as a result of the removal of a director under section 128 (3), be filled

(i)  by the shareholders at the shareholders' meeting, if any, at which the director is removed, or

(ii)  if not filled in the manner contemplated by subparagraph (i) of this paragraph, by the shareholders or by the remaining directors, or

(b) may, in the case of a casual vacancy, be filled by the remaining directors.

### 135 If no directors in office

**135**  (1) If there are no directors in office,

(a) an individual may be empowered by the shareholders, incorporators or subscribers, as the case may be, under subsection (2), to

(i)  call a meeting of the shareholders, incorporators or subscribers, as the case may be, for the election or appointment of directors, and

(ii)  appoint as directors, to hold office until the vacancies are filled at that meeting, the number of individuals that will constitute a quorum, or

(b) there may be appointed, in the manner referred to in subsection (3), not more than the number of directors who, under the memorandum or articles, may be elected or appointed at an annual general meeting.

(2) An individual may be empowered under subsection (1) (a) by an instrument in writing

(a) signed by shareholders who, in the aggregate, hold shares carrying, in the aggregate, more than 1/2 of the votes that may be cast in an election or appointment of directors at a general meeting,

(b) if there are no shareholders whose shares carry the right to vote in an election or appointment of directors at a general meeting, signed by more than 1/2 of the shareholders, or

(c) if no shares have been issued, signed by more than 1/2 of the incorporators or, in the case of a pre-existing company, by more than 1/2 of the subscribers.

(3) An appointment under subsection (1) (b) may be effected by

(a) a unanimous resolution of the shareholders who hold shares carrying the right to vote in an election or appointment of directors at a general meeting,

(b) if there are no shareholders whose shares carry the right to vote in an election or appointment of directors at a general meeting, by a unanimous resolution of all of the shareholders, or

(c) if no shares have been issued, by an instrument in writing signed by all of the incorporators or, in the case of a pre-existing company, by all of the subscribers.

(1)(a) When no directors are in office an individual may be empowered by SHs (with >50%) to call meeting and appoint directors

(1)(b) Those individuals can hold office of director until vacancy is filled

##

## Division 2 — Powers and Duties of Directors, Officers, Attorneys, Representatives and Agents

### 136 Powers and functions of directors

**136**  (1) The directors of a company must, subject to this Act, the regulations and the memorandum and articles of the company, manage or supervise the management of the business and affairs of the company.

(2) Without limiting section 146, a limitation or restriction on the powers or functions of the directors is not effective against a person who does not have knowledge of the limitation or restriction.

* “management of the business” is the key in the section
* Company articles can specify limitations to the s136 powers
	+ Letters patent jurisdictions only allow limitations with unanimous SH agreement
* Powers under s136 is not absolute and subject to s301 (sale of undertaking) and s223-226 (for public companies)
* The Board of Directors collectively hold the powers, not individual directors (thus must obtain support from members of the board)
* S136 powers can be delegated because “supervise the management” implies the senior management (agents) will be given the powers. Directors must be able to revoke such power
* Powers of directors cannot be transferred unless allowed by statute (s137)

S146 & 136(2)
- cannot use limitations of powers as an excuse to escape liability unless that person has knowledge or by virtue of that persons’ relationship with CO ought to know of the limitation

*Automatic Case*
- resolutions passed by SHs in relation to management of company is not binding.
- once powers are vested in the board the SHs CANNOT interfere with management of company unless either: 1. Articles so allow OR 2. Directors are removed with special resolution OR 3. Articles are amended with special resolution.

###

### 137 Powers of directors may be transferred

**137**  (1) Subject to subsection (1.1) but despite any other provision of this Act, the articles of a company may transfer, in whole or in part, the powers of the directors to manage or supervise the management of the business and affairs of the company to one or more other persons.

(1.1) A provision of the articles transferring powers of the directors to manage or supervise the management of the business and affairs of the company is effective

(a) if the provision is included in the articles at the time of the company's recognition or if the company resolved, by special resolution, to add that provision to the articles, and

(b) if the provision clearly indicates, by express reference to this section or otherwise, the intention that the powers be transferred to the proposed transferee.

(2) If the whole or any part of the powers of the directors is transferred in the manner contemplated by subsection (1),

(a) the persons to whom those powers are transferred have all the rights, powers, duties and liabilities of the directors of the company, whether arising under this Act or otherwise, in relation to and to the extent of the transfer, including any defences available to the directors, and

(b) the directors are relieved of their rights, powers, duties and liabilities to the same extent.

(3) If and to the extent that the articles transfer to a person a right, power, duty or liability that is, under this Act, given to or imposed on a director or directors, the reference in this Act or the regulations to a director or directors in relation to that right, power, duty or liability is deemed to be a reference to the person.

(4) A company may resolve to alter its articles, by special resolution, to alter a provision referred to in subsection (1.1).

### 138 Application of this Act to persons performing functions of a director

**138**  (1) Without limiting section 137 but subject to subsection (2) of this section, if a person who is not a director of a company performs functions of a director of the company, sections 142, 231, 234, 251, 335, 347 and 354 and Divisions 3 to 5 of this Part apply to that person

(a) as if that person were a director of the company, and

(b) in relation to, and only to the extent of, those functions.

(2) Subsection (1) of this section does not apply to a person who is not a director of a company and who participates in the management of the company if

(a) the person participates in the management under the direction or control of a shareholder, director or senior officer of the company,

(b) the person is a lawyer, accountant or other professional whose primary participation in the management of the company is the provision of professional services to the company,

(c) the company is bankrupt and the person is a trustee in bankruptcy who participates in the management of the company or exercises control over its property, rights and interests primarily for the purposes of the administration of the bankrupt's estate, or

(d) the person is a receiver, receiver manager or creditor who participates in the management of the company or exercises control over any of its property, rights and interests primarily for the purposes of enforcing a debt obligation of the company.

Persons performing functions of director is subject to 142 (duties of directors), Division 3 (conflicts of interest), Division 4 (liability of directors), Division 5 (Indemnification of Directors and Officers and Payment of Expenses). Div 3-5 (147-165)

###

### 139 Revocation of resolutions

**139**  The directors may

(a) revoke a special resolution before it is acted on if the directors are authorized to do so by that special resolution or by another special resolution,

(b) revoke a special separate resolution passed by shareholders holding shares of a class or series of shares before it is acted on if the directors are authorized to do so by that special separate resolution or by another special separate resolution passed by shareholders holding shares of that class or series of shares, or

(c) revoke an ordinary resolution before it is acted on if the directors are authorized to do so by that ordinary resolution or by another ordinary resolution.

Directors can revoke a special resolution BEFORE it is acted on if that resolution so allows.

### 141 Officers

**141**  (1) Subject to subsection (3) and to the memorandum and articles of a company, the directors may appoint officers and may specify their duties.

(2) Unless the memorandum or articles provide otherwise,

(a) any individual, including a director, may be appointed to any office of the company, and

(b) 2 or more offices of the company may be held by the same individual.

(3) An individual who is not qualified under section 124 to become or act as a director of a company is not qualified to become or act as an officer of the company.

(4) Unless the memorandum or articles provide otherwise, the directors may remove any officer.

Subject to the articles, directors can:
- appoint officers
- directors can be an officer and hold more than 1 office
- directors can remove any officer

Individuals who do not qualify as directors under 124 cannot be an officer (so can this be a defense for people being alleged as an officer?)

### 142 Duties of directors and officers

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

Applies to directors and officers (including senior officers) WHEN acting as a director. THUS if director/officer acted beyond capacity, there may still be possibility of lawsuit directly against the person?

(a) act honestly and in good faith with a view to the best interests of the company,

Fiduciary Duties
- An equitable principle which allows equitable remedies only (ie. injunctions)
- Held individually by each director
-See beginning of CAN for details

(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,

Negligence

* A common law principle thus open to damages
* Each director owes the company a duty of care
* No professional definition/standards for directors thus impossible to lay down precisely
* “exercise in comparable circumstances” is the key (interpreted in *People’s* case)
* See beginning of CAN for details

(c) act in accordance with this Act and the regulations, and

(d) subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company.

(2) This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors and officers of a company.

Duties above are in addition to the common law and does not oust the common law

(3) No provision in a contract, the memorandum or the articles relieves a director or officer from

(a) the duty to act in accordance with this Act and the regulations, or

(b) liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company.

Cannot contract out of, or articles release the director/officer from duty to act in accordance with Act or liability arise by virtue of any enactment or rule of law or equity that would otherwise attach. (cannot contract out of disclosures)
Automatic ratification clauses no longer effective. Cannot contract out of negligence, etc, but something beyond that is fine

### 143 Validity of acts of directors and officers

**143**  An act of a director or officer is not invalid **merely** because of an irregularity in the election or appointment or a defect in the qualification of that director or officer.

## Division 3 — Conflicts of Interest

Complete codification of self-dealings for directors/senior officers
common law still applies to officers
s142 cannot be used to establish further liability on self-dealings

###

### 147 Disclosable interests

**147**  (1) For the purposes of this Division, a director or senior officer of a company holds a disclosable interest in a contract or transaction if

(a) the contract or transaction is material to the company,

“transaction” is included so even if a contract is not concluded it will fall under the statute
“material” is not considered in case law but can simply ask “whether interest is such that there is any reasonable basis for a concern that it may affect the director’s ability to perform his duty”?

(b) the company has entered, or proposes to enter, into the contract or transaction, and

(c) either of the following applies to the director or senior officer:

(i)  the director or senior officer has a material interest in the contract or transaction;

(ii)  the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction.

(2) For the purposes of subsection (1) and this Division, a director or senior officer of a company does not hold a disclosable interest in a contract or transaction if

Exclusions that focus on lifting the corporate veil for subsidiaries, etc. not important

(a) the situation that would otherwise constitute a disclosable interest under subsection (1) arose before the coming into force of this Act or, if the company was recognized under this Act, before that recognition, and was disclosed and approved under, or was not required to be disclosed under, the legislation that

(i)  applied to the corporation on or after the date on which the situation arose, and

(ii)  is comparable in scope and intent to the provisions of this Division,

(b) both the company and the other party to the contract or transaction are wholly owned subsidiaries of the same corporation,

(c) the company is a wholly owned subsidiary of the other party to the contract or transaction,

(d) the other party to the contract or transaction is a wholly owned subsidiary of the company, or

(e) the director or senior officer is the sole shareholder of the company or of a corporation of which the company is a wholly owned subsidiary.

(3) In subsection (2), **"other party"** means a person of which the director or senior officer is a director or senior officer or in which the director or senior officer has a material interest.

(4) For the purposes of subsection (1) and this Division, a director or senior officer of a company does not hold a disclosable interest in a contract or transaction merely because

The following are not disclosable interests. But not the word MERELY. So it is possible to argue the following cases would trigger disclosure

(a) the contract or transaction is an arrangement by way of security granted by the company for money loaned to, or obligations undertaken by, the director or senior officer, or a person in whom the director or senior officer has a material interest, for the benefit of the company or an affiliate of the company,

(b) the contract or transaction relates to an indemnity or insurance under Division 5,

(c) the contract or transaction relates to the remuneration of the director or senior officer in that person's capacity as director, officer, employee or agent of the company or of an affiliate of the company,

(d) the contract or transaction relates to a loan to the company, and the director or senior officer, or a person in whom the director or senior officer has a material interest, is or is to be a guarantor of some or all of the loan, or

(e) the contract or transaction has been or will be made with or for the benefit of a corporation that is affiliated with the company and the director or senior officer is also a director or senior officer of that corporation or an affiliate of that corporation.

### 148 Obligation to account for profits

Profits must be paid over unless 1. Disclosed + more OR 2. Exception under s148(2)

**148**  (1) Subject to subsection (2) and unless the court orders otherwise under section 150 (1) (a), a director or senior officer of a company is liable to account to the company for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer holds a disclosable interest.

(2) A director or senior officer of a company is not liable to account for and may retain the profit referred to in subsection (1) of this section in any of the following circumstances:

(a) the disclosable interest was disclosed before the coming into force of this Act under the former Companies Act that was in force at the time of the disclosure, and, after that disclosure, the contract or transaction is approved in accordance with section 149 of this Act, other than section 149 (3);

(b) the contract or transaction is approved by the directors in accordance with section 149, other than section 149 (3), after the nature and extent of the disclosable interest has been disclosed to the directors;

(c) the contract or transaction is approved by a special resolution in accordance with section 149, after the nature and extent of the disclosable interest has been disclosed to the shareholders entitled to vote on that resolution;

(d) whether or not the contract or transaction is approved in accordance with section 149,

(i)  the company entered into the contract or transaction before the director or senior officer became a director or senior officer of the company,

(ii)  the disclosable interest is disclosed to the directors or the shareholders, and

(iii)  the director or senior officer does not participate in, and, in the case of a director, does not vote as a director on, any decision or resolution touching on the contract or transaction.

When Directors Can keep the Profits (in sequential order)

1. Approved by Board of Directors (148(b) in accordance with 149 (but not 149(3)))
	* Must have proper disclosure to board
	* board majority approval is sufficient, but CANNOT be approved by the board if all directors have interest (149(3))
	* note the quorum requirements for directors
2. Special Resolution of Shareholders
	* Must have proper disclosure to SHs
	* Special majority required
3. Court can make an order based on “fair and reasonableness” test
	* Court can decide whether it is fair and reasonable for the director to keep the profits

(3) The disclosure referred to in subsection (2) (b), (c) or (d) of this section must be evidenced in a consent resolution, the minutes of a meeting or any other record deposited in the company's records office.

(4) A general statement in writing provided to a company by a director or senior officer of the company is a sufficient disclosure of a disclosable interest for the purpose of this Division in relation to any contract or transaction that the company has entered into or proposes to enter into with a person if the statement declares that the director or senior officer is a director or senior officer of, or has a material interest in, the person with whom the company has entered, or proposes to enter, into the contract or transaction.

(5) In addition to the records that a shareholder of the company may inspect under section 46, that shareholder may, without charge, inspect

(a) the portions of any minutes of meetings of directors, or of any consent resolutions of directors, that contain disclosures under this section, and

(b) the portions of any other records that contain those disclosures.

(6) In addition to the records a former shareholder of the company may inspect under section 46, that former shareholder may, without charge, inspect the records referred to in subsection (5) (a) and (b) of this section that are kept under section 42 and that relate to the period when that person was a shareholder.

(7) Sections 46 (7) and (8), 48 (1) and (3) and 50 apply to the portions of minutes, resolutions and records referred to in subsections (5) and (6) of this section.

### 149 Approval of contracts and transactions

149 goes along with 148. This section talks about “approving of contracts” but approval of contracts does not mean profits can be kept (ie. 149(3)).

**149**  (1) A contract or transaction in respect of which disclosure has been made in accordance with section 148 may be approved by the directors or by a special resolution.

(2) Subject to subsection (3), a director who has a disclosable interest in a contract or transaction is not entitled to vote on any directors' resolution referred to in subsection (1) to approve that contract or transaction.

(3) If all of the directors have a disclosable interest in a contract or transaction, any or all of those directors may vote on a directors' resolution to approve the contract or transaction.

If all directors have an interest they can all vote but they cannot keep the profits (note the wording + 148(2)(b))

(4) Unless the memorandum or articles provide otherwise, a director who has a disclosable interest in a contract or transaction and who is present at the meeting of directors at which the contract or transaction is considered for approval may be counted in the quorum at the meeting whether or not the director votes on any or all of the resolutions considered at the meeting.

### 150 Powers of court

**150**  (1) On an application by a company or by a director, senior officer, shareholder or beneficial owner of shares of the company, the court may, if it determines that a contract or transaction in which a director or senior officer has a disclosable interest was fair and reasonable to the company,

(a) order that the director or senior officer is not liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction, and

(b) make any other order that the court considers appropriate.

This section applies when the interested party wants a court’s ruling on whether the profits can be kept.
Wording of the statute does not seem to bar a SH from making an application even after it has been approved by the board/special resolution.
SHs have standing as of right. This right did not exist under common law.
derivative action for self-dealings is no longer necessary/possible.

(2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148 (2), the court may, on an application by the company or by a director, senior officer, shareholder or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:

(a) enjoin the company from entering into the proposed contract or transaction;

(b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;

(c) make any other order that the court considers appropriate.

Similar to the above. This section applies when the contract has not even been approved under 148(2) yet which means the court has the power to call the transaction off as well.

###

### 151 Validity of contracts and transactions

**151**  A contract or transaction with a company is not invalid merely because

(a) a director or senior officer of the company has an interest, direct or indirect, in the contract or transaction,

(b) a director or senior officer of the company has not disclosed an interest he or she has in the contract or transaction, or

(c) the directors or shareholders of the company have not approved the contract or transaction in which a director or senior officer of the company has an interest.

Protects the 3rd party from having their deal affected but note the word merely

### 152 Limitation of obligations of directors and senior officers

**152**  Except as is provided in this Division, a director or senior officer of a company has no obligation to

(a) disclose any direct or indirect interest that the director or senior officer has in a contract or transaction, or

(b) subject to section 192, account for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer has a disclosable interest.

The statutory remedies are exhausitive for directors and senior officers (not officers) for self-dealings.
The statute spells out the extent of their obligation to disclose (but this does not mean the company’s articles cannot make it stricter than the Act).
Exceptions for accounting in insider trading cases.

###

### 153 Disclosure of conflict of office or property

**153**  (1) If a director or senior officer of a company holds any office or possesses any property, right or interest that could result, directly or indirectly, in the creation of a duty or interest that materially conflicts with that individual's duty or interest as a director or senior officer of the company, the director or senior officer must disclose, in accordance with this section, the nature and extent of the conflict.

(2) The disclosure required from a director or senior officer under subsection (1)

(a) must be made to the directors promptly

(i)  after that individual becomes a director or senior officer of the company, or

(ii)  if that individual is already a director or senior officer of the company, after that individual begins to hold the office or possess the property, right or interest for which disclosure is required, and

(b) must be evidenced in one of the ways referred to in section 148 (3).

Director has duty to disclose to THE BOARD, NOT THE SHs.
at common law, there was no positive duty to disclose, but under statute there is
Possible conflicts must be disclosed.
Must be careful what is meant by “property”
- Paterson says owning shares can be “property” but owning a mutual fund should not be an issue
- he stated there is no case law in the area
- my argument: I think the key to note is “creation of a duty or interest” that conflicts. This duty/interest would usually arise if the person has “control”. One can hardly argue that he has “control” over the mutual funds or if it is in some trust fund that is not under the “control” of the director.

##

## Division 4 — Liability of Directors

### 154 Directors' liability

Specific liabilities established for directors violating specific sections of the statute
common law/equitable rights are not diminished and those remedies are still available. (ie. 142 + CL)

**154**  (1) Subject to section 157, directors of a company who vote for or consent to a resolution that authorizes the company to do any of the following are jointly and severally liable to restore to the company any amount paid or distributed as a result and not otherwise recovered by the company:

“vote for OR consent to” = the person need not have voted for it, see subsections below
“jointly and severally liable” = all the directors voting for it are liable and under civil procedure can go after any/all of them
only DIRECTORS are bound by 154, but….there is some controversy that can be found here…

(a) to do an act contrary to section 33 (1) as a result of which the company has paid compensation to any person;

33(1) is exercising powers beyond those the business is capable of

(b) to pay a commission or allow a discount contrary to section 67;

(c) to pay a dividend contrary to section 70 (2);

(d) to purchase, redeem or otherwise acquire shares contrary to section 78 or 79;

(e) to make a payment or give an indemnity contrary to section 163.

163 is when indemnification is inappropriately given
might be a good deal since it is “jointly and severally liable” the “bad director” can spread the costs to the “consenting directors”

(2) Subject to subsection (4) of this section and section 157, directors of a company who vote for or consent to a resolution that authorizes the issue of a share in contravention of section 63 (2) (b) or 64 are jointly and severally liable to compensate the company, or any shareholder or beneficial owner of shares of the company, for any losses, damages and costs sustained or incurred as a result by the company, the shareholder or the beneficial owner, as the case may be.

(3) The liability imposed by subsections (1) and (2) of this section is in addition to and not in derogation of any liability imposed on a director by this Act or any other enactment or by any rule of law or equity.

There are still common law liabilities available (ie. breach of warranty of authority, etc issues under common law)

(4) A director is not liable under subsection (2) if the director did not know and could not reasonably have known that the value of the consideration for which the share was issued was less than the issue price set for the share under section 63.

(5) For the purposes of this section, a director of a company who is present at a meeting of the directors or of a committee of directors is deemed to have consented to a resolution referred to in subsection (1) or (2) of this section that is passed at the meeting unless that director's dissent

(a) is recorded in the minutes of the meeting,

(b) is put in writing by the director and is provided to the secretary of the meeting before the end of the meeting, or

(c) is, promptly after the end of the meeting, put in writing and delivered to the delivery address of, or mailed by registered mail to the mailing address of, the company's registered office.

Director who is present at the meeting is deemed to consent to resolution unless he dissent

(6) A director who votes in favour of a resolution referred to in subsection (1) or (2) is not entitled to dissent under subsection (5).

(7) Subject to subsection (8), a director who is not present at a meeting of the directors or of a committee of directors at which a resolution referred to in subsection (1) or (2) is passed is deemed to have consented to the resolution if,

(a) in the case of a resolution passed at a directors' meeting, the individual was a director at the time of the meeting, or

(b) in the case of a resolution passed at a meeting of a committee of directors, the individual was a member of that committee at the time of the meeting.

Director who is absent at the meeting is deemed to consent unless he delivers a written dissent under subsection 8. He must have become aware of the passing of a resolution.

(8) Subsection (7) does not apply to a director who, within 7 days after becoming aware of the passing of a resolution referred to in subsection (1) or (2), delivers to the delivery address of, or mails by registered mail to the mailing address of, the company's registered office, a written dissent.

(9) A legal proceeding to enforce a liability imposed by this section may not be commenced more than 2 years after the date of the applicable resolution.

What if the issue is found after 2 years? What if litigation of s33(1) took over 2 years? Probably need leave of the court?

### 157 Limitations on liability

Despite below saying the director is not liable under section 154, these defenses apply to s154 AND s142 issues (negligence and breach of fiduciary duties

**157**  (1) A director of a company is not liable under section 154 and has complied with his or her duties under section 142 (1) if the director relied, in good faith, on

Only “directors” can use this defense, but Paterson suggests it could also be used by officers under s142
must have good faith AND complied with s142(1) duties so it not compliant with 142(1) then cannot use.
the reliance defenses below will be weaker for lower level employees (if they try to invoke the defenses)

(a) financial statements of the company represented to the director by an officer of the company or in a written report of the auditor of the company to fairly reflect the financial position of the company,

(b) a written report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by that person,

“profession” means it has to be a professional who is held to standards by a regulatory body. It cannot simply be someone with education and experience (*Peoples)*

(c) a statement of fact represented to the director by an officer of the company to be correct, or

(d) any record, information or representation that the court considers provides reasonable grounds for the actions of the director, whether or not

(i)  the record was forged, fraudulently made or inaccurate, or

(ii)  the information or representation was fraudulently made or inaccurate.

(2) [Repealed 2003-70-35.]

(2) A director of a company is not liable under section 154 if the director did not know and could not reasonably have known that the act done by the director or authorized by the resolution voted for or consented to by the director was contrary to this Act.

Lack of knowledge defense.

##

## Division 5 — Indemnification of Directors and Officers and Payment of Expenses

### 159 Definitions

**159**  In this Division:

**"associated corporation"** means a corporation or entity referred to in paragraph (b) or (c) of the definition of "eligible party";

**"eligible party"**, in relation to a company, means an individual who

(a) is or was a director or officer of the company,

(b) is or was a director or officer of another corporation

(i)  at a time when the corporation is or was an affiliate of the company, or

(ii)  at the request of the company, or

(c) at the request of the company, is or was, or holds or held a position equivalent to that of, a director or officer of a partnership, trust, joint venture or other unincorporated entity,

and includes, except in the definition of "eligible proceeding" and except in sections 163 (1) (c) and (d) and 165, the heirs and personal or other legal representatives of that individual;

**"eligible penalty"** means a judgment, penalty or fine awarded or imposed in, or an amount paid in settlement of, an eligible proceeding;

**"eligible proceeding"** means a proceeding in which an eligible party or any of the heirs and personal or other legal representatives of the eligible party, by reason of the eligible party being or having been a director or officer of, or holding or having held a position equivalent to that of a director or officer of, the company or an associated corporation

(a) is or may be joined as a party, or

(b) is or may be liable for or in respect of a judgment, penalty or fine in, or expenses related to, the proceeding;

**"expenses"** includes costs, charges and expenses, including legal and other fees, but does not include judgments, penalties, fines or amounts paid in settlement of a proceeding;

**"proceeding"** includes any legal proceeding or investigative action, whether current, threatened, pending or completed.

### 160 Indemnification and payment permitted

**160**  Subject to section 163, a company may do one or both of the following:

(a) indemnify an eligible party against all eligible penalties to which the eligible party is or may be liable;

(b) after the final disposition of an eligible proceeding, pay the expenses actually and reasonably incurred by an eligible party in respect of that proceeding.

A company, at its discretion, can indemnify for expenses (ie. costs of legal proceeding) and/or judgments, subject to section 163 (which says breach of fiduciary duties cannot be indemnified)

###

### 161 Mandatory payment of expenses

**161**  Subject to section 163, a company must, after the final disposition of an eligible proceeding, pay the expenses actually and reasonably incurred by the eligible party in respect of that proceeding if the eligible party

(a) has not been reimbursed for those expenses, and

(b) is wholly successful, on the merits or otherwise, in the outcome of the proceeding or is substantially successful on the merits in the outcome of the proceeding.

A company MUST indemnify for expenses (ie. costs of legal proceeding) if the person wins the case (on the merits, but what about procedurally?), subject to section 163 (which says breach of fiduciary duties cannot be indemnified)

###

### 162 Authority to advance expenses

**162**  (1) Subject to section 163 and subsection (2) of this section, a company may pay, as they are incurred in advance of the final disposition of an eligible proceeding, the expenses actually and reasonably incurred by an eligible party in respect of that proceeding.

(2) A company must not make the payments referred to in subsection (1) unless the company first receives from the eligible party a written undertaking that, if it is ultimately determined that the payment of expenses is prohibited by section 163, the eligible party will repay the amounts advanced.

### 163 Indemnification prohibited

**163**  (1) A company must not indemnify an eligible party under section 160 (a) or pay the expenses of an eligible party under section 160 (b), 161 or 162 if any of the following circumstances apply:

(a) if the indemnity or payment is made under an earlier agreement to indemnify or pay expenses and, at the time that the agreement to indemnify or pay expenses was made, the company was prohibited from giving the indemnity or paying the expenses by its memorandum or articles;

(b) if the indemnity or payment is made otherwise than under an earlier agreement to indemnify or pay expenses and, at the time that the indemnity or payment is made, the company is prohibited from giving the indemnity or paying the expenses by its memorandum or articles;

(c) if, in relation to the subject matter of the eligible proceeding, the eligible party did not act honestly and in good faith with a view to the best interests of the company or the associated corporation, as the case may be;

Company can make indemnification agreements unless the articles provide otherwise (b)
Company must not indemnify for breach of fiduciary duties (but likely can for negligence)

(d) in the case of an eligible proceeding other than a civil proceeding, if the eligible party did not have reasonable grounds for believing that the eligible party's conduct in respect of which the proceeding was brought was lawful.

(2) If an eligible proceeding is brought against an eligible party by or on behalf of the company or by or on behalf of an associated corporation, the company must not do either of the following:

(a) indemnify the eligible party under section 160 (a) in respect of the proceeding;

(b) pay the expenses of the eligible party under section 160 (b), 161 or 162 in respect of the proceeding.

No indemnification if company is suing or suing derivatively

###

### 164 Court ordered indemnification

**164**  Despite any other provision of this Division and whether or not payment of expenses or indemnification has been sought, authorized or declined under this Division, on the application of a company or an eligible party, the court may do one or more of the following:

(a) order a company to indemnify an eligible party against any liability incurred by the eligible party in respect of an eligible proceeding;

(b) order a company to pay some or all of the expenses incurred by an eligible party in respect of an eligible proceeding;

(c) order the enforcement of, or any payment under, an agreement of indemnification entered into by a company;

(d) order a company to pay some or all of the expenses actually and reasonably incurred by any person in obtaining an order under this section;

(e) make any other order the court considers appropriate.

Court has power to order indemnification or no indemnification despite what the statute says (could even be possible to override an indemnification agreement?)

###

### 165 Insurance

**165**  A company may purchase and maintain insurance for the benefit of an eligible party or the heirs and personal or other legal representatives of the eligible party against any liability that may be incurred by reason of the eligible party being or having been a director or officer of, or holding or having held a position equivalent to that of a director or officer of, the company or an associated corporation.

## Division 6 — Meetings of Shareholders

### 166 Location of general meetings

**166**  A general meeting of a company,

(a) subject to paragraph (b), must be held in British Columbia, or

(b) may be held at a location outside British Columbia if

(i)  the location is provided for in the articles,

(ii)  the articles do not restrict the company from approving a location outside of British Columbia for the holding of the general meeting and the location for the meeting is

(A)  approved by the resolution required by the articles for that purpose, or

(B)  if no resolution is required for that purpose by the articles, approved by ordinary resolution, or

(iii)  the location for the meeting is approved in writing by the registrar before the meeting is held.

### 167 Requisitions for general meetings

**167**  (1) Shareholders referred to in subsection (2) may requisition a general meeting for the purpose of transacting any business that may be transacted at a general meeting.

(2) A requisition under this section may be made by shareholders who, at the date on which the requisition is received by the company, hold in the aggregate at least 1/20 of the issued shares of the company that carry the right to vote at general meetings.

(3) A requisition under this section

(a) must, in 1 000 words or less, state the business to be transacted at the meeting, including any special resolution or exceptional resolution to be submitted to the meeting,

(b) must be signed by, and include the names and mailing addresses of, all of the requisitioning shareholders,

(c) may be made in a single record or may consist of several records, in similar form and content, each of which is signed by one or more of the requisitioning shareholders, and

(d) must be delivered to the delivery address of, or mailed by registered mail to the mailing address of, the registered office of the company.

(4) If a requisition under this section consists of more than one record, the requisition is received by the company on the first date by which the company has received requisition records that comply with subsection (3) from shareholders who, in the aggregate, hold at least the number of shares necessary to qualify under subsection (2).

(5) On receiving a requisition that complies with subsections (2) and (3), the directors must, regardless of the memorandum or articles, call a general meeting to be held not more than 4 months after the date on which the requisition is received by the company to transact the business stated in the requisition and must, subject to subsection (7),

(a) send notice of the date, time and location of that meeting at least the prescribed number of days, but not more than 4 months, before the meeting

(i)  to each shareholder entitled to attend the meeting, and

(ii)  to each director, and

(b) send, in accordance with subsection (6), to the persons entitled to notice of the meeting, the text of the requisition referred to in subsection (3) (a).

(6) The text referred to in subsection (5) (b) must be sent

(a) in, or within the time set for the sending of, the notice of the requisitioned meeting, or

(b) in the company's information circular or equivalent, if any, sent in respect of the requisitioned meeting.

(7) The directors need not comply with subsection (5) if

(a) the directors have called a general meeting to be held after the date on which the requisition is received by the company and have sent notice of that meeting in accordance with section 169,

(b) substantially the same business was submitted to shareholders to be transacted at a general meeting that was held not more than the prescribed period before the receipt of the requisition, and any resolution to transact that business at that earlier meeting did not receive the prescribed amount of support,

(c) it clearly appears that the business stated in the requisition does not relate in a significant way to the business or affairs of the company,

(d) it clearly appears that the primary purpose for the requisition is

(i)  securing publicity, or

(ii)  enforcing a personal claim or redressing a personal grievance against the company or any of its directors, officers or security holders,

(e) the business stated in the requisition has already been substantially implemented,

(f) the business stated in the requisition, if implemented, would cause the company to commit an offence, or

(g) the requisition deals with matters beyond the company's power to implement.

(8) If the directors do not, within 21 days after the date on which the requisition is received by the company, send notice of a general meeting in accordance with subsection (5) of this section, the requisitioning shareholders, or any one or more of them holding, in the aggregate, more than 1/40 of the issued shares of the company that carry the right to vote at general meetings, may send notice of a general meeting to be held to transact the business stated in the requisition.

(9) A general meeting called, under subsection (8), by the requisitioning shareholders must

(a) be called in accordance with subsection (5),

(b) be held within 4 months after the date on which the requisition is received by the company, and

(c) as nearly as possible, be conducted in the same manner as a general meeting called by the directors.

(10) Unless the shareholders resolve otherwise by an ordinary resolution at the general meeting called, under subsection (8), by the requisitioning shareholders, the company must reimburse the requisitioning shareholders for the expenses actually and reasonably incurred by them in requisitioning, calling and holding that meeting.

### 168 No liability

**168**  No company or person acting on behalf of a company incurs any liability merely because the company or person complies with section 167 (5) (b) or (6).

### 169 Notice of general meetings

**169**  (1) Subject to sections 167 and 170, a company must send notice of the date, time and location of a general meeting of the company at least the prescribed number of days but not more than 2 months before the meeting,

(a) to each shareholder entitled to attend the meeting, and

(b) to each director.

(2) The accidental omission to send notice of any general meeting to, or the non-receipt of any notice by, any of the persons entitled to notice does not invalidate any proceedings at that meeting.

### 170 Waiver of notice

**170**  (1) Despite any other provision of this Act, a shareholder and any other person entitled to notice of a meeting of shareholders may waive that entitlement or may agree to reduce the period of that notice.

(2) Despite section 7 (4), the right of a person to waive the entitlement to notice or to reduce the period of notice under subsection (1) of this section need not be exercised in writing.

(3) Without limiting subsection (2), attendance of a person at a meeting of shareholders is a waiver of entitlement to notice of the meeting, unless that person attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

### 171 Setting record dates

**171**  (1) The directors may set a date as the record date under this section for any purpose, including for the purpose of determining shareholders

(a) entitled to receive payment of a dividend,

(b) entitled to participate in a liquidation distribution,

(c) entitled to notice of a meeting of shareholders, or

(d) entitled to vote at a meeting of shareholders.

(2) A record date set under subsection (1) must not

(a) precede by more than 2 months the date on which the action referred to in subsection (1) (a) or (b) is to be taken,

(b) precede by more than 2 months, or, in the case of a meeting referred to in section 167, 4 months, or by fewer than the prescribed number of days the date on which the meeting referred to in subsection (1) (c) of this section is to be held, or

(c) precede by more than 2 months, or, in the case of a meeting referred to in section 167, 4 months, the date on which the meeting referred to in subsection (1) (d) of this section is to be held.

(3) If no record date is set under this section,

(a) the record date for determining the shareholders who are entitled to notice of, or to vote at, a meeting of shareholders is

(i)  5 p.m. on the day immediately preceding the first date on which notice is sent, or

(ii)  if no notice is sent, the beginning of the meeting, and

(b) the record date for determining shareholders for any other purpose is 5 p.m. on the date on which the directors pass the resolution relating to the matter for which the record date is required.

### 172 Quorum for shareholders' meetings

**172**  (1) The quorum for the transaction of business at a meeting of shareholders of a company is

(a) the quorum established by the memorandum or articles,

(b) if no quorum is established by the memorandum or articles, 2 shareholders entitled to vote at the meeting whether present in person or by proxy, or

(c) if the number of shareholders entitled to vote at the meeting is less than the quorum applicable to the company under paragraph (a) or (b), all of the shareholders entitled to vote at the meeting whether present in person or by proxy.

(2) Unless the memorandum or articles provide otherwise, if a quorum is not present at the opening of a meeting of shareholders, the shareholders entitled to vote at the meeting who are present in person or by proxy at the meeting may adjourn the meeting to a set time and place but may not transact any other business.

(3) If the company has only one shareholder entitled to vote at a meeting of shareholders, one person who is, or who represents by proxy, that shareholder may constitute that meeting.

### 173 Voting

**173**  (1) Subject to sections 69 (2), 82 (6) and 177 and subsection (9) (a) of this section and unless the memorandum or articles provide otherwise, a shareholder has one vote in respect of each share held by that shareholder and is entitled to vote in person or by proxy.

(2) Unless the memorandum or articles provide otherwise, voting at a meeting of shareholders must,

(a) if one or more shareholders vote at the meeting in a manner contemplated by section 174 (1), be by poll or be conducted in any other manner that adequately discloses the intentions of the shareholders,

(b) if a poll is demanded by a shareholder or proxy holder entitled to vote at the meeting or is directed by the chair, be by poll, or

(c) in any other case, be by show of hands.

(3) At any meeting of shareholders at which a resolution is submitted, a declaration of the chair that the resolution is carried by the necessary majority or is defeated is, unless a poll is required or demanded under subsection (2) or (4) of this section or is directed by the chair, conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting of shareholders at which a resolution is submitted, a shareholder or proxy holder entitled to vote at the meeting may, before or promptly after the declaration of the results of a vote taken by a show of hands, demand a poll.

(5) A company must, for at least 3 months after a meeting of shareholders, keep at its records office each ballot cast on a poll and each proxy voted at the meeting.

(6) Any shareholder or proxy holder who was entitled to vote at a meeting referred to in subsection (5) may, without charge, inspect the ballots and proxies kept by the company under that subsection in respect of that meeting.

(7) Sections 46 (7) and (8), 48 (1) and (3) and 50 apply to the records referred to in subsection (6) of this section.

(8) Unless otherwise provided under this Act or in the memorandum or articles, any action that must or may be taken or authorized by the shareholders under this Act may be taken or authorized by an ordinary resolution.

(9) If a shareholder whose shares do not otherwise carry the right to vote is, by this Act, given the right to vote on a matter,

(a) the shareholder has, on that matter, the greatest of

(i)  one vote in respect of each of those shares,

(ii)  the same number of votes per share as are attached, under the memorandum or articles, to shares of the class or series of shares to which is attached the least number of votes per share that may be cast in relation to that matter, and

(iii)  the number of votes per share as are, under the memorandum or articles, attached to those shares in relation to that matter, and

(b) the provisions of the memorandum or articles or this Division, as the case may be, that apply in relation to the exercise of voting rights held by shareholders whose shares carry the right to vote at general meetings also apply in relation to the exercise by that shareholder of the voting rights given by this Act on that matter.

### 174 Participation at meetings of shareholders

**174**  (1) Unless the memorandum or articles provide otherwise, a shareholder or proxy holder who is entitled to participate in, including vote at, a meeting of shareholders may do so by telephone or other communications medium if all shareholders and proxy holders participating in the meeting, whether by telephone, by other communications medium or in person, are able to communicate with each other.

(2) Nothing in subsection (1) obligates a company to take any action or provide any facility to permit or facilitate the use of any communications medium at a meeting of shareholders.

(3) If one or more shareholders or proxy holders participate in a meeting of shareholders in a manner contemplated by subsection (1),

(a) each such shareholder or proxy holder is deemed, for the purposes of this Act and of the memorandum and articles of the company, to be present at the meeting, and

(b) the meeting is deemed to be held at the location specified in the notice of the meeting.

### 175 Pooling agreements

**175**  Two or more shareholders may, in a written agreement, agree that when exercising voting rights in relation to the shares held by them, they will vote those shares in accordance with the terms of the agreement.

A redundant provision that allows SHs to agree in advance how to vote (this facilitates Voting Trusts). These agreements require privity to modify.

Agreements can only be made for voting rights of SHAREHOLDERS, cannot FETTER voting discretion of directors (*Ringuet*). Although in the USA (*Clark v Dodge*) it is possible if there is unanimity and no harm threatened.

###

### 176 Date of resolution

**176**  A resolution passed at a meeting of shareholders is, for all purposes, deemed to have been passed on the date and time on which it is in fact passed despite the fact that the meeting at which the resolution is passed is a continuation of an adjourned meeting.

### 177 Subsidiary not to vote

**177**  If a subsidiary is a shareholder of its holding corporation and the holding corporation is a British Columbia corporation, the subsidiary is not entitled to vote at a meeting of shareholders of the holding corporation.

### 178 Election of chair

**178**  Unless the memorandum or articles of a company provide otherwise, the shareholders who are present in person or by proxy at a meeting of shareholders and who are entitled to vote at the meeting may elect as the chair of the meeting any shareholder or proxy holder who is entitled to vote at the meeting.

### 179 Minutes

**179**  (1) A company must ensure that minutes are kept of all proceedings at meetings of shareholders.

(2) The minutes of a meeting referred to in subsection (1), if purported to be signed by the chair of the meeting or by the chair of the next succeeding meeting, are evidence of the proceedings.

(3) Until the contrary is proved, if minutes of a meeting have been signed in accordance with this section,

(a) the meeting is deemed to have been duly held and convened,

(b) all proceedings at the meeting are deemed to have been duly taken, and

(c) all elections and appointments of directors, officers, auditors or liquidators made at the meeting are deemed to be valid.

### 180 Consent resolutions of shareholders

**180**  A consent resolution of shareholders is deemed

(a) to be a proceeding at a meeting of those shareholders, and

(b) to be as valid and effective as if it had been passed at a meeting of shareholders that satisfies all the requirements of this Act and the regulations, and all the requirements of the memorandum and articles of the company, relating to meetings of shareholders.

### 181 Rules applicable to general meetings apply to other shareholders' meetings

**181**  To the extent that this Act or the regulations or the memorandum or articles of a company do not make provision for any particular meeting of shareholders, the provisions of this Act, the regulations, the memorandum and the articles relating to the call, holding and conduct of general meetings apply, with the necessary changes and so far as they are applicable, to that meeting of shareholders.

### 182 Annual general meetings

**182**  (1) Subject to subsections (2) to (5), a company must hold an annual general meeting,

(a) for the first time, not more than 18 months after the date on which it was recognized, and

(b) after its first annual reference date, at least once in each calendar year and not more than 15 months after the annual reference date for the preceding calendar year.

(2) Subject to subsection (3), all of the shareholders entitled to vote at an annual general meeting of a company may,

(a) by a unanimous resolution passed on or before the date by which that annual general meeting is required to be held under this section, defer the holding of that annual general meeting to a date that is later than the date by which the meeting is required to be held under subsection (1),

(b) by a unanimous resolution, consent to all of the business required to be transacted at that annual general meeting, or

(c) by a unanimous resolution, waive the holding of

(i)  that annual general meeting,

(ii)  the previous annual general meeting, or

(iii)  any earlier annual general meeting that the company had been obliged to hold.

(3) The shareholders must, in any unanimous resolution passed under subsection (2) (a), (b) or (c) (i) or (ii), select, as the company's annual reference date, a date that would, under subsection (1), be appropriate for the holding of the applicable annual general meeting.

(4) If a unanimous resolution is not passed under subsection (2) with respect to an annual general meeting of a company, on the application of the company, the registrar may, if satisfied that it is appropriate to do so and on the terms and conditions the registrar considers appropriate, allow the company to hold that annual general meeting on a date that is later than the date by which the meeting is required to be held under subsection (1).

(5) If a unanimous resolution is passed in relation to an annual general meeting under subsection (2) (b) or (c), the company need not hold that annual general meeting.

### 183 First annual reference date for pre-existing companies

**183**  For the purposes of section 182 (1) (b), a pre-existing company that has neither held an annual general meeting under this Act nor passed a resolution under section 182 (2) has, as its first annual reference date,

(a) if the company was recognized not more than 18 months before the coming into force of this Act, the earlier of

(i)  the date of the company's first annual general meeting, if any, that was held, or was deemed to have been held, under the Company Act, 1996, and

(ii)  the date that is 18 months after the recognition of the company, or

(b) if the company was recognized more than 18 months before the coming into force of this Act, the later of

(i)  the date that is 13 months after the date of the company's most recent annual general meeting, if any, that was held, or was deemed to have been held, under the Company Act, 1996, and

(ii)  the date that is 6 months before the day on which this Act comes into force.

### 184 Pre-existing reporting company meetings

**184**  (1) In this section, "registrant" means a person registered or required to be registered in any jurisdiction to trade in securities within the meaning of the Securities Act, but does not include a trustee with respect to shares held under a trust instrument that regulates the manner in which those shares are to be voted.

(2) A meeting of shareholders of a pre-existing reporting company, and any action taken at the meeting, is not invalid merely because a registrant fails to comply with one or more of the provisions applicable to registrants, in their capacity as registrants, of the Statutory Reporting Company Provisions or the company's articles.

(3) If a pre-existing reporting company is bound by any provision in the Statutory Reporting Company Provisions or in the articles of the company that imposes any requirements on the manner, form or contents of a proxy or a proxy solicitation, or that otherwise relates to proxies or proxy solicitations, any person soliciting or granting a proxy to vote shares of that company is also bound by those provisions.

### 185 Information for shareholders

**185**  (1) The directors of a company that holds an annual general meeting must place the following before that meeting:

(a) in the case of a reporting issuer, the annual financial statements that the company is required to file with the Securities Commission under the Securities Act in relation to the most recently completed financial year;

(b) in the case of a reporting issuer equivalent or of a company within a prescribed class of companies, the annual financial statements that the company is required to produce or file in relation to the most recently completed financial year under the legislation that

(i)  applies to the company, and

(ii)  has provisions that are comparable in scope and intent to the financial disclosure provisions of the Securities Act and the regulations made under that Act;

(c) in any other case, the financial statements, if any, that the directors are, under section 198 (2) of this Act, required to produce and publish on or before the annual reference date that relates to that annual general meeting;

(d) any auditor's report made under section 212 (1) (a) on those financial statements.

(2) The directors of a company who are required under subsection (1) of this section to place financial statements before an annual general meeting must, on the request of any shareholder or proxy holder present at that meeting, provide a copy of those financial statements and of any auditor's report made under section 212 (1) (a) on those financial statements to that shareholder or proxy holder.

(3) If, within 6 months after an annual reference date, a shareholder of the company requests a copy of the company's financial statements referred to in subsection (1) (a), (b) or (c) of this section, the directors must promptly send to that shareholder a copy of those financial statements and of any auditor's report made under section 212 (1) (a) on those financial statements.

### 186 Powers of court

**186**  (1) The court may, on its own motion or on the application of the company, the application of a director or the application of a shareholder entitled to vote at the meeting,

(a) order that a meeting of shareholders be called, held and conducted in the manner the court considers appropriate, and

(b) give directions it considers necessary as to the call, holding and conduct of the meeting.

(2) The court may make an order under subsection (1)

(a) if it is impracticable for any reason for the company to call or conduct a meeting of shareholders in the manner required under this Act, the memorandum or the articles,

(b) if the company fails to hold a meeting of shareholders in accordance with this Act or the regulations or its memorandum or articles, or

(c) for any other reason the court considers appropriate.

(3) Without limiting subsection (1), the court may order that the quorum or notice required by the memorandum or articles or this Act or the regulations be varied or dispensed with in respect of a meeting.

## Division 7 — Shareholders' Proposals

### 187 Definitions and application

**187**  (1) In this Division:

**"proposal"** means a written notice setting out a matter that the submitter wishes to have considered at the next annual general meeting of the company;

**"qualified shareholder"** means, in relation to a proposal, a person who

(a) is a registered owner or beneficial owner of one or more shares of the company that carry the right to vote at general meetings, and

(b) has been a registered owner or beneficial owner of one or more such shares for an uninterrupted period of at least 2 years before the date of the signing of the proposal,

but does not include a person referred to in subsection (2);

**"submitter"** means the qualified shareholder who submits a proposal to a company;

**"supporter"** means a person who signs a proposal under section 188 (1) (b).

(2) A person is not a qualified shareholder if, within 2 years before the date of the signing of the proposal, the person failed to present, in person or by proxy, at an annual general meeting, an earlier proposal

(a) of which the person was the submitter, and

(b) in response to which the company had complied with section 189 (1) to (3).

(3) This Division does not apply to a company unless the company is a public company.

### 188 Requirements for valid proposals

**188**  (1) A proposal is valid if

(a) the proposal is signed by the submitter,

(b) the proposal is signed by qualified shareholders who, together with the submitter, are, at the time of signing, registered owners or beneficial owners of shares that, in the aggregate,

(i)  constitute at least 1/100 of the issued shares of the company that carry the right to vote at general meetings, or

(ii)  have a fair market value in excess of the prescribed amount,

(c) the proposal, and the declarations referred to in paragraph (d), are received at the registered office of the company at least 3 months before the anniversary of the previous year's annual reference date, and

(d) the proposal is accompanied by a declaration from the submitter and each supporter, signed by the submitter or supporter, as the case may be, or, in the case of a submitter or supporter that is a corporation, by a director or senior officer of the signatory,

(i)  providing the name of and a mailing address for that signatory,

(ii)  declaring the number and class or series of shares carrying the right to vote at general meetings that are owned by that signatory as a registered owner or beneficial owner, and

(iii)  unless the name of the registered owner has already been provided under subparagraph (i), providing the name of the registered owner of those shares.

(2) A proposal may be accompanied by one written statement in support of the proposal.

(3) A proposal, or, if a statement is provided under subsection (2), the statement and proposal together, must not exceed 1 000 words in length and, for the purposes of this subsection, the proposal does not include the signatures referred to in subsection (1) (a) or (b) and the declarations referred to in subsection (1) (d).

### 189 Rights and obligations arising from proposal

**189**  (1) Subject to subsections (4) (b) and (5), a company that receives a proposal must send, in accordance with subsection (2), to all of the persons who are entitled to notice of the annual general meeting in relation to which the proposal is made,

(a) the text of the proposal,

(b) the names and mailing addresses of the submitter and the supporters, and

(c) the text of the statement, if any, accompanying the proposal under section 188 (2).

(2) The information referred to in subsection (1) of this section must be sent

(a) in, or within the time set for the sending of, the notice of the applicable annual general meeting under section 169, or

(b) in the company's information circular or equivalent, if any, sent in respect of the applicable annual general meeting.

(3) Subject to subsections (4) (b) and (5) of this section, the company must allow a submitter to present the proposal, in person or by proxy, at the annual general meeting in relation to which the proposal was made if the submitter is a qualified shareholder at the time of that meeting.

(4) If a company receives more than one proposal in relation to an annual general meeting, the company, if the proposals relate to substantially the same matter,

(a) must comply with subsections (1) to (3) in relation to the first of those proposals to be received at its registered office, and

(b) need not comply with subsections (1) to (3) in relation to any other of those proposals.

(5) Subject to section 191 (3), the company need not process a proposal in accordance with subsections (1) to (4) of this section if any of the following circumstances applies:

(a) the directors have called an annual general meeting to be held after the date on which the proposal is received by the company and have sent notice of that meeting in accordance with section 169;

(b) the proposal is not valid within the meaning of section 188 (1) or exceeds the maximum length established by section 188 (3);

(c) substantially the same proposal was submitted to shareholders in a notice of meeting, or an information circular or equivalent, relating to a general meeting that was held not more than the prescribed period before the receipt of the proposal, and did not receive the prescribed amount of support at the meeting;

(d) it clearly appears that the proposal does not relate in a significant way to the business or affairs of the company;

(e) it clearly appears that the primary purpose for the proposal is

(i)  securing publicity, or

(ii)  enforcing a personal claim or redressing a personal grievance against the company or any of its directors, officers or security holders;

(f) the proposal has already been substantially implemented;

(g) the proposal, if implemented, would cause the company to commit an offence;

(h) the proposal deals with matters beyond the company's power to implement.

### 190 No liability

**190**  No company or person acting on behalf of a company incurs any liability merely because the company or person complies with section 189 (1), (2), (3) or (4).

### 191 Refusal to process proposal

**191**  (1) A company that does not intend to process a proposal in accordance with section 189 (1) to (4) on the basis that subsection (5) of that section applies to the proposal or on the basis that the proposal is one referred to in subsection (4) (b) of that section must, within 21 days after the proposal is received by its registered office, send to the submitter

(a) written notice of the company's decision in relation to the proposal, and

(b) a written explanation as to the company's reasons for its decision, including a specific reference to the provision of section 189 that the company is relying on in refusing to process the proposal and the reasons why the company believes that that provision applies.

(2) The submitter to whom a notice is sent under subsection (1) (a) of this section may apply to the court for a review of the company's decision.

(3) On an application under subsection (2), the court may restrain the holding of the annual general meeting in relation to which the proposal is made and may, if it determines that the company did not have proper grounds to refuse to process the proposal in accordance with section 189 (1) to (4), make any order it considers appropriate, including one or more of the following:

(a) an order that the company comply with section 189 (1) to (4) in the manner and within the time ordered by the court;

(b) if the information referred to in section 189 (1) cannot be provided to the shareholders within a reasonable period of time before the annual general meeting, an order that the company

(i)  hold, at its sole expense, a general meeting for the purpose of considering the proposal, and

(ii)  comply with section 189 (1) to (4) in relation to that meeting on the terms and conditions imposed by the court;

(c) an order that the company reimburse the submitter for all reasonable legal expenses, including all reasonable disbursements, incurred in the application.

(4) The company or any person claiming to be aggrieved by a proposal may apply to the court for an order permitting or requiring the company to refrain from processing the proposal in accordance with section 189 (1) to (4) and the court, if it is satisfied that section 189 (4) (b) or (5) applies, may make such order as it considers appropriate.

# Part 7 — Audits

## Division 5 — Audit Committee

**Audit Committee**: A formal requirement for **public** COs in BC, which create a procedural control on Director’s powers by discussing audited financial statements.

* The symbolic value of these provisions may be more important than their real value.
	+ Public companies would create multiple committees themselves anyways
	+ This statutory requirement obligates the company to create a specific audit committee
* Puts this committee in a “supervisory” role
* The provisions in the BCBCA do not say much about how the committee is to carry out this review.
	+ Compliance can be in letter but not in spirit
* SHs have limited say as to who will sit on the committee, and it can be an issue where the relationships between the committee and the board becomes too close.
* Board is required to produce publicly available financial statements, which **must be audited by accountants** who are in statutory relationship with the CO (s202-220)
* If auditors do not carry out their task with diligence, they may be liable to the CO in negligence. They may also be sued for breach of K in cases of major oversight.
* Only recently have Canadian courts held that auditors owe a duty of care to SHs of the CO.

###

### 223 Application

**223**  This Division does not apply to a company unless the company is a public company.

### 224 Appointment and procedures of audit committee

**224**  (1) The directors of a company must, at their first meeting held on or after each annual reference date, elect from among their number a committee, to be known as the audit committee, to hold office until the next annual reference date.

(2) An audit committee must be composed of at least 3 directors, and a majority of the members of the committee must not be officers or employees of the company or of an affiliate of the company.

(3) The quorum for a meeting of the audit committee is a majority of the members of the committee who are not officers or employees of the company or of an affiliate of the company.

(4) The members of the audit committee must elect a chair from among their number and, subject to subsection (3), may determine their own procedures.

(5) The auditor of a company must be given reasonable notice of, and has the right to appear before and to be heard at, each meeting of the company's audit committee, and must appear before the audit committee when requested to do so by the committee and after being given reasonable notice to do so.

(6) On the request of the auditor, the chair of the audit committee must convene a meeting of the audit committee to consider any matter that the auditor believes should be brought to the attention of the directors or shareholders.

### 225 Duties of audit committee

**225**  The audit committee must, in addition to or as part of any responsibilities assigned to it under this Act, review and report to the directors on the following before they are published:

(a) the financial statements of the company, referred to in section 185 (1) (a), (b) or (c), other than any financial statements of the company referred to in section 198 (2) (b);

(b) the auditor's report, if any, prepared in relation to those financial statements.

### 226 Provision of financial statements to audit committee

**226**  The directors must provide to the audit committee the financial statements and auditor's report referred to in section 225 in sufficient time to allow the committee to review and report on those financial statements and auditor's report as required under that section.

# Part 8 — Proceedings

## Division 1 — Court Proceedings

### 227 Complaints by shareholder

Also known as the **Oppression Remedy**
A lower standard than winding up and this remedy has its origins in winding up
overlaps with breaches of fiduciary duties. Breach of fiduciary duties is prima facie oppression.
Easier to bring (standing as of right) and broader relief than derivative claims. Can be brought together

**227**  (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

Standing (must make application in Chambers)
Courts will consider other avenues before granting leave for party to sue. (80% SHs, 10% Creditors, 10% Trustees sue)
**Creditors** are appropriate persons to get standing but court will consider their level of sophistication (*First Edmonton*)
**Employee-Shareholder** can get standing if loss of employment intrinsically linked to SH status (*Naneff*)
**Widow** of deceased SH can get standing
**Trustee in bankruptcy** can get standing
**Majority shareholder** an be oppressed by acts of directors (so this section not limited to protecting the minority only)

(2) A shareholder may apply to the court for an order under this section on the ground

(a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

(b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

See beginning of CAN for case law/interpretation of this section

(3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

(a) directing or prohibiting any act,

(b) regulating the conduct of the company's affairs,

(c) appointing a receiver or receiver manager,

(d) directing an issue or conversion or exchange of shares,

(e) appointing directors in place of or in addition to all or any of the directors then in office,

(f) removing any director,

(g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,

Not a reasonable remedy for those who do not have a reasonable expectation to be a director (*Jackman*)

(h) directing a shareholder to purchase some or all of the shares of any other shareholder,

(i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,

(j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,

(k) varying or setting aside a resolution,

(l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,

(m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,

(n) directing correction of the registers or other records of the company,

(o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,

(p) directing that an investigation be made under Division 3 of this Part,

(q) requiring the trial of any issue, or

(r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

(4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

Laches defense but not case law showing this to be successful.

(5) If an order is made under subsection (3) (g), (i) or (m), the company must pay to a person the full amount payable under that order unless there are reasonable grounds for believing that

(a) the company is insolvent, or

(b) the payment would render the company insolvent.

(6) If reasonable grounds exist for believing that subsection (5) (a) or (b) applies,

(a) the company is prohibited from paying the person the full amount of money to which the person is entitled,

(b) the company must pay to the person as much of the amount as is possible without causing a circumstance set out in subsection (5) to occur, and

(c) the company must pay the balance of the amount as soon as the company is able to do so without causing a circumstance set out in subsection (5) to occur.

If company is insolvent it must not pay full amount, but as much as it can

(7) If an order is made under subsection (3) (o), Part 10 applies.

### 228 Compliance or restraining orders

**228**  (1) In this section, **"complainant"** means, in relation to a company referred to in subsection (2), a shareholder of the company or any other person whom the court considers to be an appropriate person to make an application under this section.

Shareholders have standing to sue under s228 as of right because of s19, other parties need to get leave of the court in Chambers. Director must sue as a SH (if they are one)
**Appropriate person can be creditors** (easier for unsecured creditors).

**Historically**, breach of Articles is brought derivatively as a breach of fiduciary duties. No longer the case now.

S228 cannot be used to go around derivative claims under s142. S228 cannot be used if making a finding of non-compliance requires determination of complex issues of fact/law (ie. breach of fiduciary duties). S228 is only for technical breaches! (*Goldhar*)

(2) If a company or any director, officer, shareholder, employee, agent, auditor, trustee, receiver, receiver manager or liquidator of a company contravenes or is about to contravene a provision of this Act or the regulations or of the memorandum, notice of articles or articles of the company, a complainant may, in addition to any other rights that that person might have, apply to the court for an order that the person who has contravened or is about to contravene the provision comply with or refrain from contravening the provision.

Can also be used to enforce unanimous shareholder agreements (*Duha Printers*)

(3) On an application under this section, the court may make any order it considers appropriate, including an order

(a) directing a person referred to in subsection (2) to comply with or to refrain from contravening a provision referred to in that subsection,

(b) enjoining the company from selling or otherwise disposing of property, rights or interests, or from receiving property, rights or interests, or

(c) requiring, in respect of a contract made contrary to section 33 (1), that compensation be paid to the company or to any other party to the contract.

### 229 Remedying corporate mistakes

**229**  (1) In this section, **"corporate mistake"** means an omission, defect, error or irregularity that has occurred in the conduct of the business or affairs of a company as a result of which

(a) a breach of a provision of this Act, a former Companies Act or the regulations under any of them has occurred,

(b) there has been default in compliance with the memorandum, notice of articles or articles of the company,

(c) proceedings at or in connection with any of the following have been rendered ineffective:

(i)  a meeting of shareholders;

(ii)  a meeting of the directors or of a committee of directors;

(iii)  any assembly purporting to be a meeting referred to in subparagraph (i) or (ii), or

(d) a consent resolution or records purporting to be a consent resolution have been rendered ineffective.

(2) Despite any other provision of this Act, the court, either on its own motion or on the application of any interested person, may make an order to correct or cause to be corrected, to negative or to modify or cause to be modified the consequences in law of a corporate mistake or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the corporate mistake, and may give ancillary or consequential directions it considers necessary.

(3) The court must, before making an order under this section, consider the effect that the order might have on the company and on its directors, officers, creditors and shareholders and on the beneficial owners of its shares.

(4) Unless the court orders otherwise, an order made under subsection (2) does not prejudice the rights of any third party who acquired those rights

(a) for valuable consideration, and

(b) without notice of the corporate mistake that is the subject of the order.

### 232 Derivative actions

**232**  (1) In this section and section 233,

**"complainant"** means, in relation to a company, a shareholder or director of the company;

**"shareholder"** has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company

(a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

(3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.

(4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

### 233 Powers of court in relation to derivative actions

**233**  (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

(a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,

(b) notice of the application for leave has been given to the company and to any other person the court may order,

(c) the complainant is acting in good faith, and

(d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

(2) Nothing in this section prevents the court from making an order that the complainant give security for costs.

(3) While a legal proceeding prosecuted or defended under this section is pending, the court may,

(a) on the application of the complainant, authorize any person to control the conduct of the legal proceeding or give any other directions for the conduct of the legal proceeding, and

(b) on the application of the person controlling the conduct of the legal proceeding, order, on the terms and conditions that the court considers appropriate, that the company pay to the person controlling the conduct of the legal proceeding interim costs in the amount and for the matters, including legal fees and disbursements, that the court considers appropriate.

(4) On the final disposition of a legal proceeding prosecuted or defended under this section, the court may make any order it considers appropriate, including an order that

(a) a person to whom costs are paid under subsection (3) (b) repay to the company some or all of those costs,

(b) the company or any other party to the legal proceeding indemnify

(i)  the complainant for the costs incurred by the complainant in prosecuting or defending the legal proceeding, or

(ii)  the person controlling the conduct of the legal proceeding for the costs incurred by the person in controlling the conduct of the legal proceeding, or

(c) the complainant or the person controlling the conduct of the legal proceeding indemnify one or more of the company, a director of the company and an officer of the company for expenses, including legal costs, that they incurred as a result of the legal proceeding.

(5) No legal proceeding prosecuted or defended under this section may be discontinued, settled or dismissed without the approval of the court.

(6) No application made or legal proceeding prosecuted or defended under section 232 or this section may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of the company, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 232 or this section.

*NorthWest* – SHs that are also directors can participate in ratification
*Porcupine Mines* – SH ratification requires that they know the full/extent nature of the issue (judge has discretion to take into account by virtue of the statute)
**definitive codification of ratification in relation to derivative suits**
Common Law View (which is arguably superceded by statute and ratification is in the hands/discretion of judge what to think of it)
- negligence is ratifiable
- appropriation of property not ratifiable
- fraud on minority cannot be ratified

###

### 234 Relief in legal proceedings

**234**  If, in a legal proceeding against a director, officer, receiver, receiver manager or liquidator of a company, the court finds that that person is or may be liable in respect of negligence, default, breach of duty or breach of trust, the court must take into consideration all of the circumstances of the case, including those circumstances connected with the person's election or appointment, and may relieve the person, either wholly or partly, from liability, on the terms the court considers necessary, if it appears to the court that, despite the finding of liability, the person has acted honestly and reasonably and ought fairly to be excused.

Also known as the **desperation defense**
Test: “acted honestly and reasonably”? But then…shouldn’t this already be covered under breach of fiduciary duty?
**most useful to outside directors, based on fairness (courts view this defense very narrowly)
Simon’s View**: this is not a substantive defense but rather a direction to the court that they can accept evidence in relation to the election/appointment (which is usually not an issue that is relevant to the case) – evidentiary issue being addressed

##

## Division 2 — Dissent Proceedings

###

Also known as the Appraisal Remedy

### 237 Definitions and application

**237**  (1) In this Division:

**"dissenter"** means a shareholder who, being entitled to do so, sends written notice of dissent when and as required by section 242;

**"notice shares"** means, in relation to a notice of dissent, the shares in respect of which dissent is being exercised under the notice of dissent;

**"payout value"** means,

(a) in the case of a dissent in respect of a resolution, the fair value that the notice shares had immediately before the passing of the resolution,

(b) in the case of a dissent in respect of an arrangement approved by a court order made under section 291 (2) (c) that permits dissent, the fair value that the notice shares had immediately before the passing of the resolution adopting the arrangement, or

(c) in the case of a dissent in respect of a matter approved or authorized by any other court order that permits dissent, the fair value that the notice shares had at the time specified by the court order,

excluding any appreciation or depreciation in anticipation of the corporate action approved or authorized by the resolution or court order unless exclusion would be inequitable.

(2) This Division applies to any right of dissent exercisable by a shareholder except to the extent that

(a) the court orders otherwise, or

(b) in the case of a right of dissent authorized by a resolution referred to in section 238 (1) (g), the court orders otherwise or the resolution provides otherwise.

### 238 Right to dissent

**238**  (1) A shareholder of a company, whether or not the shareholder's shares carry the right to vote, is entitled to dissent as follows:

(a) under section 260, in respect of a resolution to alter the articles to alter restrictions on the powers of the company or on the business it is permitted to carry on;

(b) under section 272, in respect of a resolution to adopt an amalgamation agreement;

(c) under section 287, in respect of a resolution to approve an amalgamation under Division 4 of Part 9;

(d) in respect of a resolution to approve an arrangement, the terms of which arrangement permit dissent;

(e) under section 301 (5), in respect of a resolution to authorize or ratify the sale, lease or other disposition of all or substantially all of the company's undertaking;

(f) under section 309, in respect of a resolution to authorize the continuation of the company into a jurisdiction other than British Columbia;

(g) in respect of any other resolution, if dissent is authorized by the resolution;

(h) in respect of any court order that permits dissent.

(2) A shareholder wishing to dissent must

(a) prepare a separate notice of dissent under section 242 for

(i)  the shareholder, if the shareholder is dissenting on the shareholder's own behalf, and

(ii)  each other person who beneficially owns shares registered in the shareholder's name and on whose behalf the shareholder is dissenting,

(b) identify in each notice of dissent, in accordance with section 242 (4), the person on whose behalf dissent is being exercised in that notice of dissent, and

(c) dissent with respect to all of the shares, registered in the shareholder's name, of which the person identified under paragraph (b) of this subsection is the beneficial owner.

(3) Without limiting subsection (2), a person who wishes to have dissent exercised with respect to shares of which the person is the beneficial owner must

(a) dissent with respect to all of the shares, if any, of which the person is both the registered owner and the beneficial owner, and

(b) cause each shareholder who is a registered owner of any other shares of which the person is the beneficial owner to dissent with respect to all of those shares.

### 239 Waiver of right to dissent

**239**  (1) A shareholder may not waive generally a right to dissent but may, in writing, waive the right to dissent with respect to a particular corporate action.

Shareholder cannot waive general right to dissent, but can waive it for specific cases.

(2) A shareholder wishing to waive a right of dissent with respect to a particular corporate action must

(a) provide to the company a separate waiver for

(i)  the shareholder, if the shareholder is providing a waiver on the shareholder's own behalf, and

(ii)  each other person who beneficially owns shares registered in the shareholder's name and on whose behalf the shareholder is providing a waiver, and

(b) identify in each waiver the person on whose behalf the waiver is made.

(3) If a shareholder waives a right of dissent with respect to a particular corporate action and indicates in the waiver that the right to dissent is being waived on the shareholder's own behalf, the shareholder's right to dissent with respect to the particular corporate action terminates in respect of the shares of which the shareholder is both the registered owner and the beneficial owner, and this Division ceases to apply to

(a) the shareholder in respect of the shares of which the shareholder is both the registered owner and the beneficial owner, and

(b) any other shareholders, who are registered owners of shares beneficially owned by the first mentioned shareholder, in respect of the shares that are beneficially owned by the first mentioned shareholder.

(4) If a shareholder waives a right of dissent with respect to a particular corporate action and indicates in the waiver that the right to dissent is being waived on behalf of a specified person who beneficially owns shares registered in the name of the shareholder, the right of shareholders who are registered owners of shares beneficially owned by that specified person to dissent on behalf of that specified person with respect to the particular corporate action terminates and this Division ceases to apply to those shareholders in respect of the shares that are beneficially owned by that specified person.

### 240 Notice of resolution

**240**  (1) If a resolution in respect of which a shareholder is entitled to dissent is to be considered at a meeting of shareholders, the company must, at least the prescribed number of days before the date of the proposed meeting, send to each of its shareholders, whether or not their shares carry the right to vote,

(a) a copy of the proposed resolution, and

(b) a notice of the meeting that specifies the date of the meeting, and contains a statement advising of the right to send a notice of dissent.

Give notice to shareholders when considering a resolution which they can dissent on

(2) If a resolution in respect of which a shareholder is entitled to dissent is to be passed as a consent resolution of shareholders or as a resolution of directors and the earliest date on which that resolution can be passed is specified in the resolution or in the statement referred to in paragraph (b), the company may, at least 21 days before that specified date, send to each of its shareholders, whether or not their shares carry the right to vote,

(a) a copy of the proposed resolution, and

(b) a statement advising of the right to send a notice of dissent.

(3) If a resolution in respect of which a shareholder is entitled to dissent was or is to be passed as a resolution of shareholders without the company complying with subsection (1) or (2), or was or is to be passed as a directors' resolution without the company complying with subsection (2), the company must, before or within 14 days after the passing of the resolution, send to each of its shareholders who has not, on behalf of every person who beneficially owns shares registered in the name of the shareholder, consented to the resolution or voted in favour of the resolution, whether or not their shares carry the right to vote,

(a) a copy of the resolution,

(b) a statement advising of the right to send a notice of dissent, and

(c) if the resolution has passed, notification of that fact and the date on which it was passed.

Shareholder must receive notice 14 days after resolution if company did not send notice before hand

(4) Nothing in subsection (1), (2) or (3) gives a shareholder a right to vote in a meeting at which, or on a resolution on which, the shareholder would not otherwise be entitled to vote.

### 241 Notice of court orders

**241**  If a court order provides for a right of dissent, the company must, not later than 14 days after the date on which the company receives a copy of the entered order, send to each shareholder who is entitled to exercise that right of dissent

(a) a copy of the entered order, and

(b) a statement advising of the right to send a notice of dissent.

### 242 Notice of dissent

**242**  (1) A shareholder intending to dissent in respect of a resolution referred to in section 238 (1) (a), (b), (c), (d), (e) or (f) must,

(a) if the company has complied with section 240 (1) or (2), send written notice of dissent to the company at least 2 days before the date on which the resolution is to be passed or can be passed, as the case may be,

(b) if the company has complied with section 240 (3), send written notice of dissent to the company not more than 14 days after receiving the records referred to in that section, or

(c) if the company has not complied with section 240 (1), (2) or (3), send written notice of dissent to the company not more than 14 days after the later of

(i)  the date on which the shareholder learns that the resolution was passed, and

(ii)  the date on which the shareholder learns that the shareholder is entitled to dissent.

(2) A shareholder intending to dissent in respect of a resolution referred to in section 238 (1) (g) must send written notice of dissent to the company

(a) on or before the date specified by the resolution or in the statement referred to in section 240 (2) (b) or (3) (b) as the last date by which notice of dissent must be sent, or

(b) if the resolution or statement does not specify a date, in accordance with subsection (1) of this section.

(3) A shareholder intending to dissent under section 238 (1) (h) in respect of a court order that permits dissent must send written notice of dissent to the company

(a) within the number of days, specified by the court order, after the shareholder receives the records referred to in section 241, or

(b) if the court order does not specify the number of days referred to in paragraph (a) of this subsection, within 14 days after the shareholder receives the records referred to in section 241.

(4) A notice of dissent sent under this section must set out the number, and the class and series, if applicable, of the notice shares, and must set out whichever of the following is applicable:

(a) if the notice shares constitute all of the shares of which the shareholder is both the registered owner and beneficial owner and the shareholder owns no other shares of the company as beneficial owner, a statement to that effect;

(b) if the notice shares constitute all of the shares of which the shareholder is both the registered owner and beneficial owner but the shareholder owns other shares of the company as beneficial owner, a statement to that effect and

(i)  the names of the registered owners of those other shares,

(ii)  the number, and the class and series, if applicable, of those other shares that are held by each of those registered owners, and

(iii)  a statement that notices of dissent are being, or have been, sent in respect of all of those other shares;

(c) if dissent is being exercised by the shareholder on behalf of a beneficial owner who is not the dissenting shareholder, a statement to that effect and

(i)  the name and address of the beneficial owner, and

(ii)  a statement that the shareholder is dissenting in relation to all of the shares beneficially owned by the beneficial owner that are registered in the shareholder's name.

(5) The right of a shareholder to dissent on behalf of a beneficial owner of shares, including the shareholder, terminates and this Division ceases to apply to the shareholder in respect of that beneficial owner if subsections (1) to (4) of this section, as those subsections pertain to that beneficial owner, are not complied with.

### 243 Notice of intention to proceed

**243**  (1) A company that receives a notice of dissent under section 242 from a dissenter must,

(a) if the company intends to act on the authority of the resolution or court order in respect of which the notice of dissent was sent, send a notice to the dissenter promptly after the later of

(i)  the date on which the company forms the intention to proceed, and

(ii)  the date on which the notice of dissent was received, or

(b) if the company has acted on the authority of that resolution or court order, promptly send a notice to the dissenter.

(2) A notice sent under subsection (1) (a) or (b) of this section must

(a) be dated not earlier than the date on which the notice is sent,

(b) state that the company intends to act, or has acted, as the case may be, on the authority of the resolution or court order, and

(c) advise the dissenter of the manner in which dissent is to be completed under section 244.

### 244 Completion of dissent

**244**  (1) A dissenter who receives a notice under section 243 must, if the dissenter wishes to proceed with the dissent, send to the company or its transfer agent for the notice shares, within one month after the date of the notice,

(a) a written statement that the dissenter requires the company to purchase all of the notice shares,

(b) the certificates, if any, representing the notice shares, and

(c) if section 242 (4) (c) applies, a written statement that complies with subsection (2) of this section.

(2) The written statement referred to in subsection (1) (c) must

(a) be signed by the beneficial owner on whose behalf dissent is being exercised, and

(b) set out whether or not the beneficial owner is the beneficial owner of other shares of the company and, if so, set out

(i)  the names of the registered owners of those other shares,

(ii)  the number, and the class and series, if applicable, of those other shares that are held by each of those registered owners, and

(iii)  that dissent is being exercised in respect of all of those other shares.

(3) After the dissenter has complied with subsection (1),

(a) the dissenter is deemed to have sold to the company the notice shares, and

(b) the company is deemed to have purchased those shares, and must comply with section 245, whether or not it is authorized to do so by, and despite any restriction in, its memorandum or articles.

(4) Unless the court orders otherwise, if the dissenter fails to comply with subsection (1) of this section in relation to notice shares, the right of the dissenter to dissent with respect to those notice shares terminates and this Division, other than section 247, ceases to apply to the dissenter with respect to those notice shares.

(5) Unless the court orders otherwise, if a person on whose behalf dissent is being exercised in relation to a particular corporate action fails to ensure that every shareholder who is a registered owner of any of the shares beneficially owned by that person complies with subsection (1) of this section, the right of shareholders who are registered owners of shares beneficially owned by that person to dissent on behalf of that person with respect to that corporate action terminates and this Division, other than section 247, ceases to apply to those shareholders in respect of the shares that are beneficially owned by that person.

(6) A dissenter who has complied with subsection (1) of this section may not vote, or exercise or assert any rights of a shareholder, in respect of the notice shares, other than under this Division.

Cannot seek further remedies if Appraisal remedy is given, so think carefully and do the other remedies first!!!

### 245 Payment for notice shares

**245**  (1) A company and a dissenter who has complied with section 244 (1) may agree on the amount of the payout value of the notice shares and, in that event, the company must

(a) promptly pay that amount to the dissenter, or

(b) if subsection (5) of this section applies, promptly send a notice to the dissenter that the company is unable lawfully to pay dissenters for their shares.

(2) A dissenter who has not entered into an agreement with the company under subsection (1) or the company may apply to the court and the court may

(a) determine the payout value of the notice shares of those dissenters who have not entered into an agreement with the company under subsection (1), or order that the payout value of those notice shares be established by arbitration or by reference to the registrar, or a referee, of the court,

(b) join in the application each dissenter, other than a dissenter who has entered into an agreement with the company under subsection (1), who has complied with section 244 (1), and

(c) make consequential orders and give directions it considers appropriate.

Court has to determine the “fair value” for the shares by itself, with help of experts using the following methods (or combination thereof) (*Domglass*):
**Market value**: What shares are selling for on open-market. For timing, use average of mean daily price over preceding 21 days, which is called the **New York Rule**. If trading is sporadic or minimal, then something else has to be used. Market value is only good for public COs.

**Asset value**: Appraise the value of the CO, and divide it by the number of shares. Problem is that it won’t work for service or high-tech COs, which are more likely represented by income streams. Court will estimate future income of CO and determine discounted present value of shares based on that. BC courts have not taken into account increase in share value of getting rid of SHs.

**Capitalization of earnings**: Look at anticipated future stream of earnings and extrapolate, discount to present value.

*Domglass Inc v. Jarislowsky* [1982] QBCA: It **might be possible** for dissenting minority SHs to demand premium on their shares (ie. a squeeze out premium), but BC tends not to pay premium

(3) Promptly after a determination of the payout value for notice shares has been made under subsection (2) (a) of this section, the company must

(a) pay to each dissenter who has complied with section 244 (1) in relation to those notice shares, other than a dissenter who has entered into an agreement with the company under subsection (1) of this section, the payout value applicable to that dissenter's notice shares, or

(b) if subsection (5) applies, promptly send a notice to the dissenter that the company is unable lawfully to pay dissenters for their shares.

(4) If a dissenter receives a notice under subsection (1) (b) or (3) (b),

(a) the dissenter may, within 30 days after receipt, withdraw the dissenter's notice of dissent, in which case the company is deemed to consent to the withdrawal and this Division, other than section 247, ceases to apply to the dissenter with respect to the notice shares, or

(b) if the dissenter does not withdraw the notice of dissent in accordance with paragraph (a) of this subsection, the dissenter retains a status as a claimant against the company, to be paid as soon as the company is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the company but in priority to its shareholders.

(5) A company must not make a payment to a dissenter under this section if there are reasonable grounds for believing that

(a) the company is insolvent, or

(b) the payment would render the company insolvent.

### 246 Loss of right to dissent

**246**  The right of a dissenter to dissent with respect to notice shares terminates and this Division, other than section 247, ceases to apply to the dissenter with respect to those notice shares, if, before payment is made to the dissenter of the full amount of money to which the dissenter is entitled under section 245 in relation to those notice shares, any of the following events occur:

(a) the corporate action approved or authorized, or to be approved or authorized, by the resolution or court order in respect of which the notice of dissent was sent is abandoned;

(b) the resolution in respect of which the notice of dissent was sent does not pass;

(c) the resolution in respect of which the notice of dissent was sent is revoked before the corporate action approved or authorized by that resolution is taken;

(d) the notice of dissent was sent in respect of a resolution adopting an amalgamation agreement and the amalgamation is abandoned or, by the terms of the agreement, will not proceed;

(e) the arrangement in respect of which the notice of dissent was sent is abandoned or by its terms will not proceed;

(f) a court permanently enjoins or sets aside the corporate action approved or authorized by the resolution or court order in respect of which the notice of dissent was sent;

(g) with respect to the notice shares, the dissenter consents to, or votes in favour of, the resolution in respect of which the notice of dissent was sent;

Dissenter can no longer dissent if they consented to the resolution

(h) the notice of dissent is withdrawn with the written consent of the company;

(i) the court determines that the dissenter is not entitled to dissent under this Division or that the dissenter is not entitled to dissent with respect to the notice shares under this Division.

### 247 Shareholders entitled to return of shares and rights

**247**  If, under section 244 (4) or (5), 245 (4) (a) or 246, this Division, other than this section, ceases to apply to a dissenter with respect to notice shares,

(a) the company must return to the dissenter each of the applicable share certificates, if any, sent under section 244 (1) (b) or, if those share certificates are unavailable, replacements for those share certificates,

(b) the dissenter regains any ability lost under section 244 (6) to vote, or exercise or assert any rights of a shareholder, in respect of the notice shares, and

(c) the dissenter must return any money that the company paid to the dissenter in respect of the notice shares under, or in purported compliance with, this Division.

# Part 9 — Company Alterations

## Division 1 — Memorandum, Notice of Articles and Articles

### 259 Alteration to articles

**259**  (1) A company may resolve to alter its articles

(a) by the type of resolution specified by this Act,

(b) if this Act does not specify the type of resolution, by the type of resolution specified by the articles, or

(c) if neither this Act nor the articles specify the type of resolution, by a special resolution.

First look at if this Act (subsections below) says what resolution is required
Second check if Articles said anything
Default: special resolution

Anything requiring the change to articles triggers this section and then triggers s260 (Right to Dissent). Reason is that it may be considered a fundamental change and the SH should be entitled to a refund.

(2) A company may alter its articles to specify or change the majority of votes that is required to pass a special resolution, which majority must be at least 2/3 and not more than 3/4 of the votes cast on the resolution, if the shareholders resolve, by a special resolution, to make the alteration.

(3) A company may alter its articles to specify or change the majority of votes that is required for shareholders holding shares of a class or series of shares to pass a special separate resolution, which majority must be at least 2/3 and not more than 3/4 of the votes cast on the resolution, if

(a) the shareholders resolve, by a special resolution, to make the alteration, and

(b) shareholders holding shares of that class or series of shares consent by a special separate resolution of those shareholders.

(4) If an alteration to the articles would, on becoming effective, render incorrect or incomplete any information in the notice of articles or alter special rights or restrictions attached to shares, the company must

(a) note on the resolution referred to in subsection (1) that the alteration to the articles does not take effect until the notice of articles is altered to reflect that alteration to the articles,

(b) deposit that resolution at the company's records office, and

(c) after complying with paragraphs (a) and (b) of this subsection, alter its notice of articles, in accordance with section 257, to reflect the alteration to be made to the articles.

(5) An alteration to the articles referred to in subsection (4) of this section takes effect when the alteration to the notice of articles referred to in subsection (4) (c) takes effect.

(6) An alteration to the articles that is not an alteration referred to in subsection (4) takes effect

(a) on the date and time that the resolution referred to in subsection (1) is received for deposit at the company's records office, or

(b) if the resolution specifies a date, or a date and time, on which the alteration is to take effect that is later than the date and time on which the resolution is received for deposit at the company's records office,

(i)  on the specified date and time, or

(ii)  if no time is specified, at the beginning of the specified date.

(7) This section does not apply to a change of name or to an adoption or change of any translation of name.

(8) Nothing in subsection (5) or (6) prevents an alteration to the articles made by a court order from taking effect in accordance with that order.

### 260 Shareholders may dissent

**260**  Any shareholder of a company may send a notice of dissent, under Division 2 of Part 8, to the company in respect of any resolution under section 259 (1) to alter any restrictions on the powers of the company or on the business it is permitted to carry on.

## Division 7 — Disposal of Undertaking

### 301 Power to dispose of undertaking

**301**  (1) A company must not sell, lease or otherwise dispose of all or substantially all of its undertaking unless

(a) it does so in the ordinary course of its business, or

(b) it has been authorized to do so by a special resolution.

“undertaking” = all of the property/assets of the company, facts based
“ordinary course of business” = the qualitative/quantitative tests should be determinative of this point
“all or substantially all” = use qualitative/quantitative tests

Essentially gives SHs a veto power for such sales, but SH approval does not mean directors must sell! Reiterated by 301(5).
Can only sell all assets during ordinary course of business OR by special resolution.
Main battleground for most undertaking cases

CBC Case (2 prong tests)

1. Quantitative significance of what is being sold measures the value of what is being sold in light of the value of the CO. If the sale is more than 50% of the assets, then the sale is presumed to be out of the ordinary.
2. Qualitative approach looks at whether the sale is out of line with CO’s normal pattern of business activities, or whether it strikes at the heart of business. Questions to ask:
	1. Will it end up doing something totally different than before?
	2. Critical to the continuing of its business?
	3. Change the perception of a SH?
	4. How often the company engages in such sales?
	5. Liquid vs non-liquid assets?

The higher the quantitative of the sale, it is presumed the higher the qualitative.

Low quantitative value does not mean it cannot be qualitative, but usually harder to argue that it is qualitative

(2) If the company contravenes subsection (1) in respect of a disposition of all or substantially all of a company's undertaking, the court, on the application of any shareholder, director or creditor of the company, may, unless subsection (3) applies, do one or more of the following:

(a) enjoin the proposed disposition;

(b) set aside the disposition;

(c) make any other order the court considers appropriate.

Courts can make any order, but unclear if they can award compensation. It is possible…but no court cases

(3) A disposition of all or substantially all of the undertaking of a company is not invalid merely because the company contravenes subsection (1), if the disposition is

(a) for valuable consideration to a person who is dealing with the company in good faith, or

(b) ratified by a special resolution.

Third party is protected:

* If that PERSON deals with company in good faith for valuable consideration (good faith of directors not relevant), OR
* Ratified by special resolution

(4) Despite the passing of a special resolution under subsection (1) (b) or (3) (b) to authorize or ratify a disposition of all or substantially all of the undertaking of a company, the directors may abandon the disposition without further action by the shareholders.

(5) Any shareholder of the company may send notice of dissent, under Division 2 of Part 8, to the company in respect of a special resolution under subsection (1) (b) or (3) (b).

ANY SH can dissent if a special resolution is passed authorizing the sale. REGARDLESS if voting share or not

(6) The prohibition in subsection (1) does not apply to a disposition of all or substantially all of the undertaking of the company

(a) by way of security interest,

(b) by a lease if

(i)  the term of the lease, at its beginning, does not exceed 3 years, and

(ii)  any option or covenant for renewal included in the lease is not capable of extending the total lease periods beyond 3 years,

(c) to a corporation that is a wholly owned subsidiary of the company,

(d) to a corporation of which the company is a wholly owned subsidiary,

(e) to a corporation if the company and the corporation are

(i)  wholly owned subsidiaries of the same holding corporation, or

(ii)  wholly owned by the same person, or

(f) to the person, other than a corporation, who holds all of the shares of

(i)  the company, or

(ii)  a corporation of which the company is a wholly owned subsidiary.

# Part 10 — Liquidation, Dissolution, Restoration and Reinstatement

## Division 4 — Powers and Duties of the Court

### 324 Court may order company be liquidated and dissolved

Company can be dissolved by: 1. Special resolution, 2. AG applies due to fraud/criminal activity, 3. S324 (commonly soguht with oppression)

**324**  (1) On an application made in respect of a company by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if

(a) an event occurs on the occurrence of which the memorandum or the articles of the company provide that the company is to be liquidated and dissolved, or

(b) the court otherwise considers it just and equitable to do so.

* The “just and equitable” threshold is very high
	+ Being outvoted is not just and equitable, have to suck it up if you are a minority position
	+ Economics/business of the company inadequate grounds to be just and equitable
	+ “just and equitable” is a slightly lower bar than fraud
	+ Person seeking remedy should have “clean hands”
	+ Compare with partnerships, is it just and equitable if this were a partnership?
* After BCE, courts should consider the reasonable expectations test for winding up and oppression
* Courts are very reluctant to provide this remedy if other remedies are possible
* S227 oppression can be changed into a winding up case
* *Piggot v. Zubovits* [1995] ONJ: Winding up can be ordered when it is no longer possible for the CO to carry on the business for which it was created.
* *Loch v. John Blackwood Ltd* [1924] PC: Winding up can be ordered where SH seeking relief has “justifiable lack of confidence” in conduct of management.
	+ Lack of confidence cannot consist only of disagreement, but must be some serious misbehavior on part of management, such as fraud or deliberate violations of corporate policy,
* *Embrahimi v. Westbourne Galleries* [1972] HL: Winding up can be ordered where CO is a partnership where the partners disagree fundamentally on how the business should operate.
* *Re Yenidje Tobacco Co [1916] CHANC*: Winding up can be ordered when disagreement and deadlock makes it impossible for the CO to act.

(2) Nothing in subsection (1) prevents the court from requiring that security for costs be provided by a person bringing an application under that subsection.

(3) If the court considers that an applicant for an order referred to in subsection (1) (b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following:

(a) make an order that the company be liquidated and dissolved;

(b) make any order under section 227 (3) it considers appropriate.

(4) If the court orders under this Act that a company be liquidated and dissolved, the court must, in its order, appoint one or more liquidators.

(5) An appointment of a liquidator under subsection (4) takes effect on the commencement of the liquidation.

# Part 11 — Extraprovincial Companies

## Division 1 — Registration

### 374 Definitions

**374**  In this Part:

**"director"** has the same meaning as in paragraph (b) of the definition of "director" in section 1 (1) and, when used in relation to a foreign entity, or an extraprovincial company, that is a limited liability company, means a manager of the limited liability company;

**"shareholder"**, when used in relation to a foreign entity, or an extraprovincial company, that is a limited liability company, means a member of the limited liability company.

### 375 Foreign entities required to be registered

**375**  (1) A foreign entity must register as an extraprovincial company in accordance with this Act within 2 months after the foreign entity begins to carry on business in British Columbia.

(2) For the purposes of this Act and subject to subsection (3), a foreign entity is deemed to carry on business in British Columbia if

(a) its name, or any name under which it carries on business, is listed in a telephone directory

(i)  for any part of British Columbia, and

(ii)  in which an address or telephone number in British Columbia is given for the foreign entity,

(b) its name, or any name under which it carries on business, appears or is announced in any advertisement in which an address or telephone number in British Columbia is given for the foreign entity,

(c) it has, in British Columbia,

(i)  a resident agent, or

(ii)  a warehouse, office or place of business, or

(d) it otherwise carries on business in British Columbia.

Test for whether a company is “carrying on business in BC”, much broader than common law

(3) A foreign entity does not carry on business in British Columbia

(a) if it is a bank,

(b) if its only business in British Columbia is constructing and operating a railway, or

(c) merely because it has an interest as a limited partner in a limited partnership carrying on business in British Columbia.

(4) A foreign entity need not be registered under this Act or comply with this Part other than subsection (5) of this section, and may carry on business in British Columbia as if it were registered under this Act, if

(a) the principal business of the foreign entity consists of the operation of one or more ships, and

(b) the foreign entity does not maintain in British Columbia a warehouse, office or place of business under its own control or under the control of a person on behalf of the foreign entity.

(5) Every person who is a resident agent or representative of a foreign entity referred to in subsection (4) must file with the registrar

(a) a notice of agency in the form established by the registrar stating

(i)  the name of the foreign entity,

(ii)  the chief place of business of the foreign entity outside British Columbia, and

(iii)  particulars of the person's agency, and

(b) a notice of change of agency in the form established by the registrar identifying any change in that name, chief place of business or agency.

(6) Sections 27 (1), 384 and 385 apply to a foreign entity referred to in subsection (4) as if it were an extraprovincial company.

### 376 Application for registration

**376**  (1) To apply to register as an extraprovincial company under this Act, a foreign entity must provide to the registrar the records and information the registrar may require and must

(a) reserve its name or an assumed name under section 22 or 26, as the case may be,

(b) appoint one or more attorneys if required under section 386, and

(c) submit to the registrar for filing

(i)  a registration statement, and

(ii)  any other records the registrar may require.

(2) Subsection (1) (a) of this section does not apply to a federal corporation.

(3) The registration statement referred to in subsection (1) (c) (i) must

(a) be in the form established by the registrar,

(b) set out,

(i)  if the foreign entity is a federal corporation, the name of the federal corporation,

(ii)  if the name of the foreign entity is reserved under section 22, the reserved name and the reservation number given for it, or

(iii)  for a foreign entity to which section 26 applies, the name of the foreign entity and the assumed name reserved for it under section 26 and the reservation number given for it,

(c) set out the foreign entity's jurisdiction,

(d) set out the most recent of the following dates:

(i)  the date on which the foreign entity was incorporated or organized, as the case may be;

(ii)  the date on which the foreign entity was continued or otherwise transferred by a similar process into a foreign jurisdiction;

(iii)  if the foreign entity resulted from an amalgamation or a similar process, the date of that amalgamation or similar process,

(e) set out any incorporation, continuation, amalgamation or other identifying number or designation given to the foreign entity by the foreign entity's jurisdiction,

(f) set out the mailing address and the delivery address of the head office of the foreign entity, whether or not the head office is in British Columbia, and

(g) set out, for each person, if any, appointed as an attorney by the foreign entity,

(i)  the full name of the attorney, and

(ii)  the mailing address and the delivery address of the attorney in accordance with section 386 (3).

(4) At any time, before or after a foreign entity is registered as an extraprovincial company, the registrar may order the foreign entity to provide to the registrar, within the time required by the registrar, proof satisfactory to the registrar of the foreign entity's status in the foreign entity's jurisdiction.

### 377 Registration as an extraprovincial company

**377**  (1) After a foreign entity complies with section 376 to the satisfaction of the registrar, the registrar must, if the foreign entity is a federal corporation, and may, in any other case,

(a) file the registration statement, and

(b) register the foreign entity as an extraprovincial company.

(2) After a foreign entity is registered as an extraprovincial company under subsection (1) of this section, the registrar must

(a) issue a certificate of registration showing

(i)  the name and any assumed name for the extraprovincial company,

(ii)  its registration number, and

(iii)  the date and time of its registration,

(b) furnish to the extraprovincial company that certificate and a copy of the registration statement,

(c) furnish a copy of the registration statement to each attorney referred to in the registration statement who has not been furnished with a copy of that record under paragraph (b), and

(d) publish in the prescribed manner a notice of the registration.

### 378 Effect of registration

**378**  (1) Whether or not the requirements precedent and incidental to registration of a foreign entity as an extraprovincial company have been complied with, a notation in the corporate register that a foreign entity has been registered as an extraprovincial company is conclusive evidence for the purposes of this Act and for all other purposes that the foreign entity has been duly registered as an extraprovincial company on the date shown and the time, if any, shown in the corporate register.

(2) Subject to the provisions of this Act, to the laws of British Columbia and to the laws of any other jurisdiction that are or may be applicable to it, an extraprovincial company may, for the purpose of carrying on business in British Columbia, exercise in British Columbia the powers contained in or permitted by its charter or similar record.

(3) Registration of a foreign entity as an extraprovincial company does not entitle the foreign entity to do either of the following:

(a) carry on any business or exercise any power that its charter or similar record restricts it from carrying on or exercising;

(b) exercise any of its powers in a manner inconsistent with those restrictions in its charter or similar record.

(4) No act of a foreign entity that carries on business in British Columbia, including a transfer of property, rights or interests to it or by it, is invalid merely because

(a) the act contravenes subsection (3), or

(b) the foreign entity was not, at the time of that act, registered as an extraprovincial company.

### 379 Amalgamation of extraprovincial company

**379**  (1) If a foreign entity that is registered as an extraprovincial company is a party to an amalgamation or similar process other than one that results in a company, there must be provided to the registrar the records and information the registrar may require, and there must be filed with the registrar, within 2 months after the effective date of the amalgamation or similar process,

(a) a notice of amalgamation of extraprovincial company that complies with subsection (2), and

(b) any other records the registrar may require.

(2) A notice of amalgamation of extraprovincial company must be in the form established by the registrar and must set out

(a) the name of the amalgamated extraprovincial company if the amalgamated extra provincial company

(i)  has adopted as its name the name of one of the amalgamating extraprovincial companies, or

(ii)  is a federal corporation,

(b) if paragraph (a) does not apply, the name reserved for the amalgamated extraprovincial company under section 22 and the reservation number given for it, or

(c) if paragraphs (a) and (b) of this subsection do not apply but section 26 applies, the name of the foreign entity, the assumed name reserved for it under section 26 and the reservation number given for that assumed name.

(3) After the notice of amalgamation of extraprovincial company is filed with the registrar, the registrar must

(a) issue a certificate of registration showing

(i)  the name and any assumed name for the amalgamated extraprovincial company,

(ii)  its registration number and the date and time of its registration, and

(iii)  the date, and the time, if any, shown for the amalgamation or similar process on the notice of amalgamation of extraprovincial company,

(b) furnish to the amalgamated extraprovincial company the certificate referred to in paragraph (a) and a copy of the notice of amalgamation of extraprovincial company,

(c) furnish a copy of the notice of amalgamation of extraprovincial company to each attorney of the amalgamated extraprovincial company who has not been furnished with a copy of that record under paragraph (b), and

(d) publish in the prescribed manner a notice of the amalgamation or similar process.

(4) From the time of the amalgamation or similar process, the amalgamated extraprovincial company is seized of and holds and possesses all land of the amalgamating entities that is located in British Columbia.

(5) At any time, before or after a certificate of registration is issued under subsection (3), the registrar may order the amalgamated foreign entity to provide to the registrar, within the time required by the registrar, proof satisfactory to the registrar of the foreign entity's status in the foreign entity's jurisdiction.

### 380 Extraprovincial companies to file annual report

**380**  (1) Subject to section 411 (2), an extraprovincial company must file with the registrar an annual report in the form established by the registrar,

(a) unless another date has been prescribed under paragraph (b) of this section, within 2 months after each anniversary of the date of its registration as an extraprovincial company, or

(b) if another date has been prescribed, within 2 months after each anniversary of that prescribed date.

(2) An annual report filed under subsection (1) must contain information that was correct as of the most recent applicable anniversary.

### 381 Extraprovincial companies to notify registrar of changes

**381**  (1) An extraprovincial company must file with the registrar a notice of change respecting extraprovincial company in respect of any change that renders incorrect or incomplete any of the information shown in the corporate register with respect to the extraprovincial company.

(2) A notice of change respecting extraprovincial company required by subsection (1) must be

(a) in the form established by the registrar, and

(b) submitted to the registrar for filing promptly after the occurrence of the change in respect of which the notice is filed.

### 382 Change of name of extraprovincial companies

**382**  (1) If a foreign entity that is registered as an extraprovincial company changes its name, the extraprovincial company must provide to the registrar the records and information the registrar may require and must

(a) file with the registrar

(i)  a notice of change of name of extraprovincial company in the form established by the registrar, and

(ii)  any other records the registrar may require, and

(b) before filing those records,

(i)  if it wishes to carry on business in British Columbia under its new name, reserve its new name under section 22, or

(ii)  if its new name contravenes any of the prescribed requirements or any of the other requirements set out in Division 2 of Part 2 and the extraprovincial company does not have an assumed name under which it intends to continue to carry on business in British Columbia, adopt an assumed name.

(2) If an extraprovincial company wishes to adopt an assumed name under subsection (1) (b) (ii) of this section or in response to an order of the registrar under section 28 (2), section 26 applies.

(3) After the notice of change of name of extraprovincial company is filed with the registrar, the registrar must

(a) issue and furnish to the extraprovincial company a certificate showing

(i)  the change of name, and

(ii)  the assumed name, if any, under which the extraprovincial company is to carry on business in British Columbia, and

(b) publish in the prescribed manner a notice of the change of name.

(4) Subsection (1) (b) does not apply to a federal corporation.

(5) At any time, before or after a certificate is issued under subsection (3) (a), the registrar may order the foreign entity to provide to the registrar, within the time required by the registrar, proof satisfactory to the registrar of the foreign entity's status in the foreign entity's jurisdiction.

### 383 Cancellation or change of assumed name of extraprovincial company

**383**  (1) An extraprovincial company that has adopted an assumed name under this Act may, by providing to the registrar the records and information the registrar may require and by filing with the registrar a notice of change of assumed name in the form established by the registrar and any other records the registrar may require,

(a) if the extraprovincial company reserves its own name under section 22, cancel its assumed name and carry on business in British Columbia under its own name, or

(b) change its assumed name and carry on business in British Columbia under the new assumed name.

(2) If an extraprovincial company wishes to change an assumed name under subsection (1) (b) of this section, section 26 applies.

(3) After an extraprovincial company cancels or changes its assumed name in accordance with this section, the registrar must

(a) issue and furnish to the extraprovincial company a certificate showing the cancellation or change of the assumed name, and

(b) publish in the prescribed manner a notice of the cancellation or change of the assumed name.

### 384 Liability if name of extraprovincial company not displayed

**384**  (1) A director or officer of an extraprovincial company who knowingly permits the extraprovincial company to contravene section 27 (1) (a), (b) or (c) is personally liable to indemnify any of the following persons who suffer loss or damage as a result of being misled by that contravention:

(a) a purchaser of goods or services from the extraprovincial company;

(b) a supplier of goods or services to the extraprovincial company;

(c) a person holding a security of the extraprovincial company.

(2) A director or officer of an extraprovincial company who issues or authorizes the issue of any instrument referred to in section 27 (1) (d) that does not display the name or assumed name, as the case may be, of the extraprovincial company is personally liable to the person holding that instrument for the amount of it, unless it is duly paid by the extraprovincial company.

### 385 Enforcement of duty to file records

**385**  (1) If an extraprovincial company or its receiver, receiver manager or liquidator has failed to file with the registrar any record required to be filed with the registrar under this Act, any director, shareholder or creditor of the extraprovincial company may provide, to the person required to submit the record to the registrar for filing, notice requiring that person to file the record with the registrar.

(2) If the person required to file a record with the registrar under subsection (1) fails to file the record with the registrar within 14 days after receipt of the notice referred to in subsection (1), the court may, on the application of any director, shareholder or creditor of the extraprovincial company,

(a) order the person to file the record with the registrar within the time the court directs, and

(b) direct that the costs of and incidental to the application be paid by the extraprovincial company, by any director or officer of the extraprovincial company or by any other person the court considers appropriate.

(3) Neither the making of an order by the court under this section nor compliance with such an order relieves a person from any other liability.

## Division 2 — Attorneys for Extraprovincial Companies

### 386 Attorneys to be appointed

**386**  (1) An extraprovincial company must ensure that

(a) it has one or more attorneys, or

(b) under its charter or similar record, its head office is in British Columbia, in which case it may have one or more attorneys.

(2) For the purposes of this Division, each attorney for an extraprovincial company must be

(a) an individual who is resident in British Columbia, or

(b) a company.

(3) The mailing address and the delivery address of an attorney must be,

(a) in the case of an attorney that is an individual, the mailing address and the delivery address of the office in British Columbia at which the individual can usually be reached during statutory business hours, or

(b) in the case of an attorney that is a company, the mailing address and the delivery address of that company's registered office.

### 387 First attorneys

**387**  If the registration statement filed with the registrar to register a foreign entity as an extraprovincial company identifies one or more attorneys, the extraprovincial company has those persons as its first attorneys, and the mailing addresses and delivery addresses for those attorneys are the mailing addresses and delivery addresses respectively set out for those attorneys on the registration statement.

### 388 Authorization of attorneys

**388**  Each attorney for an extraprovincial company is deemed to be authorized by the extraprovincial company

(a) to accept service of process on its behalf in each legal proceeding by or against it in British Columbia, and

(b) to receive each notice to it.

### 389 Appointment of attorneys

**389**  (1) An extraprovincial company may, after its registration statement has been filed with the registrar, appoint one or more persons as attorneys and must, after that appointment, file with the registrar a notice of appointment of attorney in the form established by the registrar for each attorney so appointed.

(2) A notice of appointment of attorney filed with the registrar under subsection (1) must set out

(a) the full name of each attorney, and

(b) the mailing address and the delivery address of each attorney in accordance with section 386 (3).

(3) A person specified in a notice of appointment of attorney filed with the registrar under subsection (1) of this section becomes an attorney for the appointing extraprovincial company

(a) on the date and time that the notice of appointment of attorney is filed with the registrar, or

(b) subject to sections 390 and 410, if the notice of appointment of attorney specifies a date, or a date and time, on which the appointment of the attorney is to take effect that is later than the date and time on which the notice of appointment of attorney is filed with the registrar,

(i)  on the specified date and time, or

(ii)  if no time is specified, at the beginning of the specified date.

(4) After a person becomes an attorney for an extraprovincial company under subsection (3) of this section, the registrar must furnish to the attorney confirmation of the appointment.

### 390 Withdrawal of appointment

**390**  At any time after a notice of appointment of attorney is filed with the registrar under section 389 and before the appointment takes effect, the extraprovincial company in respect of which the filing was made or any other person who appears to the registrar to be an appropriate person to do so may withdraw the notice of appointment of attorney by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the notice of appointment of attorney.

### 391 Change of address of attorneys

**391**  (1) If there is to be a change to one or both of the mailing address and the delivery address of an attorney for an extraprovincial company, the extraprovincial company or the attorney may, before that change occurs, file with the registrar a notice of change of address of attorney in the form established by the registrar.

(2) If there is a change to one or both of the mailing address and the delivery address of an attorney for an extraprovincial company and if a notice of change of address reflecting that change was not filed under subsection (1) before that change occurred, promptly after that change occurs, the extraprovincial company or the attorney must file with the registrar a notice of change of address of attorney in the form established by the registrar.

(3) If the notice of change of address of attorney is submitted to the registrar for filing by an attorney, the attorney must mail a copy of the completed notice of change of address of attorney to the head office of the extraprovincial company.

(4) The change of address reflected in the notice of change of address of attorney filed with the registrar under subsection (1) or (2) takes effect,

(a) subject to section 392, at the beginning of the day following the date on which the notice of change of address of attorney is filed with the registrar, or

(b) subject to sections 392 and 410, if the notice of change of address of attorney specifies a date on which the change of address is to take effect that is later than the day following the date on which the notice is filed with the registrar, at the beginning of the specified date.

### 392 Withdrawal of notice of change of address

**392**  At any time after a notice of change of address of attorney is filed with the registrar under section 391 and before the change of address takes effect, the attorney or extraprovincial company in respect of which the filing was made or any other person who appears to the registrar to be an appropriate person to do so may withdraw the notice of change of address of attorney by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the notice of change of address of attorney.

### 393 Revocation of appointments of attorneys

**393**  (1) Subject to section 386 (1), an extraprovincial company may revoke the appointment of an attorney by filing with the registrar a notice of revocation of appointment of attorney in the form established by the registrar.

(2) Subject to subsection (3) of this section, a revocation referred to in a notice of revocation of appointment of attorney takes effect to terminate the appointment of the attorney referred to in that record,

(a) subject to section 394, at the beginning of the day following the date on which the notice of revocation of appointment of attorney is filed with the registrar, or

(b) subject to sections 394 and 410, if the notice of revocation of appointment of attorney specifies a date on which the revocation is to take effect that is later than the day following the date on which the notice is filed with the registrar, at the beginning of the specified date.

(3) A revocation of the appointment of an attorney does not take effect unless and until the extraprovincial company complies with section 386.

(4) After a revocation of the appointment of an attorney takes effect, the registrar must furnish confirmation of the revocation of appointment to the person whose appointment has been revoked.

### 394 Withdrawal of revocation of appointment

**394**  At any time after a notice of revocation of appointment of attorney is filed with the registrar under section 393 and before the revocation takes effect, the extraprovincial company in respect of which the filing was made or any other person who appears to the registrar to be an appropriate person to do so may withdraw the notice of revocation of appointment of attorney by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the notice of revocation of appointment of attorney.

### 395 Resignations of attorneys

**395**  (1) An attorney for an extraprovincial company who intends to resign must

(a) provide a written resignation to the extraprovincial company at its head office at least 2 months before the date on which the resignation is to take effect, and

(b) promptly after complying with paragraph (a), submit to the registrar for filing a notice of resignation of attorney in the form established by the registrar.

(2) After receiving a notice of resignation of attorney under subsection (1) (b), the registrar must file that notice.

(3) An extraprovincial company that receives a resignation under subsection (1) (a) must, within the period of time specified in that resignation, comply with section 386.

(4) An attorney who files a notice of resignation of attorney with the registrar under subsection (1) of this section ceases to be an attorney for the extraprovincial company on the later of

(a) the beginning of the day that is 2 months and one day after the date on which the notice of resignation of attorney was filed with the registrar, and

(b) the beginning of the date specified by the notice of resignation of attorney as the effective date for the resignation.

(5) Despite subsection (4), if, under section 393, the extraprovincial company revokes the appointment of a person who has filed a notice of resignation of attorney with the registrar and that revocation takes effect before the date on which the resignation would be effective under subsection (4) of this section, the person ceases to be an attorney when the revocation takes effect.

### 396 Obligation to maintain head office or attorney

**396**  If an event occurs or any action is taken that results in an extraprovincial company ceasing to comply with section 386, the extraprovincial company must, promptly after the event or action, comply with section 386.

## Division 3 — Cancellation of Registration of Extraprovincial Companies

### 397 Registrar may cancel registration of defunct extraprovincial companies

**397**  The registrar must cancel the registration of a foreign entity as an extraprovincial company if

(a) there is filed with the registrar a notice, from the person in the foreign entity's jurisdiction whose role in that jurisdiction is similar to the role of the registrar in British Columbia, that the foreign entity has ceased to exist, or

(b) the foreign entity files with the registrar a notice of ceasing to carry on business in British Columbia in the form established by the registrar, stating that the foreign entity has ceased to carry on business in British Columbia.

### 398 Lieutenant Governor in Council may cancel registration of extraprovincial companies

**398**  (1) The Lieutenant Governor in Council may cancel the registration of a foreign entity as an extraprovincial company.

(2) The Lieutenant Governor in Council may restore the registration of a foreign entity that has had its registration as an extraprovincial company cancelled.

(3) This section does not apply to a federal corporation.

### 399 Registrar's duties on cancellation of registration

**399**  After a foreign entity's registration as an extraprovincial company is cancelled under section 397, 398 or 422, the registrar must publish in the prescribed manner a notice of the cancellation.

# Part 12 — Administration

## Division 2 — Records Filed with or Issued by the Registrar

### 421 No constructive notice

**421**  No person is affected by or is deemed to have notice or knowledge of the contents of a record concerning a corporation or limited liability company merely because the record has been filed with the registrar or is available for examination at an office of the corporation or limited liability company.

## Division 3 — Powers of Dissolution and Cancellation

### 422 Dissolutions and cancellations of registration by registrar

**422**  (1) The registrar may, in accordance with this section, dissolve a company or cancel the registration of a foreign entity as an extraprovincial company if the company or extraprovincial company

(a) fails, in each of 2 consecutive years, to file with the registrar an annual report required by this Act or a former Companies Act to be filed,

(b) has, for a period of at least 2 years, failed to file with the registrar a record required by this Act or a former Companies Act to be filed, other than an annual report,

(c) fails to comply with an order of the registrar, including an order to change its name or assumed name,

(d) fails, without reasonable excuse, to return a record to the registrar within 21 days after the date of a request furnished by the registrar under section 420 (1),

(e) tenders a cheque in payment of a fee required under section 431, which cheque fails to clear the savings institution on which it is drawn, or otherwise fails to pay a fee required under section 431,

(f) in the case of a pre-existing company, fails to comply with section 370 or 436, as the case may be, or

(g) in the case of an extraprovincial company, fails to comply with section 386 or breaches an undertaking given under section 26 (2).

(2) If the registrar has reasonable cause for believing that one or more of the paragraphs of subsection (1) of this section apply to a company or an extraprovincial company, the registrar may furnish to the company or extraprovincial company a letter informing it of its default and of the powers of the registrar under this section.

(3) The registrar may publish in the prescribed manner a notice that complies with subsection (4) unless, within one month after the date of the letter referred to in subsection (2),

(a) the default identified in the letter is remedied, or

(b) the registrar receives a response to the letter

(i)  that satisfies the registrar that reasonable steps are being taken to remedy the default, or

(ii)  that is otherwise satisfactory to the registrar.

(4) A notice published by the registrar under subsection (3) must

(a) identify the company or extraprovincial company to which the letter referred to in subsection (2) was furnished, and

(b) state that the company may be dissolved or that the registration of the foreign entity as an extraprovincial company may be cancelled unless, within one month after the date of the publication of the notice under subsection (3),

(i)  cause to the contrary is shown,

(ii)  the company or extraprovincial company satisfies the registrar that it is not in default, that the default has been remedied or that reasonable steps are being taken to remedy the default, or

(iii)  a copy of an entered court order to the contrary is filed with the registrar.

(5) At any time after one month after the date of publication of the notice under subsection (3), the registrar may dissolve the company or cancel the registration of the foreign entity as an extraprovincial company unless

(a) cause to the contrary is shown,

(b) the company or extraprovincial company has satisfied the registrar in accordance with subsection (4) (b) (ii), or

(c) a copy of an entered court order to the contrary is filed with the registrar.

(6) A company is dissolved under this section, or the registration of a foreign entity as an extraprovincial company is cancelled under this section, on the date and time recorded in the corporate register as the date and time of dissolution or cancellation.

### 423 Lieutenant Governor in Council may cancel incorporation of company

**423**  The Lieutenant Governor in Council may cancel the incorporation of a company and declare it to be dissolved.