**TABLE OF CONTENTS**

[1. PARTNERSHIPS AND SOLE PROPREITORSHIPS 3](#_Toc437886692)

[A. Sole Proprietorships 3](#_Toc437886693)

[B. Partnerships 4](#_Toc437886694)

[(i) Definition 4](#_Toc437886695)

[(ii) Legal Personality of Partnership 5](#_Toc437886696)

[(iii) Relationship of Partners to Each Other and Third Parties 6](#_Toc437886697)

[C. Limited Liability Partnerships 8](#_Toc437886698)

[D. Limited Partnerships 9](#_Toc437886699)

[2. THE EVOLUTION OF CORPORATIONS LAW & THE NATURE OF CORPORATE PERSONALITY 10](#_Toc437886700)

[A. Corporate Personality and Limited Liability 11](#_Toc437886701)

[B. Liability in Tort 11](#_Toc437886702)

[C. Piercing the Corporate Veil 11](#_Toc437886703)

[D. Criminal Liability 12](#_Toc437886704)

[3. JURISDICTIONAL AND CATEGORISATION CONSIDERATIONS 13](#_Toc437886705)

[A. Classification of Corporations 14](#_Toc437886706)

[(i) “Widely-held” (“public”) and “closely-held” (“private”) corporations 14](#_Toc437886707)

[(ii) Community Contribution Companies 14](#_Toc437886708)

[B. Extra-provincial Licensing and Filing Requirements 15](#_Toc437886709)

[C. Continuance Under the Law of Another Jurisdiction 17](#_Toc437886710)

[4. THE CORPORATE CONSTITUTION 19](#_Toc437886711)

[A. Corporate Names 19](#_Toc437886712)

[B. Creating the Corporation 20](#_Toc437886713)

[C. The Concept of Restrictions 22](#_Toc437886714)

[5. PRE-INCORPORATION CONTRACTS 23](#_Toc437886715)

[A. Common Law 23](#_Toc437886716)

[B. Statute 24](#_Toc437886717)

[6. MANAGEMENT AND CONTROL OF THE CORPORATION 26](#_Toc437886718)

[A. Directors and Officers 26](#_Toc437886719)

[(i) Appointment and terms 26](#_Toc437886720)

[(ii) Powers – Meetings – Decisions 28](#_Toc437886721)

[(iii) Officers – Procedural Issues 29](#_Toc437886722)

[B. Corporate Responsibility 30](#_Toc437886723)

[(i) Old approach 30](#_Toc437886724)

[(ii) New Approach 30](#_Toc437886725)

[C. Shareholder Input 31](#_Toc437886726)

[(i) Sale of the Undertaking 32](#_Toc437886727)

[(ii) Unanimous Shareholder Agreements (and Equivalent) 33](#_Toc437886728)

[D. Protecting Third Party Reliance – The Indoor Management Rule 34](#_Toc437886729)

[E. Protecting Outside Directors – The Audit Committee 36](#_Toc437886730)

[7. DUTIES OF DIRECTORS AND OFFICERS 37](#_Toc437886731)

[A. Directors – Personal Liability 37](#_Toc437886732)

[B. Care and Skill 39](#_Toc437886733)

[(i) The Business Judgement Rule 40](#_Toc437886734)

[C. Fiduciary Duties 40](#_Toc437886735)

[(i) Self-Dealing 42](#_Toc437886736)

[(ii) Corporate Opportunity 44](#_Toc437886737)

[(iii) Competition (Conflict of Interest) 44](#_Toc437886738)

[(iv) Hostile takeovers 45](#_Toc437886739)

[D. Relief From Liability 46](#_Toc437886740)

[(i) Compliance 46](#_Toc437886741)

[(ii) Indemnification and Insurance 47](#_Toc437886742)

[8. SHAREHOLDERS, SHARES AND SHAREHOLDERS’ RIGHTS 49](#_Toc437886743)

[A. Shares 49](#_Toc437886744)

[(i) Structure and definitions 49](#_Toc437886745)

[(ii) Issue of Shares 51](#_Toc437886746)

[(iii) Form of Shares 52](#_Toc437886747)

[(iv) Record of Shareholders 52](#_Toc437886748)

[B. Restrictions on Transfer 53](#_Toc437886749)

[C. Voting Rights 54](#_Toc437886750)

[D. Shareholder Agreements 54](#_Toc437886751)

[E. Shareholder Meetings 55](#_Toc437886752)

[(i) Types of Meetings 55](#_Toc437886753)

[(ii) How to Vote 57](#_Toc437886754)

[(iii) Types of Resolutions 58](#_Toc437886755)

[(iv) Meeting Procedure 60](#_Toc437886756)

[(v) Business at a Meeting 61](#_Toc437886757)

[(vi) Shareholder Proposals 61](#_Toc437886758)

[(vii) Removal of Directors 65](#_Toc437886759)

[9. SHAREHOLDER REMEDIES AND RELIEF 66](#_Toc437886760)

[A. The Derivative Action 66](#_Toc437886761)

[B. The Personal Action 69](#_Toc437886762)

[C. The Statutory Oppression Remedy 70](#_Toc437886763)

[D. The Appraisal Remedy (Dissent Proceedings) 73](#_Toc437886764)

[E. Compliance and Restraining Orders 76](#_Toc437886765)

[F. Investigations 79](#_Toc437886766)

[G. Winding-Up 80](#_Toc437886767)

# PARTNERSHIPS AND SOLE PROPREITORSHIPS

## Sole Proprietorships

* There is no difference between the entity and the individual. The individual gets all the benefits and is entirely liable (“unlimited liability”).
* There are some restrictions on naming to prevent people from being misled.
* There are no form or reporting requirements.

*Partnership Act*

**1**"sole proprietorship" means a person who under s 88(1) is required to file a registration statement

**88 (1)** A person who is engaged in business for trading, manufacturing or mining purposes and who is not associated in partnership with any other person or persons… must file a registration statement within 3 months if using as a business name something other than their own name or uses "and Company" or something indicating plurality of members in the business.

**89 (1)** Registration statement must not be filed under 88(1) if the business name:

1. Is already the name of a corporation in BC; or
2. So nearly resembles that name that it would likely confuse or mislead; or registrar otherwise disapproves

## Partnerships

### Definition

* If s 2 is met, it is a partnership. This is the definitive statement, s 3 and 4 is “guidance”.
* Carrying on a business
* Must be some period of time over which this exists
* In common
* Sharing information; sharing profits; sharing decision making
* With a view to profit
* Expectation of profit (a proposition); even if distant
* Some guidance is provided in s 3 and 4
* A corporation is not a partnership (but can be a partner to a partnership)
* Rules for determining partnership
* Co-ownership of property not sufficient (but may be if it is ongoing)
* Sharing gross returns is not sufficient (but may be if it is ongoing)
* May be a partnership if sharing profits (i.e. income after expenses) subject to
	+ - Being a creditor
		- Working on a commission
		- Receiving an annuity
* These intention to form a partnership is viewed objectively (*LePage*).
* The ability to sell an interest in the business without the consent of the co-owners is clear evidence of an intention not to form a partnership.
* *LePage: co-owned a property; each had a right of first refusal (offer it to the others first); if not one wanted it, it could be sold to outsiders.*
* That is a creditor is not a partner is merely a presumption that can be rebutted by evidence to the contrary
* *Pooley: creditors restricted how the partners could employ capital; partners could not sell, lend of borrow without consent of creditos; creditors had access to the books; if creditor went bankrupt the arrangement ended and the capital was paid back; etc.*

*Partnership Act*

**1** “general partnership” means a partnership that

1. Has BC as its governing jurisdiction; and
2. Is neither a LP or a LLP

**1** “firm” is the collective term for persons in a partnership with one another

**2** A partnership is defined as the relation which subsists between persons carrying on business with a view of profit.

**3** A corporation is not a partnership

**4** In determining whether a partnership exists, regard must be had to the following rules:

1. Co-ownership of property is not sufficient, whether or not the co-owners share the profits
2. Sharing gross returns is not sufficient, whether or not the persons have a joint or common interest in the property
3. Receipt of a share of profits is proof of partnership in the absence of evidence to the contrary, but the receipt of a payment contingent on a varying with the profits is not sufficient to make him a partner, in particular:
4. Being a creditor (payment of debt based on profits)
5. Working on a commission after taking into account expenses
6. Annuity payments
7. Being a creditor (payment of debt based on profits)
8. In consideration of the sale of the goodwill of the business

**91** Rules of common law of equity continue to apply unless inconsistent with this Act.

### Legal Personality of Partnership

* Once property is brought into the partnership, an outsider can make a claim against it. Once it is partnership property, it is always partnership property.
* Section 16 is estoppel by representation. For particular purposes, you cannot deny you are a partner. This gives an outsider a claim against you.
* The claimant must prove reliance.
* The apparent partner must try and prevent this.
* A person cannot be an employee of a partnership because a partnership is not an artificial person (legal entity) distinct from the members comprising it.
* *Thorne: a partner worked in the partnership’s mill; injured; could not claim worker’s compensation; the payment of wages is merely an agreement with regard to the share of profits.*

*Partnership Act*

* 1. “partnership property” means property and interests in property
1. Originally brought into the partnership stock
2. Acquired on account of the firm
3. Acquired for the purposes and in the course of the partnership

**16 (1)** A person who represents himself, or knowingly allows himself to be represented, as a partner in a firm is liable as a partner to anyone who has, on the faith of that representation, given credit to the firm.

**(2)** This applied whether or not the apparent partner had knowledge of the representation or allowed it to be made.

**(3)** If a partner dies and the partnership continues in the old firm name, that does not make the estate of the deceased liable for any debts contracted after his death.

### Relationship of Partners to Each Other and Third Parties

* Partners have aspects of agency and fiduciary relationships to one another and the firm.
* Agency (s 7) - acts of one partner bind the firm (within the context of the business).
* Fiduciary (s 22) – partners must share info, be proactive, share losses and gains (in the business of the firm).
* Liability before and after becoming a partner (s 19).
* Partners can vary their rights and duties by contract (s 21).
* Partnership property can only be used for the partnership (s 23).
* Property bought with firm money is firm property (s 24).
* Without an agreement, there are rules that determine the rights and duties of partners (s 27)
* How to expel a partner (s 28)
* Ending the partnership (s 29, 35, 36, 37)
* Internal liabilities of partners (s 11-14)

*Partnership Act*

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

**(2)** The acts of every partner who does any act for the purpose of carrying on in the usual way the business of the kind carried on by the firm, binds the firm and partners unless

1. The partner has no authority to act for the firm in the particular matter
2. The person with whom he or she is dealing either knows that the partner has no authority, or does not know or believe him to be a partner.

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

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

**19** **(1)** A partner is not liable to the creditors of the firm for anything done before he became a partner.

**(2)** A partner who retires from a firm is liable for partnership debts or obligations incurred before his retirement.

**(3)** A retiring partner may be discharged from any existing liabilities by an agreement to that effect between the retiring partner, members of the firm, and the creditors.

**(4)** An agreement under (3) may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

**21** Partners can vary their rights and duties to each other by contract (except for ss 7 and 22).

**23 (1)** All partnership property must be used exclusively for the partnership and in accordance with the partnership agreement.

**24** Property bought with firm money is firm property (unless a contrary intention is shown).

**27** Without a partnership agreement, these rules determine the rights and duties of partners:

1. All partners are equally entitled to the capital and profits, and must contribute equally towards losses
2. The firm must compensate each partner for payments made and liabilities incurred
3. A partner is not entitled to interest on the capital subscribed by him
4. A partner is not entitled to remuneration for acting in the partnership business
5. The consent of all partners is required to introduce a new person as partner
6. Ordinary matters may be decided by a majority, but a change in the nature of the business requires consent of all partners.
7. All partners have access to the books.

**28** Unanimous agreement is required to expel a partner, unless this power is explicit in an agreement and exercised in good faith.

**29** Any partner can end the partnership at any time by giving notice.

**35** A partnership is dissolved

1. By the expiration of any set term
2. By the termination of any undertaking, if entered into for a single undertaking
3. By any partner giving notice

**36** On bankruptcy, death or dissolution of a partner, the partnership with that person is dissolved.

**37** A partnership is dissolved by any event which makes it unlawful for the business of the firm to be carried on.

**11** Partners are jointly liable for voluntary liabilities incurred while they are a partner.

**12** The firm is liable for any wrong act or omission of any partner acting in the ordinary course of business.

**14** Partners are jointly and severally liable for everything for which the firm is liable under s 12.

## Limited Liability Partnerships

* Definition (s 94)
* The internal aspects remain the same, but exposure to the rest of the world (i.e. s 11 and 14) is changed (s 95)
* Extent to which partner is liable (ss 104 and 105)

*Partnership Act*

**94** “limited liability partnership” means a partnership registered as an LLP under this Act

**95 (1)** Parts 1, 2, 4 and 5 of the Act apply to LLPs

**(2)** Section 11 and 14 don’t apply to LLPs

**104 (1)** A partner in an LLP is

1. not personally liable for a partnership obligation merely for being a partner
2. not personally liable for an obligation in an agreement between the partnership and another person
3. not personally liable to the partnership or another partner for an obligation under a) or b)

**(2)** This does not relieve a partner in an LLP from personal liability

1. for their own negligent or wrongful act or omission
2. for a partner’s negligent or wrongful act or omission if
3. they knew about it, and
4. did not take the actions that a reasonable person would take to prevent it

**(3)** This does not protect a partner’s interest in the partnership property from claims against the partnership respecting a partnership obligation

**105 (1)** Partners in an LLP are personally liable for a partnership obligation if and to the same extent the obligation was that of a corporation and they were directors of that corporation.

**(2)** This does not impose the duties imposed on directors of corporations.

## Limited Partnerships

* For limited partnerships, the rest of the Act must be read subject to this part (s 49)
* Rights and liabilities in a partnership are changed internally and externally
* A limited partnership has GPs and LPs and can carry on any business that a partnership without LPs can carry on (s 50).
* Registration requirements (s 51)
* Can be a LP and GP at the same time (s 52).
* Can make decisions internally, and make a limited contribution and have a priority claim to that contribution, but will be personally liable.
* An LP can contribute money but not services (s 55)
* Constraints on GPs to protect LPs (s 56)
* LP is only liable for their contribution (s 57)
* LPs have a right to information (s 58)
* LPs have a right to share in profits equally with GPs (s 59)
* LP rights among themselves (s 61)
* LP’s have a right to their contribution before GPs (s 62)
* LP is not liable as a GP unless he takes part in the management of the business (s 64)
* See cases: creditor coming after partnership where corp is GP shh are LPs
* *Haughton: the LP was personally liable because he displayed himself to the public as a manager of the partnership: in person, on business cards, and in the product.*
* *Nordile: the LP was not personally liable because he participated in management of the partnership solely in the capacity as a director or officer of the GP.*

*Partnership Act*

**49** The provisions of this Act must in the case of LPs be read subject to this part

**50 (1)** A limited partnership may be formed to carry on any business that a partnership without limited partners may carry on

**(2)** A limited partnership consists of

1. one or more GPs
2. one or more LPs

**51 (1)** Formation requires filing a certificate with the registrar

**(2)** The certificate must state

1. the business name of the limited partnership
2. the nature of the business
3. the name and address of GPs
4. the term for which it will exist
5. the value of cash and property contributed by each LP
6. on what basis the share of LPs is different

**(3)** The certificate may contain the name and addresses of LPs

**52 (1)** A person may be a GP and LP at the same time in the same limited partnership

**(2)** This person has the same rights, powers and restrictions as a GP, but in respect of their contribution the person has the rights against the other partners as if they were a LP.

**55** A LP can contribute money and other property to the limited partnership, but not services

**56** Without written consent of the LPs, a GP has no authority to

1. do an act which makes it impossible to carry on the business of the limited partnership
2. consent to a judgement against the limited partnership
3. possess or dispose of limited partnership property, for other than a partnership purpose
4. admit a person as a GP or LP
5. continue the business of the limited partnership on the death/bankruptcy/retire of a GP

**57** A LP is only liable for their contribution of capital to the limited partnership

**58** A LP has the same right as a GP to be given information, and inspect and copy that information, of all things affecting the limited partnership.

**59 (1)** A LP has the right

1. to a share of the profits
2. to have his contribution returned

**(2)** A LP may receive their share of profits if, after payment is made, whether from the property of the limited partnership or that of a GP, the limited partnerships assets exceed all the liabilities, excepting liabilities to LPs on account of their contributions and GPs.

**61 (1)** LPs, in relation to one another, share in the limited partnership assets in respect of

1. their claims for capital and profits, in proportion to the respective amounts of the claims
2. all other claims, equally

**(2)** The partnership agreement may give some LPs greater rights than others, with respect to contributions, profits and other matters.

**62 (1)** A limited partner is not entitled to receive from a general partner or out of the limited partnership property any part of his or her contribution until

1. all liabilities of the limited partnership, excepting liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains sufficient limited partnership property to pay them

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

# THE EVOLUTION OF CORPORATIONS LAW & THE NATURE OF CORPORATE PERSONALITY

## Corporate Personality and Limited Liability

A company’s legal personality is separate and independent from its members’ personalities, and therefore the members are not personally liable for the liabilities of the company.

* *Salomon: he was not personally liable; there is nothing wrong with a company being under the control of one person and there is nothing requiring its members to be independent or unconnected.*

A person can be both a director and an employee of a company.

* *Lee: he was director, sole shh and employee; he died in the course of his employment; his estate was entitled to worker’s compensation*.

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **87** | **(1)** No shh is personally liable for the debts, obligations, defaults or acts of the company. | **45** | **(1)** The shh are not liable for any liability, act or default of the corporation. |

## Liability in Tort

Officers, directors and employees of companies are personally responsible for their tortious conduct even though that conduct was directed in a *bona fide* manner to the best interests of the company. The only exception is an employee, acting *bona fide* within the scope of his authority, who procures or causes the breach of contract between his employer and a third person.

* *ADGA: an officer of a company induced employees of another company to breach their employment contracts and join his company; personally liable.*
* The exception allows employers to terminate a contract on the assumption they will only be liable for a claim under contract. It also ensures that a person cannot sue the company for breach of contract and the directors for tortious conduct.
* La Forest dissented in *London Drugs* and argued that a tort claim should only be available where there is no contract between the company and a third party (i.e. an “involuntary arrangement”).

## Piercing the Corporate Veil

The principle from *Salomon* should not be applied where the company is the mere agent of the controlling person and therefore is a sham, cloak or alter ego.

* *Clarkson: D is bankrupt; prior to bankruptcy he had one of his companies transfer land to his sister to the prejudice of his creditors; the court did not lift the corporate veil*
* *The company was not formed for an unlawful purpose*
* *D was not insolvent when the company was formed*
* *D did not transfer his personal assets to the company*
* *The property always belonged to the company*
* *He never treated the property as if it was his own*

Tax

An enterprise should be taxed as a whole if a company has no room for free will and is a direct instrument of its parent company (and indirect instrument of its grandparent company).

* *De Salaberry: a holding company sets up a parent company which sets up subsidiaries; each subsidiary buys and sells property; the court says the enterprise should be taxed as a whole*
* *The profits were treated as profits of the parent company*
* *The appointment of directors was made by the parent company*
* *The directors and shh are all the same*
* *Capital was brought in by the parent company*
* *The parent company is in constant control*
* *Jodery: D set up a parent and subsidiary; the parent owns all the shares in the subsidiary; D gave his grandchildren all shares in the parent; D’s will bequested a $3 million promissory note to the subsidiary; the court lifted the veil and imposed estate taxes.*
* *Both companies were created on the same day in the same office by the same lawyer*
* *There was no business activity between their creation and his death*
* *Neither had creditors*
* *They both had the same directors and officer*
* *“The reality is that the subsidiary was bound hand and foot by the parent…it was a mere conduit pipe linking the parent to the estate.”*

Special interests

The court will take a flexible approach to lifting the corporate veil where an otherwise permissible corporate arrangement is designed to undermine a law’s social purpose.

* *Lynch: D set up corporations so that assets would be transferred to his offshore accounts, and so the director could be ordered to resign and leave him in charge; his family is trying to access the assets through family law; the court lifted the corporate veil.*
* *D was using the corporate structure for one sole purpose: to disguise his property so that his spouse and children have no access to it*
* *It was a scheme to conceal his assets and create the impression someone else owned the property*
* *It is not because he is the beneficial owner of the shares; it is because he is the beneficial owner of the property*

## Criminal Liability

*Canadian Dredge:*

The criminal conduct, including the state of mind, of employees and agents of a company is attributed to the company so as to render it liable so long as the employee or agent in question is of such a position in the organization that he or she represents its *de facto* directing mind so that the company is identified with the act of that individual.

This is reciprocal: an individual is liable for the act of a company, where that individual is in such a position in the organization and activity of the company that he or she represents its *de facto* directing mind.

This approach was taken as opposed to:

* Total vicarious liability for the conduct of any of its agents whatever their level of employment or responsibility so long as they are acting within the scope of their employment; and
* No criminal liability unless the act was committed on the direction or request, express or clearly implied, of the corporation as expressed through its board of directors.

# JURISDICTIONAL AND CATEGORISATION CONSIDERATIONS

## Classification of Corporations

### “Widely-held” (“public”) and “closely-held” (“private”) corporations

There is a big difference between big and small corporations in terms of the number of shareholders involved.

* For example, a shareholder in a large, public company could just sell their shares on the market rather than using the dissent remedy

But the duties owed and procedures are always the same.

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **1** | "**public company**" means reporting issuer or equivalent. | **2(1)** | "**distributing corporation**"means (as per the regulations): |
|  | "**reporting issuer**" means issued securities, filed prospectus, etc. (as per *Securities Act*) |  | **(a)** a "reporting issuer"as per provincial securities legislation or |
|  | "**reporting issuer equivalent**" means the equivalent under laws of any Canadian jurisdiction other than BC |  | **(b)** has filed prospectus or has securities listed outside Canada, or one of participating bodies has.  |

### Community Contribution Companies

These are a special type of company. There are strict controls on what it does and where it goes. Most companies are designed for profit; they move and do things you might not like. This is a middle ground between a non-profit corporation and a regular corporation. The hope is that more people will invest when there is both a societal purpose and a chance of profit.

* The *CBCA* does not provide for these types of corporations (although the restrictions could be provided for in the by-laws; or the articles under the *BCA*)
* It has to fit within the definition of “community purpose” (s 51.91)
* At least 60% of the profits must go to the beneficiaries of this purpose(s)
* It is a CCC if so stated in the notice of articles (s 51.911)
* The purpose(s) must be set out in the articles (s 51.92)
* There are various restrictions and controls (ss 51.921 - 51.99)

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **51.91** | "**community purpose**" means a purpose beneficial to1. society at large, or
2. a segment broader than group of persons related to the company

and includes, without limitation, a purpose of providing health, social, environmental, cultural, educational or other services |  |  |
| **51.911** | A company is a CCC if it states so in its notice of articles. |  |  |
| **51.92** | One or more of the primary purposes of a CCC must be community purposes and those purposes must be set out in the articles.  |  |  |
| **51.921** | A CCC must use the words or abbreviation as part of its name. |  |  |
| **51.931** | Directors and officers |  |  |
| **51.931** | Transfer of assets |  |  |
| **51.94** | Redemption of purchase of shares |  |  |
| **51.95** | Distribution of assets on dissolution |  |  |
| **51.96** | Financial reports |  |  |
| **51.97** | Altering notice of articles to become a CCC |  |  |
| **51.98** | Amalgamation resulting in a CCC |  |  |

## Extra-provincial Licensing and Filing Requirements

When a corporation of one jurisdiction is acting in another jurisdiction:

* The corporation is restricted by the laws of BC.
* The corporation may also restricted by its corporate charter or the statute under which it was incorporated.

An extra-provincial company, including federally incorporated companies, must take extra steps before carrying on business in BC.

* The *CBCA* just has the one entity – a “corporation”
* A “company” is a corporation recognized under the *BCA*
* A “foreign corporation” is a corporation other than under the *BCA,* and it is a “foreign entity “ that must register as a “extra-provincial company”

The requirements for registration as an extra-provincial company are set out in ss 374-379.

* There are definitions for director and shareholder (s 374)
* Must register within two months of “carrying on business” (s 375)
* Some sort of permanent or ongoing action
* Why not just register and avoid the consequences?
* How to apply to register – easier for a federal corporation (s 376)
* Must reserve a name [see ss 22-28]
* Federal registration is paramount
* The result of registration is set out in (s 378).
* Conclusive evidence you are registered as an extra-provincial company
* May carry on business in BC subject to the laws of BC, your corporate charter, and the statute that you are incorporated under
* *Indoor management rule*: no act is invalid merely because it was not registered or contravened its charter (outsiders don’t have to confirm the powers of your corporation)

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **1** | "**corporation**” has a broad meaning and includes many types of corporate entities |  |  |
|  | "**company**" means a corporation recognized as such under the *BCA* |  |  |
|  | “**foreign corporation**” means a corporation that is 1. not a company
2. has issued shares
 |  |  |
|  | “**foreign entity**” means a foreign corporation |  |  |
|  | "**extra-provincial company**" means a foreign entity registered as an extra-provincial company |  |  |
| **374** | “**director**” has the same meaning, and also means a manager“**shareholder**” means a member of that foreign entity or corporation |  |  |
| **375** | **(1)** A foreign entity must register within 2 months after it begins to carry on business in BC.**(2)** Deemed to carry on business in BC if:1. name in a telephone directory
2. name is announced in an advertisement in which an address or telephone number in BC is given
3. has , in BC, a resident agent or warehouse, office or place of business
4. it otherwise carries on business
 |  |  |
| **376** | **(1)** To apply to register, the foreign entity must provide to the registrar any required records and information, and must:1. reserve its name under ss 22 or 26
2. appoint attorneys if required under s 386
3. submit to the registrar (i) a registration statement and (ii) any other records required

**(2)** (1) does not apply to a federal corporation. |  |  |
| **378** | **(1)** A notation in the register that a foreign entity is registered as an extraprovincial company is **conclusive evidence** that it has been duly registered as an extraprovincial company.**(2)** An extraprovincial company may, for the purpose of carrying on business in BC, exercise the powers contained in or permitted by its **charter** (subject to the **laws of BC or other applicable laws**).**(3)** Registration as an extraprovincial company does not allow it to exercise powers in a manner inconsistent with its charter.**(4)** **No act is invalid merely because it contravenes (3) or was not registered as an extraprovincial company.** |  |  |

## Continuance Under the Law of Another Jurisdiction

This applies when you wish to import (“continuing into”) a corporation into BC to become a “company” under the *BCA*. You may want to do this to have BC laws apply (the *BCA* is management friendly) or to make things easier after an amalgamation. You may also wish to export (“continuing out of”) the corporation out of BC.

* Must file a continuation application along with any required information (s 302)
* Proof of standing in home jurisdiction; authorization for continuation (i.e. a shareholder vote); articles that it will have as a BC company
* If the continued company does not have articles under s 302, the company will be given the provisional articles in Table 1 (s 307)
* Most rights and claims are not affected by a continuance (s 305)
* Exporting the company is in (s 308)
* Requires a special resolution
* The registrar must be satisfied the company has filed all required record
* Shareholders can dissent in respect of a resolution under 308 (s 309)
* A director or officer of an extra-provincial company may be personally liable if they contravene s 27 (displaying the name) (s 384)

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **302** | **(1)** If a foreign corporation seeks to be continued in BC as a company, whether or not registered as an extraprovincial company, it must 1. file a continuation application
2. provide any required information including proof of standing in home jurisdiction and authorization for continuation (i.e. a shareholder vote)
3. sign the articles the foreign corporation will have once continued as a BC company
 |  |  |
| **305** | Effect of continuation |  |  |
| **306** | Shares are deemed to be compliant |  |   |
| **307** | If the continued company does not provide articles under s 302(1)(c), the company will be given the provisional articles in Table 1 |  |  |
| **308** | **(1)** A company may apply to another jurisdiction for continuation.**(2)** It must be authorized by a special resolution.**(5)** The registrar must be satisfied that the company has filed all required records. |  |  |
| **309** | Any shareholder may dissent in respect of a resolution under 308(2) |  |  |

# THE CORPORATE CONSTITUTION

## Corporate Names

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **22** | **(1)** To reserve a name, must apply to the registrar.**(2)** The registrar can **reserve a name** for 56 days.**(3)** The registrar can extend the reservation.**(4)** The registrar must not reserve a name unless it **complies with the prescribed requirements** [IP issues; offensive, etc.] |  |  |
| **23** | The name must include a **suffix**. |  |  |
| **24** | Cannot use a suffix if not incorporated. |  |   |
| **25** | Must be in **English or French** or both |  |  |
| **26** | If the name of a foreign entity contravenes any of the requirements, it must use an **assumed name** [This does not change the name in the home jurisdiction, but it must be used in BC] |  |  |
| **27** | A company **must display its name** 1. In a conspicuous place at each place in BC where it carries on business
2. In all its notices and other publications used in BC
3. On all contracts, letters, orders, invoices, statements, receipts, and letters of credit used in BC
4. On all bills of exchange, promissory notes, endorsements, cheques, and money orders used in BC and signed by it.
 |  |  |
| **28** | The registrar may **order a company to change its name** if it contravenes any of the prescribed requirements. |  |  |
| **384** | A director or officer of an **extra-provincial company** who knowingly permits that company to contravene 27(1)(a)(b) or (c) is **personally liable** to indemnify: 1. A purchaser of goods or services
2. A supplier of goods or services
3. A person holding a security of the extra-provincial company
 |  |  |

## Creating the Corporation

A corporation only comes into existence by the specific actions of the individuals who want it.

* There is no stumbling in/out as in a partnership.
* The *BCA* is based on a contractual foundation – the incorporation agreement
* If a problem arises that is not governed by statute, it may be taken care of by contract law
* Although the contract is there at the outset, the shareholders can’t later use a contract to change the corporation (i.e. unanimous shareholder agreements under *CBCA*)

To create a corporation:

* Reserve a name (ss 22-28)
* Decide on the nature of the business (s 11; *CBCA* s 6)
* Name; directors; share structure
* The articles – need these from the outset - restrictions; procedural and structural rules; (s 12)
* THINK BIG: it may be hard to change these things later
* You may not need these things now, but it makes it easier if they are ready to go when you need them later (“built-in remedies”)
* Who takes filing steps
* *BCA* – incorporators enter incorporation agreement; each must take one or more shares (s 10)
* *CBCA* – decide on incorporators; some restrictions (s 5)
* Filing
* Incorporation agreement and notice of articles; articles not filed (s 10)
* Articles of incorporation (s 7)
* Changing the articles (s 259)
* Shareholder may dissent (s 260)

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **10** | **(1)** One or more persons may form a company by:1. entering into an **incorporation agreement**
2. filing an **incorporation application**, and
3. complying with this part of the statute

**(2)** The incorporation agreement must:1. contain the agreement of each incorporator to **take one or more shares in their name**

**(3)** An incorporation application must contain:1. **a** **notice of articles**
 | **5** | Any individual **may be an incorporator by signing** the articles of incorporation so long as they are not* 1. less than 18
	2. is of unsound mind
	3. is bankrupt

[Note: no requirement that each incorporator take shares; no incorporation agreement] |
| **11** | A notice of articles must:1. set out the **name** of the company
2. set out name and address of each **director**,
3. describe the **share structure** in accordance with s 53
4. set out the rights and restrictions attached to each class and series of shares
 | **6** | **(1)** The **articles of incorporation must…**1. Set out the province where the registered office is to be situated
 |
| **12** | **(1)** A company must have **articles** that1. set rules for its **conduct**

**(2)** The articles must * 1. set out **restrictions** on business the company may carry on; and the powers the company may exercise
	2. set out the **rights and restrictions** on series and classes of shares

**(4)** A company may adopt the **model articles** in Table 1 |  | [**By-laws**: in theory, these don’t have to be in place] |
| **259** | **(1)** A company may resolve to **alter its articles**1. by the type of resolution specified by this Act
2. if this Act does not specify the type of resolution, by the type of resolution specified in the articles
3. if neither specifies the type of resolution, by a special resolution
 |  |  |
| **260** | **Any shareholder may dissent** in respect of any resolution under s 259(1)1. to alter restrictions on the powers of the company or the business the company is permitted to carry on, or
2. altering the purpose of a CCC
 |  |  |

## The Concept of Restrictions

There are two propositions with regard to the powers of a corporation:

* It has all the powers of a person of full capacity, and then restrictions are put in place.
* It only has the powers that are given to it.
* Some companies only have one purpose
* This makes a difference with regard to specific performance; taxes; creditors; etc.

The *BCA* works under the first proposition.

* All the rights, powers and privileges of an individual of full capacity (s 30)
* The restrictions are there at the outset, in the articles (s 33)
* A director is personally liable for a breach of section 33 (s 154)
* The *indoor management rule* applies (33(2))
* But an outsider does need to worry – they bear the risk an action is subject to compliance and restraining orders (s 228)
* There are remedies (i.e. breach of contract) but they require litigation

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **30** | A company has the capacity and the rights, powers and privileges of an individual of **full capacity.** |  |  |
| **33** | **(1)** **A company must not [see s 154 – directors personally liable]*** 1. carry on any business or exercise any power that it is restricted by its **articles** from carrying on or exercising
	2. exercise any of its powers in a manner inconsistent with those restrictions in its articles

**(2)** **No act of a company is invalid merely because it contravenes (1)** |  |  |

# PRE-INCORPORATION CONTRACTS

The reality is that certain contracts must be in place before a corporation is in existence, otherwise there will be delays (employees; place of business; etc.).

Relevant parties:

* Promotor
* Did they have authority to bind the corporation?
* Actual; ostensible; estoppel based
* Are they mistaken as to the existence of the corporation?
* Possible deceit or negligent misrepresentation
* Third party
* Are they mistaken as to the existence of the corporation?
* Corporation
* Did it come into existence at a later date?
* Which statute is it governed by?
* Did it adopt the contract?

Sources of Liability

* Contract (main or collateral)
* Tort (misrepresentation)
* Restitution
* Estoppel (representation, promissory, convention)

“Warranty of authority”

* A collateral contract between the promotor and third party (i.e. the promotor warrants that the corporation exists; or will come into existence and adopt the contract)
* Damages are given for the breach of warranty of authority, NOT the main contract

## Common Law

A corporation cannot adopt a contract entered into before its existence (*Kelner – wine merchant; hotel company*).

Where both parties to a pre-incorporation contract know that the corporation is not in existence, they are bound personally to that contract (*Kelner: the intention of the parties was to be personally bound*).

Where both parties mistakenly believe a corporation is in existence, the promotor is not personally bound to the contract (*Black: neither party intended to bind the promotor personally*).

* Note: this case did not discuss warranty of authority

Where the promotor knows the corporation does not exist, but the third party is mistaken as to the existence of the corporation, the promotor is liable for breach of warranty of authority but is not personally bound by the contract (*Wickberg*: *contract to be manager of a corporation; never got his salary; damages were minimal because P was culpable and this is not what caused the loss*).

## Statute

Jurisdiction is very important.

* Both statutes allow the corporation to adopt a contract entered into, on its behalf, before it came into existence (s 20(3); *CBCA* s 14(2))
* Must be within a reasonable time
* By any act or conduct signifying its intention to be bound
* The corporation is bound as if it was incorporated on the date the contract was entered into (s 20(4)(a); *CBCA* s 14(2)(a))
* *BCA –* the promotor is liable for breach of warranty of authority (s 20(2))
* Warrants that the corporation will come into existence and adopt the contract in a reasonable time
* The promotor ceases to be liable if the corporation adopts the contract (s 20(4)(b))
* *CBCA –* the promotor is personally bound by the contract (s 14(1))
* Both parties need to know the corporation is not in existence
* The promotor ceases to be bound if the corporation adopts it (14(2)(b))

Note: there are unresolved issues with the *CBCA:*

* Contracts are provincial jurisdiction
* *Constitution Act, 1867* -s92(13): property and civil rights
* But the *CBCA* regulates contracts before the existence of a federal entity
* The statute is silent on warranty of authority
* The common law may still apply; this is unclear

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **20** | **(1)** In this section,"**facilitator**" means a person who, before a company is incorporated, purports to enter 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 a contract in the name of or on behalf of the company "**pre-incorporation contract**" means a purported contract referred to in (2) |  |  |
|  | **(2)** **If, before a company is incorporated,** a person purports to enter into a contract in the name of or on behalf of the company [subject to (4b) and (8)]1. the person is **deemed to warrant** to the other parties that the company (i) will come into existence in a reasonable time and (ii) will adopt the contract within a reasonable time after coming into existence
2. the person is **liable for damages** for any breach of that warranty
3. measure for damages is the **same as if** the company existed, the person had no authority to do so, and the company refused to ratify
 | **14** | **(1)** A person who enters into, or purports to enter into, a **written contract** in the name of or on behalf of a corporation before it comes into existence is **personally bound** by the contract and is entitled to its benefits. |
|  | **(8)** A facilitator is not liable under (2) if the parties to the pre-incorporation contract have, **in writing, expressly so agreed** |  | **(4)** **If expressly so provided in the written contract**, a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof. |
|  | **(3)** A new company may, within a reasonable time after its incorporation, **adopt that pre-incorporation contract** by any act or conduct signifying its intention to be bound by it.**(4)** Once adopted, * 1. **the new company is bound** by and entitled to the benefits of the pre-incorporation contract as if it was incorporated at the date of the pre-incorporation contract
	2. **the facilitator ceases to be liable under (2)** in respect of the pre-incorporation contract
 |  | **(2)** A corporation may, within a reasonable time after it comes into existence, **adopt a written contract** made before it came into existence in its name or on its behalf1. **the corporation is bound** by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto
2. a person who purported to act in the name of or on behalf of the corporation **ceases to be bound** by or entitled to the benefits of the contract [subject to 3]
 |
|  | **(5)(6)(7)** [the court can make orders to change how these provisions work] |  | **(3)** Whether or not the contract is adopted, a party to the contract may apply to court for an order respecting the nature and extent of obligations and liability under the contract, and the court may make any order it sees fit. |

# MANAGEMENT AND CONTROL OF THE CORPORATION

## Directors and Officers

Directors

* Directors have the ultimate responsibility for management and supervision a corporation (s 136; *CBCA* s 102(1))
* Note: unanimous shareholder agreements and equivalent [see below]
* The statute is silent on passing directors resolutions i.e. how a meeting is called; notice; quorum; voting; etc. (s 140(3))
* A person may be found to be a *de facto* director (s 138(1))
* Will have a director’s duties imposed on them (subject to exceptions)
* This is not in the *CBCA*
* Under the *CBCA,* directors can alter the by-laws by resolution (*CBCA* s 103(1))
* The change must be submitted to the shareholders for approval (*CBCA* s 103(2))
* Directors must be elected or appointed in accordance with the Act and the articles (s 122)
* Some restrictions on who can be a director (s 124)
* Shareholders can remove a director before the expiration of their term of office (s 128(3))
* By a special resolution, or
* In accordance with the articles
* *CBCA –* by ordinary resolution at a special meeting (*CBCA* s 109(1))

Officers

* Directors appoint/remove officers and specify their duties (s 141)
* “Senior officers” include (s 1)
* The chair or vice chair of the board of directors
* The president
* Any vice president in charge of a principal business unit including sales, finance or production
* Any officer who performs a policy making function and has capacity to influence the direction of the corporation

Directors can also be officers

* “Inside management” – implementing decisions on an ongoing basis
* “Outside management” – only take part in management occasionally
* There is an imbalance here; both are equally accountable

### Appointment and terms

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **1** | "**director**" means* 1. 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

"**first director**" means an individual designated as a director of a company on the notice of articles  | **2** | "**director**" means the director appointed under s 260 |
| **120** | A company must have **at least one director**, and in the case of a public company, must have **at least 3** directors. | **102** | **(2)** A corporation shall have **one or more** directors, but a distributing corporation **shall not have fewer than three, at least two of whom are not officers or employees** [subject to the bylaws - s 112)] |
|  |  | **103** | **(1)** The **directors may, by resolution, make, amend or repeal any bylaws** [subject to the bylaws or unanimous shh agreement]**(2)** Directors shall submit a bylaw under (1) to the shh at the next meeting, to be confirmed or rejected by ordinary resolution |
| **121** | **(1)** The **first directors** of a company hold office as directors from the recognition of the company until they cease to hold office under 128(1) [subject to (2)] |  |   |
| **122** | **(1)** Directors, other than the first directors who are in their first term of office, **must be elected or appointed in accordance with this Act and the articles**.**(2) (3)** [Appointing more directors]**(4)** Individual must be present and consent |  |  |
| **124** | **(2)** An individual is **not qualified to become a director if**1. under 18
2. found by a court to be incapable
3. an undischarged bankrupt
4. convicted of one of these offences

**(3)** Such an individual must promptly resign | **105** | **(1)** The following persons are **disqualified from being a director**1. under 18
2. found by a court to be of unsound mind
3. not an individual
4. has status of a bankrupt
 |
|  |  | **105** | **(3)** At least 25% of directors must be **resident Canadians** |
| **125** | A director is **not required to hold shares** in the company. | **105** | **(2)** A director is **not required to hold shares** in the corporation |
| **128** | **(1)** A director **ceases to hold office** when 1. the term of office expires [Act/articles]
2. dies or resigns
3. removed in accordance with (3) or (4)

**(3)** A company may **remove a director** before the expiration of their term of office1. by **special resolution** or
2. in **accordance with the articles**
 | **106** | **(3)** Shh shall, by **ordinary resolution** at the first meeting of shh and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shh following the election [subject to 107(b)] |
| **108** | **(1)** A director **ceases to hold office when**1. dies or resigns
2. removed in accordance with s 109
3. disqualified under 105(1)
 |
| **109** | **(1) The shh may by ordinary resolution at a special meeting remove any director** |

### Powers – Meetings – Decisions

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **136** | **(1) The directors of a company must, subject to this Act and the articles, manage or supervise the management of the business and affairs of the company.** | **102** | (1) Subject to any unanimous shh agreement, the directors shall manage, or supervise the management of, the business and affairs of the corporation. |
|  |  | **104** | **(1)** After issue of the certificate of incorporation, a meeting of directors shall be held at which the directors may…1. make by-laws
 |
|  |  | **115** | **(1)** The directors may appoint a **managing director** **or a committee of directors** and delegate to such managing director or committee any of the powers of the directors.**(3)** [Things the managing director does not have authority to do]1. cannot adopt, amend or appeal by-laws
 |
| **138** | **(1) If a person is not a director but performs functions of a director**, ss 142, 231, 234, 251, 335, 347 and 354 and Divisions 3 to 5 of this Part apply. |  |  |
| **140** | Director participation at meetings and decision making.**(3)** How a resolution may be passed [statute is silent on how a meeting is called; notice; quorum; voting; etc.] | **110** | Director participation at meetings and decision making. |
|  |  | **114** | “ |
|  |  | **117** | “ |

### Officers – Procedural Issues

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **1** | "**senior officer**" means, in relation to a corporation1. the chair and any vice chair of the board of director or other governing body of the corporation, if that chair or vice chair performs the functions of the office on a full time basis
2. the president of the corporation
3. any vice president in charge of a principal business unit of the corporation including sales/finance/production
4. any officer of the corporation, whether or not they are a director, who performs a policy making function and capacity to influence the direction of the corporation
 | **2** | "**officer**" means an individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices |
| **141** | **(1)** The **directors may appoint officers and specify their duties** [subject to (3) and the articles]**(2)** Unless the articles provide otherwise 1. any individual may be appointed
2. that individual may hold 2 or more offices

**(3)** **Cannot be an officer if not qualified to be a director under s 124****(4)** The directors may remove any officer [subject to articles]**(5)** The removal is without prejudice to any contractual or legal rights of the officer, but the appointment does not create any contractual rights. | **121** | Subject to the by-laws or any unanimous shh agreement1. **the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3)**
2. A director may be appointed to any office
3. two or more offices may be held by the same person
 |

## Corporate Responsibility

### Old approach

A business corporation is organized and carried on primarily for the profit of the shareholders. The powers of the directors are to be employed to attain that end and do not extend to a change in the end itself i.e. to the reduction or non-distribution of profits in order to devote them to other purposes.

* *Dodge: P are minority shh; D is a very profitable company; some dividends were declared but most profits were retained to expand the business, increase wages and reduce the cost of products for the public benefit.*
* *It is not within the lawful powers of directors to shape and conduct the affairs of a corporation for the “merely incidental” benefit of shh and primary purpose of benefitting others.*
* *The court will not interfere with the proposed expansion of the business – the ultimate results cannot be estimated. But the money is due over time and a larger sum can be paid to the shh now.*

For an expenditure of company money to be sufficiently justified, it must be: (*Parke*)

1. Reasonably incidental to the carrying on of the company’s business
2. A *bona fide* transaction
3. Done to benefit and promote the prosperity of the company.

*Parke: P are minority shh in D; D was sold and is being wound-up; the proceeds of the sale were given to the employees of D; this is a breach of fiduciary duty to the shh; the action was motivated by generosity, philosophy and politics, which are laudable reasons, but ones which do not provide sufficient justification; the benefit should go to the shareholders.*

### New Approach

[Note: the test from *Parke* is still valid; but the duty is owed to corporation, not the shareholders]

A director is required to act in the best interests of the corporation viewed as a good corporate citizen (*Peoples; BCE*).

* The duty is owed to the corporation.
* Directors, acting the best interests of the corporation, may be obliged to consider the impact of their decisions on, *inter alia,* the interests of shareholders, employers, suppliers, creditors, consumers, governments and the environment.
* Usually, the interests of the corporation and these stakeholders will coincide.

The test shifts – it changes with time (i.e. a “moving target”).

* This makes it very difficult to call management to account; courts will give deference to the business judgement of directors who take into account these ancillary interests.
* It largely depends on the situation at hand and what stage of life the corporation is at.
* It is not confined to short-term profit or share value.
* Where the business is an ongoing concern, it looks to the long-term interests of the corporation.
* It may be impossible to satisfy the interests of all stakeholders in any given situation.
* In the vicinity of insolvency, the interests of creditors are heightened (although this did not warrant a finding of breach of fiduciary duty in *Peoples*).

*Peoples: “Wise Stores” acquired “Peoples Stores”; P is the trustee in bankruptcy of Peoples; D ran the two corporations together; both went bankrupt; P claims D favoured the interests of Wise to the detriment of Peoples and its creditors.*

* *When a corporation is in the vicinity of insolvency, directors must be careful to act in its interests by creating a “better” corporation and not to favour the interests of one group of stakeholders. Even if unsuccessful, this would not be a breach of fiduciary duty.*
* *Stakeholders have other remedies at their disposal (i.e. oppression). There is no need to read creditors into the fiduciary duty. However, their interests may have a higher worth in the vicinity of insolvency, when the interests of shh are nearly worthless or exhausted.*

*BCE: there was an arrangement whereby BCE would be purchased at a premium, but would also take on a substantial amount of debt for which Bell Canada is liable; Bell Canada is a wholly-owned subsidiary of BCE; the plan was approved by BCE shh by opposed by holders of debentures issued by Bell Canada; they claim the value of their debentures will decline significantly; bring an oppression claim.*

* *It was apparent the Board considered the interests of the debentureholders and, having considered its options in these difficult circumstances, made its decision based on what it perceived to be the best interests of the corporation.*
* *BCE, facing certain takeover, acted reasonably to create a competitive bidding process. All of the bids contemplated a substantial increase in Bell Canada’s debt. BCE could not avoid this risk; it was not reasonable to suppose they could take further steps to restructure the purchase in way that would provide a satisfactory purchase price to the shh and preserve the high market value of the debentures.*
* *[The reasoning is similar with regard to dismissing the oppression claim]*

## Shareholder Input

Shareholders have certain controls over the corporation:

* Electing and removing directors
* Being involved in decision-making

In practice, these might not be effective.

* Remember: directors owe their duty to the corporation, not shareholders.
* Directors may be able to vote as shareholders, in which case they owe a duty to no one.

Where the statute requires a specified form of resolution to remove a director, the articles cannot change the type of resolution needed but can change the type of voting rights attached to shares.

* *Bushell: the articles of a corporation provide that on any vote to remove a director, that director’s shares carry three votes; this makes it impossible to remove a director by ordinary resolution as per the statute; the legislature intended to prevent articles from requiring a special or extraordinary resolution; the legislature did not intend to interfere with the right of a company to issue shares with special rights attached.*

Directors are not bound to carry into effect a resolution passed at a meeting of shareholders.

* *Automatic Self-Cleansing: the duty of the directors is owed to the corporation, not the shareholders; the directors may feel a shareholder decision is not in the best interests of the corporation.*

The statutes give shareholders various controls

* Sale of the undertaking (s 301; *CBCA* s 189)
* Unanimous shareholder agreement / resolution to amend articles (s 137, *CBCA* s 146)
* Dissent
* Sale of undertaking (s 301; *CBCA* s 189)
* Continuing in another jurisdiction (s 309)
* Altering the articles (s 260)
* Everyone can dissent, not just those entitled to vote

### Sale of the Undertaking

A sale of the undertaking requires shareholder authorization by a special resolution, unless it is in the ordinary course of business to do so (s 301(1); *CBCA* 189)

* “All or substantially all of its undertaking/property”
* Lots of litigation on this phrase
* It is best to just have a vote; avoid the hassle
* Could be a sole purpose corporation i.e. *De Salaberry*
* *Indoor management rule* applies (s 301(3))
* Shareholders may dissent to the resolution (s 301(5))
* Remember: everyone can dissent, not just those with a vote.
* *CBCA:* attached the right to vote to all shares, whether or not they normally have the right to vote (189(6))
* *BCA* does not have this

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **301** | **(1)** A company must not sell, lease or otherwise dispose of all or substantially all of its undertaking unless1. It does so in the **ordinary course** of its business, or
2. It has been authorized to do so by a **special resolution**
 | **189** | **(3)** A sale, lease or exchange of all or substantially all the property of a corporation **other than in the ordinary course of business** of the corporation requires the approval of the shareholders |
|  | **(3)** A disposition is **not invalid** merely because the company contravenes (1) if it is1. for valuable consideration to a person who is dealing with the company in good faith, or
2. ratified by a special resolution
 |  | **(4)** Notice of meeting; state that a shh **may dissent****(5)** Shareholder authorization and conditions at meeting**(8)** Must be a **special resolution****(9)** Directors **may abandon** the sale, lease or exchange without further shh approval |
|  | **(4)** Despite the passing of a special resolution under 1(b), the **directors may abandon** the disposition without further action by the shh |  | **(6)** Each share of the corporation carries the right to vote in respect of a sale, lease or exchange referred to in subsection (3) **whether or not it otherwise carries the right to vote**. |
|  | **(5)** Any shareholder may send a **notice of dissent** in respect of a resolution under 1(b) or 3(b) |  |  |

### Unanimous Shareholder Agreements (and Equivalent)

This part of the statute allows shareholders to take over management of the company.

* The *BCA* does not allow for unanimous shareholder agreements
* Have to do this through the articles, may require special resolution (s 137)
* The purpose of this is to remove the “veto” power of minority shareholders
* The *CBCA* allows for unanimous shareholder agreements (s 146)
* Purchaser of shares is deemed to be a party unless not given notice (146(3)(4))
* Shareholders can fetter their discretion when exercising their powers under a unanimous shareholder agreement (146(6))
* The shareholders can predict certain decisions will be made
* Directors cannot fetter their discretion – duty is to the corporation
* In either case, the powers and duties pass from the directors to the new person in control (s 137(2); *CBCA* s 146(5))

A person can be oppressed by a USA despite being a party to it; the oppression remedy gives the court broad power to make any order it thinks fit including amending a USA or setting limits to the exercise of power under a USA.

* *Bury: there is a USA whereby an employee who leaves must sell his shares to the corporation; the corporation must do this within 6 months but can extend this period to six months; the corporation chose to extend the period; failed to give any justification for the extension, inference is that it was meant to punish him*

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **137** | **(1)** 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 persons**. | **146** | **(1)** An otherwise lawful **written agreement among all the shh of a corporation, that restricts, in whole or in part, the powers of the directors** to manage the business and affairs of the corporation is valid. |
|  | **(1.1)** Such a provision may be included in the articles at the time of the **company's recognition** or may be added later by **special resolution**. |  | **(2)** If a person who is the beneficial owner of all the issued shares of a corporation makes a written declaration to that affect, it is deemed to be a unanimous shh agreement. |
|  | **(2)** The person to whom those powers are transferred have all **the rights, powers, duties and liabilities** of the directors, in relation to the extent of the transfer, and the directors are relieved of their rights, powers, duties and liabilities to the same extent. |  | **(3)** A purchaser or transferee of shares subject to a unanimous shh agreement is **deemed to be a party** to the agreement. |
|  |  |  | **(4)** If notice is not given to that purchaser or transferee, they may **rescind the transaction** by which they acquired the shares (within 30 days). |
|  |  |  | **(5)** Parties to the unanimous shh agreement who are given the power to manage the business and affairs of the corporation have all the **rights, duties and liabilities** of a director of the corporation to the extent the directors powers are restricted (and the directors are relieved of their rights, powers, duties and liabilities to the same extent) |
|  |  |  | **(6)** **Nothing in this section prevents shh from** **fettering their discretion** when exercising the powers of directors under a unanimous shh agreement. |

## Protecting Third Party Reliance – The Indoor Management Rule

Outsiders are protected through agency law: if it looks as though the person you are dealing with has the authority to act on behalf of the company, the transaction will be valid unless you knew or ought to have known otherwise (s 146; *CBCA* 17-18).

* Was it reasonable to rely on that person?
* How this plays out is fact-specific;
* Include the perspective of the observer
* Various situations where this can occur (s 146(1)(a-e); *CBCA* 17, 18(1)(a-e))

A pre-incorporation contract may bind a corporation based on the indoor management rule [note: this could incentivize the promotor to tell the person the corporation adopted it – to escape personally liability or breach of warranty of authority].

* *Sherwood: there is a pre-incorporation contract for the sale of property; the corporation came into existence; its lawyer wrote a letter confirming it would adopt the contract; it did not adopt the contract; vendor says breach of contract*
* *Corporation is liable - the purchaser was entitled to rely on the letter; the corporation cannot dispute the authority of the lawyer to write the letter and is bound by the legal implication that arose; the lawyer held out the authority to speak on behalf of the corporation when he referred to it as the creature of his firm, with the clear inference that a member of the firm is the nominal director*

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
|  |  | **17** | No person is affected by or is deemed to have notice or knowledge of the **contents of a document** concerning a corporation by reason only that the document has been **filed** by the Director or is **available for** **inspection** at an office of the corporation. |
| **146** | **(1)** [Subject to (2)] A company, guarantor of an obligation of a company or a person claiming through a company **may not assert against a person dealing with the company**, or dealing with any person who has acquired rights from the company, that1. **articles** have not been complied with
2. the individuals shown as directors in the **corporate register** are not directors
3. a person held out by the company as adirector, officer or agent (i) **is not** or (ii) **has no authority** to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent.
4. a **record** issued by any director, officer or agent of the company is not valid or genuine
5. a **record** kept by or for the company under s 42 is not accurate or complete

**(2)** (1) does not apply in respect of a person who **has knowledge**, or, by virtue of the person's relationship to the company, **ought to have knowledge**, of a situation described in (a)-(e). | **18** | **(1)** No corporation and no guarantor of an obligation of a corporation may assert against a person dealing with the corporation or against a person who acquired rights from the corporation that1. **articles, bylaws or any USA** not complied with
2. the persons named in the most recent notice sent to the Director under s 106 or 113 are **not the directors** of the corporation
3. the place named in the most recent notice sent to the Director under s 19 is **not the registered office** of the corporation
4. a person held out by a corporation as a director, officer, agent or mandatary of the corporation **has not been duly appointed or has no authority**
5. a **document** issued by any director, officer, agent or mandatory is not valid or genuine
6. a **sale, lease or exchange of property** under s 189(3) was not authorized

**(2)** (1) does not apply in respect of a person who **has, or ought to have, knowledge** of a situation described in that subsection by virtue of their relationship to the corporation. |

## Protecting Outside Directors – The Audit Committee

The audit committee is a form of internal protection for directors

* “Inside vs. outside management” – some directors also have ongoing management roles as officers; some directors are only occasionally involved in management decisions
* But they are equally liable as directors
* These provisions only apply to public companies (s 223)
* Directors must elect an audit committee (details in s 224)
* The committee scrutinizes the books and report to the directors (s 225)
* Directors must provide financial statements and auditors report to the committee (s 226)

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **223** | This Division does not apply to a company unless it is a **public company** or financial institution |  |  |
| **224** | **(1)** The directors must, at their first meeting held on or after each annual reference date, **elect from among their number an audit committee**, to hold office until the next annual reference date.**(2)** Composition**(3)** Quorum**(4)** Chair**(5)** Must give the auditor of the company: notice of, and right to appear at, meetings of the audit committee.**(6)** Chair must convene a meeting of the committee to consider any matter that the auditor believes should be brought to the attention of directors or shh. |  |  |
| **225** | The audit committee **must review and report to the directors on the financial statements of the company, and the auditor's report** prepared in relation to those statements, before they are published. |  |   |
| **226** | The directors **must provide to the audit committee the financial statements and auditor's report** in sufficient time to allow a review and report. |  |  |

# DUTIES OF DIRECTORS AND OFFICERS

**[NOTE**: **s 142** - **act in accordance with statute and articles** / ***CBCA* s 122** – act in accordance with the statute, by-laws **and any USA** 🡪 *BCA* excuses directors (not officers) in same manner as fiduciary duty and duty of care; *CBCA* excuses directors (not officers) in same manner as director liability**]**

## Directors – Personal Liability

There are a number of situations where directors may be jointly and severally liable to the company (s 154(1-2); *CBCA* 118(1-2), 119)

* These transactions typically involve money
* The *CBCA* includes unpaid wages (s 119); in BC this falls under employment law
* *Ultra vires* acts (s 33(1))
* Issuing shares (s 63(2)(b),64) – unless didn’t know
* Name not displayed (s 27)
* If the director was present at a meeting, deemed to consent to that resolution unless they dissent 154(5)
* If voted in favour, cannot dissent (s 154(6))
* If not present, deemed to consent if a director/member of the committee (s 154(7))
* Must dissent within 7 days (s 154(8))
* Escaping liability (s 154; *CBCA* s 123)
* *BCA*
* Reliance in good faith – this is more management friendly than the *CBCA*
* Did not know, and could not reasonably have known, that the act was contrary to the statute
* *CBCA*
* If exercised care, due diligence and skill of a reasonably prudent person in comparable circumstances (including reliance in good faith)

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **154** | **(1)** Directors are **personally liable** **to restore the company**, if they vote for or consent to a resolution that authorizes the company to do any of the following: * **33(1) – *ultra vires* act**
* 67 – commissions and discounts
* 70(2); 78, 79 – dividends/purchase/ redemption when insolvent
* 163 – indemnification of parties
* Part 2.2 - CCCs

**(2) 63(2)(b); 64 – price and payment of shares****(3)** This is not in derogation of any other duty owed by law**(4)** Not liable if did not know, or **couldn't reasonably know**, that **s 63** was contravened**(5)** **If present at a meeting,** **deemed to consent** **unless there is a dissent** (a) recorded in the minutes or (b)/(c) in writing **(6)** If voted in favour of a resolution, **cannot dissent****(7)** If not present at the meeting, deemed to consent to the resolution if (a) director at the time or (b) member of the committee**(8)** The director **must dissent within 7 days** after becoming aware of the resolution**(9)** Limitation period of two years from the resolution.  | **118** | **(1)** Directors are personally liable to the corporation for issuing a share for **less than fair value or consideration other than money (s 25)****(2)** Also, if vote for or consent to: * **34/35/36 –** **purchase, redemption or acquisition of shares**
* 41 - commissions
* 42 - dividends
* 124 - indemnity
* 190-241 - payment to a shh

**(3)** Entitled to contribution from other directors **(4)** May apply to court to pay money paid contrary to (2)**(5)** Court can do (4) among other things**(6)** Not liable if **did not know, or couldn't reasonably know**, that **(1)** was contravened**(7)** Limitation period of two years from the resolution |
| **156** | Entitled to **contribution from other directors** who voted for or consented to the resolution | **119** | Directors are liable for **unpaid wages** up to 6 months. |
| **158** | Liable if **name not displayed** **(s 27)** if it causes a loss or damage to a purchaser, supplier or person holding a security. |  |   |
| **157** | **(1)** A director is not liable under 154 if…he **relied in good faith** on1. Financial statements from an officer or auditor
2. Written report of a professional
3. Statement of fact by an officer
4. Record, information or representation that the court considers reasonable grounds for the actions of the director, whether or not it was forged, fraudulent or inaccurate

**(2) Not liable under 154 if did not know and could not reasonably have known that the act was contrary to this statute** | **123** | **(4)** A director is not liable under 118 or 119 ... if exercised the care, due diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on:1. Financial statements from an officer or auditor
2. A report from a professional
 |

## Care and Skill

This is a duty of care (s 142(1)(b); *CBCA* 122(1)(b)).

* Applies to both directors and officers
* Only the *CBCA* sets out the roles that fall under the definition of ‘officers’
* Under the *BCA,* all officers may owe this duty
* No provision in a contract or the articles relieves this duty
* Or a resolution (*CBCA* only)
* Under the *BCA,* shareholders may be able to excuse you *–* more management friendly
* However, both statutes have provisions which allow these resolutions in specific circumstances (i.e. revealing a conflict of interest)
* Escaping liability – directors only; NOT officers (s 157(1); *CBCA* s 123(5))
* Reliance in good faith
* *BCA* does not have the “did not know” clause as with director liability

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **142** | **(1)** A **director** or **officer** must:1. **exercise the care, due diligence and skill that a reasonably prudent individual would exercise in comparable circumstances**
 | **122** | **(1)** A **director** or **officer** must:1. **exercise the care, due diligence and skill that a reasonably prudent individual would exercise in comparable circumstances**
 |
| **157** | **(1)** A director … has complied with his duties under s 142(1) if **he relied in good faith** on1. Financial statements from an officer or auditor
2. Written report of a professional
3. Statement of fact by an officer
4. Record, information or representation that the court considers reasonable grounds for the actions of the director, whether or not it was forged, fraudulent or inaccurate
 | **123** | **(5)** A director has complied with his duties under s 122(1) if he relied in good faith on:1. Financial statements from an officer or auditor
2. Report of a professional
 |

The general standard for the duty of care is set out in *City Equitable (director jailed for fraud; should other directors have known?)*

1. He need not exhibit a greater degree of skill than may be reasonably expected from a person of his knowledge and experience [subjective qualities]
2. He is not bound to give continuous attention to the affairs of the company; his duties are of a more intermittent nature. But he ought to attend when he is reasonable able to do so.
* This doesn’t really apply to officers – they are generally required to be there.
1. His duties may be left to another official, having regard to the demands of the business and the articles of association [reliance].

The decision in *Peoples* sets an objective standard to be the floor of the duty (and then the subjective qualities are assessed).

* It is not purely subjective.
* It is not enough to say a director “did his best”.
* Idea of a reasonably prudent person.
* It is not purely objective.
* Look at all the circumstances.

### The Business Judgement Rule

Where there is no evidence of fraud, illegality or conflict of interest in respect of a given corporate action involving business judgement, the directors are presumed to have acted in good faith and on a reasonable basis.

* Applies to duty of care AND fiduciary duty
* Makes it difficult to show a breach of duty of care.
* Courts are reluctant to engage in extensive *ex post facto* review of the substantive merits of judgements made by directors.
* May interfere with effective business decision-making
* Courts are not best-suited to making complex business decisions
* Unfairness in using hindsight

BUT the business judgement rule does not relieve directors of their obligation to make an informed decision on a reasonable basis (idea of good faith).

* *UPM: directors approved a lucrative compensation agreement for a proposed chairman; they relied on the opinion of a committee who relied on the opinion of a consultant; the consultant was not fully informed of the circumstances*
* *Should have been a careful and objective analysis; the directors should have read and understood the terms of the agreement and considered the circumstances of the company at the time; it was approved in just 30 minutes for someone they did not know, had not recruited, and had just met.*

## Fiduciary Duties

This is a duty of honesty and good faith (s 142(1)(a); s 122(1)(a))

* Applies to both directors and officers
* Only the *CBCA* sets out the roles that fall under the definition of ‘officers’
* Under the *BCA,* all officers may owe this duty
* No provision in a contract or the articles relieves this duty
* Or a resolution (*CBCA* only)
* Under the *BCA,* shareholders may be able to excuse you *–* more management friendly
* However, both statutes have provisions which allow these resolutions in specific circumstances (i.e. revealing a conflict of interest)
* Escaping liability – directors only; NOT officers (s 157; *CBCA* s 123)
* *BCA –* reliance in good faith
* Does not have the “did not know” clause as with director liability in s 154
* *CBCA* – reliance in good faith

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **142** | **(1)** A **director** or **officer** must:1. **act honestly and in good faith with a view to the best interests of the company**
 | **122** | **(1)** A **director** or **officer** must:**act honestly and in good faith with a view to the best interests of the company** |
| **157** | **(1)** A director … has complied with his duties under s 142(1) if **he relied in good faith** on1. Financial statements from an officer or auditor
2. Written report of a professional
3. Statement of fact by an officer
4. Record, information or representation that the court considers reasonable grounds for the actions of the director, whether or not it was forged, fraudulent or inaccurate
 | **123** | **(5)** A director has complied with his duties under s 122(1) if he relied in good faith on:1. Financial statements from an officer or auditor
2. Report of a professional
 |

Duties owed under common law

* Inform
* Is addressed in the *BCA* (s 152-153) but is NOT found in the *CBCA*
* Must disclose the nature and extent of the conflict (s 153(1))
* Must be done promptly and evidenced (s 153(2))
* No obligation to account for profit that accrues as a result (s 152(b))
* *CBCA* DOES NOT HAVE THIS
* Not compete
* Not profit
* Not to put 3rd party interests first
* Using corporation’s property for own use

Remedies

* Injunction
* Damages
* Restitution
* Account for profits
* Rescission of a contract

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **153** | **(1)** If a **director** or **senior officer** holds any office or possesses any property, right or interest that could result in the creation of a duty or interest that **materially conflicts** with that individual's duty or interest as a 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 required1. must be made to the directors **promptly** as per i) or ii)
2. must be **evidenced as per s 148(3)** [consent resolution; minutes of a meeting; any other record in the company’s record office]
 |  |  |
| **152** | A director or senior officer has **no obligation to** (expect as otherwise provided in this section):1. disclose any direct or indirect interest in a contract or transaction [but must under 153]
2. **account for profit** that accrues as a result of a contract or transaction in which they have a disclosable interest [subject to s 148(1)]
 |  |  |

### Self-Dealing

This arises when there is a contract between a corporation and its directors and officers, either directly or through their interest in another entity.

This situation is addressed in the *BCA*.

* *CBCA* is essentially the same; but see “reasonable and fair when approved” (7.1)
* Objective element – nether directors nor the shareholders are supreme
* The director or senior officer is liable to account for profits that accrue as a result of a contract or transaction (s 148(1))
* Except if it was approved by directors
* Or if there was shareholder approval by special resolution
* When a director or senior officer holds a disclosable interest (s 147(1))
* Exceptions (s 147(2))
* Situations where it might not be disclosable (s 147(4))
* How to approve the contract or transaction (s 149)
* Powers of court (s 150)
* Indoor management rule (s 151)

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **148** | **(1)** **A director or senior officer of a company is liable to account to the company for any profit that accrues to him under or as a result of a contract or transaction in which he holds a disclosable interest.****(2)** Except in any these circumstances:1. it is **approved by directors** in accordance with s 149, other than (3), after disclosure to the directors
2. it is **approved by a special resolution** in accordance with s 149, after disclosure to shareholders entitled to vote

**(3)** The disclosure must be **evidenced** in a consent resolution, minutes of a meeting or any other record in the company's record office.**(4)** A general statement in writing is sufficient disclosure in relation to any K or transaction where he 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 a K or transaction with.  | **120** | **(1)** A director or officer **shall disclose**, in writing or the minutes of a meeting of directors or a committee of directors, the **nature and extent of any interest that he has in a material K or transaction**, whether made or proposed, with the corporation, if he:1. is a party to the K or transaction
2. is a director or officer of a party to the K or transaction
3. has a material interest in a party to the K or transaction

**(2)** **The disclosure shall be made**, in the case of a director:1. at the meeting where the K or transaction is first proposed
2. if not interested at the meeting, at the first meeting after he becomes interested
3. if became interested after the K or transaction, at the first meeting after he becomes interested

**(5)** he **shall not vote on any resolution** to approve the K or transaction unless it relates to a) renumeration; b) indemity or insurance; or c) an affiliate**(8)** Court powers**(7)** The K or transaction **is not invalid**, and he is **not accountable** to the corporation or its shareholders for any profit realized from it, **if:**1. **disclosure** was done in accordance with (1)-(6);
2. the directors **approved** it;
3. it was **reasonable and fair** to the corporation when it was approved

**(7.1)** Even if (7) is not met, a director or officer acting honestly and in good faith, is not accountable and the K or transaction is not invalid if:1. approved by a **special resolution**;
2. **disclosure was made** to the shareholders in a manner sufficient to indicate its nature before approval;
3. it was **reasonable and fair** to the corporation when it was approved.
 |
| **147** | **(1)** A director or senior officer **holds a disclosable interest in a K or transaction if:**1. It is material to the company
2. the company has entered (or proposes to) the K or transaction; and
3. c) either i) he has a material interest in the K or transaction; or ii) he is a director or senior officer of, or has a material interest in, a person who has a material interest in the K or transaction.

**(2)** Exceptions [subsidiaries]**(4)** The director or senior officer does **not hold a disclosable interest merely because**:**(a)(d)(e)** – guarantee for the corporation1. It relates to indemnity or insurance
2. It relates to remuneration
 |
| **149** | **(1)** A K or transaction disclosed under s 148 **may be approved** **by directors or a special resolution**.**(2)** He cannot vote on the director's resolution.**(3)** He can vote if all directors have a disclosable interest**(4)** He may be counted in the quorum |
| **150** | Powers of Court |
| **151** | A K or transaction is **not invalid** merely because a) an interest; b) not disclosed; or c) not approved. |

### Corporate Opportunity

This arises when directors and officers independently take an opportunity that could have been acquired by the corporation.

If director uses their position to make a profit, they are liable to account for that profit by reason only that they are a director and made the profit in the course of execution of that office.

* *Regal Hastings: corporation did not have enough money to put into a subsidiary; directors put in the money; made a profit; didn’t matter that their intentions were honest and well-intentioned*
* The director had to return shares and account for profits
* Under the *BCA,* he wouldn’t have had to account for profits (s 152(b))

### Competition (Conflict of Interest)

This arises when directors and officers serve on the boards of, operate, or have a material interest in, two competing corporations.

* It must be disclosed under s 153

An individual can hold multiple directorships so long as he does not disclose to one company information obtained confidentially in his role as a director for another company (*Mashonaland*).

This situation often overlaps significantly with corporate opportunity (see *Cranewood*):

* If there is an actual or potential conflict of interest, a fiduciary is liable to account even if the information came independently from his or her role as a fiduciary
* But if the company has properly rejected the opportunity, the subsequent profit on the opportunity by a fiduciary is not a breach of his duty (*Peso*).
* If the information came in the fiduciary’s course of duties, he is liable to account whether or not there is a conflict of interest.
* *Peso: the information had come independently – the opportunity was sufficiently different from that obtained in his role as fiduciary.*

But the situation in *Peso* might not be so simple now. Consider all the factors discussed in *CanAero.*

*CanAero: There is a general standard of loyalty, good faith and avoidance of conflict of duty and self-interest to which the conduct of a director or senior officer must conform. This is tested by many factors including:*

* *Position or office held;*
* *The nature of the opportunity, its ripeness, specificness and the individual’s relation to it*
* *The amount of knowledge possessed;*
* *The circumstances in which it was obtained and whether it was special or private;*
* *Time in the continuation of a fiduciary duty where the breach occurred after the relationship ended;*
* *And circumstances of how the relationship ended.*

### Hostile takeovers

This arises when an outsider attempts to obtain control of the corporation without the assent of target management; there is incentive for the current directors and officers to protect themselves from the new management.

* This could involve fiduciary duty and duty of care.

Directors must act in good faith and there must be reasonable grounds for their belief that they are serving the company’s interests, otherwise they will be found have to have been actuated by an improper purpose (*Teck*).

* *Teck: two companies attempting to takeover; the director thought one company was better suited and he facilitated that transaction; the other company’s takeover was successful; there was no evidence of a collateral purpose.*
* The onus of proof is on the plaintiff.
* The best way to show a proper purpose is through paper and procedure (i.e. records).

Setting up a special committee from members of the board, who don’t have a conflict of interest, is a valid method to alleviate concerns of directors’ conflict of interest during a takeover (*Pente*).

* *The board acted on the advice of that committee and made an informed recommendation as to the best available transaction for the shareholders in the circumstances.*
* *Senior management was involved in negotiations, but they had important business details that the bidders would be interested in.*
* *They reported to the committee who made the final decision.*
* *An auction is a reasonable way to avoid a conflict of interest, but is not required.*

## Relief From Liability

### Compliance

The *BCA* allows for shareholders to cure a breach of duty by resolution (142(3))

* But the vote cannot be brought about by unfair or improper means, or be illegal or fraudulent or oppressive to those who oppose it.
* The *CBCA* does not allow for this (s 122(3))
* Although possible in self-dealing (s 120(7-7.1))
* The *CBCA* therefore changes the common law
* *NW Transportation: the company bought a boat on unfavourable terms; the shareholders approved the transaction*
* *Note: the director owned the boat (conflict of interest) but was allowed to vote on the resolution as a shareholder; an individual is not bound by his duties as a director when exercising his shareholder voting rights.*
* Neither statute allows a breach to be cured through a contract or the articles/by-laws.

A derivative action will not be stayed merely because the alleged breach has been or may be approved by the shareholders, but evidence of such approval can be taken into account [*BCA* s 233(6); *CBCA* s 242(1)]

* This is a reason you may still want to have the shareholder vote under the *CBCA*

The court has discretion to relieve a person of liability if it appears they acted honestly and reasonably and ought to be fairly excused (*BCA* s 234).

* This is not in the *CBCA*

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **142** | **(3)** No provision in a contract, memorandum or the articles relieves the director or officer from these duties and liabilities. | **122** | **(3)** No provision in a contract, the articles, bylaws **or a resolution** relieves the director or officer from these duties and liabilities. |
| **233** | **(6)** No derivative action may be stayed merely because the alleged breach has been or might be approved by shareholders, but evidence of the approval may be taken into account. | **242** | **(1)** A claim brought under this part shall not be stayed by reason only that the alleged breach has been or may be approved by the shareholders, but evidence of shareholder approval may be taken into account. |
| **234** | The court will consider all the circumstances and may relieve a person from liability if it appears, despite a finding of liability, the person acted **honestly and reasonably and ought to be fairly excused**. |  |   |

### Indemnification and Insurance

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| *Definitions* |
| **159** | "**eligible penalty**" means a judgment, penalty or fine awarded or imposed in, or an amount paid in settlement of, an eligible proceeding"**expenses**" includes costs, charges and expenses, including legal and other fees, but does not include [eligible penalties]"**proceeding**" includes any legal proceeding or investigative action, whether current, threatened, pending or completed |  |  |
|  *Prohibited* |
| **163** | **(1) A company must not indemnify or pay expenses if:**1. prohibited by **articles** (if under earlier agreement)
2. prohibited by articles (if not under earlier agreement)
3. **it is a breach of fiduciary duty**
4. in other than a civil proceeding, they did not have **reasonable grounds for believing their conduct was lawful**

**(2)** if the proceeding is **brought by or on behalf of the company** | **124** | **(3) The corporation must not indemnify unless:**1. **they complied with their fiduciary duty, and**
2. in other than a civil proceeding, they had **reasonable grounds for believing their conduct was lawful.**

**(4)** The corporation may only indemnify or advance moneys in respect of an **action brought by the corporation** if the individual meets section 3 and they have court approval. |
| *Mandatory* |
| **161** | The company **must pay expenses** actually or reasonably incurred if the eligible party is **wholly successful** in the outcome of the proceeding, or is **substantially successful** on the merits in the outcome of the proceeding. | **124** | **(5) The corporation must pay expenses if:** 1. the individual was **not found in breach** and
2. subsection (3) is satisfied
 |
| *Permissive* |
| **160** | **A company may** 1. indemnify an eligible party against all eligible penalties
2. after the final disposition of an eligible proceeding, pay the expenses
 | **124** | **(1)** A corporation may indemnify against all **costs, charges and expenses, including an amount paid to settle an action or satisfy judgment**, in respect of any proceeding the individual is involved in because of their association with the corporation.**(2)** A corporation may advance money for the costs, charges and expenses of a proceeding, but the individual **must repay** **if (3) is not satisfied**. |
| **162** | A company may **advance expenses** before a final disposition, so long as the eligible party agrees (in writing) to **repay any expenses** if it is determined they are prohibited under 163. |
| *Court Orders* |
| **164** | **The court may order**1. the company to indemnify
2. the company to pay expenses
3. the enforcement of any agreement of indemnification
4. pay expenses for obtaining an order under this section
5. any other appropriate order
 | **124** | **(4)** The corporation may only indemnify or advance moneys **in respect of an action brought by the corporation** if the individual meets section 3 and they have court approval.**(7)** Anyone may apply for an order approving an indemnity, and the court may make any other order it sees fit. |

# SHAREHOLDERS, SHARES AND SHAREHOLDERS’ RIGHTS

## Shares

### Structure and definitions

The share structure and restrictions need to be set out in the constituting documents; this does not mean they all need to be issued.

* To change the share structure, the articles will have to be changed.
* *BCA* allows for par value and non-par value (*CBCA* does not have par value).
* Classes: equal right to vote; equal right to dividends; equal right to property on dissolution.
* Different classes can have different rights
* But the rights must exist somewhere
* Common shares: only have the right to vote
* Preferred shares: no right to vote but special access to dividends

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **56** | A share in a company is a **personal estate**. | **6** | **(1)** **Articles of incorporation shall set out**:1. the classes and any maximum number of shares the corporation is authorized to issue, and
2. if two or more classes, the rights, privileges and restrictions attached to each.
3. if a class is issued in series, the authority given to the directors to fix each series' rights, privileges and restrictions

  |
| **1** | "**authorized share structure**" means the kinds, classes and series of shares, and the limits of each that the company is authorized to issue by its articles |
| **11** | **(g)** the **notice of articles must describe** the authorized share structure in accordance with s 53 |
| **53** | The **notice of articles must**:1. give the name of each class or series, and the kind of shares which it consists of
2. set out the maximum number of shares of each class or series the company is authorized to issue, or state no max number
3. set out the par value of any shares with par value
4. identify any shares that are not par value
 |
|  |  | **24** | **(3)** Where a corporation only has one class of shares, the rights of the holders are equal in all respects and include the rights:1. to vote at shareholder meetings
2. to receive and dividend declared by the corporation
3. to receive the remaining property on dissolution.
 |
| **52** | **(1)** The **authorized share structure**1. **must consist of** i) one or both of shares with par value and shares without par value and ii) one or more classes
2. may include one or more series in a class
 |  |  |
| **59** | **(1) A company may, in its articles, provide for one or more classes of shares.****(2)** If no express provision for one or more classes in the articles, the company's shares constitute a class.**(3)** Every share must be equal to every other share, subject to rights or restrictions in the articles.**(4)** Subject to (6), shares in each class must have the same rights or restrictions as other shares in that class.**(5)** Special rights and restrictions can be binding on or accessible to only some shareholders in a class, if those rights or restrictions are attached to each of the shares in that class. |
| **60** | **(1)** **The special rights or restrictions attached to the shares of a class (a) may provide that the class includes one or more series.****(4)** Shares within a series must have the same rights and restrictions.**(5)** Those special rights and restrictions may be binding on or accessible to only some shareholders, so long as they are attached to each share within the series.**(6)** A series of shares cannot have priority over another series in the same class with respect to:1. dividends
2. return of capital
 |
| **54** | **(1)** **A company may change its share structure** [see list of possible changes]**(3)** To effect a change under (1), a company must:1. **alter the notice of articles**
2. alter both the notice of articles and articles
3. be authorized by i) the specified resolution or ii) a special resolution
 |  |  |

### Issue of Shares

Directors have the discretion to determine when and to whom shares are issued (s 62).

* Prices are set in accordance with articles, special resolution, directors resolution (s 63)
* Payment cannot be with a promise to pay (s 64)
* Must be fair market value (s 64)
* Otherwise directors could be personally liable (s 154)

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **10** | **(2)** An incorporation agreement must 1. contain the agreement of each incorporator to take one or more shares of the company
 |  |  |
| **62** | Shares may be issued at the times and to the persons that the directors may determine [subject to s 64, notice of articles, etc.] | **25** | **(1)** Shares may be issued at such times and to such persons and for such consideration as the directors may determine [subject to articles, bylaws, unanimous shh agreement, s 28]. |
| **63** | **(1)** The issue **price for a share without par value** must be set 1. in the manner contemplated by the articles or
2. if it is not contemplated in the articles **i)** a special resolution [in specific circumstances] or **ii)** in any other case, a directors resolution

**(2)** The issue price for a share **with par value** must be1. set by a directors resolutions, and
2. equal to or greater than the par value of the share
 | **25** | **(1)** Shares may be issued at such times and to such persons and for such consideration as the directors may determine [subject to articles, bylaws, unanimous shh agreement, s 28]. |
| **64** | **(1)** In this section, **property does not include evidence of indebtedness**.**(2)** A share must not be issued **until it is fully paid.****(3)** A share is fully paid when1. consideration is provided by (i) past services to the company (ii) property (iii) money, and
2. the value of the consideration equals or exceeds the issue price set under s 63

**(4)** The directors must be satisfied of (3) and must not attribute to that consideration a value that exceeds **fair market value**. | **25** | **(3)** A share **must not be issued until consideration is fully paid** in money or property or past services that are not less in value than the **fair equivalent** of the money the corporation would have received if the share had been issued for money.**(4)** In determining the fair equivalent of money, the directors may take into account reasonable charges and expenses.**(5)** **Property does not include a promise to pay.** |
| **154** | **(2)** directors who vote for or consent to a resolution in contravention of 63(2)(b) or 64 are **jointly and severally liable** [subject to (4) and s 157](4) Not liable if **did not know, or couldn't reasonably know**, that s 63 was contravened. |  |  |
| **157** | Not liable under 154 if **relied in good faith**... |
| **70** | Shares may be issued by way of a dividend. |  |  |

### Form of Shares

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **107** | A share may be represented by a **share certificate or may be uncertificated** (not represented by a certificate). |  |  |

### Record of Shareholders

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **111** | **(1)** **A company must maintain a** **central securities register** in which it registers:1. the shares issued
2. (i) name and address (ii) class and series (iii) number of shares held by each person (iv) date and particulars of each issue (v) date and particulars of each transfer
 |  |  |
| **49** | **(1)** **A person may apply for a list of:**1. name and address of shh
2. number of shares held by each person

**(2)** The application **must be in writing and include**1. an **affidavit** (i) with info of applicant and (ii) stating the list will not be used except as permitted under (3)
2. **payment**

**(3)** A person **must not use the list except in an effort to**:1. influence a vote
2. buy or sell shares
3. effect an amalgamation or reorganization
4. call a meeting
 |  |  |

## Restrictions on Transfer

In certain companies, insiders guard who can join the ‘inner circle’, especially in small, closely-held companies.

* The directors place restrictions on the transfer of shares
* Transfer: holder voluntarily sells or transfers
* Transmission: law causes a share to change hands
* A typical restriction is a requirement of director approval, or a right of first refusal.
* The restrictions must be set out in advance and be located on the certificate.
* The *CBCA* does not allow for restrictions on shares of public companies.

Where the articles confer discretion on directors to refuse a transfer of shares, they must exercise this discretion *bona fide* in what they consider to be in the interests of the company, and not for any collateral purpose (*Smith*).

* Otherwise this might be a breach of fiduciary duty or a breach of duty of care.
* There may be good business reasons for refusing a transfer, particularly in a small or private company.
* Business judgement rule will usually kick in.
* *Edmonton Country Club: articles required majority of directors to approve a transfer; they rejected; there was no evidence that the directors acted in bad faith or arbitrarily or otherwise abused their power.*

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **11** | The **notice of articles** must:1. **set out any special rights or restrictions** attached to a class or series of shares
 | **6** | **(1)** **Articles of incorporation shall set out**:1. any **restrictions** on the issue, transfer or ownership of shares
 |
| **57** | **(3)** each share certificate must have the full text of any special rights or restrictions that are attached to that share | **49** | **(9) a distributing company must not have restrictions on the transfer or ownership of its shares [except by way of permit under 174]****(8)** No restriction is effective unless it is noted conspicuously on the certificate. |

## Voting Rights

There is a presumption that each share has a vote attached to it (s 173).

* This can be changed through the articles.

If voting rights are to vary, separate classes of shares must be created so that the different voting rights are attached to the shares themselves and not to the holder (*Jacobsen*).

* *Jacobsen: the company enacted a by-law which provided that no person shall be permitted to vote more than 1,000 shares notwithstanding the number of shares actually held by him; this is a breach of the statute; rights cannot be attached personally.*
* *Bowater: the articles had a provision which provided that certain shares carry 10 votes per share in the hands of a certain individual, but 1 vote per share in the hands of a transferee; not valid.*

When shareholders vote, they owe a duty to no one.

* However, their vote could constitute oppression.
* The corporation may pay, or even the shareholders.
* Note: the *CBCA* gives shareholders voting rights where they might not otherwise have them.

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **173** | **(1)** A shareholder has one vote in respect of each share and may vote in person or by proxy [subject to the articles and 69(2), 82(6), 177, and (9)(a)] |  |  |

## Shareholder Agreements

Shareholders can have an agreement among themselves to vote a certain way.

* It is not a breach of fiduciary duty to agree to agree on a course of policy and to vote in as director, one of the parties to the agreement (*Ringuet*).
* A breach constitutes a breach of contract; have to look for remedies here.
* But the vote will be valid.

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **175** | **Two or more shareholders may, in a written agreement, agree that they will exercise their voting rights in accordance with the terms of the agreement.** | **145.1** | **Two or more shareholders may, in a written agreement, agree that they will exercise their voting rights in accordance with the terms of the agreement.** |

## Shareholder Meetings

### Types of Meetings

Shareholders can requisition a general meeting (s 167(1); *CBCA* 143(1))

* If the procedure is not adequate (i.e. urgency) the court can order a meeting (s 186))
* They must hold 1/20 of the issued shares that carry a right to vote (s 167(2))
* Must state the business to be transacted at the meeting (s 167(3))
* The directors must call a meeting within 4 months (s 167(5))
* They need not comply for various reasons (s 167(7))
* *Airline Industry: the fact they had already called a meeting was not sufficient because the matter needed to be dealt with before the meeting date; however, the court refused to order a meeting because the shareholders still have the ability to call a meeting after the directors refused (i.e. didn’t want to impose costs on the company)*
* If the directors do not comply within 21 days, shareholders with 1/40 of the issued shares with a right to vote can send notice of a meeting to transact the business (s 167(8)).
* *CBCA –* at this point any shareholder can call the meeting (s 143(4))
* If a meeting is called under (8), the shareholders may resolve to impose the costs on the requisitioning shareholders (167(10)).

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **1** | "**general meeting**" means a general meeting of shareholders | **133** | **(1)** The directors shall call an **annual meeting** (a) not longer than 18 months after coming into existence and (b) not later than 15 months after the last annual meeting, but no later than 6 months after the end of a financial year.**(2)** The directors may at any time call a **special meeting** of shareholders. |
| **182** | **(1)** A company must hold an **annual general meeting** (a) not longer than 18 months after being recognized and (b) at least once every calender year and not more than 15 months after the last annual general meeting. |
| **181** | For a **particular meeting**, the provisions of this Act and the articles relating to general meetings, apply. |
| **167** | **(1)** **Shareholders may requisition** a general meeting for the purpose of transacting any business that may done at a general meeting.**(2)** The shh must hold **at least 1/20** of the issued shares that carry a right to vote at general meetings**(3)** The requisition1. Must, in 1000 words or less, state the business to be transacted at the meeting including any special or exceptional resolution to be submitted to the meeting.

**(5)** On receiving a requisition that complies with (2) and (3), the directors **must, regardless of the articles, call a general meeting** to be held within 4 months and send notice (a)(b).**(6)** Further directions for sending notice.**(7)** The directors need not comply with (5) if1. the directors have **already called a meeting**
2. **substantially the same business** was submitted to shareholders and did not receive the requisite support
3. **it clearly appears that the business does not relate in a significant way** to the business or affairs of the company
4. **it clearly appears that the primary purpose is (i) securing publicity or (ii) a personal claim or grievance**
5. the business has already been **substantially implemented**
6. the business would cause the company to **commit an offence**
7. the requisition deals with matters **beyond the company's power** to implement

**(8)** **If the directors do not compl**y with (5) within 21 days, the requisitioning shareholders holding **more than 1/40** of the issued shares with a right to vote at a general meeting, **may send notice** of a general meeting to be held to transact the business stated in the requisition**(9)** That meeting under (8) should be (a) called in accordance with (5), (b) held within 4 months and (c) be conducted in the same manner as a general meeting called by the directors(10) If a meeting is called under (8) **the company must reimburse** the requisitioning shareholders **unless the shareholders resolve otherwise** by ordinary resolution | **143** | **(1)** The holders of **not less than 5%** of the issued shares that carry the right to vote at a meeting may requisition the directors to call a meeting for the purposes stated in the requisition.**(3)** The directors shall call a meeting unless:1. a meeting has **already been called**
2. the business of the meeting **includes matters in 137(5) (b)-(e)**

**(4)** If the directors do not call a meeting within 21 days, **any shareholder** who signed the requisition may call the meeting.**(6)** The corporation **shall reimburse** the requisitioning shareholders unless the shareholders **resolve otherwise** at the meeting. |
| **186** | **(1)** **The court may**, on its own motion or an application:1. **order a meeting**
2. and **give directors** as to its call, holding and conduct

**(2)** Reasons the court may make an order under (1)1. it is **impractical** for any reason for the company to call or conduct a meeting in the manner required by this Act of the articles
2. the **company fails** to hold a meeting in accordance with this Act or the articles
3. any other reason the court considers appropriate

**(3)** The court may vary or dispense with the quorum or notice required by this Act or the articles. | **143** | **(1)** **The court may**, on an application, order a meeting to be called, held and conducted in the manner that the court directs, if1. it is impracticable to call the meeting within the time or manner in which those meetings are to be called
2. it is impracticable to conduct the meeting in the manner required by this Act or the by-laws
3. for any other reason the court thinks the meeting should be called, held and conducted in the manner it directs.

**(2)** The court may vary or dispense with the quorum requirements. |

### How to Vote

Although the majority should listen to reasonable arguments for a reasonable time, they may shut down a minority who is obstructing business and resolved on talking forever (*Wall*).

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **173** | **(2)** **Voting must be done** [subject to the articles]:1. if one or more shareholders vote as **per s 174**, by poll or another manner that adequately discloses the intention of the shareholders
2. by **poll**, if demanded by a shareholder or the chair
3. otherwise by a **show of hands**

**(3)** A **declaration by the chair is conclusive evidence** without proof of the number of votes for or against the resolution.**(4)** A shareholder entitled to vote **may demand a poll**, before or promptly after the declaration of results taken by a show of hands. |  |  |
| **174** | **(1)** A shareholder may participate in and vote at a meeting **by telephone or another medium** if all shareholders and proxy holders participating in the meeting are able to communicate [subject to the articles]. |  |  |
| **178** | Shareholders who are present and entitle to vote may **elect as the chair** any shareholder who is entitled to vote [subject to the articles]. |  |   |

### Types of Resolutions

The presumption is that an ordinary resolution is required (simple majority) (s 173).

* A special resolution requires 2/3 of the votes.
* Certain provisions require this; can’t change through the articles.

There may a written resolution ‘in lieu’ of a meeting (consent resolution).

* *BCA:* need only be a special majority
* For a special resolution, it has to be unanimous.
* *CBCA:* must be unanimous (s 142).

When approval is given by consent resolution, the company cannot deny that approval when it is given in an informal manner (*Eisenberg: director and sole shareholder had merely written a note to the secretary*).

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **1** | "**ordinary resolution**" means a resolution:1. passed by a simple majority or
2. passed by being consented to in writing by at least a special majority of votes entitled to be cast
 | **2** | "**ordinary resolution**" means a resolution passed by the majority of votes cast |
| **178** | **(3)** Unless otherwise specified, any action requiring shareholder authorization must be done by ordinary resolution. |
| **1** | "**special resolution**" means1. a resolution passed under the following circumstances:
2. notice specifying intention to propose a special resolution
3. majority of votes cast is in favour
4. it is a special majority (2/3 of votes cast)
5. a resolution passed by being consented to in writing by all shareholders holding shares that carry the right to vote at general meetings
 | **2** | "**special resolution**" means a resolution passed by a majority of not less than 2/3 of the votes cast OR signed by all shareholders entitled to vote on that resolution |
| **1** | "**exceptional resolution**" means1. a resolution passed under the following circumstances:
2. notice specifying intention to propose a special reso.
3. the articles provide that a specified majority is req.
4. that specified in (ii) is greater than a special maj.
5. not less than (ii) is in favour.
6. a resolution passed by being consented to in writing by all shh holding shares that carry the right to vote at general meetings.
 |  |  |
| **1** | "**consent resolution**" means1. in the case of a an ordinary resolution, that in paragraph (b) or ordinary resolution.
2. in the case of any other resolution, a unanimous resolution.
 |  |  |
| **180** | A consent resolution is deemed:1. to be a proceeding at a meeting of those shareholder
2. to be **valid and effective** if it satisfies all the requirements of this Act and the articles
 |  |  |
| **1** | "**unanimous resolution**" means a resolution passed by being consented to in writing by all of the shareholders entitled to vote on the resolution | **142** | **(1)** Resolution in lieu of meeting [subject to 110(2) or 168(5)] 1. a resolution in writing signed by all shh entitled to vote on that resolution at a meeting is valid as if it had been passed at a meeting of shh.
2. such a resolution satisfies all the requirements of this Act relating to a meeting of shh.
 |

### Meeting Procedure

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **166** | A **general meeting**1. must be held in BC or
2. outside BC (i) as per the articles (ii) the articles do not prohibit and it is approved by resolution or (iii) the location is approved by the registrar
 |  |  |
| **169** | **(1)** A company **must send notice** to each shh and director the prescribed number of days but not more than 2 months before the meeting**(2)** Lack of notice does not invalidate the proceedings. | **135** | **(1) Notice of the meeting** shall be sent within the prescribed period to each shh entitled to vote, each director, and the auditor of the corporation.**(6)** Notice of a meeting at which special business is to be transacted shall state 1. the nature of that business in sufficient detail to permit the shh to form a reasoned judgement thereon
2. the text of any special resolution to be submitted at the meeting.
 |
| **170** | **(1)** A person may **wave their entitlement to notice.****(2)** It need not be in writing.**(3)** Attendance is waiver, unless they object on the grounds it was unlawfully called. |  |   |
| **185** | Directors must place **financial statements** before the meeting. |  |  |
| **172** | **(1)** The **quorum** for the transaction of business at a meeting of shh is:1. as per the articles
2. 2 shh entitled to vote, or
3. if the number of shh entitled to vote is less than (a) or (b), than that number
 | **139** | **(1)** A **quorum** is present if the holders of a majority of shares entitled to vote are present [subject to bylaws].**(4)** If the corp only has one shh, or only one holder of a class or series of shares, that shh present consitutes a meeting. |
| **178** | Shh present and eligible to vote at a meeting may elect as the chair any shh who is entitled to vote [subject to articles]. |  |  |
| **179** | Minutes must be kept of all proceedings at meetings of shareholders. |  |  |

### Business at a Meeting

There are three big issues the shareholders must vote on, and must be at the AGM.

* Appointing and removing a director
* Approving financial statements
* Appointing and removing an auditor

Otherwise, the shareholders role would end up as a veto to what management is trying to do.

* Directors can approve or reject proposals; they are just “suggestions”
* This can be changed through the articles or a unanimous shareholder agreement.

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **185** | Directors must place **financial statements** before the meeting. | **135** | **(5)** All business transacted at a special meeting and annual meeting is deemed to be special business, except consideration of **financial statements, auditor's report, election of directors and re-appointment of the incumbent auditor****(6)** [See contents of notice for a special meeting]. |
| **204** | **(1)** Directors must **appoint the first auditor** to hold office until the annual reference date.**(2)** On or before the annual reference date, and on or before each subsequent a.r.d., shh must appoint, by ordinary resolution, an auditor to hold office from that a.r.d. to the next a.r.d. **(3)** If an auditor is not appointed under (2), the auditor in office continues as auditor until a successor is appointed. |

### Shareholder Proposals

There are two ways to get an item on the agenda:

* A “shareholder proposal” – piggyback on another meeting.
* A “requisitioned meeting” – risk is that you pay the cost of the meeting.
* In either case, the directors do not have to implement your suggestion.
* Unless you are removing the director.

Shareholder proposals

* To be considered at the next AGM.
* Only apply to public companies (s 187(3)).
* *CBCA* is silent on this issue.
* Need to be a qualified shareholder (s 187(1)).
* *CBCA:* hold the prescribed number of shares.
* For the proposal to be valid, need 1% of signatures and received by the company 3 months before the AGM anniversary (s 188(1)).
* Can attach a written statement.
* The company must send the text of the proposal and allow the person to present (s 189(1-3))
* Various reasons the company need not do this (s 189(5))
* Already called the meeting
* Not valid under s 188
* Substantially the same proposal has already been considered
* Clearly appears it does not relate in a significant way to the company’s business
* Clearly appears the primary purpose is publicity or a personal claim
* Careful with the wording in the proposal/statement
* *Jesuit Fathers: the language of the proposal left no doubt the primary purpose was abolition of apartheid; the fact there was a more specific purpose does not save the proposal.*
* Already been substantially implemented
* Would cause the company to commit an offence
* *Ultra vires*
* If the company refuses, they must point to the reason why (s 191(1))
* The court can reverse this decision (s 191(3))

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **187** | **(1)** "**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 1. has **one or more shares** with the right to vote
2. has had those shares for an uninterrupted period of **at least 2 years** before the date of the signing of the proposal

**(2)** A person is **not a qualified shareholder** if, within two years before the date of the signing of the proposal, the person **failed to present** at an AGM an earlier proposal1. of which they were the submitter and
2. the company had complied with s 189 (1-3)

**(3)** **This division does not apply unless the company is a public company**. | **137** | **(1)** A shareholder entitled to vote at an annual meeting of shareholders may1. **submit** to the corp. notice of any matter that the person proposes to raise at the meeting (a "**proposal**")
2. **discuss at the meeting** any matter in respect of which the person would have been entitled to submit a proposal
 |
| **188** | **(1) A proposal is valid if** 1. it is signed by qualified shareholders who **constitute at least 1/100** of the issued shares that carry the right to vote.
2. it is received at the registered office of the company **at least 3 months** before the anniversary of previous annual reference date.

**(2)** The proposal may be accompanied by a **written statement** in support.**(3)** The statement cannot exceed **1000 words.** | **137** | **(1.1) To be eligible** to submit a proposal, a person must1. hold at least the prescribed number of shares
2. must have the support of persons who, in the aggregate, hold the prescribed number of shares **(1%)**

**(4)** The proposal may include **nominations for election of directors** if it is signed by shareholders representing **no less than 5%** of the shares entitled to vote at the meeting [this does not preclude nominations made at a meeting of shareholders] |
| **189** | **(1)** **A company that receives a proposal must** **send** to all person entitled to notice of the AGM in which the proposal is made:1. the **text of the proposal**
2. names and addresses of the submitter and supporters
3. the text of the **written statement**

**(2)** This information must be sent 1. within the time set for the sending of notice of an AGM under 169 or

**(3)** The company **must allow a submitter to present the proposal** at the AGM in relation to which the proposal was made if the submitted is a qualified shareholder at the time of that meeting. | **137** | **(2)** A corporation that solicits proxies shall **include the proposal in the mgmt proxy circular**. **(3)** If requested by the submitter, the corporation shall include in the mgmt proxy circular the **statement** in support of the proposal. The statement and proposal must not together exceed the prescribed maximum number of words. |
| **189** | **(5)** **The company** **need not process a proposal if** any of the following circumstances apply:1. the **directors have called and sent notice** of an AGM to be held after the date on which the proposal is received
2. it does not meet **188 (1) or (3)**
3. **substantially the same proposal** was submitted to shh and did not receive support at the meeting
4. it **clearly appears** that the proposal **does not relate in a significant way** to the business or affairs of the company
5. it **clearly appears** that the **primary purpose for the proposal is (i) securing publicity or (ii) a personal claim or grievance** against the company
6. it has already been **substantially implemented**
7. it would cause the company to **commit an offence**
8. it deals with matters **beyond the company's powers**
 | **137** | **(5)** **A corporation is not required to comply** with (2) and (3) if  **a)** it is **not submitted at least the prescribed number of days** before the anniversary date of the notice of the previous annual meeting. **b)** it clearly appears that the primary purpose of the proposal is to enforce a **personal claim or redress a personal grievance** against the corporation or its directors, officers or security holders. **b.1)** it clearly appears that the proposal **does not relate in a significant way** to the business or affairs of the corporation. **c)** a person **failed to present** at a meeting, a proposal that had been included in a mgmt proxy circular at the person's request [if this was not more than prescribed period before the receipt of the proposal] **d)** **substantially the same proposal** was submitted to shh within the prescribed period and did not receive the prescribed minimum amount of support **e)** the rights conferred by this section are being **abused to secure publicity****(5.1)** The corporation is not required to comply if the person who submits a proposal **fails to meet (1.1).** |
| **190** | No company or person acting on behalf of a company **incurs any liability** merely because the person complies with 189(1-4). | **137** | **(7)** If a corporation refuses to comply with (2), they must **provide notice and reasons in writing** to the person submitting the proposal, within the prescribed period.**(8)** If that person applied to court, the court may **restrain the holding of the meeting** to which the proposal is sought to be presented.**(9)** The corporation or any person claiming to be aggrieved by a proposal **may apply to court for an order permitting the corporation to omit the proposal**, and the court may do so if satisfied that (5) is met. |
| **191** | **(1)** A company that **does not process a proposal** in accordance with 189(1-4) on the basis of 189(5) must, within 21 days after the receiving the proposal, send to the submitter1. written notice of the decision
2. a written **explanation for its decision**, including a specific reference to the provision of 189 the company is relying on and why that provision applies

**(2)** The submitter **may apply to court for a review of the decision**.**(3)** The court may restrain the holding of the AGM, **order the company to comply with 189(1-4)**, and impose costs. |

### Removal of Directors

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **128** | **(3) A company may remove a director before the expiration of the director's term of office** **a)** by **special resolution** **b)** or by the resolution or method specified in the articles**(4)** This right **may be exclusive** to a class or series of shares. | **109** | (1) The shareholders may by **ordinary resolution** at a special meeting remove any director from office(2) This right **may be exclusive** to a class or series by an ordinary resolution.(3) This vacancy may be filled at that meeting. |
| **131** | A vacancy that occurs among the directors1. may, if it occurred under 128(3), be filled
2. by the shh at that meeting
 |

# SHAREHOLDER REMEDIES AND RELIEF

You need to point to a duty that was broken.

* To whom was that duty owed?
* May not be the only person who can bring the claim.
* If you are successful, what is the remedy?
* Some are better than others.
* Oppression is very handy.
* What does the remedy do?
* Turn back time?
* Stop something?
* Are the remedies cumulative?
* Usually not possible; but a few situations
* Who can seek the remedy?
* Sometimes it depends on the common law
* There may still be room for common law oppression claims under the *BCA*
* If it is in the statute, it is very clear

## The Derivative Action

This is a procedure whereby some interested party gets court allowance to designate someone to bring a claim in the name of the corporation.

* For very limited purposes
* It is a procedural step – both to begin and to end the action
* You don’t need to have been harmed personally
* It is a three-part procedure
* Standing
* Allowed to proceed
* Proceed

This stems from the rule in *Foss v Harbottle*: only the corporation can bring a claim where there has been a breach of duty to the corporation.

* There are common law exceptions to this (*Edwards*)
* *Ultra vires* act – management caused the corp. to do something it ought not to do
* Fraud on the minority – majority is controlling corp. to the detriment of the minority.
* Special majorities – where the act required a special majority
* Or, you could find a duty owed to the shareholders and bring the claim in a personal capacity.
* Personal rights
* Duty of care – it might be possible to bring a claim if it caused personal harm.

The remedy exists in both statutes (s 232(2); *CBCA* 239(1)))

* You must be a director, shareholder or appropriate person (s 232(1))
* *CBCA* – security holder, director, proper person (s 238)
* The court may grant leave if the complainant made reasonable efforts, gave notice, is acting in good faith, and it is in the best interests of the corporation (s 233(1)).
* *CBCA –* 14 days’ notice; good faith; best interests of the corporation (s 239(2)
* It is easier under the *CBCA*
* Shareholder approval is not determinative of the action, but can be taken into account (s 233(6); *CBCA* 242(1))

“Reasonable efforts” – the complainant must reasonably specify the precise nature of the claim (i.e. what is the wrong and what the company should do).

* *NW Forest Products: assets sold at undervalue; directors were petitioned to hold a shareholder vote but did not respond; the relief sought in the motion and that set out in the requisition were basically the same.*

“Best interests” – the complainant must adduce sufficient evidence which *prima facie* shows that there is some substance to the claim and that nothing is being done about it (*NW Forest Products*).

* Focus on what the directors actually did; this helps to avoid the business judgement rule.
* *Bellman: the directors had sought outside advice on whether to bring the claim; normally the BJR would apply; BUT the directors used corporate information to their own benefit, and the loan agreement affects their independence because they had to vote in ways favourable to the lender – looks like a breach of fiduciary duty.*
* It may be in the best interests of the company to have this aired in court.
* Note: can ask for an investigation (s 248; *CBCA* s 229/230)
* There may be some reasons it is not in the company’s best interest:
* Bankruptcy; health of the corporation
* Deadlock
* Cause delay
* Shareholders have approved (evidence is not determinative but can be taken into account)

The court controls the action - from allowing it to proceed, to controlling conduct and costs, deciding what the remedy will be, and when it ends – not a lot of predictability.

* Authorize any person to control the conduct of the proceeding, and give directions for the conduct of the proceeding (s 233(3); *CBCA* 240(a))
* You may not be controlling the prosecution
* No proceeding may be discontinued, settled or dismissed without court approval (s 233(5); *CBCA* s 242(1))
* Once the ball is rolling, the court is in control.
* On final disposition, the court can make any order it considers appropriate (s 233(5); *CBCA* 240)
* Distinct advantage of the derivative action: the money can be paid to the shareholders rather than the corporation.
* Note: the *BCA* distinguishes between during and after the proceeding; *CBCA* doesn’t.
* In determining who should bear the cost of a derivative action, the court will consider all the circumstances including to what extent the benefit sought is more for the plaintiff than the corporation (*Turner*).
* *The plaintiff had a large stake in the company, made no claim of financial inability, and the outcome would not so much benefit the company as it would the plaintiff (as opposed to someone with a minimal stake, financial inability, where the benefit would largely benefit the corporation).*

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **232** | **(1)** In this section and 233"**complainant**" means, in relation to a company, a **shareholder** or **director** of the company"**shareholder**" has the same meaning as s 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** the company1. to **enforce** a right, duty or obligation owed to the company that **could be enforced by the company itself**
2. to **obtain damages** for any breach referred to in (a)

**(3)** Subsection (2) applies whether the duty arises **under this Act or otherwise**.**(4)** With leave of the court, a complainant **may defend** in the name of the company. | **238** | "**complainant**" means1. a past or present **security holder**
2. a past or present **director** or officer
3. the **Director**
4. any other person who is a **proper perso**n to make an application under this act
 |
| **239** | **(1)** A complainant may apply to a court for **leave** to bring an action in the name and **on behalf of a corporation**, for the purpose of **prosecuting, defending, or discontinuing the action** on behalf of the corporation [subject to (2)]. |
| **233** | **(1)** The court may grant leave under 232 if1. the complainant has made **reasonable efforts** to cause the directors of the company to prosecute or defend the legal proceeding
2. **notice** has been given to company any others
3. the complainant is acting in **good faith** and
4. it is in the **best interests of the company** for the legal proceeding to be prosecuted or defended
 | **239** | **(2)** No action may be brought unless the court is satisfied that:1. the complainant has given **notice** to the directors of the corporation no less than **14 days** before bringing the action
2. the complainant is acting in **good faith** and
3. it appears to be in the **best interests of the corporation** that the action be brought, prosecuted, defended or discontinued
 |
| **233** | **(3)** While a legal proceeding under this section is pending, the court may1. authorize any person to **control the conduct** of the proceeding, or **give any other directions** for the conduct of the proceeding
2. order the company to pay **interim costs**

**(4)** On **final disposition**, the court may make any order it considers appropriate including1. repay costs under 3(b)
2. a party indemnify the (i) complainant or (ii) controller for costs incurred during the proceeding
3. the complainant or controller indemnify the company, director or officer for costs incurred
 | **240** | In connection with an action under 239, the court may at any time make **any order it thinks fit** including1. authorizing the complainant or any other person to **control the conduct** of the action
2. **giving directions** for the conduct of the action
3. order payment to past or present shareholders rather than the corporation
4. requiring the corporation to pay the complainant's legal fees
 |
| **233** | **(5)** **No proceeding under this section may be discontinued, settled or dismissed without court approval.** | **242** | **(2) An application or action under this Part shall not be stayed, discontinued, settled or dismissed without the approval of the court.** |
| **233** | **(6) Evidence of a shareholder approval is not determinative but can be taken into account.** | **242** | **(1) Evidence of a shareholder approval is not determinative but can be taken into account.** |

## The Personal Action

A claimant may bring a personal and derivative action together, but the personal claim must be separate and distinct from the breach of duty to the corporation (i.e. there must be a duty to the corporation and to you personally).

* *Goldex: dispute over a proposed purchase of assets from a company controlled by a former director; the plaintiff set out a breach of duty owed to the corporation; did not differentiate the personal claim and derivative claim*

Claims in respect of losses stemming from shareholder oversight and supervision of management of a corporation are derivative in nature.

* *Hercules Management: an accounting firm negligently prepared a report for shareholders; not a personal action.*
* *In supervising management, shareholders are acting in the corporate interest, not personal; they assume a managerial role through resolutions – their decisions are made in respect of the corporation; any duty owed to the shareholders in this respect is a duty owed not to the shareholders as individuals but as a group, acting in the best interests of the corporation; the wrong was to the corporation.*

## The Statutory Oppression Remedy

In a public corporation, there are only certain reasons you would argue oppression.

* No need to ask for a buy-out; just sell shares on the market.
* As a creditor, you likely have a contract that provides the remedies.
* You likely want to company to do something specific, or be wound-up.

In determining whether oppression has occurred, the court will first determine whether there has been a breach of reasonable expectations, and then determine if that conduct amounts to oppression or unfair prejudice [or unfair disregard] (*BCE*).

* To determine if there has been a breach of reasonable expectations, the court will consider:
* Fairness, or what is just and equitable
* There is no need to point to specific legal rights or obligations
* The context and circumstances
* Facts of the specific case
* Relationships at issue
* Conflicting claims and expectations (the key is to treat everyone fairly)
* Does that conduct amount to:
* Oppression: coercive; abusive; in bad faith
* Unfair prejudice: a less culpable state of mine, but has unfair consequences
* Unfair disregard: ignoring an interest contrary to reasonable expectations

Equity enables the court to consider the personal relationships arising in a corporation which may make it unjust or inequitable to insist on legal rights or exercise those rights in a particular way. Consider:

* The size of the company
* If it is private or public
* If it was formed on the basis of a personal relationship involving mutual confidence
* An understanding the shareholders participate in the conduct of the business
* Restrictions on transferring interests

These factors refer to conceptions of good faith and mutual confidence which are part of the law of partnerships (*Ebrahimi: P started the company with D; they split all shares and profits; D’s brother was made a director and given shares; the brothers voted out P as a director*).

It may be very hard to bring an oppression claim in a large company.

* *Ferguson: three couples in a closely-held corporation; divorce; she was discharged, her shares converted, and her dividends were denied; this is oppression; there were certain expectations she would be involved as a ‘partner’; not like someone who came to the company later and took a minority position; this was a means to end her presence.*
* *Bury: there is a USA whereby an employee who leaves must sell his shares to the corporation; the corporation must do this within 6 months but can extend this period to six months; the corporation chose to extend the period; failed to give any justification for the extension; reasonable expectation is that it would not be used this way; inference is that it was meant to punish him*

The Statute

*BCA*

* Must be a shareholder or an appropriate person (s 227(1))
* The claim must relate to (s 227(2)):
* Affairs of company being conducted; or powers of directors being exercised
* In an oppressive manner
* This only includes “being” or “have been” (no future acts)
* Some act of the company; or resolution of the shareholders
* Is unfairly prejudicial
* This includes “threatened or proposed”
* The court can make any order it considers appropriate including (s 227(3)):
* There is a very long list; looks like anything is possible
* Most common is to be bought-out
* The application should be brought in timely manner (s 227(4))
* May be an issue of the company is nearing insolvency (s 227(5-6))

*CBCA*

* The *CBCA* is much more general.
* Must be a security holder; director or officer; any other proper person (s 238)
* Security holder: a person must hold a security of the corporation that is capable of being registered somewhere (*First Edmonton Place*)
* Proper person: can include a creditor; must show in the circumstances that justice and equity require the claim to be tried (*First Edmonton Place: not a proper person; he was not owed anything – he gave the money for free*)
* The claim can be brought against affiliates (s 241(2))
* Sister corporations; subsidiaries; etc.
* The claim must relate to (s 241(2)):
* Three scenarios
* Act or omission; conduct; powers exercised
* Any of which leads to one of three consequences
* Oppression; unfair prejudice; unfair disregard
* You need not be personally affected (s 241(2))
* Long list of remedies (s 241(3))
* May be an issue of the company is nearing insolvency (s 241(6))
* As with the derivative action:
* Evidence of shareholder approval is not determinative but can be taken into account (s 242(1))
* An application cannot be stayed, dismissed, settled or discontinued without the approval of the court (s 242(2))

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **227** | **(1)** "**shareholder**" has the same meaning as s 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 | **238** | "**complainant**" means1. a past or present **security holder**
2. a past or present **director** or officer
3. the **Director**
4. any other person who is a **proper perso**n to make an application under this act
 |
| **227** | **(2)** A shareholder may apply to the court for an order under this section on the ground1. 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
2. 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
 | **241** | **(1)** A complainant may apply to court for an order under this section.**(2)** If the court is satisfied that in respect of a corporation **or any of its affiliates**1. any act or omission of the corporation or any of its affiliates effects a result
2. the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner
3. the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is **oppressive** or **unfairly prejudicial** to or that **unfairly disregards** the interests of **any security holder, creditor, director or officer**, the court may make an order to rectify the matters complained of |
| **227** | **(3)** Court can make **any order it considers appropriate** including[see long list of potential orders]**(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**.**(5)(6)** [Issues with health of company] | **241** | **(3)** Court can make any order it considers appropriate including…**(6)** [Issues with health of corporation] |
|  |  | **242** | **(1)** Evidence of a shareholder approval is not determinative but can be taken into account.**(2)** An application or action under this Part shall not be stayed, discontinued, settled or dismissed without the approval of the court. |

## The Appraisal Remedy (Dissent Proceedings)

This is a buy-out; the remedy is only available to shareholders.

There is a list of contexts in which you can dissent (s 238(2); *CBCA* 190(1))

* Altering the articles
* Amalgamation
* Arrangements
* Continuing
* Sale of the undertaking
* *BCA* always gives you the right, whether or not your shares carry the right to vote.
* *CBCA* s 190(1)(a) – it is conceivable you can’t dissent in this instance

Limitations:

* A shareholder must dissent with respect to all shares they own (s 238(3))
* *CBCA* 190(4) – it may be possible to only dissent with one class of shares
* The right to dissent ceases to apply if the dissenter consents to or votes for the resolution (s 246(g); *CBCA* 190(6))
* Among other reasons (s 246(a-i))

Procedure

* *BCA*
* Company must send notice of a resolution in respect of which shareholders are entitled to dissent (s 240(1))
* Shareholder must send a notice of dissent (s 242(1))
* Otherwise the right ceases to apply (s 242(5))
* The company must send notice if it intends to act on the resolution (s 243(1))
* The dissenter then sends a written statement requiring the company to purchase all of the notice shares (s 244(1))
* The dissenter is deemed to have sold the shares; and the company is deemed to have purchased the shares (s 244(3))
* The dissenter and company may agree on the payout value; or apply to the court to determine the payout value (s 245(1-2))
* The company must promptly pay (s 245(1-3))
* The company must not pay if there are insolvency issues (s 245(6))
* *CBCA*
* Dissenter sends a written objection to a resolution (s 190(5))
* Corporation sends notice the resolution has been adopted (190(6))
* Dissenter sends notice demanding payment for the shares (190(7))
* Corporation sends payment (190(12))
* Dissenter must accept within a certain time frame (190(14))
* Either part may apply to court to determine fair value (190(15-16,20))
* There may be solvency concerns (190(26))

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **238** | **(2)** A shareholder of a company, **whether or not the shareholder's shares carry the right to vote**, is entitled to dissent on a resolution to1. **alter the articles** to (i) alter restrictions on the powers of the company or on the business the company is permitted to carry on (ii) alter community purpose
2. adopt an **amalgamation agreement**
3. approve an amalgamation
4. approve an **arrangement**
5. authorize or ratify the sale, lease or other disposition of **all or substantially all the company's undertaking**
6. authorize the **continuation** of the company into a jurisdiction other than BC
7. in respect of a resolution where dissent is authorized
8. in respect of any court order that permits dissent
 | **190** | **(1)** A holder of shares of any class of a corporation may dissent if the corporation resolves to1. **amend its articles** to change or remove any provisions restricting the issue, transfer or ownership of shares of that class
2. **amend its articles** to change or remove any restriction on the business the corporation may carry on
3. **amalgamate**
4. be **continued** in another jurisdiction
5. **sell, lease or exchange substantially all of its property**
6. carry out a going-private transaction or squeeze-out transaction
 |
| **238** | **(3)** A person who wishes to dissent must dissent with respect to **all of the shares they own**. | **190** | **(4)** A dissenting shareholder may only claim under this section with respect to **all of the shares of a class** held in the name of the dissenting shareholder |
| **240** | **(1)** If a resolution in respect of which a shh is entitled to dissent is to be considered at a shh meeting, **the company must send** to each of its shh whether or not their shares carry the right to vote:1. **a copy of the proposed resolution**
2. **a notice of the meeting and statement advising of the right to send a notice of dissent**
 | **190** | **(5)** A dissenting shareholder shall send to the corporation, at or before any meeting of shareholders at which a resolution referred to in (1) is to be voted on, **a written objection** to the resolution, **unless the corporation did not give notice** to the shareholder of the purpose of the meeting and of their right to dissent. |
| **242** | **(1)** **A shh intending to dissent must**1. if the company has complied with s 240, **send written notice of dissent** to the company at least two days before the date on which the resolution is to be passed
2. if the company has not complied with s 240, send written notice of dissent to the company not more than 14 days after the later of (i) date learning the resolution was passed (ii) date learning of entitlement to dissent

**(5)** The right of a shh to dissent **ceases to apply** to that shh if ss (1)-(4) are not complied with. |
| **243** | **(1)** A company that receives notice of dissent under s 242 must, **if the company has or intends to act on the authority of the resolution**, must send a notice to the dissenter**.** | **190** | **(6)** The corporation shall, within ten days after the shareholders adopt the resolution, send to each shareholder who has filed the objection referred to in subsection (5) **notice that the resolution has been adopted**, but such notice is **not required to be sent to any shareholder who voted for the resolution** or who has withdrawn their objection. |
| **244** | **(1)** A dissenter who receives notice under s 243 must, if wishing to proceed with the dissent, must send to the company **a written statement** that the dissenter requires the company to purchase all of the notice shares**(3)** After complying with (1), **the dissenter is deemed to have sold to the company the notice shares, and the company is deemed to have purchased those shares.** | **190** | **(7)** A dissenting shareholder shall, within twenty days after receiving a notice under subsection (6) or, if the shareholder does not receive such notice, within twenty days after learning that the resolution has been adopted, send to the corporation a **written notice containing a demand for payment** of the fair value of the shares. |
| **245** | **(1)** A company and dissenter who comply with s 244 may agree on the amount of the **payout value**, and the company must **promptly** may that amount to the dissenter**(2)** A dissenter, or the company, who has not entered into an agreement under (1), may **apply to the court** to determine the payout value.**(3)** **Promptly** after a determination of the payout value by the court under (2), the company must pay that value to the dissenter.**(5)** A company must **not** make payment if there are reasonable grounds for believing the company is **insolvent** or the payment would render the company insolvent. | **190** | **(12)** A corporation shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the corporation received the notice referred to in subsection (7), **send to each dissenting shareholder** who has sent such notice1. an amount considered by the directors to be **fair value**

**(14)** A corporation shall pay for the shares of a dissenting shareholder within ten days after an offer made under subsection (12) has been accepted, but any such offer lapses if the corporation does not receive an acceptance thereof within thirty days after the offer has been made.**(15)(16)(20)** The corporation or dissenter may **apply to court** for a determination of fair value.**(26)** A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that there are **solvency concerns**. |
| **246** | The right of a dissenter to dissent **ceases to apply** to the dissenter if, before payment is made1. the matter is abandoned
2. resolution does not pass
3. resolution revoked
4. amalgamation will not proceed
5. arrangement will not proceed
6. a court enjoins or permanently sets aside the action
7. **the dissenter consents to, or votes in favour, the resolution**
8. notice of dissent is withdrawn
9. court determines the dissenter is not entitled to dissent
 | **190** | **[See (6)]** |

## Compliance and Restraining Orders

An injunction creates a duty to the court – may be in contempt if you don’t comply.

* This may be combined with other remedies as an interim measure
* “in addition to”
* If a party is not complying with the Act or articles (or unanimous shareholder agreement)

This seems much simpler than the other remedies i.e short-circuit the procedures

* *Goldhar* throws cold water on this idea
* *This remedy does not confer rights alternative, concurrent or complementary to those conferred by the derivative action, oppression remedy, etc. Parties who seek to enforce those rights must do so in an action pursuant to those provisions.*
* *It should be limited to rectification of simple “mechanical” omissions of a type that lend themselves to summary disposition.*
* The bulk of authority follows this decision
* But you may still argue to the court that the remedies are “one or the other or both” (the statute is silent on this issue)
* You can still use this as an interim measure.

*BCA*

* Complainant is a shareholder or appropriate person (s 228(1))
* Can be used against (s 228(2)):
* Company, director, officers, shareholder, employee, agent, auditor, trustee, etc.
* The court can make any order it considers appropriate including (s 228(3)):
* Compliance or restraint with respect the Acts or articles
* Enjoin from disposing of property, rights or interests
* Requiring compensation in respect of a contract contrary to s 33(1)

*CBCA*

* Complainant can be a security holder, director, officer, or a proper person (s 238)
* Creditor is also mentioned
* Long list of parties this can be brought against, similar to *BCA* (s 247)
* The court can make any order it thinks fit (s 247)
* Including compliance or restraint with respect to the by-laws, Act, or a unanimous shareholder agreement.

The *BCA* also has a remedy in corporate mistakes (s 229).

* Note: the courts have declined to be too creative with this remedy.
* i.e. it is just meant to correct mistakes
* Can be used “despite any other provision”
* To correct an omission, defect, error or irregularity that has occurred in the conduct of the business or affairs of a company, with certain results (s 229(1)).
* The court can make an order to correct the mistake (s 229(2)).
* But must consider the effect that order might have on various interests (s 229(3))
* Unless the court orders otherwise, this does not prejudice the rights of any third party who acquired those rights (s 229(4)).

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **228** | **(1)** “**Complainant**” means a shareholder or appropriate person**(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.**(3)** On an application under this section, the court may make **any order it considers appropriate**, including an order1. Directing the person to **comply or refrain** from contravening a provision
2. **Enjoining the company** from selling, disposing of or receiving property, rights or interests
3. In respect of a contract, requiring **compensation**
 | **238** | “**Complainant**” means1. Security holder
2. Director or officer
3. The Director
4. Any other proper person
 |
| **247** | If a corporation or any director, officer, employee, agent or mandatary, auditor, trustee, receiver, receiver-manager, sequestrator or liquidator of a corporation…does not comply with this Act, the regulations, articles or by-laws, or a unanimous shareholder agreement…a complainant or a creditor of the corporation may, in addition to any other right they have…apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions of this Act, the regulations, articles or by-laws, or a unanimous shareholder agreement…and on such application the court may so order and make any further order it thinks fit. |
| **229** | **(1)** “**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 which1. Breach of the statute
2. Breach of the articles
3. Proceedings (i.e. meetings) have been rendered in effective
4. Consent resolution is 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 rights1. for valuable consideration, and
2. without notice of the corporate mistake
 |  |  |

## Investigations

This is typically in the context of a derivative action or oppression claim.

* You likely need this to proceed with the action.
* If the other party is not being forthcoming
* Or if that party wishes to give the appearance of being thorough and unbiased
* The applicant must (s 248(1)):
* Be a shareholder (doesn’t include “appropriate person”)
* *CBCA* – a security holder or the Director (broader)
* Hold at least 1/5 of the issued shares
* There must be reasonable grounds one of these things is occurring (s 248(3))

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **248** | **(1)** On the application of one or more shareholders who, in the aggregate, hold **at least 1/5** of the issued shares of a company, the court may1. appoint an inspector to **conduct an investigation** of the company, and
2. determine the manner and extent of the investigation

**(3) The court may make an order under (1) if there are reasonable grounds for believing that**1. oppression as per 227(1)
2. business carried on with intent to defraud
3. formed or dissolved for fraudulent or unlawful purpose
4. persons connected have acted fraudulently or dishonestly
5. issues with a community contribution company
 | **229/230** | **[Similar to *BCA*]** |
| **253** | On the conclusion of the investigation, an inspector must make a **report to the court** and send a copy to the company. |
| **254** | A copy of the report is **admissible** in any legal proceeding. |

## Winding-Up

The court will look at these provisions to determine if winding-up is an appropriate remedy.

* Can be the company, shareholder, director or other appropriate person
* Just a shareholder under the *CBCA*
* Under the *CBCA,* may wind up an affiliate
* The *BCA* gives two situations (s 324(1):
* If the articles provide for it in this event
* If the court considers it just and equitable to do so
* The *CBCA* gives three situations (s 214(1)):
* Oppression
* Entitled under an unanimous shareholder agreement
* It is just an equitable to do so
* *Naneff: father started the business and makes all the decisions; let his two sons in; one misbehaved and the father kicked him out; this remedy is too extreme; the son never really had a say; but he did have a stake make valueless; a buy-out is more appropriate.*

|  |  |
| --- | --- |
| **BCA** | **CBCA** |
| **324** | **(1)** On application by the **company, a shh, director, or any other appropriate person**, the court may order the company to be liquidated and dissolved if1. an event occurs on the occurrence of which the **articles of the company provide** that the company is to be liquidated and dissolved, or
2. the court otherwise considers it **just and equitable** to do so
 | **214** | **(1)** A court may order the liquidation and dissolution of a corporation or any of its **affiliated corporations** on the application of a **shareholder**1. **oppression**
2. (i) **unanimous shh agreement** entitles a shh to demand dissolution after the occurrence of a specified event, or

(ii) it is **just and equitable** to do so |

**THE END**