Corporations CAN – Yahya

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# Chapter 1: Choosing the Form of Business Enterprise

## Types of Business Vehicles

### Sole Proprietorship

* Easy to set up
* Unlimited liability: any liability that the business incurs also goes to you

### Unlimited Liability Corporations (NOT ON EXAM)

* Tax advantages for US investors
* Tax arbitrage – wanted to attract US investors

### Partnerships

* 2+ people getting together; each partner is an agent of the firm & of the other partners
* *Partnership Act* s. 11(2): Each partner is jointly liable w/ the other partners for all the debts + obligations – can go after any partner for liability even if no wrong was committed by them
	+ *PA* s. 15: A firm is liable and each partner is jointly and severally liable, for any penalty or loss or injury caused to a non-partner by the wrongful act or omission of a partner acting in the ordinary course of business, or with the authority of the co-partners, to the same extend as the wrongdoing partner
	+ *PA* s. 6: Each partner is an agent of the firm and of the other partner’s other partners for the purposes of the business of the business of the partnership
	+ See *Volzke* and *McDonic*
* Partners share in the profits + losses

#### Limited Partnership

* General partners fully liable – Limited partners only liable up to amt of contribution
* There are general partners who are in control and then there’s limited partners who just put money in and get to share in the profits and losses but don’t share the same day-to-day ctrl. The limited partners are only exposed to liability up to the amount of money they put in.
	+ - Strict conditions – no involvement in management

#### Limited Liability Partnerships (LLP)

* For professionals (lawyers, doctrines, etc.)
* Shields personal assets from debtors BUT all other aspects of partnership law in effect

#### Joint Venture (NOT ON EXAM)

* Partnership btwn 2 other business associations (usually corps)
	+ E.g. 2 companies/partners can form a joint venture where A makes the fabric and B makes electronic wear – limited purpose entity
* Can raise antitrust competition law issues
	+ E.g. Ford + GM can’t form JV b/c they’ll ctrl the market

### Corporation

* A statutory entity having authority under the law to act as a single person distinct from the shareholders who make it up and having rights to issue stock and exist indefinitely. Can also borrow money.

|  |  |
| --- | --- |
| Pros | Cons |
| Limited liability | Higher costs (filing + legal costs) |
| Flexibility | Public disclosure |
| Greater access to capital | Great regulation |
| Continuous existence | Dissolution complicated |
| Tax benefits | Tax disadvantages |
| Transferability of shares | Possible loss of ctrl |
| Potentially broad management base | Potential bureaucracy |

## Agency

* A fiduciary relationship created by express or implied contract or by law, whereby one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions.

#### How does a Principle-Agent relationship arise?

1. Assent: There must be an agreement (formal or informal) btwn the principal + agent.
2. Benefit: The agent must be acting for the benefit of the principal.
3. Control: The principal must have the right to ctrl the agent. \*key

#### Rights & Duties of an Agent

The principal is obliged to pay, reimburse and indemnify the agent, while the agent owes the principal the following duties:

1. Duty to perform the assigned tasks and obey instructions
2. Duty of reasonable care
3. Duty of Loyalty: The agent must not…\*key
	1. Engage in self-dealing
	2. Usurp the principal’s opportunity, or
	3. Make secret profits

#### Typical Issues in Agency Law

* Liability of the principal to 3rd parties for contracts entered into by the agent
	+ Agent acts on behalf of the principal. Is the principal now bound by the contract?
* Liability of the principal to 3rd parties for torts committed by the agent
	+ The principal can be liable for the agent’s tort if these 3 conditions are met:
1. A principal-agency relationship exists.
2. The tort was committed within the scope of that relationship.
	1. Frolic: A departure from the assigned task (e.g. going to a concert after hours in the company car) – torts committed during a frolic ≠ within the scope of employment
	2. Detour: A mere departure from an assigned task – torts committed during a detour are considered within the scope of employment
3. The agent intended to benefit the principal.

An agent is acting within the scope of employment if the conduct is of the kind that the agent was hired to perform and occurs substantially within the authorized time and space limits.

#### How to determine agency?

Determining agency is more of a one-way street where the principal directs the agent what to do. You prove that the agent did it for the principal.

##### **Actual Express Authority**

* If the principal expressly authorizes the agent orally or in writing to enter into a contract, the principal is bound by the contract entered into by the agent. The principle may revoke such authority at any time. It may also be revoked by the death or incapacity of the principal or agent, unless the principal has granted the agent a “durable power of attorney.”

##### **Actual Implied Authority**

* Where the agent has been authorized to perform certain tasks and
1. It is necessary to enter into certain contracts to perform the task;
2. It is customary for the agent to enter into certain contracts to perform the assigned task; or
3. If there’s prior dealings btwn the principal + agent where the agent has entered into certain contracts,

then the agent is said to have implied authority to enter into the contract, and the principle is bound by these contracts.

##### **Apparent Authority**

* When a principal (1) “cloaks” an agent w/ the appearance of authority; and (2) the 3rd party relies on that appearance.
	+ (1) Making you look like my agent, (2) the agent acts on it, (3) diff 3rd party relies on it
* E.g. If the agent has actual authority but the principal has secretly limited that authority, if the agent exceeds the secret limitation the principal is still bound.
* Also, if the agent has been terminated but 3rd parties used to dealing w/ the agent (and whom the principal should know would rely on the former agent’s authority) have not received notice, their contracts w/ the agent may still be binding. The principal needs to give them notice of termination.

##### **Ratification**

* The principal can grant the authority to the agent after the contract was performed.
	+ After the fact; I like these apples even though I didn’t authorize you to get them for me in the first place so I will pay for the apples.
	+ E.g. Kids writing cheques on behalf of parents: parents can ratify it after the fact

## Partnership

#### How to determine partnership?

You must prove that A + B were in it together – they made joint decisions, shared in the profits, referred to each other as partners or referred clients to each other or did stuff for each other. This is a two-way relationship between the people. After, you have to figure out with which authority the partnership is based on to determine liability.

1. Actual Authority: Does either of the alleged partners expressly state that they are partners?
2. Implied Authority: Did either of the individuals act in a way that implied partnership?
3. Express Authority: Did either of the individuals hold the other out as a partner?

#### Volzke Construction (Classic partnership case)

|  |  |
| --- | --- |
| F:  | Shopping centre had 2 shareholders: Shefsky + Bonel. Volzke was hired to expand the shopping centre by Shefsky. Shefsky dies.  |
| I:  | Can Volzke collect from Bonel? Is there a partnership btwn Shefsky + Bonel?  |
| R:  | A partnership is a form of business organization where each partner is an agent of the partnership and all the partners. Every one factor by itself does not create a partnership in itself but all the factors combined can support a finding of partnership.  |
| A:  | Control doesn’t have anything to do w/ whether a partnership exists. You have to look at all relevant factors surrounding a course of dealing btwn the associated businesses. They spoke of each other as partners, shared in both the profits + cost of expanding the mall & consulted w/ e/o about new tenants. They signed several docs together (interim financing arrangement; title to the land). From all these factors, the court implied a partnership out of all these factors. Also, there was a previous dispute btwn these 2 partners in which the court found them to be partners. Partnership can be expressly stated or implied: * Expressly: Said they were partners to other partners
* Implied: Acted like partners
 |
| C:  | Shefsky’s contract binds Bonel and they are liable.  |

#### McDonic (Partnership & how to det via express/implied/apparent authority)

|  |  |
| --- | --- |
| F:  | Lawyer cheated clients. Clients sue firm + claimed that the lawyer was an agent for the firm.  |
| I:  | Are the partners of a law firm also liable for the harm caused by the negligent investing of a client’s money by one of the partners, when the partner kept the money in the firm’s account, but conducted his actions w/o the knowledge of the other partners? |
| R:  | A partner can have express, implied, or apparent authority to act on behalf of the partnership.  |
| A:  | Anything the lawyer does within the scope of the partnership can bind the rest of the lawyers. * Express authority: Flows from the authorization of the other partners
	+ None found here
* Implied authority: Flows from acts done in the ordinary course of business of the firm
	+ Lawyer kept funds together w/ the firms’ money + used all the facilities of the law firm
* Apparent authority: Concerns whether a person dealing w/ the partner would reasonably regard the partner as acting on behalf of the partnership
	+ Other lawyers knew what was going on; firm also conducted financial services for other clients
 |
| C:  | Lawyer = agent of partnership via implied + apparent authority – firm liable for lost investments.  |

#### Clarification from Yahya about Agency vs. Partnership

Partners are also principals of each other, so they have authority over agents. Agents only act for principals and CAN generate liability for the principals via contract or tort. So for example, if C is suing B for A's acts. If C claims B was A's agent, and proves it by actual, implied, or apparent agency, then C can recover from B (assuming A was acting within the scope of B's agency). In a partnership, however, the issue is a bit broader, because A might be doing their own thing, which may or may not be within the scope of agency. In the Volzke case, it was not clear that the building was being done at the behest of the second partner, so finding that the dead partner was an agent might not have created liability. Same in McDonice, partner doing financial management wasn't doing that for other partners.

So partnership is broader and a two-way relationship. But establishing it is done in similar fashion as agency. What is different is what you are proving, so you don't prove that A acted for B. You prove A and B were in it together. So A and B made joint decisions, shared in the profits, referred to each other as partners or referred clients to each other or did stuff for each other. These are two-way relationships, as opposed to the one-way between principal and agent.

# Chapter 2: A Backgrounder to Corporations

Recall: A corporation is statutory entity having authority under the law to act as a single person distinct from the shareholders who make it up and having rights to issue stock and exist indefinitely. Can also borrow money.

* One or more shareholders follow certain procedures + incorporate the corporation. This creates a new indep entity called the corporation. The corporation is usually funded by capital which is either debt or equity.
	+ Equity is that which the shareholders own. A share is the ratio of ownership. The ratio that a shareholder puts in is usually but not always a one-to-one/related to the portion of the capital paid. The corporation can issue more shares (stock – equity) later and also borrow money (bonds – debt – debentures, etc.) to get money.
* Typically, you pay the debt holders first and then the shareholders/equity holders are paid, if at all, whatever’s leftover. But the company can also choose to leave the money in the bank.
* Limited liability for shareholders: You usually can’t sue the shareholders for unpaid debt that the company incurs.
* The shareholders aren’t actually the ones who run the company – instead, they elect a border of directors that oversees the management of the firm. The board doesn’t manage the day-to-day operations though – they appoint the officers (e.g. CEO, president, etc.) who then hire the rest of the staff.
* The board is responsible to the shareholders and to other parties for the acts of the corporation.
* Back in the old day, you had to incorporate via Royal Charter but nowadays, you just need the articles of incorporation.

## Salomon v Salomon & Co Ltd (Foundational case that created the principle that a corp = separate legal entity)

|  |  |
| --- | --- |
| F:  | S incorporates and gives shares to himself and his children. S also lent his own cash to the company in the form of secured debt (first in queue to get paid). However, there are other secured debts the corp has too. These guys only get to seize assets/money if there’s anything leftover. Business failed – went into liquidation. Liquidator said the company was a sham – corp = agent of S tf S personally liable for debt.  |
| I:  | Whether a corporation is a separate legal entity and whether any secured-debts owed by the corp to a shareholder can be properly enforced by the shareholder? |
| R:  | A corporation is a separate legal entity. As such, shareholders are separate from the corporation.  |
| A:  | Shareholders are not liable for corporate obligations – S properly incorporated the company so his motives were irrelevant. Case created the corporate veil. The unsecured creditors could have also asked for security or tell S to unsecure his debt or even have S at the back of the queue to be paid before investing. Creditors always have the ability to impose conditions on the company when they’re lending money.  |
| C:  | S can enforce his debt against the company; company is a separate legal entity.  |

# Chapter 3: The Process of Incorporation

## Process of Incorporation – Preliminary Matters

1. Consult with client
2. Purpose of Incorporation – Tax consequences – Professional Registration (e.g. CPSA reqs)
3. Choice of jurisdiction
4. Licensing & Registration (e.g. Business permits)
5. Unanimous Shareholder Agreements – should be in writing/thought out in advance – each shareholder needs counsel in addition to the company lawyer
	1. Basically an almost irrevocable constitution of the company – USA locks in the company; not focus of this course, just FYI for practice
6. Insurance
7. Explain nature + consequences of incorporation

## Process of Incorporation – Procedure

1. Check the name against existing names
2. Prepare:
	1. Articles of Incorporation – the constitution of the corporation
		1. Name of Corporation
			* Name must comply w/ s. 10-13
			* S. 10(1): You must specify in your corp name that you’re a company (“limited”, “limitee”, “incorporated”, “incorporee”, “corporation”, “ltd”, “ltee”, “inc”, “corp” as the last word)
			* S. 10(8): Corp must use its registered name on all contracts/invoices/etc made by or on behalf of the corp
			* S. 12(1)(b): Can’t use a name that’s identical to (i) an already incorporated company in AB, (ii) extra-prov corp in AB, (iii) a Canada corp
			* S. 12(1)(c): Can’t use a name that’s similarto (i) an already incorporated company in AB, (ii) extra-prov corp in AB, (iii) a Canada corp if the name is confusing or misleading
			* S. 13: Registrar can force name change – if you don’t appeal within 60 days, registrar will assign you new name
		2. Place of Registered Office
		3. Shares + any restrictions on transfer
			* Shares – can specify (but don’t have to) max # of shares that can be issued – doesn’t need to be all issued right away
			* Can be any number of classes of shares
			* Usually there is **common stock** – the holders of these have full voting rights (most power/ctrl of the company) but also have the least priority in terms of payments unless otherwise specified
			* **Preferred stock** – the holder gets paid first (after debt but before common stock) – but has (usually) no voting rights
		4. Number of Directors
		5. Restrictions on Business
		6. Other provisions
		7. Incorporators
	2. Notice of Address
	3. Notice of Directors
3. Filing Fee

### Basics of Corporate Control

* 3 groups: shareholders (owners), directors (oversees management) & officers (day-to-day management)
* Shareholders elect directors who oversee officers
* In closely-held corporations, shareholders likely to be directors also (+probably officers)
* Shareholders vote at AGMs (*ABCA* s. 139)
* There can be different classes of stock – usually done initially when capital is raised and might be done during the life of the firm. Each class gets diff voting rights regardless of how much capital they contributed.
* Voting by Proxy: Sometimes shareholders can’t attend the GM so they can delegate their voting to a proxy. (*ABCA* s. 147-154). Usually sought by management but other (usually dissident) shareholders can seek them too. Can also be sought by social groups who use these proxy fights to get their social causes known by the AGM.
* Cumulative Voting: Allowed in AB if specified in the articles of incorp (*ABCA* s. 107)
* Normally, you vote for each director – this means the majority shareholder (or block of shareholders w/ the majority) can elect all the directors. Cumulative voting allows minority shareholders to get some directors elected.

### Directors

* Management of the corp – shareholders have little ctrl over management in publicly traded corporations except through electing directors. In closely-held corps, shareholders have far more ctrl + are usually the directors.
* Not full-time managers – rather, supervisors or oversees. They need to exercise care in managing the corp + supervising management. Usually meet periodically – attendance is highly recommended other a director may be held liable for negligence (not showing up = indicia of negligence).
* Approve of all major decisions concerning company – info they base their decisions on is usually prepped by management. Directors owe the corp fiduciary duties but do not owe the shareholders any duties directly (some exceptions later).
* Directors are given great deference by courts under “Business Judgment Rule” – as long as the board exercised their due diligence and relied upon some tangible information, the courts aren’t going to second-guess it.
* Quasi-trustees; shareholders can vote to remove existing director(s).
* *ABCA* s. 145 & 146
	+ Shareholder agreements: Shareholders can agree amongst themselves to vote a certain way. This is a contract and is subject to contract law.
	+ They may also place their shares in a trust + direct the trustee to vote the shares a certain way.
* Directors are divided into insider + outsider (independent) directors (with others in btwn these 2 categories). Insiders = officers + other employees; indep directors = no direct stake in the corp; not a shareholder or employee e.g. ex-MLA
	+ Insiders may have more incentive to look after the best interest of the corp since they have a lot more at stake but they also might be able to collude + maximize personal gain at expense of corp
	+ Outsiders may not be able to adequately understand what’s going on
* Directors work in committees
	+ Audit committee: audits the book + hires external auditor
	+ Nominating committee: selects outside directors (to be elected by shareholders)
	+ Compensation committee: sets executive salaries

### Officers

* Must act within authority – whether actual, implied, or apparent

### Formation Issues

* Articles of incorp can be amended by shareholder vote (usually majority unless articles require higher #)
* If the amendment affects a certain class of shares, then that class has to also approve. One group can’t impose restrictions on another group w/o authorization. – *ABCA* s. 176
* Negotiation issues: how to strike right balance btwn ownership + ctrl?
	+ Can restrict share transfer – more transferability means more liquidity which raises value but could also mean more ctrl by outsiders.

### Ultra Vires

* “Beyond authority/power” – if the corp is engaged in activities prohibited by its articles of incorp, then the activity can be stopped. Usually not an issue today b/c corps wants to stay flexible but it’s still in play for crown corps.
* E.g. Lawn mower company only but manager decides to do weed whacking = ultra vires purchase which is illegal

## Promoter Liability/Pre-Incorporation Liability

* Promoter: Person who helps start the company either in founding or organizing the corp – can be anyone e.g. consultant
* Prior to incorporation, promoters are usually partners + need to enter into contracts. The promoter doesn’t want to be stuck w/ the bill; ultimate goal: move all contracts to the company + eventually disappear. Issue arises when promoter gets stuck w/ the bill when the company doesn’t work out.
* If the promoter is the agent of the corp, then the promoter isn’t personally liable on the contracts – the corp is. But a promoter can only be an agent of an existing corp.
* Possible solutions the court tried to come up with:
	+ **Ratification**: A person’s binding adopting of an act already completed but either not done in a way that produced a legal obligation or done by a stranger having no authority at the time to act as the person’s agent.
		- 3 requirements:
			* The agent whose act is sought to be ratified must have purported to act for the principal.
			* At the time the act was done, the agent must have had a competent principal.
			* At the time of ratification, the principal must be legally capable of doing the act himself.
		- Problem:
			* The last condition isn’t valid w/ promoter of a yet-to-be incorp company.
	+ **Adoption**: Process by which a person agrees to assume a contract that was previously made for that person’s benefit
		- Problem: Can’t adopt something that doesn’t exist
	+ **Novation**: Tear up previous contract + sign new one – problem is company might not have anyone to sign and you need consent of all parties

### Common Law Treatment

* Kelner v. Baxter (1866):
	+ First case that deals w/ pre-incorp contracts/promoter’s liability
	+ Agent who made contracts on behalf of non-existent corp = personally liable
	+ For a contract to exist, you need two existing parties but a corp only exists after incorp. Could only look at contract – no extrinsic evidence (strict parol evidence rule.
	+ Even if the corp ratified or adopted the contract, the agent was still liable. A novation may work but requires the consent of all parties.
* Black v Smallwood:
	+ Look at intention of parties when they sign contract: did the 3rd party intend to contract w/ the corp or agent personally?
	+ Both parties thoughts corp in existence. But what if only one party thought so? Then answer unclear.

### Legislative/Statutory Reform

* *ONCA/CBCA*: Decided to change the *Kelner/Black* rules by statute – promoter is deemed a party to the contract
	+ Promoter is deemed to be the other party of the pre-incorporation contract. Once the corporation is created and adopts the contract, the promoter is released. If the corporation isn’t created or if it fails to adopt the contract in a reasonable time, the promoter remains liable for the non-performance of the contract.
	+ *Westcom* decision: Defendant thought company existed and signed w/ plaintiff as director + signing officer. Company didn’t exist + p sued d. Trial court dismissed + so did appeal court. Appeal court gave bad analysis and took the status of pre-incorp contracts back to *Kelner* and *Black*. Even though there are statutes, courts still can’t wrap their heads around this.
* More cases after where the courts still can’t agree on approach
	+ ***Sherwood Design***
		- **Shell corporation**: A corporation that has no active business + usually exists only in name as a vehicle for another company or person’s maneuvers – nothing inside the company, just there in name
		- **Dummy corporation**: A corporation whose only purpose is to hide the principal’s identity + to protect the principal from liability or other financial expose – don’t want ppl to know who you are
		- **Holding corporation**: Only purpose is to own more companies/corps. Typically the parent corp of many subsidiaries – doesn’t really do anything itself but holds other companies
			* Has its own shareholders but doesn’t want to do the work themselves – literally just holds all these companies together
		- **Shelf corporation**: A corporation that already exists and is just sitting on the ‘shelf’ – created in advance to avoid the hassles of setting it up or convenience
		- **Background**: Normally, with a shelf corporation, the lawyer lends it out to a client to do transactions. Client gets their own corporation and then transfers the assets from the shelf to their own corporation. The shelf corporation then goes back on the lawyer’s shelf.

|  |  |
| --- | --- |
| F:  | Initial client + corp agreed to into a purchase agreement with a shelf company from law firm but the deal didn’t end up going through. The plaintiff wanted to sue but the corp had no asserts. The shelf company was returned to the shelf and assigned to a different subsequent client of the law firm. Once the corp had assets, the plaintiff sued.  |
| I:  | Whether the numbered corporation had adopted the contract on behalf of the individuals/whether the pre-incorporation contract has been adopted by the corporation |
| A/R:  | Corporations live forever and it is the same shelf company so the suit could proceed. The corporation had adopted the contract and the defendant is liable.  |

* + - Bad decision – finding of lacks + lack of awareness of commercial realities. Need action or conduct for adoption. What the attorney should have done is to specify that notwithstanding any implication to the contrary, the client corporation has not, as of that date, adopted any pre-incorporation contract, AND that only corporation to be formed is the one that can adopt the contract.
		- Sherwood is still good law, especially in Ontario. The practice today is to give away the shelf corporation instead of re-using the same one for multiple clients.
	+ ***Szecket v Huang***
		- Defendants entered into a pre-incorp contract w/ plaintiffs on behalf of “company yet to be formed”. Company never formed so the plaintiff sued the defendants personally.
		- Trial court & appeal court allowed suit. The corporation was never incorporated so the promoter is personally liable (nothing in contract to get promoter out of it and off the hook).
* *ABCA,* s. 15: promoter is a warrantor – can never be a party to the contract
	+ Note: Contract must be **WRITTEN** – if oral contract, then we’re back to the common law interpretation
	+ Promoter must put in (1) a good faith effort within a reasonable time to get company off the ground & (2) that the company will adopt the contract in a reasonable time after incorp – if so, then you’re off the hook. But if not, then you’re personally liable for the contract.

# Chapter 4: The Corporation as a Legal Person

* In law, a corporation is treated as a legal person w/ a personality separate from those behind the corporation (Recall: Saloman). Shareholders have limited liability for debts + other obligations of the corp.
* In rare situations, a court may choose to disregard the corporate veil and impose liability on those behind the corporation. Directors + officers of the corp may also be held personally liable for torts committed by them while they were ostensibly conducting business affairs in the name of the corp.
* ***Kosmopoulos – foundational case for no piercing corp veil***
	+ Rule: Do not “lift” or pierce corporate veil unless unjust result (too flagrantly opposed to justice)
	+ Continues to be the law in AB
* ***Yaiguaje v Chevron Corporation – no piercing corp veil; has to be fraud/complete ctrl***
	+ Facts: Plaintiffs sued Chevron in Ecuador for heavy pollution because of their oil exploration + extraction and won. However, Chevron-E doesn’t have assets. Tried to get judgment enforced in US but didn’t work. So, they sue Chevron Canada.
	+ I: Can the plaintiff enforce the judgment on Chevron Canada?
	+ R: Courts will disregard the separate legal personality of a corporate entity where it is completely dominated + ctrled and being used as a shield for fraudulent or improper conduct, or when the interests of justice demand it.
		- **Two Steps for Lifting the Corporate Veil:**
			* **Step one**: the court must be satisfied that there’s complete control of the subsidiary, such that the subsidiary is the ‘mere puppet’ of the parent corp; and
			* **Step two (going to fraud or improper conduct)**: the court must be satisfied that the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity
	+ A: If the company is set up and it just so happens that there’s some liability incurred in one subsidiary or the company itself, it doesn’t tag the shareholders or the other corp(s) that’s subsidiary just because one doesn’t have assets and the other does. There’s no wrongdoing allegation against Chevron Canada or the way its corporate ownership was structured.
	+ Aside: US used to/still have something called the alien torts claim act/statute which was used to tag corps/indivs for the bad things they did abroad. Statute has since lay dormant, but the Supreme Court shut it down.
* ***Lynch v Segal – pierced corp veil a la family law asshole who tried to skip out on wife/child support***
	+ Involved the use of a corporation to disguise property so that the defendant’s wife + children wouldn’t have access to it for support purposes. Made a new corp and puts assets there – using the corp structure not for corp stuff but just to hide your assets. Corporate veil lifted here.
* ***Downtown Eatery Limited v Ontario – pierced corp veil but sketchy corp whose sole purpose was to pay for stuff***
	+ Corp employment case where all the money the restaurant had was being funneled to this other company. The plaintiff had entered an employment contract with a non-legal entity + was paid by a corp that was simply acting as the paymaster for a group of companies. As far as the court could tell, it was only to hold the money so court pierced corp veil.
* ***Big Bend Hotel – corp veil pierced b/c owner engaged in smelly fraud***
	+ F: Plaintiff’s hotel is suing insurance company that refuses to pay for fire at hotel. Insurance claims that p didn’t truthfully disclose previous fires at other hotels owned by p’s owner, nor the fact that insurance had been cancelled before.
	+ I: Should the fact that something happened at the p’s other hotel (K&S Enterprises Forth Hotel) affect Big Bend? Prior fire was at a company, although owned by the p’s owner, not related to the current plaintiff.
	+ R/A: Both hotels completely controlled by owner. The owner is closer to the action which makes the lack of disclosure more fraudulent. He did not disclose because he wouldn’t have received insurance. At the end of the day, it’s just the smell test: does this smell funny?
	+ **EXAM TIP**: Look at the cases and try to figure out if the facts are similar to the cases we’re studying or not. The question then becomes: the fact that you’re hiding behind the corp veil, is it legitimate? Or are you trying to conceal something?
* ***Jin v Ren – corp veil pierced b/c director indistinguishable from corp***
	+ F: Jin invested money in Ren's company in exchange for a controlling interest. Ren would not provide him with proof of interest, so Jin asked him to return his money. Ren then promised to return the investment only if Jin would not work in any hemp-related industry in China or Canada. Jin sued Ren personally and sued the company.
	+ I: Should the corporate veil be lifted so that Ren is personally liable?
	+ A/C: Ren was the controlling mind of the company as the director and expressly directed a wrong to be done. The court may impose liability on you as a shareholder still because of your capacity as the director who oversaw the management decisions. Ren was personally liable b/c he was virtually indistinguishable from the company.
	+ **EXAM TIP**: When dealing with possible fraud/funny smells, you should explore both avenues.
		- “If this were fraud, then … [what would happen] …”
		- “If this were not fraud, then … [what would happen] …”
* ***Aubin v Petrone – reverse corp veil piercing***
	+ P + A were married, incorporated a company called Q. P essentially owns and operates the company but A had shares in Q too. They bought a home through another company they owned. TJ ordered P to pay A about $5.6 million for divorce - P said he had no money on his own but couldn't get money out of the corporation. Lower court ordered that the money judgment be secured (“imposed a charge”) against P’s shares which registered a debt onto the ex-husband’s shares and made A the secured creditor.
	+ Normally, piercing corp veil = debtors of the company going after the assets of the indiv shareholders. But here, it’s the reverse where you’re using the debts of the shareholder to go after the assets of the corp. This only works because both P+A own the company.
* ***Rockwell Developments – no piercing of corp veil, no fraud, you know you dealin w/ a corp dude don’t try 2b smart with me here***
	+ Rockwell the corp attempted to purchase land from Newtonbrook but the deal fell through. N sued R which was found to be liable. TJ ordered the owner of Rockwell to pay the dmg since Rockwell had no assets + owner had been conducting all the business w/o authorization from the directors of Rockwell. HOWEVER, surprise, surprise. Kelner the owner didn’t pay his debts so there’s another lawsuit to hold him liable. But guess what… the appeal judge said nope – per Salomon, owner isn’t liable. There was no fraud because N knew it was dealing w/ a corp. So, Kelner isn’t personally liable for the debts of the failed company.
	+ Comparison btwn Rockwell & Jin v Wren: The facts seem similar but here, N was doing all the business dealings w/ R the corp directly. There was no fraud in the sense that Kelner wasn’t holding himself out to be *the only* one doing business. They knew they were dealing with R as a corp – if they don’t have money, you’re SOL.
* ***Walkovszky v Carlton – piercing corp veil via thin capitalization arg failed***
	+ **Thin capitalization**: Where shareholders have invested a very small amt of money in return for shares, usually in an amt too small to cover the reasonably foreseeable obligations of the corp’s business – no actual statutory or CL obligations on how much a capital has but despite this, ppl like to use this concept to sue and try to make courts pierce the corp veil – don’t think it’s really relevant for this course – ask Yahya
	+ F: P was injured by a taxi owned by Seon corp. The d is an indiv who owns 10 corps, each one operating in the taxi business. Each corp carries the min req’d insurance. The P wants to hold the indiv liable for more than the min insurance amount of one corp. Wants to sue all the companies for liability.
	+ I: Can p pierce the corp veil via thin capitalization?
	+ R/A: Simply b/c the corp has little assets isn’t enough to pierce the corp veil. There’s no agency established of cab company for indiv and no liability for indiv. It’s not like the dude set this company up specifically after hitting this one guy. There must be some fraud going on.
* ***Wolfe v Moir – use your company name dammit***
	+ F: P injured while roller-skating at d’s company rink. P sues d personally.
	+ I: Can we pierce the corp veil and have d personally liable along w/ the corp?
	+ R/A: D had been operating the roller skating company w/o properly identifying the owning company. Rather, he had been holding himself as the true operator of the company. **You must make it clear that it’s a company otherwise you may find yourself personally liable**. He conducted himself as the person running the show + the corp name was never used. No mention of company name in ads, newspapers, or tickets. You didn’t let the world know that your name + the company name aren’t the same.
		- S. 10(8) *ABCA*: if a person chooses to advertise + hold himself out to the public w/o identifying the name of the company with which he’s associated, he runs the risk of being held personally liable
	+ C: D personally liable.
* ***Vallis v Prairie Alternative Energy Solutions Ltd – dumbass didn’t put ‘inc/ltd’ at the end of his business name so liability based on technicality***
	+ F: PK and the parties entered a contract for the installation of a geothermal heating system. K failed to represent that his business was incorporated - not included in his email, on his truck, in any documents or cheques to tell people that you’re dealing with a registered company.
	+ I: Is PK personally liable? (Note: The company was found to be liable)
	+ R: PK failed to comply with the statute with respect to the proper identification of the corporation under which he was carrying on business.
	+ A/C: Not dishonestly done but he failed to accurately represent the corporate status of his business so he’s also personally liable.

**On the exam re: veil piercing:**

1. Write out the general rule as per Saloman: corporation = separate legal entity
2. Write out the general rule as per Kosmopoulos: no piercing thru veil unless fraud
3. Point out Yaiguaje v Chevron: if corp is set up under sole ctrl of the possible fraud person and it is set up solely for fraud, is fraud yo
4. If fraud, then this.
5. If not fraud, then this.
6. Conclude.

# Chapter 5: Tortious, Criminal, Regulatory & Contractual Liability of the Corporation

In this section, we’re talking about the liability of the corporation. This is different from chapter 4 where the shareholders are hidden behind the corporate veil and the only way you can get through it is if there’s some bad behaviour (fraud).

Chapter 5 is about attributing what the individual did to the corporation so it’s like the corporation did the wrongful act.

Topics in this section:

* Tortious liability
* Criminal liability
* Regulatory liability
* Contractual liability
* Liability of the corporation via the principal-agency relationship

## Tortious Liability

* Holding a corporation directly liable for committing the tort (primary liability)

### The “Rhone” v The “Peter A.B. Widener” - def’n of directing mind

|  |  |
| --- | --- |
| F:  | Peter Widener, under the management of Captain Kelch, crashed into the Rhone. Rhone wants to sue Great Lakes Towing Inc. Under the Shipping Act, the owner of the ship isn’t vicariously liability. The owner has very limited liability unless it can be proven that it’s the actual owner’s fault.  |
| I:  | Is Captain Kelch the directing mind behind the corporation such that liability can be found? At what point in the hierarchy of a company is the fault of a person employed in the organization to be treated as the fault of the company itself? |
| R:  | Liability for the corporation is found when it is caused by the directing mind of the company. **Directing mind**: the person(s) who have governing executive authority to design and supervise implementation of corporate policy |
| A:  | The focus of the inquiry must be whether the impugned individual has been delegated the “governing executive authority” of the company within the scope of his or her authority. The focus of the inquiry is whether the impugned individual has been delegated the governing executive authority of the company within her authority. This means that one must determine whether the delegation amounts to authority to design and supervise the implementation of corporate policy, rather than simply to carry out the policy (about governing executive authority). We need someone who is actually doing the grand-level planning and not the person who is carrying out the micro-level doing.  |
| C:  | Kelch is not the directing mind – subject to supervision + direction of Captain Lloyd; no liability found.  |

### Deloitte & Touch v Livent Inc (Receiver Of) – test for finding liability for the corp

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| --- | --- |
| F:  | Two shareholders on Livent’s board fudged the financial records. Deloitte was hired to audit the books and issues statements that said everything was fine. These statements are used by shareholders to decide whether they want to invest or not. Livent becomes bankrupt – the receiver wants to sue Deloitte because they didn’t do their audit properly. Deloitte argues they’re not liable because the two directors were the one who fed them fake news (illegality defence) and they were part of the company therefore it was LIVENT WHO WAS COMMITTING THE FRAUD! AHA! But remember: the only conduct done illegally was by the two directors. For Deloitte to rely on the illegality defence, you have to attribute the actions of the two directors to the company itself.  |
| I:  | Are the two directors identified with the company such that their illegal actions can be associated with Livent? |
| R:  | Determining whether the person’s actions are of directing mind will determine whether liability can be extended to the corporation. If you are the directing mind and the wrongdoing was done within the scope of your authority as the directing mind, then your actions will be considered the actions of the company.  |
| A:  | Test: Directing minds + wrongdoing done within the scope of their authorityAn individual is a directing mind if the action…(1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation It meets the test – they were both the directing minds and were authorized in their capacity to essentially cook the books. They were cooking the books to enrich the company even though it was somewhat for themselves too. HOWEVER, the court also must consider policy reasons. This is where Deloitte fails. Deloitte’s purpose was to uncover fraud.  |
| C:  | Liability found for public policy reasons.  |

## Criminal Liability

Historically, it was hard for companies to be charged under criminal liability but parliament has amended the criminal code (s. 2, 22.1, and 22.2) to make it easier. We didn’t really talk about this one in class.

For the exam, if there is something criminal, it is going to be blatant and obvious that something very wrong was done. E.g. Scaffold was not designed properly; it can only take a certain amt of weight, etc.

### Metron

* F: Swing stage scaffolding collapsed; several workers died.
* R: Company can be criminally liable if senior officers or even lower in seniority but who have some authority are reckless or negligent (generally speaking).
	+ Company itself to be charged criminally if the actual directing mind did something wrong.
	+ Directing mind doesn’t have to be someone at the top – has to be senior enough w/ general authority for how the company is run.

#### Deferred Prosecution Agreement (DPAs)

* + Agreement entered into between a prosecutor and a company alleged to have engaged in economic crimes. It suspends the outstanding prosecution while simultaneously establishing specified undertakings that the organization must fulfill in order to avoid facing potential criminal charges.
		- Basically, we won’t prosecute you if you do some remedial steps in the interim.
		- Very controversial e.g. Meng + Huawei resolved w/ a DPA

## Regulatory Offences

Both corporations and officers and directors have exposure to considerable regulatory liability, particularly liability in relation to environmental offences. Regulatory offences are usually strict liability offences where if you prove the AR of the prohibited act, you are liable quasi-criminally. The MR of the offence doesn’t matter. One defence that corporations can use to mitigate liability is the defence of:

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

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

 🡪 This must be established on a balance of probabilities.

### R v Bata

|  |  |
| --- | --- |
| F:  | Shoe company had large barrel storage site containing toxic chemical waste. Many barrels were rusting + some even leaking toxic chemicals in the ground. The company/directors allowed the barrels to sit, rust and eventually disintegrate. No evidence any barrels ever moved. Discharge of liquid industrial waste went into ground, which could impair the quality of the groundwater or the Trent River.  |
| I:  | Did the board of directors establish a pollution prevention “system”, i.e., was there supervision or inspection? Did each director ensure that the corporate officers have been instructed to set up a system sufficient within the terms and practices of its industry of ensuring compliance with environmental laws? |
| R:  | Directors can be found liable for regulatory offences; the higher the authority, the more responsibility. Due diligence requires reasonable effort on the part of the director(s) to use as a defence.  |
| A:  | Directors are responsible for reviewing environmental compliance reports provided by the officers of the corp, but are justified in reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties. Directors should ensure that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders. Directors should be aware of the standards of their industry and other industries which deal w/ similar environmental pollutants or risks. Directors should immediately and personally react when they have notice the system has failed.  |
| C:  | Founder/CEO acquitted (so far up that he’d done his due diligence of hiring the people); other officers who had more ctrl over the day-to-day affairs convicted.  |

### Syncrude

|  |  |
| --- | --- |
| F:  | Migratory birds landed in Syncrude’s tailing ponds and died. Syncrude was charged with failing to stop the birds from landing in ponds.  |
| R/A:  | * Due diligence defence available “if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent; or if it took all reasonable steps to avoid the particular event”
* Availability of the defence to a corporation depends on “whether such due diligence was taken but those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself”
 |
| C: | Syncrude fined $3 million & their rep took a hit.  |

## Contractual Liability

## *DOCTRINE OF ULTRA VIRES (Came from the common-law but nullified by ABCA, s. 17(3))*

A corporation cannot exist outside of the bounds of what creates it. If it goes outside the capacity that is *ultra vires* and what that corporation is purporting to do is meaningless. If the corporation is engaged in activities prohibited by its articles of incorporation, then the activity can be stopped.

While a contract may have been made *ultra vires*, it doesn’t get automatically nullified according to ABCA s. 17(3). The contract can still be valid despite it being *ultra vires*. Nowadays, instead of having an objects clause, if the corporation is restricted from carrying on specific business, these restrictions are specified – but, the doctrine of *ultra vires* can still operate in specialized circumstances (see *Pickles*).

## *DOCTRINE OF CONSTRUCTIVE NOTICE (Came from the common-law but limited by s. 18 ABCA)*

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

**S.18 ABCA**: no person is affected by or is deemed to have notice of the contents of a document concerning a corporation only because the document is filed by the registrar or is available for inspection at a corporation (doctrine of constructive notice is statutorily repealed in these circumstances)

### Jon Beaforte – corp acting ultra vires can’t get money back/contract can be voided

|  |  |
| --- | --- |
| F:  | Company was incorporated with the authorization to only sell costumes. It sold fuel with invoices billed as veneered panels. The company then went bankrupt and the suppliers want their money for supplies relating to the manufacture of coal/veneer panels.  |
| I: | Does the company have to pay for the coal/veneer panels if the company is limited to selling costumes?  |
| R/A:  | Constructive notice is knowledge of a fact that is presumed or imputed by law. At CL, a person who dealt with a corporate body was deemed to have notice of all contents of all documents that the corporation was required to file with a public office open to public inspection  |
| C: | All who deal with company have constructive notice of what the company is authorized to deal. Hence, coke suppliers can’t claim their payments since the contracts were void.  |

### Canadian Pickles Corp – regular corps, ultra vires doesn’t nullify contract; crown corps ultra vires still applies

|  |  |
| --- | --- |
| F:  | Statutory corporation made loan to Pickle Corp in violation of its statutory purpose. Economic development corporation was meant to make loans for the economic development of ‘remote and isolated communities’. Recipient of loan was only 15-20km outside Winnipeg – not remote or isolated. Pickle Corp goes bankrupt. Economic development corp wants it loan money back from corp and guarantor.  |
| I: | Can the stat corp recover despite lending money ultra vires of its statutory purpose?  |
| R/A:  | The common law conception that a company is not liable due to ultra vires operation isn’t fair (so ultra vires was technically repealed here). HOWEVER, there are limited circumstances in which ultra vires can apply. In this case, the stat corp was only authorized by statute to lend out the money. Here it is a special act corporation – ultra vires applies here because it protects the public purpose – a company created for a specific act by the legislature shouldn’t be able to act outside of its purpose. |
| C: | Since loan was ultra vires, loan was invalid so guarantor not liable.  |

## Contracting with Agents of the Corporation

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

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

**Agent:** the one who acts.



Recall from Chapter 1: An agent can have express, implied, apparent or ratification authority to bind an agency-principal relationship.

On the exam, if you see a possible agency-principal relationship, ask yourself:

1. Is this person an agent? (Express, implied, apparent, agency by estoppel)?
2. Is this within the scope of the agency?

### Panorama Developments – actual authority can be found the higher you are in a corp

|  |  |
| --- | --- |
| F:  | The secretary (senior position) of the fabric company fraudulently rented cars from the plaintiff. The company had never authorized the secretary to rent those cars. The plaintiff is suing the defendant company for the rent and the defendant claims their agent had no actual authority.  |
| I:  | Was the secretary an agent of the company? Should the company be liable for the bill?  |
| R:  | Generally, corporations are liable for contracts of high-ranking officers. The higher up an individual is the more actual authority the individual has to do anything on behalf of the company. |
| A:  | The court held that the secretary of the company had actual authority, since an officer of the company of that position is always authorized to rent, buy, sell, and make all sorts of business decisions. The corporate secretary was essentially the top head haunch. Who else would question their authority? The paperwork to rent the company was from the company and he was a senior period with actual authority.  |
| C:  | Actual authority found – company is responsible for paying the bill.  |

### Freeman and Lockyer – apparent authority test

|  |  |
| --- | --- |
| F:  | One of the shareholder and directors of defendant corporation conducted transactions with the plaintiff and did not pay for them. The individual director acted as if he was in charge, even though there was no explicit authorization.  |
| I:  | Is the defendant liable for the actions of its agent?  |
| R:  | Even if actual authority was not given to the agent, apparent authority can still be found if you satisfy the 4-part test. Although the director did not have explicit authorization, the board was aware that he was doing business deals with representing the company.  |
| A:  | 4-part test for finding apparent authority:1. Representation was made
2. Representation was made by agent who generally had actual authority to make such kinds of contracts
3. Inducement
4. Company wasn’t prevented by its bylaws to enter into such contracts
 |
| C:  | Apparent authority found; company liable.  |

### Doiron v Mfg Life Ins. – used apparent authority test; reaffirmed that if apparent authority then liable

|  |  |
| --- | --- |
| F:  | Insurance agent sold clients an investment package that lost all their money. He was an independent agent selling insurance and got commission as his pay. The clients sued the investment company (bankrupt), agent (bankrupt), and the insurance company Manulife.  |
| I:  | Was the insurance salesman employee of the company?  |
| R:  | A principle is liable for the acts of an agent, so long as the agent is acting within the scope of their actual/apparent authority. |
| A:  | The insurance salesman was an agent of the company because he was authorized to sell insurance packages on their behalf. The issue is that the insurance agent was not authorized to sell the *specific* insurance package that wasn’t offered by Manulife. However, the insurance salesman was acting with apparently authority when he sold the clients the investment. The court used the 4-part test in Freeman to determine if the agent had apparent authority. Evidence of Apparent Authority: His office was within the Manulife office; when someone called for him, they called through the Manulife switchboard; he had Manulife promotional material; he used Manulife letterhead, and there were newspaper ads running that associated them.While he was not authorized to sell these specific investments, the clients had no idea and thought this was the type of investment the insurance company sold.  |
| C:  | Insurance company liable for losses.  |

### Canadian Laboratory – lower level employee confirmations can also give apparent authority

|  |  |
| --- | --- |
| F:  | Employee of plaintiff would buy platinum from defendant, sell it to a fictitious company, and then obtain a refund for the scrap from the defendant. Defendant had called plaintiff and asked about all the refunds – on two occasions, a low level employee and then a senior employee referred the defendant to the fraudulent employee. Plaintiff wants its scrap back, on a theory of conversion (strict liability tort – any willful and unlawful interference with a chattel of another which is inconsistent with the right of possession of the other). The defendant replies that since the employee had apparent authority, the plaintiff is bound by his refunds. The plaintiff counters saying that the employee was no agent and could not have had any authority.  |
| I:  | Is the employee an agent with apparent/actual authority? When does the liability for the agent’s actions start? |
| R/A:  | The majority ruled that the conversion ends in 1966 when the lower level employee responded. This gives apparent authority because the employee was dealing on behalf of the company. The reality is that most of us don’t deal with senior officers – we deal with the person who answers the phone. Commercial realities dictate that third parties can rely on representations of lower level employees, especially when contact is initiated by the third party.  |
| C:  | Company liable for conversion until 1966.  |

Employee has apparent/actual authority not because the senior officer said employee in charge to the plat company

Contentious period

Actual Fraud/Conversion

**‘68**
Officer notified and told fraudulent employee to answer

**‘66**
Lower level employee notified and told fraudulent employee to answer

**‘62**
Fraud begins

F

# Chapter 6: Corporate Governance

**Objectives**

* Directors are given the task of operating the business and affairs of the corporation by the ABCA and are elected by the shareholders.
* ABCA imposes certain qualifications on directors before they are eligible to take office.
* Directors owe a duty of care, skill and diligence and hold a fiduciary position with respect to the corporation.
* Directors may also be personally liable for torts committed while conducting the affairs of the corporation.
* Directors and officers have the ability to claim indemnification

**Key Statutory Provisions**

ABCA, ss 6(1)(d), 101, 105-109, 111-116, 120-124, 132, 144
CBCA, ss 122, 123, 237.3, 237.4

## *Fiduciary Duties*

Recall from agency the duty of care and duty of loyalty (no self-dealing; no usurping corporate opportunity; no secret profit – as per Yahya, the “no stealing duties”). The duties owed by **directors AND officers** are enshrined in the ABCA s. 122(1).

**S.122 ABCA:** (1) Every director and officer of a corporation in exercising the director’s or officer’s powers and discharging the director’s or officer’s duties shall:

(a) act honestly and in good faith with a view to the best interests of the corporation, and
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

The fiduciary duties have two components to it. There are negative duties (don’t do this) and positive duties (duty of care – do do this).

* Negative (prophylactic) duties – “don’t steal” type duties (s. 122(1)(b)) :
	+ Conflicts of interests
	+ Appropriating corporate opportunities
	+ Self-dealing
	+ Note: There is **NO deference** given to this behavior that breaches the duty of loyalty.
* Positive duties – duty of care – “maximize value” type of duties (s. 122(1)(a)):
	+ Do the best the maximize value of firm
	+ Business judgment rule (BJR) deference to this
		- Courts will not second-guess business decisions if the board did so in a prudent manner

## *Business Judgment Rule (Canada: Duty of Care)*

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

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

As long as process or procedure followed by a Board of Directors is fair, honest, and done with reasonable care, the courts will defer to the judgment of the Board. The BJR is a procedural rule NOT a substantive rule.

**Note: You CANNOT contract out of duty of care in AB.**

**S.122 ABCA:** (3) … no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director or officer from liability for a breach of that duty.

## Introduction to Directors’ Fiduciary Duty & Duty of Care and the Business Judgment Rule

### Peoples – No duty owed to creditors; BJR applies

|  |  |
| --- | --- |
| F:  | Wise purchased Peoples from Marks & Spencers but they weren’t allowed to merge the two entities. To avoid duplication of procurement overhead, they divided the purchases by region. Peoples purchased North American goods, while Wise purchased from the rest of the world. Wise was a net debtor to peoples. Both declared bankruptcy. Peoples’ trustee paid most of the creditors except the trade creditors. Trustee sued Wise’s directors for breaching their fiduciary duties to its creditors – i.e. Peoples. Trial judge found them liable but Court of Appeal and Supreme Court did not.  |
| I:  | Do the directors owe fiduciary duties to its creditors?  |
| R:  | Fiduciary duties are owed to the corporation.  |
| A:  | Absent showing of dishonesty, there was no breach of fiduciary duties regardless of who they were owed to. Duty of care extends to all stakeholders (corporation as a whole). The SCC rejected the shifting of duties in the vicinity of insolvency in Canada – here, duty is only owed to the corporation. Duty is never owed to the shareholders so can’t shift duties to creditors. The SCC re-affirmed the role of the business judgment rule in protecting directors. Courts (absent a showing of dishonesty or gross procedural negligence) should not second-guess the directors. If a business decision was made in a honest and reasonably informed manner, the court should not question it. Creditors may use oppression remedy.  |

### BCE Inc v 1976 Debentureholders – BJR applies

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| F:  | When debt becomes riskier, the value of the debt falls. BCE’s shares being bought by 3rd party, BCE borrowed $30B. Bell Canada (wholly owned subsidiary of BCE) was to guarantee BCE’s debt which had a negative impact on the existing debentures. Debenture holders saying the whole deal stinks! Claimed directors were breaching their duties.  |
| I:  | Did the directors breach their fiduciary duties by adding more SECURED debt such that the old debt is bumped lower in the queue to be paid?  |
| R:  | Under the BJR, deference should be given to Directors’ business decisions taken in good faith and in the performance of the functions they were elected to perform. Although Directors must consider the best interest of the corporation, it may also be appropriate, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders, but this is not mandatory.  |
| A/C:  |  There is no duty of fairness beyond what the debt contract requires. It was still in the best interest of the corporation and overall, the value went up 40% even though the value of the old unsecured debt went down. Courts are really hesitant to second-guess a legitimate business decision unless it is so extreme and obvious that it’s a breach of fiduciary duties.  |

### Smith v Van Gorkom – first major case where courts ignored BJR

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| --- | --- |
| F:  | Van Gorkem received a take-over bid at $55/share for the shares of the company. The board approved without much deliberation. V approached a corporate takeover specialist - idea there would be a cash out merger of TU into New T (shareholders of TU are bought out, they don't get a new interest). Dissenting shareholders say the cash out merger approved by the board was at too low a price, they should have held out for a better offer. |
| I:  | Did the Directors breach their fiduciary duty? Was the decision of the Directors protected by the BJR? |
| R:  | The BJR itself is a presumption that in making a business decision, the directors of a corporation acted on an **informed basis**, in **good faith**, and in the **honest belief** that the action taken was in the *best interests of the company*.  |
| A/C:  | The determination of whether a business judgment is an informed one turns on whether the directors have informed themselves prior to making a business decision of all material information reasonably available to them. Under the BJR rule, there’s no protection for directors who have made “an unintelligent or unadvised judgment”. Directors’ decision was not protected by the BJR because the Directors did not act in an informed manner, which is required by the BJR. In this case, there was no report by a professional that the Directors relied on, they only had a two-hour meeting, only a 20-minute presentation was given to describe the sale, the Board didn’t read the agreement, the Board didn’t question VG on how he came up with the price, there was a time restriction, and they didn’t know the true value of the corporation.  |

## Fiduciary Duties

Taking Corporate Opportunities - The corporate opportunity doctrine arises out of the fundamental obligation of a fiduciary not to allow a conflict of his or her duty with his or her own interests.

### Cook v Deeks

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| F:  | Three directors (out of four) who controlled the majority of shares in a company obtained a contract for themselves to the exclusion of the company. The fourth shareholder sued.  |
| I:  | Did the defendants breach their fiduciary duties?  |
| R:  | Directors who assume the complete control of a company’s business must remember that they are not at liberty to sacrifice the interests which they are bound to protect…[nor] divert in their own favour business which should properly belong to the company they represent.  |
| A:  | The only reason the 3 could get the second contract was because they served on the board. They accelerated the work on the expiring contract and secretly negotiated a new contract so that the company could not get the contract. The directors were fiduciaries to the company and thus owed fiduciary obligations. They breached their fiduciary duty by giving a business opportunity that belonged to the corporation to their new company. The vote itself was a fraud on the minority; the Court found that the ratification vote could not be saved because it was oppressing Cook and was a gift to themselves. |
| C:  | Directors breached duty – profits were accounted for and disgorged.  |

### Canadian Aero Service Ltd v O’Malley

|  |  |
| --- | --- |
| F:  | O’Malley and Zaryzcki resigned from Canaero, incorporated new company Terra Surveys Ltd., and then immediately took over contract that Canaero under the direction of O’Malley and Zarycki had been pursuing for years.  |
| I:  | What is the status of the defendants (are they fiduciaries? O+Z are senior employees but not shareholders or directors)? What duties did they owe? Did they breach those duties? What’s their liability for breach of duty?  |
| R:  | A director or a senior officer is **precluded from obtaining for himself**, either secretly or without the approval of the company any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company. * 1. **Don’t have to be appointed as director to find liability as such** – duties apply equally to any officials of the company authorized to act on its behalf, in particular those acting in a managerial capacity

Cannot usurp corporate opportunity for himself **even after his resignation** where the resignation was prompted by a wish to acquire for himself the opportunity or that his position with the company led him to the opportunity. (Note: Court doesn’t specify how long after resignation before ex-fiduciary can go after corp’s business) |
| A:  | Factors to consider to determine if the corp opp belongs to company:* Factor of position or office held (the less senior you are, the faster you can leave w/ no owed fid duties)
* The nature of the corporate opportunity (e.g. top secret vs widely-known)
* Its ripeness, its specificness and the director’s or managerial officer’s relation to it (e.g. how mature was it – just one signature away here)
* The amount of knowledge possessed
* The circumstances in which it was obtained and whether it was special or, indeed, even private
* The factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship the company
* The circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge
 |
| C:  | O+Z = fiduciaries tf owed fiduciary duties and breached them. Remedy: Disgorge the profits that Terra made from having been awarded the contract after proving what its loss of profit had been had it been given the profit (accounting of profits) |

Self-Dealing Transactions

(i) Common Law: All self-dealing transactions are going to be invalid.

Where the director is on both sides of a transaction. Concern is that the self-dealer has an influence on the decision making of a corporation and has some personal interest in the outcome. When an individual is on both sides of the transaction, which puts you in a conflict position; as a purchaser, you want to spend the least money possible. As a vendor, you want to receive the most money possible.

### Aberdeen Railway v Blaikie Bros – all self-dealing tx = invalid

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| --- | --- |
| F:  | Aberdeen transacted with partnership of which one of the partners was a director on the board of Aberdeen.  |
| I:  | Can a director engage in transactions, on behalf of the firm whose board she sits on, that are done with a firm in which the director has a financial stake? |
| R:  | All self-dealing transactions are going to be invalid. An individual cannot be on both sides of the contract. When a particular transaction leads to a conflict in interest, the Director who has the conflict should recuse themselves from participating in that decision. |
| A:  | A director is the fiduciary of the firm and thus owes a duty to refrain from self-dealing no matter how material the conflict of interest. Doesn’t matter whether the company ultimately benefitted for the self-dealing transaction, nor whether he was the sole director or one of many.(ABCA S. 120 – it has to be of some sort of material interest; we don’t want to get into trifle matters) |
| C:  | Contract is voidable.  |

### North-West Transportation Company Ltd v Beatty – self-dealing invalid UNLESS ratified w/ no fraud/oppression

|  |  |
| --- | --- |
| F:  | Company bought steamer from a director and then the shareholders ratified the purchase. The majority of the shareholders consisted of the self-dealing director and his friends.  |
| I:  | Is the self-dealing contract voidable or insulated by ratification? Did selling the steamer violate the FD owed to the corporation? |
| R:  | A Director may acquire a majority of the shares and use the shareholder vote to ratify a transaction that would violate a fiduciary duty only if the Director does not act in an unfair and improper manner. |
| A:  | 2 conflicting principles: (1) directors are fiduciaries and owe a duty to refrain from self-dealing & (2) resolution by majority of shareholders is always binding on corporation and minority shareholders. Majority of shareholders can ratify actions by self-dealing directors, even if self-dealing directors are the majority of shareholders, unless they do so in an unfair, oppressive, or fraudulent manner.  |
| C:  | Contract for sale held valid and enforceable because it was ratified by a SH vote that was not unfair or improper.  |

(ii) Legislative Response: How to get around voiding a contract in which someone might have an interest in

**ABCA, s. 120(1):** A director or officer of a corporation who

(a) is a party to a material contract or proposed material contract with the corporation, or

(b) is a director or an officer of or has a material interest in any person who is a party to a material contract or proposed material contract with the corporation, shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of the director’s or officer’s interest.

* Material interest = financial interest

**ABCA, s. 120(8):** If a material contract is made between a corporation and [self-dealing director],
(a) the contract is neither void nor voidable … [&]
(b) a director or officer or former director or officer of the corporation to whom a profit accrues as a result of the making of the contract is not liable to account to the corporation for that profit … if the director or officer disclosed the director’s or officer’s interest … and the contract was approved by the directors or the shareholders and it was reasonable and fair to the corporation at the time it was approved.

* Once you disclose and the board + shareholders agree and ratify the contract, as long as it’s not unfair or oppression, the contract is still valid

**ABCA, s. 120(9):** If a director or officer of a corporation fails to disclose the director’s or officer’s interest in a material contract…, the court may, on the application of the corporation or a shareholder of the corporation, set aside the contract on any terms it thinks fit.

* If you’re not disclose, then it’s probably shady and the court reserves the right to modify the contract.

### Dimo Holdings Ltd v H Jager Developments Inc

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| F:  | Director of Jager negotiated deal whereby Jager borrowed money from Dimo, whose officer/director/shareholder was the director’s wife. Jager is being sued by Dimo for repayment of loan. Dimo asks that the loan be set aside, because the director was self-dealing or in conflict of material interest.  |
| I:  | Does s. 120 apply? Did the director have a material interest in the loan? Can the loan be set aside?  |
| R:  | **Material Interest:** denotes a personal, financial interest and it must be significant. Any dealings between a director’s corp. and another corp. controlled by a family member of the Director does not constitute a “material interest” that requires disclosure.  |
| A:  | * 1. Director is only required to disclose *his* material interest, not his associate’s (wife’s). If the contract is fair and reasonable to the corporation at the time it was approved, courts should be reluctant to set the contract aside (no harm no foul). Here, the director didn’t profit from the contract (except for a modest interest rate).
	2. Court didn’t want to set the contract aside and forgive the debt – beyond this, the court confirms that even in the absence of an enforceable contract, Jager would be obliged to pay the debt subject to the principles of unjust enrichment.
 |
| C:  | Director did not have material interest – Loan still valid.  |

### Zysko v Thorarinson

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| --- | --- |
| F:  | Two directors (husband/wife) granted their company (Bluebird) a mortgage from company (ESJ Company) where they were directors without disclosing to third director.  |
| I:  | Is the mortgage valid under s. 120?  |
| R:  | Material contract: “possibility that the Director was to benefit from the contract more then *de minimis* then the transaction should be disclosed to the corporation.” |
| A:  | Rule of thumb: “there should be disclosure whenever the director or officer’s involvement might be relevant to the corporation’s decision-making process”“If the corporation would undertake additional due diligence to determine whether the contract or any of its terms is truly in the best interest or if it would assign another director or officer to handle the negotiations, the contract is material and must be disclosed” |
| C:  | No notice given; violates ABCA; material interest found  |

**Competing Director**

The CL has been tolerant towards the issue of competing director. It is the idea that we have a director of Company A that sits on the board of Company B, a competitor.

### London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd

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| F:  | A director appeared on two different boards.  |
| I:  | Can a director serve on two or more boards?  |
| R/A:  | If no confidential information is used from one company in the management of another, a director can serve on two different boards. If there’s no overlap between the boards, it’s usually fine. Problems arise when you sit on a competitor’s board – if the two companies are competing, the director probably cannot serve on both boards.  |

### Sports Villas Resort, Inc. (Re)

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| F:  | Dobbin was a director (and shareholder) of Sports Villas that operated golf course resort; was also director of other golf course company Cabot. Pardy = also director/shareholder of Sports Villas; alleges that Dobbin has breached his fiduciary duty to Sports Villas + should be removed.  |
| I:  | Did Dobbin breach his fiduciary duties by sitting on two boards?  |
| R:  | * 1. Fiduciary duty does not preclude multiple memberships on the boards of different companies. Must consider whether membership on the boards is competing via product and geographic market and if any proprietary info was shared that allowed the second company to have an extra edge. A Director may engage in a competing business, but their fiduciary obligations require avoidance of actions which would come into conflict w/ the interests of the business. If there is no evidence that another corp is in direct competition w/ an existing business, then no breach of FD can be found.
 |
| A:  | Competitor issue: Corporations are not in competition (200km apart; diff target audience). In antitrust (competition) law, we always need to identify **(1) product and (2) geographic market.** * 1. Policy consideration: directors are fiduciaries, but they also have expertise which makes them a scarce resource – don’t want to unduly burden

Proprietary/confidential info issue: Did D take confidential info and use it for his own benefit in developing the second golf course? Court held the info here was not unique, it was generic, no evidence that D has used any info from Sports Villas. Dobbin shouldn’t be prevented from using generic expertise in other company as long as it doesn’t violate initial understanding or misuse confidential information or resources.  |
| C:  | No breach found.  |

**Takeover Bids and Defensive Tactics by Management**

During corporate takeovers, a potential conflict arises because directors of a target company have a duty to act in the interests of the company, BUT they also have an interest in maintaining their employment – directors have an incentive to adopt defensive measures to discourage the takeover.

Examples:

* 1. Poison pills: give existing shareholders the right to buy new shares at very low prices if an event is triggered, such as the acquiring firm buying more than x% of the firm. This makes the acquisition of the firm costly because they must buy all the new shares.
	2. Break out fee: solicit rival friendly bids BUT allow the rival bidder to receive a huge fee if their bid is unsuccessful. This means that if unfriendly firm acquires the target firm, they must pay huge fee.

Note: These tactics *may* be a breach of fiduciary duty.

### Maple Leaf Foods v Schneider Corp

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| F:  | Maple Leaf bid to take over Schneider at $19/share. The Board established a special committee indep of the controlling family to study alt offers. A bid by Smithfield Foods at $25/share was accepted. Maple Leaf tried to bid at $29/share but was rejected.  |
| I:  | Did the standing committee act in the best interest of the corporation in accordance with its fiduciary duties?  |
| R:  | When a corporation is in the process of an unsolicited takeover bid, directors must act in the best interests of the corporation, and this requires specific duties. The business judgement rule applies if the board make an informed and reasonable decision with due diligence. **ASK**: Did the Directors take the steps necessary to avoid a conflict of interests? |
| A:  | The committee is not obligated to take the highest bid. They did their due diligence in creating a separate standing committee to prevent conflict of interests and in trying to solicit more bids. Special committee struck to avoid conflicts between directors representing majority/minority shareholders. The board should have made a reasonable decision, not the perfect decision. BJR applies.  |
| C:  | Claim rejected.  |

### Other Sources of Fiduciary Obligation

### Tongue v Vencap Equities Alberta Ltd. – when directors owe shareholders fid duty (LIMITED); can’t contract out of fid duty – note: controversial area of law; not all courts follow this

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| --- | --- |
| F:  | Tongue and Harrap are two shareholders in Synerlogic. There are shareholder directors and non-shareholder directors. Majority shareholder is aware of takeover by Andersen so he convinces the minority shareholders to sell their shapes to him cheaply BUT majority shareholder did this under an intermediary company (Vencap) so he’s not identified. Majority shareholder then resells the shares to Arthur Andersen at a profit ($2.16 - $0.60).  |
| I:  | Do directors owe shareholders a fiduciary duty?  |
| R/A:  | In general, directors do NOT owe shareholders fiduciary duty.Exceptions:1. When directors act outside of ordinary duties
	1. In soliciting and arranging for the disposition of shares for the company, this causes a new role and the director occupies a new role outside the scope of their duties to the corp – a fiduciary duty can arise
2. When directors purchase shares from shareholder
3. Other circumstances – e.g., when directors possess the information necessary for the shareholder to make informed decision

Releases that contract out of the duty of care is not allowed (ABCA, s. 122(3)). Case is really about insider trading (ABCA s. 130(1)) – an insider who sells to or purchases from a shareholder of the corporation or any of its affiliates a security of the corporation… and in connection with that sale or purchase makes use of any specific confidential information for the insider’s own benefit … (a) is liable to compensate … (b) is accountable to the corporation |
| C:  | Directors breached fid duties – liable jointly and severally.  |

## Other Statutory Duties

### Zwierschke v MNR

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| --- | --- |
| F:  | Director didn’t maintain enough cash to pay taxes. Company becomes insolvent and now the state wants its share of taxes from director.  |
| I:  | Is the director liable under the Income Tax Act? |
| R/A/C:  | The corporation was cash poor, and while it did make its source deductions, it failed to remit the money. The director is exposed to personal liability for this failure. Only defence is under the Income Tax Act – not liable if you exercise the required degree of care and skill in this context o If yes, no personal liability for unremitted source deductions. Here – can’t rely on this defence because he didn’t exercise any degree of care, diligence, or skill. He managed the company and knew about its affairs. Writing a cheque to the government and hoping it will clear doesn’t count as due diligence.  |

## Case Study: Directors’ and Officers’ Liability in Tort to Third Parties

Canadian common-law is fractured regarding whether directors/officers are personally liable for torts they commit in a corporate capacity. Complicating question is *whether the directing mind of a corporation is also a tortfeasor in a personal capacity, and therefore should also be personally liable.*

**INDUCING BREACH OF CONTRACT**

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

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

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

### McFadden v 481782 Ontario Ltd – directors can be personally liable for inducing breach of contracts

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| F:  | Directors of company were sued by employee who was fired by company. Employee sues them for inducing breach of contract.  |
| I:  | Are the directors personally liable for inducing a breach of contract?  |
| R/A/C:  | **Directors will rarely be liable absent fraud, deceit, dishonesty or want of authority** – gives a broad shield of protection because liability is contingent on it being shown that the actions themselves are tortious or exhibit a separate identity or interest from that of the company, so as to make the act or conduct complained of their own. Court held directors (also officers and shareholders) personally liable. The court looked at the behaviour of directors who had moved funds out of corporation just around firing of employee. The company got bought and sold a few times – they didn’t like the guy so instead of paying him severance, they just fired him. The directors induced the breach of contract.  |

**NEGLIGENCE**

### Montreal Trust Co of Canada v Scotia McLeod Inc – directors, if actively involved in negligent misrep, can be personally liable

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| F:  | Company issue debentures (debt). Two directors/executives who were active in the issuance of the debt had neglected to mention that the company had other obligations. Essentially, they borrowed money and conveniently forgot to mention their other debt. Corp goes bankrupt – directors get sued for negligent misrepresentation.  |
| I:  | Can directors be found personally liable for actions taken in benefit of the corporation?  |
| R/A/C:  | The two specific directors could be sued for negligent misrepresentation but not the other “passive” directors for the purpose of raising money. They can’t be sued, and they weren’t involved in raising the money – not directly involved even though it’s ultimately the board that gets the money. Instead, the bad behaviour came from the two specific directors. **Any third-party claiming damages against directors must show how the acts of the directors harmed them.**  |

### ADGA Systems International v Valcom – directors who engage in tortious activity will be held liable

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| F:  | Director of defendant company induced employees of plaintiff company to list themselves as employees of defendant, to win bid from government. They won the bid, and the employees leave the company to join the company that won the bid. Plaintiff sued defendant’s director for inducing breach of fiduciary duties.  |
| I:  | Whether director and employees of corporation that induces breach of fiduciary duties by employees of competitor firm can be sued personally – even though this action was in the best interest of the defendant firm? Note: That the company was doing something bad is obvious – but the director was acting according to the company’s interest and not just his person interest.  |
| R/A/C:  | The case reaches the opposite conclusion of Scotia. This case holds that director/officer liability is common & only a small shield of protection, there would be liability for ordinary negligence provided that a duty of care is in place. This case is distinguished from Scotia in that in Scotia, there was no allegation of wrongdoing against passive directors – but here, there is. So, the new theory is that if directors did something wrong, they can be held personally liable. ADGA expanded liability for directors beyond original factors – now, any allegation of wrongdoing against a director can proceed. Also – Solomon principle doesn’t apply here because here, they’re being sued as directors and not shareholders. Yahya doesn’t think this is good reasoning because Solomon says you can’t sue the owner – NOT that you can’t sue employees or directors.  |

### NBD Bank, Canada v Dofasco Inc – negligence liability via DOC, back towards ADGA

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| F:  | Bank is suing Dofasco (which owns Algoma) and officer (Melville) of Algoma. NBD loaned some money to Algoma based on communications by Dofasco and Melville to the bank. There are 2 sets of directors here: passive directors and the active directors borrowing money. Algoma becomes bankrupt and was re-organized. Bank can only get cents on the dollar back for its loan. So, it wants the remainder from the director and Dofasco (the parent company). Why? They neglected to mention the bad financial affairs of Algoma – NBD only loaned money based on the letters from Dofasco and Melville. The parent company and the officer are sued for negligent misrepresentation.  |
| I:  | Can the parent company and the officer be held personally liable?  |
| R/A/C:  | Personal liability issue: * Melville argues he shouldn’t be personally liable because he was acting in the best interests of the firm – ala Scotia McLeod. Court reaffirms ADGA saying the director was tortious, so liability is attached.

Duty of care issue:* For negligent misrep, you need:
	+ Sufficiently close relationship between Melville and NBD
		- The bank relied on Melville’s representations and gave a loan based on conversations. The bank’s reliance on his representation was reasonable.
	+ Policy reasons for not holding Melville liable
		- Anomalous to hold Melville liable when they can’t hold the corporation liable
			* The re-organization released Algoma from any liabilities – but did not release Melville. The CCAA (re-organization act) allows releases of directors except those made by “claims of misrepresentation” – so the statutory scheme indicates that directors may be liable after re-organization proceedings
			* Also, if director’s actions caused the re-organization after insolvency, why should director get benefit of the proceedings?
		- Risk was allocated by contract between Melville and bank
			* Risk allocation is fine if there’s full disclosure – but here, Melville hid some critical information. His conduct meant that bank didn’t foresee the need to protect itself.
		- Indeterminate liability for Melville
			* Just as bank should have protected itself according to Melville, Melville could have foreseen his liability because he knows who his potential plaintiffs might be.
			* Not indeterminate – might be large but can still count it.
 |

### Hogarth v Rocky Mountain Slate Inc – not doing too much lying is fine sometimes

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| --- | --- |
| F:  | Suhan, Simonson, and Powell want to operate a quarry (pulling rocks and selling them). They set up a limited partnership and prepared financial documents to solicit investors. These financial documents included a “future oriented financial information” document, which included forecasts and projections of business opportunities. They also represented that they would follow with all the regulatory requirements. They had investors invest in the limited partnership, the quarry operates for a short time, lose all of their money, and cease operations. The Investors sue Suhan, Simonson, and Powel for negligent misrepresentation. They’re held liable at trial, and Simonson appeals. |
| I:  | Partnership liable but what about individual partners?  |
| R:  | If the conduct is not “tortious in itself” or doesn’t exhibit “a separate identity or interest form that of the corporation,” (Scotia McLeod) there is no duty of care. Slatter had different way of getting to it liability for ordinary negligence possible but there is no *prima facie* DOC. Must go through tort analysis to determine whether DOC exists |
| A:  | The representation in question must be untrue, inaccurate, or misleading* The Court was not convinced that all the misrepresentations were untrue. The Directors also did not misrepresent their expertise or background; making representations about their skill in management does not create personal liability if mistakes are made in the management of the corporations. The representations were based on future events, not representations of facts how they exist now.

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

**EXAM TIP:** If there’s a director who borrowed money, you should decide whether the fact pattern is closer to Hogarth or ADGA.  |
| C:  | No reliance/liability found.  |

### More on director liability in tort:

***Abt Estate v Cold Lake Industrial Park* (2019 ABCA)**

* When directors/senior officers are directly involved and doing bad stuff, regardless of whether it’s motivated by the corporation or not, there tends to be liability. If what they’re doing is more of the nature of negligence where they’re bumbling through business but there’s no real intentionally bad stuff being doing, then it’s just a risk that the investor takes.
* Says that circumstances where individual takes responsibility for accuracy for their words may be sufficient to identify separate identity to make that conduct complained of their own
* Taking personal responsibility for words makes it consistent with Scotia McLeod now for establishing “separateness” needed for director
* If director invites personal reliance on their words, they fit the test for separateness in SM (a repackaging of SM)

### Deloitte & Touche v Livent Inc (Receiver of) – auditor can be liable for neg audits in some circumstances

|  |  |
| --- | --- |
| F:  | Two shareholders on Livent’s board fudged the financial records. Deloitte was hired to audit the books and issues statements that said everything was fine. These statements are used by shareholders to decide whether they want to invest or not. Livent becomes bankrupt. |
| I:  | Can auditors be liable for negligently conducting audits of corporation?  |
| R/A:  | A duty of care needs to exist to support a tort of negligent misrepresentation. Because the losses here are economic losses, it must fit into one of the exceptions (negligent statements) and courts will be hesitant to find a duty (because measuring the losses are very speculative). It also cannot lead to determinate liability as per the Anns/Kamloops two-part test. The court examined ABCA, s. 155 (annual financial statements) to determine that there was a legal requirement that an auditor statement is done and put to the shareholders every year. There’s also a duty on the auditor to examine the financial statements that are going to be put toward – as such, there’s a statutory imposition on auditors to engage in competent auditing. **1. Prima facie duty of care will exist when:**(a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation, and (b) that reliance by the plaintiff, in the circumstances, would be reasonable* The d had a direct/indirect financial interest in the transaction in respect of which the representation was made
* The d was a professional or someone who possessed special skill, judgment, or knowledge
* The advice or information was provided in the course of the defendant’s business
* The information or advice was given deliberately, and not on a social occasion.

**2. Indeterminate liability issue**: Difficult but not impossible to determine – not an issue here.The auditors knew the identity of the plaintiff (shareholders) who would rely on the audit AND the audit was used precisely for the purpose for which the auditor prepared it. The purpose of the reports was for shareholders to decide whether to invest money in the company and the management of the corporation.  |
| C:  | Met all the points for reasonable reliance.  |

## Indemnification by the Corporation

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

**ABCA, s. 124(1)**: A corporation may indemnify a Director/Officer … who acts or acted at the corporation’s request… against all costs and expenses … reasonably incurred by the director/officer in respect of any civil, criminal, or administrative action or proceeding to which the director or officer is made a party … if:

* The Director or Officer (a) “acted honestly and in good faith with a view to the best interests of the corporation” …
* (4) A corporation may purchase and maintain insurance for the benefit of any person referred in subsection (1) against any liability incurred by the person …
* (5) A corporation or a person referred to in subsection (1) may apply to the Court for an order approving an indemnity under this section and the Court may so order and make any future order it thinks fit
	+ In order to get insurance, you have to at least be acting honestly (can’t be stealing from corp) but any kind of tort, even criminal or regulatory actions can be indemnified depending on what the corp’s policies are

### Blair v Consolidated Enfield Corp

|  |  |
| --- | --- |
| F:  | Blair was the CEO of a corporation. He runs AGM; His slate for the board of directors was defeated, but he annulled the election because he believed that some votes were improperly cast. The competing slate sued and were reinstated. Costs were awarded against Blair, and Blair now seeks indemnification from the company.  |
| I:  | Whether an officer can be indemnified by the corporation for costs incurred by the officer who unsuccessfully nullified an election that removed the officer, and the officer relied on legal advice to nullify the election OR whether such a director was acting in the best interest of the firm, even though his interest was at stake, and the law firm’s self interest was at stake when rendering the legal advice |
| R/A:  | Concern with integrity of election, even if it means serving the self-interest of the officer, is acting in the best interests of the firm. If an officer has a good faith reliance on legal advice, then this is a factor or indicia of acting in the best interests of the firm. If there was a disinterested chair of the meeting, they too would have relied on the same legal advice. Should he have ignored legal advice, simply, because it served his interests? |
| C: | Indemnification allowed. |

### R v Bata Industries Ltd (Ont CA)

|  |  |
| --- | --- |
| F:  | Shoe company had large barrel storage site containing toxic chemical waste that were leaking toxic chemicals onto the ground. The company, as well as three of its directors (CEO, president, VP) were charged with six regulatory offences. Following the convictions, the TJ imposed a probation order and fined each of the directors 12k. A term of the probation order prohibited Bata from indemnifying the directors.  |
| I:  | Can the court prevent a company from indemnifying its directors?  |
| R:  | It is up to the company to decide if directors can be indemnified.  |
| A:  | The probation order has application for max 2 years; thus, if a corp were intent on providing indemnification to a director who had been fined, it could do so unencumbered by a probation order by simply waiting for it to expire. An indemnity prohibition in a probation order can therefore do very little to advance general deterrence objectives.  |
| C:  | Indemnification allowed.  |

# Chapter 7: Corporate Social Responsibility

Also now known as: environmental and social governance (ESG)

Issues:

* Should companies be nice people?
* And how nice should they be?
* Should we allow for lawsuits in Canada for human rights abuses abroad?

CSR not about acting legally but whether companies should go a step further – a concept that arises from the **growing expectation that businesses should embrace social accountability –** *foundation is the notion that corporations have responsibilities to stakeholders other than just their shareholders.*

There’s a back and forth that exists between people who believe that CSR should be legislated vs. corporate lobby groups against regulation.

### Dodge v Ford Motor Company

* At the time, Ford was profitable and sitting on tons of cash. He announced he wants to do good, pay his employees more, invest in the corporation, etc. Ford stopped paying dividends to shareholders. Dodge brothers aren’t happy – why would we invest in this corp if we don’t get any money back?
* Court held that Ford must pay the dividends because it’s oppressive to the other shareholders. Essentially, he can’t do good. Corporations exist to make profits and you should be only doing that. Incidental humanitarian expenditures for the benefit of employees are allowed, but Ford can’t run a charity and have specific profit-making duties to the shareholders too. Dividends ordered to be paid.
* This case is widely debated.

##### Business Roundtable Statement, 2019

* Roundtable statement that says we’re going to focus focusing on the shareholder and start doing good for the world.
* “While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:
	+ Delivering value to our customers…
	+ Investing in our employees…
	+ Dealing fairly and ethically with our suppliers…
	+ Supporting the communities in which we work…
	+ Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate…”

##### UN Guiding Principles on Business and HR

* 3 pillars:
	+ State responsibility to “protect” HR within their territory
	+ Business responsibility to “respect” HR
	+ Joint responsibility to provided remedy
* Inspiring material developments in HR-related legal risks facing business worldwide:
	+ Litigation
		- Transnational tort claims
		- Misrepresentation claims
		- Shareholder class actions
	+ Legislation

##### CSR in Courts

* In US: ATS (Alien Tort Statute) or ATCA (Alien Tort Claims Act)
	+ Not very successful and effectively useless today
* US Courts do not hear claims by non-US residents against US or non-US companies for (law of nations) torts committed abroad
* BUT can bring claims under state laws
* In Canada, *Nevsun* case opened door for such lawsuits

### Re Varity Corp

* Facts: Some shareholders wanted to put a proposal to have company stop doing business in South Africa. They wanted the company to pay for and circulate the proposal to all shareholders.
	+ Shareholder activism where they put a proposal to the corporation to change the direction of company
	+ Apartheid regime that was racially segregated at the time – pressure on Western corps to stop doing business in South Africa because of this
* Court held that such a proposal was for the promotion of social causes, and not related to genuine management issues.
* See ABCA, s. 136.

### ABCA, s. 136: Shareholder Proposals

1. A shareholder entitled to vote at an annual meeting of shareholders may
	1. Submit to the corporation notice of any matter that the shareholder proposes to raise at the meeting, referred to in this section as a “proposal”, and
	2. Discuss at the meeting any matter in respect of which the shareholder would have been entitled to submit a proposal
2. A corporation that solicits proxies shall set out the proposal in the management proxy circular required by section 150 or attach the proposal to it
3. If so requested by the shareholder, the corporation shall include in the management proxy circular or attach to it a statement by the shareholder of not more than 200 words in support of the proposal, and the name and address of the shareholder
4. n/a
5. a corporation is not required to comply with subsections (2) and (3) if…
	1. n/a
	2. it clearly appears that the proposal has been submitted by the shareholder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the corporation, its directors, officers, or security holders or any of them, or primarily for the purpose of promoting general economic, political, racial, religious, social, or similar clauses, …

(9) The corporation or any person claiming to be aggrieved by a proposal may apply to the Court for an order permitting the corporation to omit the proposal from the management proxy circular, and the Court may, if it’s satisfied that subsection (5) applies, make any order it thinks fit.

# Chapter 8: Shareholder Rights & Remedies

**Shareholder Remedies**

1. **Oppression Action:** Brought by shareholders/stakeholders on behalf of the shareholders/stakeholders if specific shareholder/stakeholder affect so company as a whole not necessarily harmed – suing in a personal capacity and not on behalf of the company. Any money recovered goes back to the individual(s).
2. **Derivative Action:** Brought by a shareholder/stakeholder on behalf of the corporation against the board or specific directors/officers – deriving your right to sue on behalf of the company. DA can only be brought when the company as a whole has been harmed. Any money recovered goes back to the company.
3. **Compliance & Restraining Orders:** where a SH is not complying w/ a USA or the Articles (what the business is restricted to), someone can get a Compliance/Restraining Order to shut down what is being done.
4. **Dissent and Appraisal:** if you’re a SH that has voted against a major change in the corporation, you can force the corporation to buy your shares (only available to SH).
5. **Class Veto:** when there are certain changes that will affect a class of shares, that class can vote. If they vote against the change, the change cannot be accepted (only available to SH).
6. **Investigations:** powers under the *ABCA* allow for corporations to collect information re: what’s going on, including having an inspector investigate the books. Most useful w/ Director fraud.

**Relevant Sections of ABCA**

## *ABCA, s.239: Definitions (who can complain)*

**S.239(b)**: “Complainant” means

* (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
* (ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
* (iii) a creditor …
* Or (iv) any other person who, in the discretion of the Court, is a proper person to make an application under this part.

**Judicial Interpretation: What is Oppressive or Unfair Conduct?**

### Deluce Holdings Inc v Air Canada

|  |  |
| --- | --- |
| F:  | Air Canada (AC) and Deluce (D) are 75% and 25% shareholders, respectively, in Air Ontario through a numbered holding company. AC and D had a unanimous shareholder agreement that governed their relationship. One provision gave Air Canada the option to acquire D’s interest upon the termination of employment of the father (chairman) and Deluce (CEO) by Air Ontario or the holding company. Another called for arbitration in the event of a dispute over the value of the shares. In April 1991, Air Canada wanted to acquire 100% ownership of Air Ontario, so in October 1991, the employment of Deluce was terminated. D claims AC improperly exercised its majority control of the board of directors of the holding company to terminate Deluce’s employment. D claims Deluce was terminated to allow it to buy out D’s minority interest in the holding company. D claims this conduct was oppressive. D claims that there can be no arbitration before deciding the oppression issue because you don’t know if there’s oppression involved. If there’s oppression, then no arbitration is allowed. If it was a fair dealing, the arbitration can go ahead to decide the proper value of the shares.  |
| I:  | Is there oppression?  |
| R:  | Oppression is a personal cause of action by an aggrieved shareholder who does not claim that the corporation was harmed *per se*, but rather that some group (usually the majority shareholder because of their control of the corp.) has engaged in conduct that has been unfair to another shareholder  |
| A:  | The USA means that termination can only occur if it is in the best interests of Air Ontario and only in good faith, according to the court. AC repeatedly asked William to step down to buy Air Ontario’s shares (he had a letter of proof) and, minutes before terminating him, there were minutes from a meeting where Air Ontario was praising William’s work.AC wanted more control over regional carriers to create more efficiencies which is a perfectly legitimate goal for AC but not necessarily for AO. It’s the duty of directors to act in the best interest of corporation. Hence, only termination of employment that’s in best interests of AO is legitimate and will trigger arbitration agreement. It may be that this was in the best interest, but board made no such findings. AC directors should have acted in best interests of AO and not AC. Note: Even if they acted in best interest of AO, that could still be oppressive. Also tension between what’s good for company as a whole including D, and what’s good for parent AC.  |
| C:  | Arbitration stayed; oppression found.  |

### BCE Inc v 1979 Debentureholders

|  |  |
| --- | --- |
| F:  | Recall: Company borrowed money from BCE for secured debt. Tried to sue for breach of fiduciary duty (derivative) and oppression (we, the unsecured creditors, are being oppressed because you brought on more debt and put it in front of us in the queue).  |
| I:  | Is there oppression?  |
| R:  | 2-part test for oppression1. Were reasonable expectations met?
	1. First, what were the debtholders’ expectations?
	2. Were these expectations reasonable?
		1. **Factors that are useful in determining whether a reasonable expectation exists include**: general commercial practice; the nature of the corporation; the relationship between parties; past practice; steps the claimant would have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders
2. Was that unfair?
	1. Violated by conduct, and
	2. Falls within the terms “oppression,” “unfair prejudice,” or “unfair disregard” or relevant interest? (ABCA, s. 242)
 |
| A:  | The best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard”. Creditor’s expectations = credit rating/value be maintained. Court held that creditors could have negotiated protections in the debt contracts (covenants).  |
| C:  | No oppression.  |

### Re Ferguson and Imax Systems Corp

|  |  |
| --- | --- |
| F:  | Company incorporated to exploit a patented film projection system. The promoters included the husband of the complainant and the complainant. The first shareholders were three couples. Each husband received 700 shares of the common stock (full voting rights) of the company and each wife received 700 shares of the class B stock of the company. The shares of the class B stock were non-redeemable (can’t just cash them out/sell them) and entitled the holder to receive priority to the common shares a non-cumulative cash dividend. The class B shares were non-voting unless the company failed to pay the 5 cents dividend for two consecutive years. Ex-wife worked in the company until separating from her husband in 1972. She was then shunned by the rest of the shareholders. They stopped paying dividends beyond minimum required, and this was to force her to sell her shares. Company held special meeting to vote on resolution to amend articles to reorganize capital. Ex-wife claims resolution will have effect of putting her out of company and claims this was oppressive and unfairly prejudicial.  |
| I:  | Is there oppression?  |
| R/A:  | Court looked at relationship between the various shareholders and the small close nature of the corporation. The resolution authorizing the change in the capital of the company is the culminating event in a lengthy course of oppressive and unfairly prejudicial conduct to the appellant. The company hasn’t acted bona fides in exercising its powers to amend. Court held that the intention of that company was to single out one shareholder. The decision was not a business decision but a personal one.  |
| C:  | There was oppression – implementation of new resolution prohibited.  |

### Downtown Eatery (1993) Ltd v Ontario

|  |  |
| --- | --- |
| F:  | A was dismissed by his employer Best Ltd, then sues for wrongful dismissal. Several years after the action was commenced, Grad and Grosman reorganized their companies such that Best Ltd ceased to do business. They transferred its assets to other companies in the group, leaving Best with no assets to pay any liabilities. Wrongful dismissal action goes to court and A is successful, seeks to realize on his judgment, but G and G claim you can only execute against Best Ltd, which no longer exists, so nothing he can do. A alleges oppression against G and G for undertaking a corporate reorganization in face of his claims (he’s suing them as officers/directors under oppression – NOT as a shareholder) |
| I:  | What is A’s standing? Does he qualify as a ‘complainant’ to sue under s. 239? Does he meet the oppression test? |
| R:  | Oppression can proceed without considering the directors’ intentions behind the reorganization. A creditor can be a complainant.  |
| A:  | Because the employee was owed money from lawsuit, court said that he was a creditor and could sue for oppression given that the company was bankrupted by owners. The creditor’s legitimate/reasonable expectations were that there would be money in Best to satisfy judgment. His expectations were unfairly not met because the assets were moved to avoid paying the judgment. Expectations were oppressed – evidence showed that they emptied the companies to not pay.  |
| C:  | Allowed suit for oppression.  |

### Shefsky v California Gold Mining Inc

* Skim – important takeaways:
	+ Confirms test from BCE – must have reasonable expectations that arise from either the normal/ordinary course of doing business or refer to the case law.
		- **EXAM TIP**: For exam, use the cases we’ve studied to determine what’s a reasonable expectation – it’s not every fanciful whim.
	+ Two-part test from BCE:
		- (1) does the evidence support the reasonable expectation asserted by the claimant?
			* Useful factors given in BCE reiterated in this case.
		- (2) does the evidence establish that the reasonable expectation was:
			* (a) violated by conduct, and
			* (b) falls within the terms “oppression”, “unfair prejudice” or “unfair disregard” of the relevant interest.
	+ **OPPRESSION REMEDY VS DERIVATIVE ACTION**
		- When starting an **oppression action,** some complainants do not need prior approval of the court (shareholders and other security holders, directors, officers, former directors, former officers) and some complainants do need prior approval of the court; they must convince the court that they are a proper party.
		- When starting a **derivative action,** a complainant must always apply to the Court for permission and must satisfy the court under **section 240(1).**
		- **Section 240(1):** Subject to subsection **(2)**, a complainant must apply to the Court for permission to **(a)** Bring an action in the name and on behalf of a corporation or any of its subsidiaries, or **(b)** Intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending, or discontinuing the action on behalf of the corporation or subsidiary.
		- **Section 240(2):** No permission may be granted under **(1)** unless the Court is satisfied that: **(a)** The complainant has given reasonable notice to the directors of the corporation; **(b)** The complainant is acting in good faith; and **(c)** It appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended, or discontinued.

**Judicial Interpretation: Oppression or Derivative?**

### Hercules Managements v Ernst & Young – what is reasonable reliance re: prima facie DOC

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| F:  | Some shareholders advanced moneys to two firms, and then they failed. The firms’ financial statements, which were prepared by Ernst & Young did not indicate any problems. Shareholders of NGA and NGH sued Ernst & Young for negligent misrepresentation for losses from advancing money to NGA and NGH and diminution in value of shares. Note: (1) case was before Livent – was the leading case that had the opposite result on accountants but still law; (2) shareholders advanced the lawsuit at the accountants instead of the corporation, but management isn’t going to sue because they were probably the ones who cooked the books |
| I:  | (1) Whether and when accountants who perform an audit of a corporation’s financial statements owe a duty of care in tort to shareholders of the corporation who claim to have suffered losses in reliance on the audited statements; (2) whether certain types of claims against auditors may properly be brought by shareholders as individuals or whether they must be brought by the corporation in the form of a derivative action |
| R:  | Individual shareholders have no cause of action in law for any wrongs done to the corporation and that, if an action is brought in respect of such a loss, it must be brought either by the corporation itself (through management) or by way of a derivative action.*Hercules* – **Indicia of Reasonable Reliance*** The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
* The defendant was a professional, or someone who possessed special skill, judgment, or knowledge.
* The advice or information was provided in the course of the defendant’s business.
* The information or advice was given deliberately and not on a social occasion.
* The information or advice was given in response to a specific enquiry or request.
 |
| A:  | Negligent misrepresentation is a tort, so we need a duty to exist before a suit can proceed. You must be able to fit the negligent statement(s) into one of the categories of pure economic loss and it must not lead to indeterminate liability. A prima facie duty of care will exist when: (a) the defendant ought treasonably to have foreseen that the plaintiff would rely on his representation, and (b) that reliance by the plaintiff, in the circumstances, would be reasonable. The financial statements are prepared because the law requires it (ABCA s. 155, 169). Court created indicia of reasonable reliance and noted that all were present except that the information given was not in response to a specific enquiry or request. As such, there is a prima facie case for duty. However, the purpose of the auditor’s reports is to permit shareholders as a COLLECTIVE to make the decision to invest or not. It’s for the collective overseeing of the management of the firm – NOT for personal investment decisions by individual shareholders. Hence, any losses by individual shareholders are not recoverable in tort. Any loss isn’t really about the shareholders individually but about the company as a whole – not for personal investment but for shareholders overall. In the end, who gets to sue E&Y is the company or the shareholders collectively – not the individual shareholders. The duty the auditor owes is to the company – can be collective shareholders or even creditors. As such, the management/board should be the ones to sue but they’re the people who bankrupt the company and lied. Court held that individual shareholders could bring a derivative suit.  |
| C:  | Derivative suit allowed on behalf of the corporation.  |

### 1043325 Ontario Ltd v CSA Building Sciences Western

|  |  |
| --- | --- |
| F:  | J (56%) + S (44%) both own CSA. S alleges that S misled re: CSA’s financial condition, paid himself an excessive management fee, breached his fid duty to CSA and forged S’ signature on engineering documents.  |
| I:  | Can S sue in oppression?  |
| R:  | In a two-person shareholder firm, although S should sue J in a derivative action, there is only one shareholder who is oppressed. Any recovery from J would go back to the company. Oppression may be allowed by court if there is specific targeting even if it harmed the company as a whole.  |
| A:  | J’s forged signature not oppression – it’s bad but it’s not corporate governance. The misleading financial statements + management fees caused CSA to pay J. J actively lulled S into the belief that CSA was not doing well so S did not expect any significant return on its shares. Meanwhile, J stripped CSA of most of its profits every year, not in the form of dividends in which both members would share, but in the front of “very high” management fees paid to himself and his wife. At least in a closely-held corporation, a majority shareholder’s appropriation of management fees in disregard of the interests of expectations of the minority may constitute oppression. At the same time, the payment of excessive management fees to, or other self-dealing by, the majority or corporate directors also constitutes a wrong to the corporation; a complaint of this kind can therefore be brought as a derivative action on the corporation’s behalf if leave of the Court is obtained under s. 240. The relationship between the two actions has been resolved by the principle that where a petitioner under s. 240 complains of a wrong (usually breach of fiduciary duty) to the corporation, an oppression action is unlikely to be appropriate unless s/he suffered some loss or damage “separate and distinction from” the indirect effect of the wrong suffered by all shareholders generally (must show some loss or particular detriment beyond a diminution in the value of his/her shares). S has shown particular prejudice or damage, personal to itself, and should not be required to sue derivatively. J treated CSA “as if it was his alone” and without regard for the minority shareholder’s position.  |
| C:  | OK to sue under oppression; remedy: pay back the excess management fees.  |

## *ABCA, s.240: Commencing derivative action (derivative)*

**S.240(1):** …a complainant may apply to the Court for permission to

* (a) bring an action in the name and on behalf of a corporation or any of its subsidiaries, or …

**S.240(2):** No permission may be granted under subsection (1) unless the Court is satisfied that

* (a) the complainant has given reasonable notice to the directors of the corporation…
* (b) the complainant is acting in good faith, and
* (c) it appears to be in the interests of the corporation … that the action be brought, prosecuted, defended, or discontinued.

**S.240(3):** Notwithstanding subsection (2), when all the directors of the corporation or its subsidiary have been named as defendants, notice to the directors under subsection (2)(a) of the complainant’s intention to apply to the Court is not required.

**Derivative Actions: Commencing an Action**

### Pathak v Moloo – leave of notice requirements – no need for notice b/c only 2 shareholders

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| --- | --- |
| F:  | P+M both 50/50 shareholders but M was diverting corporate opportunities to Conquest Steel (owned by M’s wife).  |
| I:  | What is required to initiate a derivative claim when there’s only two shareholders?  |
| R:  | **To succeed on application, need to show the requirements:** 1. Applicant must be a complainant under s 239
2. Reasonable notice: complainant must give reasonable notice to the directors of the corporation of the complainant's intention to apply to the court
	1. Was met here because the letter was "clear+specific" – but also because only 2 shareholders tf N/A
3. Good faith: good faith with respect to *commencing* the action, not with respect to all previous actions of the complainant
	1. His decision to start the lawsuit was in good faith. There were negotiations prior to and just because he threatened a lawsuit does not mean he was acting in bad faith.
4. Interests of the corp: show a prima facie case (it "appears to be in the interest" of the corporation, not that it is in the *best* interest of the corp)
 |

## *ABCA, s.242: Relief by Court on the ground of oppression or unfairness (oppression)*

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

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

* (a) any act or omission of the corporation or any of its affiliates effects a result
* (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
* (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that’s 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

S.242(3): In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

* [various remedies – read your act for these and be familiar with the wide range of equitable remedies available]

**Scope of Relief Available**

### Wilson v Alharayeri

|  |  |
| --- | --- |
| F:  | President of company was ousted from company. Another director took over and was able to convert his shares to common shares. The audit committee chair allowed this to happen. They denied former President’s request to convert his shares to common shares. He brought an oppression claim against current president and chair of audit committee.  |
| I:  | Can the ex-president sue under oppression? What remedy is he owed?  |
| R/A/C:  | The ex-president’s shares meet the criteria for conversation. It’s unclear where the current president could convert his shares. The audit committee chair and current president worked together and did a bad thing against the ex-president. The two targeted him specifically and his reasonable expectations were not met. This is a long case that essentially boils down to the issue of the ex-president being treated differentially by two people. Judge ruled that Wilson had to personally pay damages for his conduct to the respondent, including because Wilson had personally benefitted from the oppression. * 1. **The oppressive conduct must be "properly attributable to the director because he or she is implicated in the oppression. The imposition of personal liability must be fit in all circumstances.**
 |

### Naneff v Concrete-Holdings Ltd (2-parter re: oppression but mostly on remedies)

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| F:  | Father implemented an estate freeze (estate planning maneuver whereby owner of closely-held corporation exchanges the common stock for dividend paying preferred shares, and gives the common shares to the children) to allow passing control and ownership of company to his sons Alex and Boris. Each got 50% of common stock. Note: father still in control because of the way he set up the preferred shares. Alex and Boris both involved in the running of the company. Alex started partying and having a relationship with a person that the parents did not approve of. The parents and the brother took steps to oust Alex from the company and effectively reduce his equity in the company. Alex brings an oppression claim. The alleged oppressive conduct is that they fired him (& didn’t pay severance in lieu of notice), he was excluded from the day-to-day operations and management of the business and from any meaningful participation as a director and shareholder, and they refused to repay Alex’s shareholder loans within a reasonable time. They emptied the company and conducted actions that essentially made Alex’s shares worthless even if he were to try and sell it.  |
| I:  | Can oppression be made out? What remedies are owed?  |
| R:  | Any order made under s 241(3) should go no further than necessary to rectify the oppression. Articulated a test for how to apply remedies in this scenario. Discretionary powers in this section must be exercised within two limitations:* They must only rectify oppressive conduct
* They may protect only the person's interest as a shareholder, director, or officer as such
 |
| A/C:  | **Lower Divisional Court**A claim for wrongful dismissal is not, in itself, a proper claim to be asserted by way of the oppression remedy. * 1. Where the dismissal is part of an overall pattern of oppression, and where the complainant's position of employment is closely connected with her rights as a shareholder, officer and officer of the company, the dismissal may properly be considered as part of that pattern of conduct. The termination of employment was oppressive. Although termination of employment is not oppressive by itself, since there was no evidence that Alex’s professional conduct had been sub-par, his firing was motivated by non-professional reasons.

Alex had an expectation that he would remain an owner of the company and participate in management. Since he did not engage in conduct that was adverse to the corporation, his personal conduct cannot be a factor in terminating his employment and ownership of the firm. Alex had been involved in the day-to-day operations of the firm for a long time – hence, the gift by the parents can no longer be revoked. The court had 3 options for Alex’s equity: (1) put him back into management, (2) force the company to be sold on the open market, and (3) force the parents and Boris to buy Alex’s shares without “minority discount”. The lower court rejects 1 & 3 because putting him back into management is only going to create more trouble. Figuring out the fair price without minority discount wouldn’t be impossible but it would be difficult, so the court forced the company to be sold on the open market. The parents appeal. **Appeal Court**The court reviews the remedies and the expectations of both the oppressed shareholder and the other general shareholders. With respect to the forced sale of the company, the oppression remedies only protect a shareholder’s interests and rights as a shareholder only. Alex had an expectation in owning the company BUT he also expected the father to retain control and that he would work given the familial atmosphere. A forced sale gives Alex more than his expectations since he might be able to control the entire company. Alex has been treated unfairly but we must give a remedy that’s fair for everyone and to restore order. Court balanced the equities and found that the remedy was unfair to the father/family. Court picks the forced sale without minority discount as the better solution and upholds other aspects of the divisional court (forced sale of house w/ compensation from Alex). The divisional court was hesitant on forcing the sale w/o discount because it was hard but, sometimes, the court will have to do the hard thing to avoid harm/unfairness to the other side just because they did a bad thing.  |

**Other Statutory Remedies**

Compliance and Restraining Orders

### Caleron Properties Ltd v 510207 Alberta Ltd

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| F:  | AGM of Shareholders of the Corp was held and amendments to the bylaws passed: (1) directors’ meetings req 10 business days notice in writing; (2) directors must attend meetings in-person; (3) directors’ meetings must be held at reg office; (4) the presence of Slater (Caleron) + 2 any two other directors at meeting constitutes quorum for the tx of business & (5) Slater is appointed signing authority, either alone or in concert w/ another person wrt docs executed by corp. Two meetings were held w/o Slater. Meetings were called with <10 business days notice + not held in reg office. The meeting consisted of appointing new directors to fill vacancies, new counsel + appointing persons other than Slater as signing authority for the Corp.  |
| I:  | Are the bylaws valid? Can the court force the Directors to comply with them? |
| R/A/C:  | Court held that some of the amendments were *ultra vires* the articles of incorporation BUT ordered board to follow remaining amendments. The takeaway here is that the court can order the directors to follow the rule.**Other possible remedies:*** **Valuations**
	+ No specific case but the closest one would be Nanef where the court forced valuation and ordered the parents to pay Alex the value minus the minority discount
* **Investigations**
	+ Alleged wrongdoing by the corp but the court can’t ascertain anything so they can order a third-party investigation
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Dissolution

### Scozzafava v Prosperi

* Two business partners are at odds with each other. One party seeks to have the liquidation remedy applied. This means that the company is sold, and everyone divides the proceeds.
* This remedy is to only be used when the company is deadlocked and cannot function. It is a last resort and only to be used in extremely bad behaviour.
* “Just and Equitable” to dissolve a company when:
* Deadlock in Management
* Business Akin to a Partnership
* Loss of Substratum (where the whole purpose of incorporation is gone)
* Loss of Confidence in Management
* Is there another remedy possible? Court should not order dissolution where equity can be achieved by some other means.

**Review of Derivative and Oppression**

* In analyzing shareholder remedy cases, you must first look to see if a wrong has been committed, *either* against the company itself, or against a particular group, or both.
* Wrongs against the company include breaches of duty of care (not paying attention/doing a good job so company is suffering) and breaches of fiduciary duties (stealing/siphoning money, usurping corp opp, self-dealing).
	+ If you spot these two – then this means that a derivative action can be maintained.
* But there may also be an action for oppression, especially if there’s a particular shareholder that’s affected more than the others.
* If there is no wrong to the corporation at all, but some harm to a particular group – then need to ask if that harm was aimed specifically at that group, or was the group’s misfortune a byproduct of an otherwise valid reasonable business decision. (E.g. BCE – leveraged debt that was a valid business decision but harmed unsecured creditors)
	+ If yes – then an oppression action may be maintained.
	+ If there is both harm to the corporation and a specific group, then both actions might be ok.

**EXAM TIP**: There is no right or wrong answer – it’s more for discussion and identifying the possibilities. On the exam, clear answers will be more of the stealing + usurping duties. For the DOC, he’s looking more for a general discussion. He’ll make it very clear that someone has engaged in bad behaviour. The facts may be a bit complicated, but in terms of figuring out if it's good or bad behaviour, it should be clear.

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| Lifting the corporate veil cases | Liability based on thin capitalization | Liability based on disregard of formality |
| Kosmopoulos v Constitution Insurance Co of Canada | Walkovszky v Carlton | Wolfe v Moire |
| Yaiguaje v Chevon Corporation |  | Vallis v Prairie Alternative Energy Solutions Ltd.  |
| Big Bend Hotel Ltd v Security Mutual Casualty Co |  |  |
| Jin v Ren |  |  |
| Aubin v Petrone |  |  |
| Rockwell Developments Ltd v Newtonbrook Plaza Ltd |  |  |