Corporations – Winter 2023

1. Choosing the Form of Business Vehicle

Partnership & Agency Test:

1. Is it a partnership? Is there a "relationship that subsists between persons carrying on a **business in common** with a **view to profit**"? (*Partnerships Act*, s 1(g))
    a. Share profit ⇒ The determinative factor in finding a partnership is **whether parties share in net profit of the business** (***Volzke***; Partnerships Act, s 4(c))
        i. Receipt of share of profits is proof of partnership UNLESS evidence to the contrary (***Volzke***)
    b. Speak of each other as partners
    c. **Control ≠ indicator of partnership**; control = irrelevant (***Volzke***)
2. If partnership ⇒ Each partner is an **agent of the firm and of the partner's other partners <u>for the purpose of the business</u> of the partnership**. What is the scope of authority & ?/Where does agency in the partner relationship begin & end?
    a. **Actual express authority** (PA s 13): Scope of agent's authority determined based on **circumstances/facts & the usual course of business** (as long as agent can show they acted in good faith & in accordance w/ authority bestowed on them, principal liable)
    b. **Actual implied authority** (PA s 13): Ordinary course of business relevant to determining whether there is actual implied authority
        i. If unclear or vague → can look at what's customary in the business to make it out
        ii. When vague, court will fill in gaps and imply authority → every agent has implied authority
        iii. Every agent has implied authority to do everything necessary for, and ordinarily incidental to, carrying out his express authority according to the usual way in which such authority is executed
    c. **Ostensible/apparent authority**: **Rule**: if principal gives impression (by conduct) to TP that X was their agent (don't have to expressly or impliedly grant authority), they will be bound by that representation if TP relied on that representation to their detriment.

i. **Exception**: If principal puts TP on notice that agent's authority is restricted to something specific, TP can't claim agent was authorized for more than included in the agent's notice.
ii. ***McDonic***: Ostensible authority found when the **reasonable TP** would **interpret the representations** of/conduct by the ostensible principal **as indicative of a principal/agent relationship**. Manifestations by a principal that indicate a principal/agent relationship include:
    - Office in the offices of the law firm
    - Correspond with CLs on firm letter head
    - Cheques to CLs from law firm
    - Records referring to investments kept by the firm as part of their records
    - Bookkeeping done by law firm
    - Firm charged Ps for the investment services.
    - Nothing to distinguish Watt's activities vis-a-vis the TPs from his work with the firm.
iii. NOTE!!! Unlike partnerships, LLPs are not individually liable for conduct of their partner that occurs in the ordinary course of carrying on a practice in an eligible profession as long as they don't know about it (BUT would be liable for partners carrying on something not in the ordinary course of business if they represented themselves as being part of the LLP in that capacity)

Types of Business Vehicles

Types: Sole proprietorship, corporation, unlimited liability corporation, partnership, limited partnership, limited liability partnership

Sole Proprietorships

- **Advantages**: simplest form, cheap (one man show), no document filing w/ gov't authority (may need license depending on type of business–still generally the easiest to set up), losses can be set against sole proprietor's income on other sources (tax advantage)
- **Disadvantages**: no legal personality separate from proprietor → unlimited liability wrt liabilities & losses of the business (any liability/losses incurred by the business **are the liabilities/losses of the indiv**)
- ***Partnerships Act,* s 110** can practice under your name OR under a trade name (but for trade name, you must register trade name by filing a declaration that would include "and company" or other words of plurality)

Corporation

- **Advantages**: Common, relatively cheap (cheaper than partnership), preferred if many SHs, separate legal personality at law (i.e., owner of business/shareholder(s) have limited liability), taxed at a preferred rate
- **Disadvantages**: more complicated incorporation, extra administrations (ongoing reporting requirements), more expensive than sole proprietorship
- **Certificate of incorporation** issued by appropriate gov official = corporation in existence
- Has **perpetual existence** (doesn't cease to exist if SH dies)
- Corporations are **separate entities at law**; SHs have limited liability (behind veil).
    - Limits/exceptions to the limited liability of shareholders/separate legal personality (CB at 3): Shareholder (SH) signs personal guarantee for corp debts, contracted personally w/o adequate notice to TP; loss resulting from SH's personal acts/negligence; not fully paid shares; personal liability in statute; SH assumed powers of director under unanimous SH agreement; SH received over-payments on liquidation; court lifted corporate veil)
- 2 ways to be **incorporated** in AB:

1. Provincially under the ***Business Corporations Act*** (***BCA***)
2. Federally under the ***Canada Business Corporations Act*** (**interprov** businesses)

- Incorporation procedures required (varies b/w provs) → "3.1 Registration Requirements" (CB at 3).
  - Articles of incorporation filed in prescribed form (1+ persons may incorporate a corporation)
    - E.g., Corp's name (NUANS name search to ensure corp doesn't already exist)
    - See CB at 3 for additional requirements.
- Ongoing reporting requirements for life of corp (i.e., requirements post-incorporation)
  - Less onerous requirements for private corporations, but significantly more onerous for public corporations
  - Filing of annual returns in prescribed form
  - Preparing financial statements
  - Filing corporate tax returns (fed and prov)
  - Notification if change of directors or addresses

Unlimited Liability Corporations (ULCs) – not available in all provs

- Uncommon; apply in limited circumstances; hybrid corporation wherein you incorporate but don't get the protection of liability from SHs; articles must say ULC
- Useful only for Americans conducting business in CA → tax benefits b/c treated as flow-through vehicles (like partnerships)

Partnerships

- ***Partnership Act*, s 1(g)**: Relationship that subsists between persons **carrying on a business in common** with a **view for profit** (***Volzke***)
  - Liability: more like a sole proprietorship
  - Legal existence: **not** a separate legal entity (more like a sole proprietorship; tied to partners)
    - Partners don't "own" the partnership property
    - Property indivisible among partners *in specie*.
      - Partners can assign profits to TPs but NOT their partnership interest without consent (***PA* ss 35(1), 28(g)**, respectively)
  - Each partner is an agent of the firm and other partners (***Partnership Act s 6***) (***McDonic***)
- **Indicia** of partnership (**PA s 4**):
  - **MOST DETERMINATIVE INDICATOR: Receipt of (at least some) profits = prima facie proof that the indiv receiving profits is a partner***
    - **EXCEPTIONS**: Receipt of debt instalments; remuneration of an EE; surviving spouse/child of a deceased partner that receives annual payment; loan doesn't make the lender a partner (if contract in writing and signed by all parties to contract); receipt of profits by a person in consideration of sale of goodwill
  - Common ownership of property doesn't by itself create a partnership (conduct req'd)
  - Sharing of gross returns doesn't of itself create a partnership
  - Receipt by a person of a share of profits of a business is prima facie proof that person is a partner in the business with exceptions:
  - Partnership agreement
  - Express declaration
  - Conduct
- Partnership arises from **contract** → by express declaration or by conduct
- **LIABILITY: Partnerships** will have either **joint liability** or **joint & several liability** (never several liability)
  - **Joint liability**, ***PA s 11***: partners are jointly liable for other partner's debts/obligations

        - Each D liable to the P to the full extent of the obligation in question
        - Jointly and severally liable for the wrongful act of a partner (negligence): P can collect 100% on its judgment from Ds but Ds can then apportion as between themselves according to fault or responsibility.
    - **Joint & several liability**: P can go after any liable D for the full amount of damages but the Ds, b/w themselves, can go after one another for varying amounts of the damages
        - Joint and several liability for injury/loss caused to non-partner by wrongful act of partner acting in ordinary course of business. Applies to misappropriation of non-partner's funds (***Partnership Act ss 14, 15***)
    - **Several liability** – NOT available for partners: liable for whatever damage the D specifically caused. Here, liability must be severed & apportioned b/w each D (P can only go after the D for the amount of damage D caused)
    - Note: newly admitted partner not liable for things having occurred prior to their admittance
    - Liability Note: New partner not liable anything before they were a partner, retirement doesn't discharge person from debts incurred before retirement (***PA s 20***)
- Each partner has a **reciprocal duty of loyalty** (no competing) and **good faith**
- Expensive to set partnerships up

Limited Partnerships

- Creatures of statute governed by **PA ss 49-80**
- **PA s 51**: **LP** = **1+** persons who are **general partners** and **1+** persons who are **limited partners**
    - **General**: unltd liability for obligations of partnership (on hook if something goes south)
        - If general partner dies/retires ⇒ partnership dissolves
    - **Limited**: only liable to the extent of the amount of personal money or property he/she contributed to the limited partnership (kind of like an SH in a corp; **PA s 56,57**)
        - Essentially a **silent partner** (no control over business, just investing).
        - If limited partner dies/retires ⇒ no dissolution
        - Limited partners can turn into general partners in the following circumstances
            - Put their name in the LP name
            - Start controlling the business
            - Interact w/ the public
        - Benefit: Limited liability but also flow through of losses and other tax consequences

Limited Liability Partnership (LLP), see PA Part III, ss 81-104

- Requirements for LLPs:
    - Applies only to members of certain professions (e.g., lawyers, accountants but NOT Drs; see **PA s 41**).
    - Must be *able*, by statute, to carry on business through a professional corporation (they're not incorporated or actual corporations, but PC = for tax purposes)
- Purpose: Partners **shielded from liability in excess of their shares** (i.e., "limited" in LLP)
    - Can only go after the partner who did the wrongdoing, not partners w/o involvement.
    - Partners in an AB LLP are **NOT** shielded from liability of partnership's **ordinary contractual obligations** if they do everything by the book (i.e., if no negligence, wrongful act, omission)
    - "A partner in an Alberta LLP is not individually liable for debts, obligations or liabilities of the partnership or another partner that arise from the negligence, wrongful acts or omissions, malpractice or misconduct of (a) another partner, or (b) an employee, agent or representative of

the partnership that occur in the ordinary course of carrying on a practice in an eligible profession" (**PA, s 12(1)**)*
    - **Exceptions to limited liability**: **PA, s 12(2)** → partners not protected if they knew about negligence misconduct, someone under their supervision did it or they failed to supervise
- **Difference b/w LLP and Limited partnership**: Limited liability but can still control the company

Considerations in Choosing a Form of Business Organization

1. Does the person need limited liability?
    - ➢ This Q depends on nature of business → does the indiv have access to limited liability? (e.g., Dr can't become an LLP but could be sole proprietor)
2. Tax implications
    - ➢ Consider: size of business, losses &/or profits, incentives for small businesses to incorporate
3. Formalities and cost and set-up
    - ➢ Cost (lower to higher): sole proprietor → incorporate → partnership
4. Degree of control (and its corresponding liability)
    - ➢ Full control for sole proprietor
    - ➢ Significant control for partnership
    - ➢ Less control for corporations
    - ➢ No control for limited partners
5. Who participates in profits? (more shareholders = more profits divided but more capital)
6. Dissolution
    - ➢ Sole proprietorship → business dies w/ you
    - ➢ Corporation → business continues after death (separate legal entity)
    - ➢ Partnership → contract must specify what happens to the business vehicle in the case of a partner's death.

Major Forms of Business Organization

Dorothy DuPlessis et al, *Canadian Business and the Law,* 6th ed, (Toronto: Nelson Education, 2017) ch 14 at 340.

Characteristic	Sole Proprietorship	Partnership	Corporation
Creation	• at will of owner	• by agreement or conduct of the parties	• by incorporation documents
Duration	• limited by life of owner	• terminated by agreement, death	• perpetual unless dissolved
Liability of owners	• unlimited	• unlimited	• limited
Taxation	• net income taxed at personal rate	• net income taxed at personal rate	• income tax to the corporation; dividends and salary taxed to shareholders
Transferability	• only assets may be transferred	• transferable by agreement	• transferable unless incorporating documents restrict transferability
Management	• owner manages	• all partners manage equally unless otherwise specified in agreement	• shareholders elect a board to manage the affairs of the corporation; officers can also be hired

Partnership (& Agency)

STEPS FOR ANALYSIS: (1) IS IT A PARTNERSHIP (2) WHAT IS THE SCOPE OF AUTHORITY

Partnership, PA s 1(g); 6

Volzke Construction Ltd v Westlock Foods Ltd, 1986 ABCA (profit = determinative)

R: Control is NOT an indicator of partnership (it is irrelevant)
Determinative factor = whether you share in net profit of the business (PA s 4(c))

F:

- P general contractor hired by Bonel Properties (owns 80% of the shopping center) to construct addition on Westlock Shopping Center.
- Bonel failed to pay what was agreed upon and P sued both (or maybe only) Bonel and Westlock Foods (Westlock owns 20% of shopping center), claiming they were partners.
- TJ: not partners → no intention to enter into partnership & Westlock had no interest in entering contract. COA reverses.

I/H: Can P sue Westlock? Only possible to sue Westlock if there is a partnership (b/c then the parties are both liable) → **Yes.** Partnership found, can sue Westlock and/or Bonel

A:

- Spoke to each other & treated each other as partners
- **PA s 4(c)** receipt of share of profits is proof person is a partner UNLESS evidence to contrary
- Important factors to show partnership:
  - Parties agreed to share costs and profits
  - S. 4(c) of Partnership Act: person receiving a share of the profits, in the absence of evidence to the contrary, means they are partners
  - Westlock's lack of control is not evidence to the contrary doesn't negate finding
  - Spoke of each other as partners (conduct)

Agency

Agency: fiduciary relationship existing b/w 2 ppl, one of whom (i.e., the principal) **expressly or impliedly consented** that the other person (i.e., agent) should act on their behalf so as to affect the principal's relationship with third parties (TPs)

- ➢ **Principal**: the one on whose behalf the act(s) are to be done
- ➢ **Agent**: the one who acts on behalf of the principal; possesses authority (actual/real; apparent/ostensible)

Policy goal: protection of TP

Actual/Real Authority

Actual/real authority: principal expressly bestows authority on an **agent** & this impacts a TP.

1. **Actual express authority**: Authority which the principal has expressly given the agent (oral or written agreement)
   - Scope of agent's authority determined based on **circumstances/facts & the usual course of business** (as long as agent can show they acted in good faith & in accordance w/ authority bestowed on them, principal liable)
   - General words used must be construed in light of the usual course of agent's business
2. **Actual implied authority:** Authority which an agent in a particular position **normally**, **usually**, or **ordinarily** possesses.

- Does the authority to cook dinner also imply the authority to buy groceries for dinner? → **general authority does not necessarily cover more specific acts the agent was specifically authorized to do**. Court will decide **whether implicit authority/authorization of unexpressed but clear intention of the principle was granted**.
- **Ordinary course of business relevant** to determining whether there is actual implied authority
    - If unclear or vague → can look at what's **customary in the business** to make it out
    - When vague, court will fill in gaps and imply authority → every agent has implied authority
    - **Every agent has implied authority to do everything necessary for, and ordinarily incidental to, carrying out his express authority according to the usual way in which such authority is executed**

*Only way out for principal: if principal gave notice to 3rd party that the agent isn't acting on their behalf, principal not bound.

Apparent/Ostensible Authority

Apparent/ostensible authority: authority resulting from a **manifestation/representation** (by conduct) of consent for an agent to have authority made by the principal **to TP**

- Principal expressly, or by conduct, signals to the TP that X person is an agent **here, it's the principal that creates the relationship (by giving a particular impression)
- **Rule**: if principal gives impression (by conduct) to TP that X was their agent (don't have to expressly or impliedly grant authority), they will be bound by that representation if TP relied on that representation to their detriment.
    - Conditions for presence of apparent/ostensible authority:
        1. The party relied on the relevant representation
        2. Such reliance was detrimental reliance (led to an alteration of the TP's position to their detriment)
    - **No requirement for agent to know about the ostensible authority** → Principal makes representation to TP & all that's required is the principal/TP know about it

*If principal puts TP on notice that agent's authority is restricted to something specific, TP can't claim agent was authorized for more than included in the agent's notice.

McDonic Estate v Hetherington (Litigation Guardian Of), 1996 ONCA (principle-agent relationship in partnership)

Context: in 1996, there were not LLPs; law firms were typical partnerships.
What if Hetherington had been an LLP? → result would be the same b/c Watt was negligent in giving *investment* advice, which is NOT an eligible profession for an LLP (see **PA s 12(1)** "... not individually liable.... That occurs in the ordinary course of carrying on practice in an eligible profession")

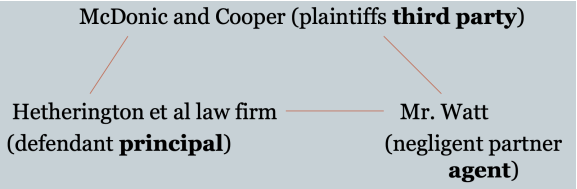
R: Ostensible authority found when the **reasonable TP** would **interpret the representations** of/conduct by the ostensible principal **as indicative of a principal/agent relationship**.

Manifestations by a principal indicative of a principal/agent relationship:
- Office in the offices of the law firm
- Correspond with CLs on firm letter head
- Cheques to CLs from law firm
- Records referring to investments kept by the firm as part of their records
- Bookkeeping done by law firm
- Firm charged Ps for the investment services.

- Nothing to distinguish Watt's activities *vis-a-vis* the TPs from his work with the firm.

F:

- McDonic and Cooper (P) = CLs, Hetherington (D – law firm, principal), Watt (negligent partner, agent)
- Law firm gave both legal & investment advice.
- Mr. Watt took CL's money, mis-invested it, and was sued in his capacity as an investment advisor (everyone else in the firm was sued along with Watt).



I/H: Can the Ps go after the other partners of the partnership/are the partners liable for Watt's actions? → **YES**.
Watt had ostensible authority within the scope of the work that the business conducted.
COA overturns TJ decision finding actual implied authority & ostensible authority.

A:

- Actual authority → PA s 13: sets out actual express & actual implied authority.
- Express when comes from express authorization of other partners
- Implied when flows from action of agent when done in the typical business of the firm
- Apparent authority → PA s 14(a): firm is liable when one partner acts inappropriately with apparent authority, specifically regarding misapplication of money
- Extends partner liability to situations wherein no express/implied authority BUT apparent authority depends on whether TP who incurred loss dealt with the rogue partner would reasonably regard that partner as acting on behalf of the partnership
- Factors indicating one would reasonably regard a partner as acting on behalf of the partnership can include business cards, name on the door, etc

Step 1: Was there actual, express authority as defined in ***PA* s 13**? → **No**

- Partners were not aware of the actual, specific transactions in question; did NOT agree to misappropriation of CL's $

Step 2: Was there actual implied authority as defined in ***PA* s 13**? → **Yes**
TJ found no implied authority BUT COA reversed.

- TJ's decision: Watt's actions were not in ordinary practice of firm b/c
  - (1) $ wasn't put in the partnership trust account, but deposited in a separate account that only Watt had access to & had exclusive control over
  - (2) activities of an investment advisor are outside the realm of a law firm's ordinary business
- COA overturns TJ on both reasons
  - (1) Watt put $ in the partnership trust account (unusual this was overturned b/c it was a finding of fact) ⇒ other partners had and exercised the same authority when they deposited money/signed cheques/etc.
  - (2) investment was in ordinary course of business of the law firm & he merely did it wrong. It wasn't the nature of the activity, but the way Watt carried out the practice (which was negligent)

Step 3: Was there ostensible, or apparent, authority?

- **Ostensible**: indicating to the world that one is a partner
  - Partners indicated to the CLs that Watt was a partner.
  - Partners tried to claim that they had no knowledge of the existence of those CLs. COA says while this indicates that perhaps there is no actual express authority, this does not negate actual implied authority nor ostensible authority.
- **Factors** indicating ostensible authority:
  - Office in the offices of the law firm
  - Corresponded with CLs on firm letter head
  - Cheques to CLs from law firm
  - Records referring to investments kept by the firm as part of their records
  - Bookkeeping done by law firm

- Firm charged Ps for the investment services.
- Nothing to distinguish Watt's activities vis-a-vis the Ps from his work with the firm.

Note: loss prevention bulletins ⇒ you are your partner's keeper! Firms should have detailed policies re personal dealings w/ clients so that partners are in the know of what the other partners are doing. Can still be liable even if innocent partners are unaware of the misconduct.

2. Backgrounder to Corporations

1. **General R**: corporation is a **separate legal entity** distinct from its SHs, directors, officers, & creators (***Salomon***; **ABCA s 16(1)**)
    a. Corps ≠ agents for SHs (***Salomon***; **ABCA s 16(1)**)
    b. Because corps = separate legal entity, they **protect directors from liability**
        i. **EXCEPTIONS**: no protection from liability if fraud or improper incorporation (***Salomon***; ***ABCA* s 46(1)**).
2. **General R**: Directors have a **residual power** to **manage corporate affairs** under ***ABCA*, s 101** (***Jorex***)
    a. Just because power is not expressly granted, does not mean that directors do not have the authority to manage the corporation (***ABCA, s* 17(1)**).; ***Jorex***).
        i. In ***Jorex***, claims by the SHs that they have the right to examine auditors was NOT sufficient to conclude that Directors did not have the right to cancel a Special Meeting they had called (wherein auditors could be examined). Directors have residual power to cancel meetings.
    b. **EXCEPTION**: Residual power can be **altered by legislation, bylaws, or a USA** (***ABCA*, ss 17, 101**; ***Jorex***). *BUT* cannot be altered in any other way.
    c. SH rights alone do not abrogate powers of Directors (***Jorex***). **BUT** SHs can exercise their rights in other ways:
        i. **Oppression Remedy** (if Directors violate or oppress the rights of SHs, ***ABCA*, s 242**)
        ii. **SHs call a meeting** (***ABCA* s 142**; directors can't cancel meeting called by SHs)
        iii. **Apply to Court** for Order directing that meeting proceed (Court has broad powers to direct directors to do anything under (***ABCA*, s 143**))
        iv. **Raise matter at AGM** (***ABCA*, s 132**; Directors can't cancel the AGM, it's statutorily required). At that AGM, SHs will review annual financial statements (***ABCA*, s 155**) and may remove directors (***ABCA*, s 109**)
        v. Enter into **SH Agreement to limit powers**. (E.g., provision in bylaws (***ABCA*, s 102(5)**) or USA (***ABCA*, s 146**)).

General Structure of a Corporation

SHs	• **Equity** claimants • Invest for a **return** • Claims or rights in terms of voting rights, dividend rights, and rights on liquidation • **Liability limited** to amount of investment • Do **not** deal with **day-to-day** policy
Corporation	• **Separate** personality • **Perpetual** existence

Directors (answer to the SHs)	• **Day-to-day** decisions • **Appoint officers** to manage the corporation • Make major decisions on **corporate policy** (Could consist of just one director)
Officers (answer to the directors)	• **Manage** the corporation • **Hire** others to (1) assist in mgmt and (2) carry on business of the corporation • e.g., president, vice-presidents, secretary, treasurer (these are officer positions, but the directors can appoint themselves to these positions too → in big, public companies, these are always separate people though).

Salomon v Salomon & Co Ltd, 1897 (corp = distinct legal identity + SH≠liable)

Separate Corporate Personality: a corporation is recognized as a legal entity distinct from its SHs, directors, officers, and creators.

➢ Absent any fraud, a corporation properly incorporated under the Act will protect directors from liability. If you want to shelter yourself from unlimited liability, then incorporate

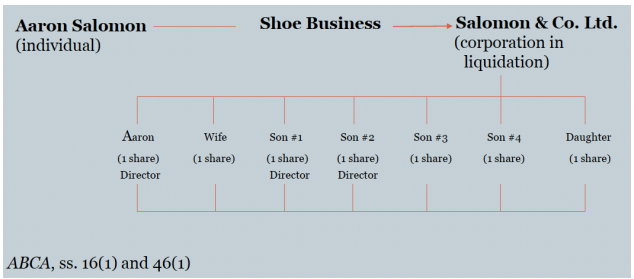
R: Corporation is its own **legal entity**, **distinct** from the indivs behind the corp, such as SHs, directors, officers, & creators (codified in ***ABCA* s 16(1)**).

➢ Corporation is **NOT** an agent for a SH

R: SHs are **not** liable for any liability, act, or default of the corporation UNLESS there is fraud or improper incorporation (codified in ***ABCA* 46(1)**).

F:

- Salomon had a sole proprietorship shoe business. Decides to incorporate. Issues shares. Mr Salomon owns a share, Mrs Salomon owns a share, and each of their children owns a share.
- Company does bad. Issues debt securities & sells them to Mr. Broderick, who becomes creditor of the corporation.
- Salomon defaults on some of the payments he had to make to Mr. B
- Since Mr. B wasn't a shareholder in the typical sense (he was a creditor), he was entitled to regular payments (instead of just dividends). As a result, upon default Mr. B moved to appoint a receiver, forcing the corporation into bankruptcy.
- Receiver wanted to sell corporate assets AND go after Mr. S's personal assets.
    - In court, receiver claimed that the whole corp was a sham → Salomon continued to be a sole proprietor & the entire business was carried on as a sole proprietorship despite the incorporation. Therefore, SHs were puppets & the whole thing was intended to defraud creditors so that creditors couldn't go after Salomon.



ABCA, ss. 16(1) and 46(1)

Proc Hist: TJ agreed it was a sham & receiver could go after Salmon. COA overturned.

I/H: Can Salomon be personally pursued by the receiver? → **NO.** Cannot go after the person behind the corporation b/c a corporation shields the person behind the corp from liability insofar as a corporation is **its own, separate legal entity**.

A:

- Once you establish a corporation, you cannot go after the indiv.

- Corp is not, in law, the agent of the SHs. Nor are the SHs the agent of the corp. **Corps are independent from the SHs**.

Corporate Constitution

Corporate constitution: basic contract documents that constitute the **fundamental terms** of the corporation. Province dependent insofar as each province has a unique name for their corporate constitutions (but all really accomplish the same function).

Sources of Corporate Power in AB:

1. **Articles of incorporation** (i.e., the corporate constitution)⇒ **mandatory**
   a. AKA "limited patent" (PEI) or "Memorandum of association" (NS)
   b. Filed w/ appropriate gov't body
   c. Result in the granting of a Certificate of Incorporation
   d. Articles include: Name, structure of share capital, place of incorporation, registered office, size of Board of Directors, any restrictions on business it can carry out, etc.
2. **Bylaws** ⇒ **not** required.
   a. Adopted internally by Board of Directors & approved by SHs.
   b. "House rules" internally (set out rights, duties, etc. of the various corporate players like directors/officers/SHs/etc.)

Other important sources of corporate conduct/power:

- Legislation (e.g. *ABCA*)
- Directors' resolutions
- **SHs' resolutions** and **Unanimous Shareholder Agreements** ("**USAs**")
  - USAs restrict the (pretty much) unrestricted powers of the directors
  - **Rationale**: when SHs want to hold powers that are regularly given to directors. However, along w/ that pwr/authority comes liability & responsibility.
  - Note: despite USAs & SH resolutions, SHs really have the final word on major decisions impacting the corporation.
- CL

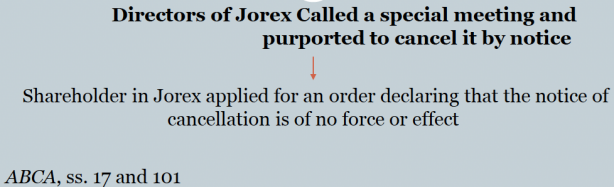
Canadian Jorex v 477749 Alberta Ltd (Directors have residual power to manage corporate affairs; SH rights)

Note – this was a CBCA case, but ABCA has the same provisions (effectively), so we refer to ABCA

R: Directors have a **residual power** to **manage corporate affairs** under ***ABCA*, s 101** and just because power is not expressly granted, does not mean that they do not have the authority to manage the corporation (***ABCA, s* 17(1)**). Residual power can only be altered by legislation, bylaws, or a USA (***ABCA*, ss 17, 101**).

F:

- Company is incorporated pursuant to the Canadian Business Corporations Act (CBCA).
- Directors called a special meeting and then decided to cancel the meeting.



- **Special meeting(s)**: any meeting other than AGM convened by SHs or Directors (for any purpose).
- **Annual General Meeting** (**AGM**): Meeting of the SHs that must be held at least every 15 months, or 6 months after the end of the corporation's fiscal year. Statutorily req'd b/c SHs do three key things in AGMs:
  - (1) Elect the director(s)
  - (2) Receive the annual financial statements of the corporation & report of the auditor on those statements (if there is one) → must review & approve the statements/report
  - (3) Choose the auditor

- SHs argued that there was no provision within the constitution empowering them to cancel the meeting. Minority SHs were concerned they would lose the right to examine the auditor of the corporation which was scheduled to occur in the meeting (**s 168(2)**)
- SH in Jorex applied for an order declaring that the notice of cancellation is of no force or effect
- Legislation (CBCA) & bylaws silent on whether Directors have pwr to cancel Special Meeting (+ no USA)

I/H: Once a special meeting of SHs has been called by directors, do directors have the power to then cancel that meeting (particularly in light of SHs exercising their rights to review auditor's reports at that special meeting)? → **YES**, directors have the power to cancel special meetings which they have called.

A:
Court confirms SH rights & clarifies the legal question as one of a substantive (not procedural) nature

- Confirms that **SHs have the right to examine auditors**. However, **this right is not sufficient to conclude that Directors don't have the power to cancel a Special Meeting that they called**.
- Directors followed appropriate procedures to cancel the meeting ⇒ no indication that the cancellation was for a surreptitious meeting. Even so, Court states that the question is merely whether the directors have the power to cancel the meeting, and not whether they followed proper procedures. Necessary to distinguish substantive q re powers of directors from the procedural question of how the directors cancelled the meeting.

Statute confers residual power on directors to manage corp

- **Default presumption** from *ABCA* ss 17(1), 101(1): directors have residual pwr to manage & supervise the corp in any way they see fit **UNLESS** they are restricted from exercising that particular power pursuant to a USA, the bylaws, or the statute by the bylaw.
  - ***ABCA*, s 17(1)**: not necessary for bylaw to be passed to confer power on the corporation or its directors
  - ***ABCA*, s 101(1)** [basket clause]: directors can manage & supervisor affairs of corp UNLESS USA creates exceptions to that power

Court sets out list for **alternate avenues to exercise SH rights**, incl right to examine the auditor

- **Oppression Remedy**: apply to court if Directors violate or oppress the rights of SHs (***ABCA*, s 242**)
- **SHs call a meeting** (***ABCA* s 142**; directors can't cancel meeting called by SHs)
- **Apply to Court** for Order directing that meeting proceed (Court has broad powers to direct directors to do anything under (***ABCA*, s 143**))
- **Raise matter at AGM** (***ABCA*, s 132**; Directors can't cancel the AGM, it's statutorily required). At that AGM, SHs will review annual financial statements (***ABCA*, s 155**) and may remove directors (***ABCA*, s 109**)
- Enter into **SH Agreement to limit powers**. E.g., provision in bylaws (***ABCA*, s 102(5)**) or USA (***ABCA*, s 146**).

3. The Process of Incorporation

See CAN for pre-/post-incorporation issues.

Corporate Names

1. **Newly Upgraded Automated Name Search (NUANS): required**. Lists existing corp names & helps registrar determine whether a name should be approved.

2. Name Approval **Criteria**:
    a. General considerations (***ABCA*, s 10**)
        - **Legal** (includes appropriate ending → ltd, inc, PC, etc.)
        - **Distinctive** (distinguishable from other corps)
        - Descriptive (*optional*, describes what corp does)
    b. **Cannot be identical** (***ABCA*, s 12(1)(b)**) to the name of another Alberta body corporate, an extraprovincial corporation registered in Alberta, or a federal corporation.
    c. **Cannot be confusing** (***ABCA*, s 12(1)(c)**) compared to name of another corp.
3. **Full name of a corp MUST** be legibly disclosed on all of its **contracts, invoices, negotiable instruments, & orders** for goods or services (***ABCA*, s 10(8)**)
4. 3 options for resolution in name cases:
    a. If it's a registered ™, **sue for ™ infringement** (contrast to passing-off in ***Stenner***)
        - Action for improper use of ™ has **no burden to prove knowledge or recognition** (P does not need to prove the mark was known to anyone in the market).
        - Potential action lies as soon as ™ is registered.
    b. **Bring claim to registrar** to protect name (***Paws***)
        - ***ABCA* s 12(1)(c)**, a corporation shall **not** be permitted to have a particular name if another corporation already has a **similar name** and the similarity of the two names is **confusing or misleading**.
            - Sufficiency of similarity defined in the Regulations (see s 4(5))
        - **TEST**: **at least one customer** was **misled** and **confused** by the name of the corporation in question **such that they came to the reasonable inference** that the name of the corporation in question is either **(a) the same** as that other corporation or **(b) affiliated with** that other corporation (***Paws***)
            - **Rationale**: should not benefit from the goodwill of another corp.
    c. Sue in **tort for passing-off** (***Stenner***)
        - **Passing off**: The representation of the D's goods as being those of the P (e.g., D uses a name which resembles that of the P or gives the impression P is involved in the business)
        - **TEST**: To prove tort of passing-off, P must prove
            - (1) existence of **goodwill**
            - (2) **deception** of the public due to a misrep
            - (3) actual or potential **damages** to the P.
            - **Test is met where** P can demonstrate that the mark, name, or get up was **known and recognized generally in the market**. Factors demonstrating it was known/recognized:
                - ➢ Goodwill associated w/ P's name
                - ➢ Being well-known in a particular industry
                - ➢ Registration of name as a ™ (supports finding of goodwill)
                - ➢ A D's continued use of the name (shows D was aware of the goodwill associated w/ the name)
        - In ***Stenner***, adding "/Campbell" to the Stenner name was NOT sufficient to distinguish Stenner and Stenner Team from the Stenner/Campbell team. BUT once she used her full name "Vanessa Stenner", she was fine. (no passing-off for using your full Christian name)
5. NOTE: no action re corp name if you use your first & last name (see ***Stenner***)

Unanimous Shareholder Agreements (USAs)

- **USAs**: contractual tools w/ strength of corp constitution that enable SHs to arrange the organization of the enterprise. Override CL assumption that role of SHs is not to run the company.
    - ***ABCA*, s 146(1)**: scope of USAs (rights & liabilities of SHs, elxn of directors, mgmt of business, any other matter allowed in a USA in *ABCA*)
    - ***ABCA*, 146(2, 3)**: if you obtain shares subject to a USA, you are deemed party to the USA (even if you don't know about it). Once SH finds out about USA, they can object or sell their shares.
    - ***ABCA*, s 146(7)**: under a USA, SHs take on liability of the Directors to the extent that they limit the powers of the Directors *AND* Directors are relieved of their duties & liabilities to that same extent.
- **USAs** are contracts of constitutional stature, but their impact is **limited to internal parties** and **cannot**

impact/**bind TPs**. In short, a director may be accountable to SHs for failure to comply with USA, but that does not render a decision that impacts a TP void and does not disentitle the TP from relying on the decision impacting them (***Cicco***)

Share Capital & SH Rights

- **Corporate share**: a common, divided, participation interest in the corp's business. Represents a **proportionate share of the value** of the net assets of the corp remaining **after** all of the corp's debts and liabilities have been paid.
- **Presumption: corporate shares are equal in all respects** (**ABCA, s 26(3)**)
    - **Result:** SHs have three rights: (1) vote at any meeting of SHs; (2) receive any dividend declared by corp; (3) receive remaining prop of corp on dissolution.
        - IF only 1 class of shares? → all rights of SHs are the same (***ABCA*, s 26(3)**)
    - **BUT** presumption can be **defeated by dividing shares into different classes**
        - **Articles of incorporation** describe which classes of shares have which rights, terms, conditions, & restrictions
        - Each share must fall within a class (can't have a classless share), but classes are mutually exclusive (i.e., a share can't fall under more than 1 class) (**ABCA, s 26(4)**).
        - Any of the classes can have any of the rights (see "Result" above) as long as each of the 3 rights are on at least one of the classes.
        - Rights of SHs ***within*** a class must be equal
        - When a corporation has more than one class of share, each class constitutes a distinct subdivision within the total share capital of the corporation
    - Common classes:
        - **Class A: Common/Equity** (full right to participation in corp)
            - Voting rights
            - Second for dividends (after all prior claims paid)
            - Second on dissolution (after repayment of all prior claims incl tax, creditors, loan capital, preferred shares, etc)
            - Higher risk than loans or other forms of debt investments & higher risk than preferred shares (b/c paid after prior claims)
        - **Class B: Preferred** (special shares w/ some type of preferential right)
            - Voting rights (usually special, distinguishable from Class A → elxn of directors, change in business of corp, sale of significant portion, locn)
            - First for dividends (prior right to receive dividends – usually fixed rate)
            - First on dissolution (priority in repayment of capital upon winding up)
            - Other rights: redemption or retraction, conversion, poison pill (augment rights of shares in take-over bids)
        - **Class C: Restricted** (special shares subject to limitations)
            - No voting (sometimes limited voting)
            - Third for dividends (e.g., defer right to receive income/return on capital until after common shares)
            - No rights on dissolution.

Evolution of Pre-Incorporation Contracts Law

1. **English CL** ⇒ Application of ***Kelner*** rules
    a. **Kelner Rule 1**: **Promoter personally liable before incorporation** (i.e., person who signed the contract on behalf of future corp = personally liable)
    b. **Kelner Rule 2: Promoter remains personally liable after incorporation** b/c incorporated corp CANNOT ratify the contract to relieve promoter of liability.
        - **Rationale**: contract law agency principle → if principal doesn't exist, you can't be its agent; can't bind corp in advance b/c it's not a party to contract; goal to protect TP.
2. **ON Courts** ⇒ Adoption of Kelner/Black in Rule #1, relaxed Kelner in Rule #2

a. **Kelner/Black Rule 1**: **Promoter personally liable for breach of contract BUT ONLY** in circs **where parties intended** for the **promoter to incur personal liability**.
b. **Kelner Rule 2 (same as CL)**: **Promoter remains personally liable after incorporation** b/c incorporated corp CANNOT ratify the contract to relieve promoter of liability.

3. **Legislative Reform ⇒** Minor differences across jurisdictions (CBCA s 14, ABCA s 15, OBCA s 21)
   a. ***CBCA*, s 14 & *OBCA*, s 21**: Synthesis of ON Courts with limitation of liability
      - **Pre-Incorporation Contract Rule**: **Promoter is personally liable UNTIL** corp is **incorporated & adopts the contract**, at which point the promoter is **absolved of liability.**
   b. ***ABCA*, s 15**: Relaxed Kelner Rule 1 & 2 for a pro-promoter rule
      - **Pre-Incorporation Contract Rules**:
        - **Promoter** is **NEVER** **party to a WRITTEN contract** & **can only be held liable as a warrantor**
          - **EXCEPTION: oral contracts require the CL Kelner/Black rules**!!!
            i. **Kelner/Black Rule 1**: **Promoter personally liable for breach of contract BUT ONLY** in circs **where parties intended** for the **promoter to incur personal liability**.
        - **Once a corporation is incorporated & adopts the contract, promoter absolved of liability**.
            i. **Kelner Rule 2 (same as CL)**: **Promoter remains personally liable after incorporation if the parties intended that**.
4. **Today's Case Law ⇒** Messy case law, potentially unsettled. See ***Westcom, Sherwood, Szecket, Wickberg***.

Pre-Incorporation Contracts Tests (In AB)

Step 1: Is there a pre-incorporation contract?

- Look for language indicating a pre-incorporation contract → "**in trust for a corporation to be incorporated**"

Step 2: Is the pre-incorporation contract ORAL or WRITTEN?

ORAL Pre-Incorp Contract Test:

- Oral contracts fall outside of the purview of *ABCA's* legislative reform in ABCA, s 15 & can therefore be liable for breach of contract *or* breach of warranty.
- Apply the CL (***Wickberg*** shows application of AB's CL analysis)):
  - (1) Did the parties **intend** the promoter to incur liability for breach of contract?
    - ***Wickberg***: Parties did not intend that P could sue Ds personally for breach of contract.
      - D's use of the word "Ltd" in the contract was reprehensible, but not sufficient to show intention for personal liability for breach of contract
      - **D defrauded P, showing D did not intend to personally enter into a contract** wherein they would be personally liable for breach of contract.
    - ***Wickberg***: absent intention for a promoter to incur liability for breach of contract, only breach of warranty is available.
  - (2) **Corporation cannot adopt contract to waive liability of promoter, liability completely determined by intention as stated above.**.

WRITTEN Pre-Incorp Contract Test:

- **DEFAULT position** = apply the legislation to find potential breach of warranty (only apply CL when the pre-incorp contract is oral)
- ***ABCA*, s 15:**

  s 15(2) Except as provided in this section, **if a person enters or purports to enter into a written contract** in the name of or on behalf of a body corporate **before it comes into existence**,

  (a) **Promoter is deemed to warrant** to the other party to the contract
    (i) that the body **corporate will come into existence** within a reasonable time, and
    (ii) that the **contract will be adopted** within a reasonable time after the body corporate comes into existence,

  (b) **Promoter is liable** for **damages for a breach of that warranty**, and

(c) the **measure of damages** for that breach of warranty shall be the same as if the body corporate existed when the contract was made, the person who made the contract on behalf of the body corporate had no authority to do so and the body corporate refused to ratify the contract.

(6) [EXCEPTION TO LIABILITY: contracting out of liability] A person who **enters or purports to enter into a written contract**… before [corp] comes into existence is **not … liable for damages under subsection (2) if the contract expressly provides that the person is not to be so liable**.

Pre-Incorporation Contracts Test (In ON/CA)

Step 1: Is there a pre-incorporation contract?

- Look for language indicating a pre-incorporation contract → "**in trust for a corporation to be incorporated**"

Step 2: Format of contract inconsequential; apply the law to determine if promoter is liable for breach of contract (exception: if law doesn't apply, can use CL to find breach of contract *or* breach of warranty)

- **De *facto* rule = use the legislation (*Szecket*)** → ***CBCA*, s 14/ *OBCA*, s 21**: Promoter is personally liable for breach of contract UNTIL corp is incorporated & adopts the contract, at which point the promoter is absolved of liability.
    - Test for whether contract was adopted by corp (***Sherwood Design***):
        - Intention required: There **must** be some **action** or **conduct** showing the corporation itself adopted that contract. Failing that, individual Ds should be held liable.
            - Majority (most corp scholars & practitioners disagree): Counsel acted on instructions of the Ds & so a draft resolution w/o signature was sufficient to show the corp intended to adopt the pre-incorporation contract. Promoter not liable.
            - Dissent: a draft is not sufficient evidence of adoption. There must be action showing adoption. Promoter liable.
        - Failing evidence the corporation adopted it, individual Ds should be held liable.
- **EXCEPTION to use of legislation** (***Szecket***): If the legislation does not apply (e.g., the parties to the alleged contract do not expressly deny liability; parties contracted out of legislation), then you can use the CL (i.e., look at the intentions of the parties to determine if there's a contract. If the intentions suggest a contract, promoter can be personally liable).

Note*** if asked about OBCA or CBCA, apply their legislation of personal liability until incorporation & adoption.

Incorporation Procedures

10 Ways to End Up in Court for Malpractice Claims:

What Not to Do	What To Do
1. Ignore conflicts of interest	• Check for conflicts of interest (don't rep same CL) • Resolve conflict once detected
2. Sue former CL for unpaid fee	• Collect fees at the time you do the work & don't let unpaid fees grow. • Terminate representation before account is so large that you will want to sue for collection.
3. Accept any CL/matter	• Screen properly (talk to references & former counsel)
4. Do business w/ a CL	• Don't invest money in a CL's business (incl in exchange for legal services) or become their partner
5. Practice outside area of expertise	• Practice only in your area
6. Open too many branch offices & make lateral hires	• Economic pressure results in overextension
7. Fail to track partner performance	• Don't treat partners as solo practitioners • Pay attention to staff concerns about partner's reliability, responsiveness, and attention to CLs

8. Ignore potential claim & represent yourself in a professional liability dispute	• Get a TP involved
9. Settle matter w/o CL written authorization	• Document settlement authority in writing in advance of agreement
10. Fail to communicate w/ CL	• Return phone calls, address CL concerns over matter progress, and include CL in significant decision-making.

Pre- and post-incorporation Issues to discuss with your CL:

Pre-incorporation:

1. **Purpose of incorporation** ⇒ is it in the CL's best interest to incorporate (consider the corporate vehicles/options available to the CL and weigh them)?
2. **Jurisdiction** of incorporation ⇒
   - federal is more expensive, so if CL is only conducting business in AB they should register there.
   - If registered in another province as an extra-jurisdictional corporation, you can practice there while still being registered as a corp in another province.
   - If you want to incorporate under a particular corporate name & it already exists in another province, you may have to carry on business in one province with X name and another with Y name. BUT if you incorporate federally, the name is protected across CA (very strong, subject only to trademark protection). still more expensive, cumbersome, etc, but consider if carrying on business in 1+ province
3. **Business licence and registration**
   - Depends on type of business CL is setting up. Do they need a licence? Is there other applicable legislation in addition to the Corporations Act?
4. **USAs**
   - Do you want to restrict powers of the directors? Do you want to assume, as an SH, some of the responsibilities of the Directors? If so, what and why?
   - If >1 SH, each SH will need independent legal advice.
5. **Insurance**
   - Depends on nature of business.
6. **Consequences** of incorporation
   - Explain consequences of incorporating to CL (benefit from corp being distinct legal person; to get LLP protection, CL has to make it clear to public that they are an incorporated business/use company's name with appropriate ending to the name; may need to register trade name; be clear about separate roles/responsibilities/rights/obligations of the different corporate roles)

Post-incorporation:

1. **Directors' organizational resolutions**
   - Organizational meeting of directors right after incorporation wherein they *can* pass resolutions to:
     i. Adopt bylaws (if adopted, SHs must approve at SH organizational resolutions meeting)
     ii. Determine share certificates (determine share capital - what type of shares? Classes? Form of share certificate → the digital doc format?)
     iii. Adopt a corporate seal (req'd for corp)
     iv. Designate officers
     v. Appoint officers (not required; may not make sense in a very small corporation – directors can act as officers, so you don't necessarily have to appoint separate officers)

vi. Deal with banking, accountants, etc.

2. **SHs' organizational resolutions**
   - Confirm bylaws (if adopted by directors)
   - Two most important roles:
     i. **Elect the directors** (note – Directors filed with the registrar may not be the same who will continue to run the company; those were essentially placeholders & the SHs may elect different directors).
     ii. **Appoint an auditor** (if SHs decide there should be an auditor)

Auditor: Can be appointed to provide an independent assessment of financial health of the corporation & detect any fraudulent behaviour of the directors.

Corporate Names

NUANS search (Newly Upgraded Automated Name Search) required.

- Lists existing corporate names & helps the registrar determine whether name should be approved.

Criteria in name approval:

- **General Considerations ⇒ *ABCA*, s 10**
  - (1) Legal (**ss 10(1, 2)**)→must include appropriate ending (e.g., LTD, incorporated, professional corporation)
  - (2) Distinctive → distinguish from other corps
  - (3) Descriptive (optional, not required) → describes what corp is/does, helpful
- **Cannot be identical** (***ABCA*, s 12(1)(b)**) **& cannot be confusing** (***ABCA*, s 12(1)(c)**) to the name of another Alberta body corporate, an extraprovincial corporation registered in Alberta, or a federal corporation.
- The **full name of a corporation must be legibly disclosed** on all of its contracts, invoices, negotiable instruments and orders for goods or services (***ABCA*, s 10(8)**)
  - Purpose: protects the public AND protects the liability of the ppl behind the corp

3 Avenues for Resolution in Name Cases:

(1) bring claim to registrar to try to protect your name (***Paws***);
(2) sue in tort for passing-off (***Stenner***);
(3) if registered ™, sue through ™ infringement.

Paws Pet Food and Accessories Ltd v Paws and Shop Inc, 1992 (*ABCA*, s 12 & test for similar names)

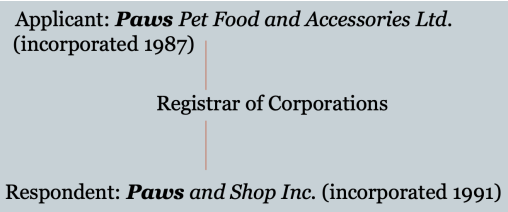
R: Under ***ABCA* s 12(1)(c)**, a corporation shall **not** be permitted to have a particular name if another corporation already has a **similar name** and the similarity of the two names is **confusing or misleading**.

TEST: **at least one customer** was **misled** and **confused** by the name of the corporation in question **such that they came to the reasonable inference** that the name of the corporation in question is either **(a) the same** as that other corporation or **(b) affiliated with** that other corporation.

Rationale: preserving the goodwill of the first corporation and preventing the second corporation from benefitting unjustly from that goodwill.

F:

- Paws Pet Food and Accessories Ltd ("the Applicant") incorporated in 1987 under the BCA. Paws and Shop Inc ("the Respondent") commenced business in 1991 selling pet food and accessories in Calgary.
- The Registrar allowed the respondent to be registered and subsequently refused to require the Respondent to change its name.
    - Admin history: Under s 13, Director can order that a corporation change their corporate name, but Registrar decided not to do this
- Applicant sought an order pursuant to s 239(1) of the Act compelling the Registrar to direct the Respondent to change its name by eliminating the word "Paws" therefrom (Paws = thought to be the distinctive element)



I/H: Must the Registrar require the Respondent to change its name? → **YES**. At least one customer was misled such that they came to the reasonable inference that the Respondent was a second store of the Applicant.

A: Respondent was in breach of s 12(1)(c) because it was confusingly or misleadingly similar under the Regulations (s 4(5))

- **At least one customer was fooled into believing the Respondent was a second store of the Applicant. This indicates some customers are misled and confused by the Respondent's name & leads to a reasonable inference that the Respondent is or would be affiliated with the Applicant**.
- The names are similar both in fact but also pursuant to s 6(1) of the regulations
- Applicant had acquired **goodwill** (i.e., benefit of a good reputation that someone has developed/established in connection with their business)

Stenner v ScotiaMcLeod, 2007 (CL protection: [business] tort of passing-off)

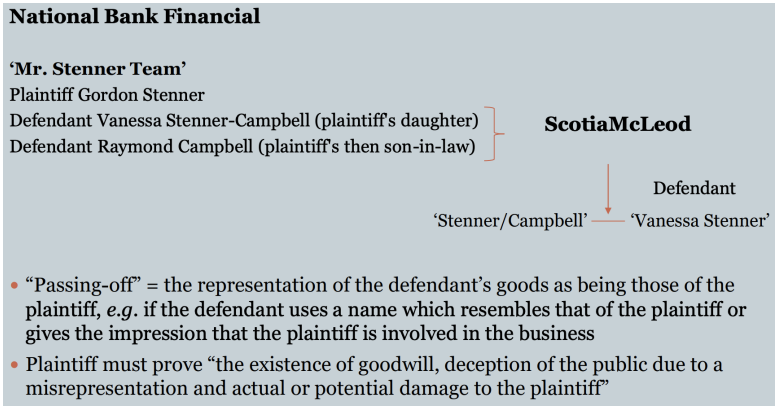
Test – passing off: to prove tort of passing off, P must prove (1) the existence of goodwill, (2) deception of the public due to a misrepresentation, and (3) actual or potential damages to the P. Test met where P can demonstrate P that the mark, name, or get-up was **known and recognized generally in the market**.

Factors demonstrating mark/name/get-up was known & recognized generally in the market:

- Goodwill associated w/ P's name etc
- Registration of name as a trademark (supports finding of goodwill)
- A D's continued use of the name etc (shows D was aware of the goodwill associated with the name etc)

F:

- Mr. Stenner provided investment services and advice to the public since 1988. He had spent millions in advertising in newspapers, magazines, and directories, as well as on television and radio.
- Stenner's daughter Vanessa Stenner-Campbell, her husband Raymond Campbell ("the defendants"), and Mr. Stenner (P) provided investment services and advice ⇒ the 3 worked together & were identified as the "Stenner Team" at National Bank Financial.
- Mr. Stenner & Ms. Stenner-Campbell had a falling out and Ms. S-C & Mr. Campbell moved to ScotiaMcLeod



- Ms. S-C & Mr. C adopted the name "Stenner/Campbell" to represent themselves in promotions.
- In 2003, Ms. S-C hosted a radio show on the same station as Mr. Stenner had hosted a radio shower and used the Stenner name in broadcasts.
- In 2006, after Ms. S-C and Mr. C divorced, Ms. S-C started using her full name "Vanessa Stenner" in ads.
- Mr. Stenner commenced an action against the Ds & Scotia, claiming that they were **passing-off** by use of the name "Stenner"/as if they were still part of the Stenner Team.
    - Sought: injunction to prevent using "Stenner" and any of the words "Investment," "Team," or "Financial" in relation to the word "Stenner" in advertising. And an internet domain name (like stennerfinancial.ca)
    - Sought: damages

I/H: Did the Ds engage in the tort of passing-off? → **YES**. When using Stenner-Campbell and Stenner/Campbell, they were passing-off (however, the damages were tempered by time & limited until the point at which Ms. S-C began using her Christian name "Vanessa Stenner").

A:

- **Passing off**: representation of the D's goods as being those of the P (e.g., D uses a name which resembles that of the P or gives the impression that P is involved in the business). **Purpose**: tort protects good will.
- **Test – passing off**: to prove tort of passing off, P must prove (1) the existence of goodwill, (2) deception of the public due to a misrepresentation, and (3) actual or potential damages to the P.
    - To meet the test, must show the name was **recognized in the market**.
- **Note: An action for trademark infringement differs from one for passing-off**:
    - **Action for improper use of a TM** has no burden to prove knowledge/recognition→ emerges as soon as TM is registered; P does **not** need to prove the mark was known to anyone in the market.
    - Action of passing off requires P to prove that the mark, name, or get-up was **known and recognized generally in the market**.

Factors supporting a finding of tort of passing off (i.e., demonstrating name was known & recognized in market):

- P had **acquired goodwill** associated w/ his financial services
- **Well-known in financial industry** associated w/ name "Stenner"
- **Registration of "Stenner" w/ TM also supported the goodwill**
- Ms. CS & Mr. C were aware of the goodwill possessed by Mr. S, indicated by their **continued use of the name**

Limits to the tort of passing off:

- Adding "/Campbell" to make it seem different than Stenner, Court found was **not** sufficient to distinguish Stenner and Stenner Team from Stenner/Campbell
- Court says up until the point she began to use her full name (Vannessa Stenner), she was passing off.
- Over time the deception, and therefore damages, were reduced b/c it became clear that Ms S-C wasn't Mr Stenner
    - Height of confusion happened very soon after Ms S-C went to ScotiaMcLeod but eventually ppl who saw her would have realized she wasn't her dad and they stayed w/ her anyways, indicating they were satisfied w/ her services in her own right.

Damages: Damages were awarded based on 10% of the defendant's gain up to trial considered as causally related to the passing-off PLUS apportionment from 10% to 5% yearly for a further five years of the present value of the defendant's book of business PLUS $1 million for the plaintiff's loss of goodwill and trademark value. Court also granted a permanent injunction from continuing to use the domain name "stennerteam.ca"

Unanimous Shareholder Agreement (USAs): *ABCA*, s 146

- **USAs**: contractual tools, with the strength of a corporate constitution, that enable SHs to arrange the organization of their enterprise (override CL assumption that the role of SHs is not to run the company)

    - **Purpose**: restrict directors' powers.
- USAs bind ppl within the corporation, but NOT outside the corporation (***Cicco***)
- ***ABCA*, s 146(7)** → under a USA, SHs take on liability of the Directors to the extent that they limit the powers of the Directors *AND* Directors are relieved of their duties & liabilities to that same extent.
- ***ABCA*, 146(2, 3)** → if you obtain shares subject to a USA, you are deemed party to the USA – even if you don't know about it. Once SH finds out about USA, they can object or sell their shares.

Cicco v 609940 Ontario Inc (Trustee of), 1985 (USAs bind internal parties only)

R: USAs are contracts of constitutional stature, but their impact is **limited to internal parties** and **cannot** impact/**bind TPs**. In short, a director may be accountable to SHs for failure to comply with USA, but that does not render a decision that impacts a TP void and does not disentitle the TP from relying on the decision impacting them.

F:
- Company (2 man shop) was on brink of bankruptcy in auto repair & used car sales business.
- Principals = Bertucci and Cicco. Each held 50 % of the shares and were the only officers and directors. They made a USA pursuant to s 108 of the BCA, which provided that "...all decisions affecting the Corporation shall be made only with the consent of both Bertucci and Cicco."
- Cicco withdrew & ceased to be a director of the company, leaving Mr. Bertucci as the sole director and president.
- A few days later, without Cicco's consent, Bertucci adopted a director's resolution that the company make an assignment in bankruptcy (i.e., appoint a trustee in bankruptcy & assigning the company's assets to the creditors) and authorized himself as president to execute the necessary documents. This was in breach of the USA.
- Cicco applies for an order declaring the assignment void on the grounds that the USA prohibited the director from adopting the resolution to make an assignment without Cicco's consent

I/H: Can the Court declare the assignment in bankruptcy void b/c the USA prohibited one director from making decisions w/o consent of the other? → **NO.** USAs can't bind TPs who were not put on notice.

A:
- Test for annulment under the Bankruptcy Act, s 151(1): "To annul the assignment the court must conclude that the assignment ought not to have been made" ⇒ but there's a USA in place.
- USA binds directors, but it does **not** bind a trustee in bankruptcy dealing with the company who has no notice of the restrictive authority of its directors
- The **effect of the USA** is to limit the director's authority, but that is an **entirely internal matter** between the director and the shareholders
- The director may be accountable to the shareholders for failure to comply with the USA and the statute, but that does not render the assignment void or disentitle the trustee to rely on the assignment and supporting resolution
    - To hold otherwise would have the result that no trustee could safely act under a corporate assignment in bankruptcy without enquiring into the internal (and unpublished) fetters on the authority of the duly appointed directors convened in a regular meeting; this cannot have been the intention of the legislature

Share Capital, *ABCA* s 26

Corporate share: a common, divided, participation interest in the corporation's business
- Can be purchased from the corporation or from another SH

- Does not represent a proportionate interest in the assets of the corporation – it represents a **proportionate share of the value** of the net assets of the corporation remaining **after all the corporation's debts/liabilities have been paid**

Presumption: corporate shares are equal in all respects (**ABCA, s 26(3)**)

BUT presumption can be **defeated by dividing shares into different classes** (each share must fall within a class, but classes are mutually exclusive, i.e., a share can't fall under more than 1 class) (**ABCA, s 26(4)**).

SH Rights: SHs have **three rights** (i.e., (1) vote at any meeting of SHs; (2) receive any dividend declared by corp; (3) receive remaining prop of corp on dissolution), and any of the classes can have any of the rights as long as each of the three rights are on at least one of the classes. **Articles of incorporation** describe which classes of shares have which rights, terms, conditions, and restrictions attached to them.

- ➢ Rights of SHs *within* a class of shares have to be equal, BUT rights of SHs don't have to be equal *across different* classes.
- ➢ IF only 1 class of shares → all rights of SHs are the same wrt voting, dividends, and remaining value of property on dissolution (***ABCA*, s 26(3)**)
- ➢ When a corporation has more than one class of share, each class constitutes a distinct subdivision within the total share capital of the corporation

Class A: **Common** (or **equity**) Full right of participation in the corporation through voting, unrestricted rights in dividends & distributions of the value of remaining property upon dissolution	**Class B**: **Preferred** Special shares to which some right preferential right is attached which makes it rank ahead of common shares in some way	**Class C**: **Restricted** Special shares subject to limitations
Voting	**Voting** (often special rights wrt all matters decided by SHs, election of directors, change in business of the corp, sale of significant portion of its undertaking, or loc'n)	**No** voting (or, sometimes, limited voting)
Second for **dividends** (receive dividends after all prior claims paid)	**First** for **dividends** (prior right to receive dividends – usually fixed rate)	**Third** for **dividends** (e.g., deferred shares defer right to receive income/return on capital until after common shares)
Second on **dissolution** (receive capital after repayment of all prior claims incl tax, creditors, loan capital, preferred shares, etc)	**First** on **dissolution** (priority in repayment of capital upon winding up)	**No** rights on dissolution
Higher risk than loans or other forms of debt investments & higher risk than preferred shares (b/c only paid dividends or repaid capital after satisfaction of other claims)	*Other rights include right of redemption or retraction, conversion rights, poison pill rights (augment rights of shares in take-over bids)*	

Note – *Class names (e.g., Class A, B, C) don't have to map onto common, preferred, restricted, respectively (e.g., Class A could be Preferred, B restricted, and C common)*

Pre-Incorporation Contracts

Conceptualizing pre-incorporation contracts

- Promoter wants to contract with a TP on behalf of/in trust for a corporation ⇒ this would be fine except that the corp doesn't exist yet
- **Goal**: conclude deal quickly BUT w/o personal liability
- Question w/ pre-incorp contracts: at the end of the day, who's left holding the bag if the corp (a) is never incorporated or (b) never actually adopts the contract the promoter tried to do
    - Either TP left w/ Unenforceable contract OR promoter held personally liable.

Relevance of evolution of law: CL pre-incorporation rule doesn't apply anymore b/c you can incorporate in minutes. HOWEVER, we may encounter a pre-incorporation contract entered into *before* the corp existed.

Evolution of Law

1. **English CL** (***Kelner***). Application of 2 fundamental rules:
    a. **Rule 1**: **Person who signed** contract ("promoter") on behalf of a corp to be incorporated was **personally liable**.
    b. **Rule 2**: Once incorporated, **corp could not ratify the contract and thereby relieve that person of personal liability**.
    c. **Rationale** based on contract law/agency principal → if principal doesn't exist, you can't be an agent of it. Can't bind corp in advance on assumption it will exist in the future & when entering into a contract, you need at least 2 parties.
    d. **Policy reason**: protect the TP. Someone always has liability so innocent TP will always have someone to sue.
2. **ON Courts**: adopted ***Kelner***, but in the 1960s they **relaxed** Rule 2 from ***Kelner***
    a. **Rule 1** (synthesis of *Kelner* and ***Black***, an AUS case): Person who signed/promoter was personally liable **BUT ONLY** in circs where parties **intended** for that to happen.
        i. Issue: uncertainty wrt when promoters may incur personal liability when entering into pre-incorp contract
    b. **Rule 2** (same CL rule as ***Kelner***): Once incorporated, **corp canNOT ratify the contract, & therefore CANNOT** relieve promoter of liability.
3. **Legislative reform in CA**: CBCA s 14, ABCA s 15, ON BCA s 21 have minor differences that are important in *particular* circumstances
    a. ***CBCA*, s 14** & ***ONCA*, s 21** → retained Rule 1 from Kelner, BUT relaxed Rule 2.
        i. **Rule**: **Promoter is personally liable UNLESS** corp is **incorporated & adopts the contract**, at which point the promoter is absolved of liability (i.e., liable until you make good on your warranty).
    b. ***ABCA*, s 15**: relaxed both Kelner rules → pro-promoter/protective of promoter, less protective of TP
        i. **R: Once corp is incorporated & adopts the contract forwarded by the promoter, promoter is absolved of liability**.
        ii. R: Even if corp doesn't incorporate or adopt the contract, the promoter is **never** considered a party to the contract. Thus, **promoter can only be held liable as a warrantor** (i.e., liable

for making a warranty to the TP that the contract would occur). Here, TP can only sue promoter for breach of warranty and NOT breach of contract.

iii. **s 15(6)**: promoter has the ability to contract out of personal liability for warranties made if the pre-incorp contract states this.

iv. **EXCEPTION**: oral contracts apply the CL rule:

1. **Rule 1**: Person who signed/promoter was personally liable **BUT ONLY** in circs where parties **intended** for that to happen.
2. **Rule 2**: Once incorporated, **corp canNOT ratify the contract, & therefore CANNOT** relieve promoter of liability. Determinative question is whether the parties intended or not.

4. Messy case law → see ***Westcom***, ***Sherwood, Szecket, Wickberg***

Westcom Radio Group Ltd v MacIssac, ONCA, 1989 (application of Kelner/Black CL rules)

"Not a particularly useful decision"

F:
- P entered into a series of contracts on behalf of a corporation in which both P&D believed to be was incorporated/in existence. Corp never actually came to be, but P had signed the contracts as director & signing officer of corp. Contracts did not indicate P signed in personal capacity.
- Things went south, P sued her personally for amounts owed under the contracts.

I/H: Is D personally liable for the contractual obligations b/w D & non-existent corporation under s 21 of the OBCA? → **NO (but this is bad law)**. ONCA claims that this was a "notional contract" so decides not to apply the legislation (Meshel points out this is circular logic. Case is more useful for seeing application of Kelner & Black CL rules).

A:
- ***OBCA*, s 21(1)**: Except as provided in this section, a person who enters into an **oral or written contract** in the name of or on behalf of a corporation before it comes into existence, is **personally bound by the contract and is entitled to the benefits** thereof.
  - Default is still promoter = party liable for breach of contract UNLESS incorporated & adopts contract
  - Had the Court applied s 21, they should have found her liable.
- ONCA analyses the situation as a notional contract, saying **the legislation doesn't apply** (note - this makes no sense, circular logic, bad law)
- ONCA applies the CL rules (i.e., Kelner & Black) notwithstanding the legislative reform efforts. They applied CL rules & find she is not personally liable.

Sherwood Design v 872935 ON Ltd, 1998 (shelf company)

R: Watch out for language indicating pre-incorporation contract: **"in trust for a corporation to be incorporated"**

R: Intention required to hold a corporation liable for failure to complete pre-incorporation contract: There must be some action or conduct showing the corporation itself adopted that contract. Failing that, individual Ds should be held liable.

F:
- Ds entered into a $300,000 agreement to purchase the Plaintiff's assets "in trust for a corporation to be incorporated"

- Discussions took place b/w counsel of P (promoter) & Ds (buyers)
    - "The lawyer acting for the defendants used one of his firm's "shelf companies" for this purpose and, by a letter to the plaintiff's lawyer, stated that the corporate defendant had been "assigned" as the corporation that would complete the purchase at closing. The deal did not proceed and the defendant "shelf company" was subsequently assigned to another of the firm's clients for a wholly different transaction."
    - Counsel for the Individual Defendants also included draft organizational documents as well as a draft, unsigned resolution of the directors adopting the pre-incorporation contract
- Deal fell through & shelf company was returned to the shelf & assigned to a subsequent CL at the firm.
- P sues the indiv Ds and the corporate D.

I/H: What does it take for the newly formed corporation to "adopt" a pre-incorporation contract in the meaning of ABCA s 15(3)? (in case, it was ON legis but said the same thing). In other words, is the unsigned pre-incorporation contract sufficient to show the corp intended to adopt the pre-incorporation contract? → **YES.**

A:
Majority held: P (promoter) left to hold the bag (or can go after the corp as it was presumably adopted) ***most corporate scholars & practitioners found this was wrong*
- Counsel was acting as an agent for this corporation which was in existence. Acted on instructions of the Ds & this is enough to give reason to make the draft resolution. The fact he was acting on instructions of individual Ds was enough to show intention of corporation to adopt & be bound by the contract

**Dissent: P can go after indiv Ds because the corporation never actually adopted it.
- Draft not sufficient evidence of the adoption of the pre-incorporation contract
- Not enough that indiv Ds said they wanted to enter, but once corp was incorporated & was to be party, that corp still has to adopt or agree to it
- Intention required: There **must** be some **action** or **conduct** showing the corporation itself adopted that contract. Failing that, individual Ds should be held liable.
- OBCA s 21(2): A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf…

Outcome
- Counsel for the Ds rolled the corporation over and assigned it to a different CL. Essentially took the corporation, put it back on the shelf, and recycled it for an entirely different CL/transaction. SO the parties to the new transaction found themselves with a $400,000 judgment against them for this breach of contract.
- If you're going to recycle a corporation, you better make sure there aren't liabilities attached to it.

Szecket v Huang, ON (latest, authoritative application of *OBCA* s 21)

*final authority that the legislation applies. Only when leg doesn't apply do we revert back to CL. What happened in Westcom is <u>not</u> good reason for the legis not to apply.

R: *de facto* rule is that we use the legislation.
EXCEPTION: If the legislation does not apply (e.g., the parties to the alleged contract do not expressly deny liability), then you can use the CL (i.e., look at the intentions of the parties to determine if there's a contract. If the intentions suggest a contract, promoter can be personally liable).

F:
- P enters into license agreement w/ P. Contract not performed. Company never incorporated.
- P sued D personally for breach of contract

Proc Hist:
- TJ: D should be personally liable, but used the reasoning in Westcom by disregarding the legislation. TJ found valid contract & therefore D is liable under the contract

I/H: Is intention relevant in situations in which s 21 applies? → **NO**. Intention is only relevant when the legislation does not apply (i.e., when the parties contracted out of the legislation).

A:
- D should be personally liable but only on the basis of s 21 (i.e., adopted dissent from Sherwood Design). D personally liable under contract b/c corp never came into existence ⇒ codifies Rule 1 of Kelner
- Effectively overturns Westcom (but not explicitly)

Pre-incorporation contracts: *ABCA*, s 15(1)

s15 summary: If you incorporate corporation & adopt a contract, you're absolved. BUT even if that didn't happen, you can only be held personally liable for breach of warranty. Promoter is never considered a party to the contract & so cannot be sued as a party.

In AB, s 15 applies & should only revert to CL when S 15 doesn't apply

Situation in which s 15 won't apply (and place where we differ from OBCA) → **oral contracts** require the CL

s 15(1) This section applies unless the parties believe the corporation is, or is intended to be, incorporated under the laws of a jurisdiction other than Alberta.
(2) Except as provided in this section, **if a person enters or purports to enter** into a **written contract** in the name of or on behalf of a body corporate **before it comes into existence**,

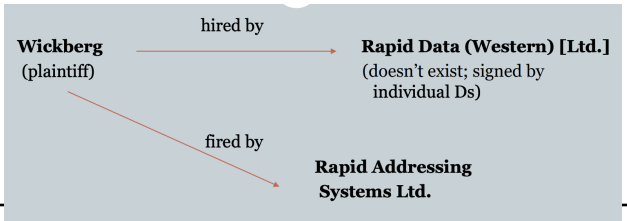
(d) **Promoter is deemed to warrant** to the other party to the contract
  (i) that the body **corporate will come into existence** within a reasonable time, and
  (ii) that the **contract will be adopted** within a reasonable time after the body corporate comes into existence,
(e) **Promoter is liable** to the OP to the contract for damages for a breach of that warranty, and
(f) the **measure of damages** for that breach of warranty **shall be the same as if the body corporate existed when the contract was made**, **the person who made the contract on behalf of the body corporate had no authority to do so and the body corporate refused to ratify the contract**.

(6) A person who **enters or purports to enter into a written contract** in the name of or on behalf of a body corporate before it comes into existence is **not in any event liable for damages under subsection (2) if the contract expressly provides that the person is not to be so liable**.

CONTRAST to ON: possible to be held a party to a contract (instead of just held liable for breach of warranty)

Wickberg v Shatsky et al, 1969, BC (outcome we would see in AB (but CL analysis), i.e., breach of warranty)

F:
- Ds were directors of Rapid Addressing Systems Ltd BUT then decided to make another corporation, Rapid Data (Western) which they never actually incorporated. Despite never incorporating, they carried on business w/ that business as "Rapid Data



(Western) Ltd" → suggested they were incorporated even though they weren't
    - Used letterhead with Rapid Data (Western) **Ltd**
- P was hired on the "Ltd" letterhead (i.e., Rapid Data (Western) **Ltd.**). Business went belly up & P was fired. Firing was written on letterhead without "Ltd" on it (i.e., Rapid Data (Western) ___).
    - P was essentially hired on a pre-incorporation contract because he was hired BEFORE incorporation happened (however, Ds presented it as if it was incorporated even though it wasn't)

I/H: Are the Ds personally liable for the firing by the purported corporation? → **NO** personal liability under the contract because the Ds were not parties to the contract; **YES**, personal liability for breach of warranty.

A:
- Application of CL rules b/c there was no legislation at the time.
- Question depends on the **intention**. Did the Ds intend to be liable for breach of contract?
    - Ds intended to be liable → Go after the Ds
    - Ds did not intend to be liable → too bad, can't sue them.
- Court says that parties did not intend that if Wickberg wants to sue for breach of contract that he could sue the two Ds personally.
    - Ds' conduct in using the "Ltd" was reprehensible, but not sufficient.
    - Ds suggest that they defrauded TP which indicates that they did not intend to personally enter into a contract wherein they were personally liable.
    - TP (i.e., Wickberg) could sue for breach of warranty, but not breach of contract.
- If this took place under OBCA → Yes you can go after promoter & they'll be liable unless there's a corp who will adopt the contract & therefore the liability.
- If this took place under ABCA → You can go after the promoter ONLY as a warrantor, not as a party to the contract.
- The breach of the warranty only leads to nominal damages.

Breach of Warranty

Breach of warranty: represented/promised that something would happen.
- If you default on that promise, you are liable only breaching your promise (i.e., a breach of warranty)
- Damages available are limited in contrast to contract breach → with contracts, you can show actual loss; whereas it's difficult to show causation insofar as there may not be an actual loss related to the corporation
- P will have to show reliance on the warranty in order to secure damages for breach of warranty

Pre-Incorporation Legislation: ABCA vs CBCA

ABCA	CBCA
Promoter is a **warrantor**, not party to the contract. Therefore, they may be awarded **nominal damages** for **breach of warranty** (ABCA s 15(2)(b); Wickberg), but not awarded compensatory damages for breach of contract.	Promoter is deemed **party** to the contract.
Exception: **Oral contracts** are subject to the CL rule (Kelner & Smallwood). I.e., apply the intention test. Possible to establish a breach of contract.	No exception for oral contracts.

Review Questions: Chapters 1-3

Final exam: she will not do a long fact pattern that covers everything. Anticipate a mix of short answer, medium length answer, and fact pattern type Qs (FP of 2ish paras)

Here she gives us the issue by asking the Q, but it may be hidden & in a longer fact pattern, she may not ask us about the issue (we may have to figure out what the relevant issues are)

1. **What is the purpose of a NUANS search?**
   - Newly U Auto Name Search; context of corporate names
   - Required by fed & prov Corp Acts
   - Have to determine if there's an existing corp name or TM existing
   - Purpose → make sure not confusing or misleading public.
   - If 3 mark Q, above is enough
   - If several marks, she is likely looking for a case that talks about this too.

2. **Rachel is a lawyer practising as a sole practitioner through a professional corporation. If a client secures judgment against Rachel for negligence in the provision of legal service, is the client limited to the assets of the professional corporation when realizing on the judgment or are Rachel's personal assets also at risk? Explain.** *(Q tries to confuse ppl into thinking she's an LLP when she's just a PC)*
   - If Rachel was an LLP, she would be shielded from liability
   - As a PC, she will be liable. Purpose of PC is tax reasons, not shielding someone from personal liability.
     - PC is not a corporation for liability purposes, it's just a business vehicle that confers only tax benefits.
3. **"The partners in the McDonic case should never have been found liable for Mr. Watt's misconduct because, by definition, misconduct falls outside the ordinary course of business of the law firm." Is this statement correct? Explain.**
   - That quote was rejected → not following the proper protocol doesn't take him out of the ordinary course of business because the law firm *did* engage in provision of investment advice.
   - The way he carried it out was relevant.
   - McDonic had implied authority.
4. **Monica Geller wants to start her own bakery shop and retains you as her lawyer. Advise Monica on the following issues:**
   a. **Should Monica operate her business as a sole proprietorship or as a corporation?**
      - List of considerations → nature of business, liability, tax, formalities, cost of set up, degree of control, who has profits, do you want it to exist forever
   b. **Monica is considering teaming up with her friend Naomi to form a partnership. She is particularly interested in the option of operating as an LLP.**
      - Can't do this b/c baker isn't a regulated profession (in statute) that would allow her to do that. Cite relevant sections.
      - Don't need to recommend her to something else
   c. **Monica is interested in entering into a contract on behalf of a corporation to be incorporated in Alberta. If the corporation never comes into existence, will Monica be held personally liable under the contract? Explain.**

- S 15 presumably applies so she could never be liable even if the corp never comes into existence. Can only be held liable for breach of warranty.
- NOTE – she didn't mention if it's oral or written!!!! If oral, s 15 doesn't apply. **hidden issue** Therefore, apply CL test w/ intentions.
    - Promoter liable unless show otherwise AND if corp doesn't adopt contract → promoter liable.
    - No lawsuit if all went well (then there won't be liability incurred)

5. **Monica ultimately decided to incorporate her business in Alberta. What would be the foundational documents of the corporation and what information would they contain?**
    - Articles of Incorporation + explain what they include
    - Bylaws (define & explain optional)
    - USA (define & explain optional)
6. **Monica favours the following name for the corporation: Best Bakery in Town Company. Do you think this name is legally acceptable? Explain.**
    - No – needs the Ltd or Inc at the end
    - "Best" is the distinguishing element, "Bakery in Town" is the descriptive element

4. The Corporation as a Legal Person: Grounds for Liability of those behind the Corp

RULE: *Soloman v Soloman* = **Corp as a legal person** ⇒ Principle in Soloman means you can't go after the ppl behind it (i.e., the individuals or the parent company) for liability.

EXCEPTIONS (i.e., disregarding the separated legal personality of a corp *or* the limited liability of SHs)

1. **Piercing the corporate veil**
    - ***Kosmopoulos*** (**overturned**): can be pierced where unjust or opposed to justice
    - ***Transamerica***: pierce when corporation is a mere facade. **3 part test**:
        1. Completely dominated & controlled by the SHs or parent company AND
            - ➢ ***Driving Force***: complete domination, alone, is not sufficient to lift veil
            - ➢ ***Rockwell***: having a single person run a company ≠ improper conduct on its own
        2. Used as a shield for fraudulent or improper conduct (basically, must be used as a puppet)
            - ➢ ***Big Bend***: creation of corp for a fraudulent purpose = sufficient to show used as "shield"
            - ➢ ***Jin***: use of corp for fraudulent purposes = sufficient to show used as shield
            - ➢ ***Rockwell***: setting litigation in motion as the sole indiv running a corporation does not mean that the individual in question is the "actual litigant" and disrespect for corporate procedures alone is not sufficient to reach the level of fraud or "improper conduct"
            - ➢ ***Driving Force***: a mere mistake ≠ sufficient to rise to level of fraud/improper conduct
        3. [Fraudulent or improper conduct caused the loss to the P]
    - ***Aubin***: P doesn't have to show the case is rare or exceptional to show injustice. Modified Transamerica test:
        1. Complete control of finances, policy, & business practices of the company including *de facto* control.
        2. Control used to commit a fraud or wrong that would unjustly deprive a claimant of their rights & can be lifted prevantatively in FL context.
        3. Conduct must be reason for claimant's injury, loss, or unjust deprivation of right to support.
2. **Total disregard of formality**
    - ***Wolfe***: if a person holds themselves out to the public w/o identifying the **name of corp** which which they're associated, they can be held **personally liable** (even if it's an accident).
        1. ***ABCA***, s 10(8): "A corporation shall set out its name in legible characters in or on all contracts, invoices, negotiable instruments, and orders for goods or services, issued or made by or on behalf

of the corporation" ⇒ if a person chooses to advertise and to hold himself out to the public without identifying the name of a company with which he is associated, he runs the risk of being held personally liable.

2. F: D was sued individually as "carrying on business in the firm name and style of Fort Whoop-up" and argued that Fort Whoop-up was operated by Chinook Sport Ltd so it should be sued. BUT tickets D gave out said "Fort", it was advertised as "Fort", etc. D liable.

- ***Vallis***: Restates Wolfe (personal liability possible w/o following statutory naming conventions, even absent intentional dishonesty) + factual indicia for when indiv liability flows from disregard of formality:
    1. Names of parties in relevant docs, signs, advertising that P may have seen;
    2. Whether D complied with business naming legislation
    3. Oral exchange b/w parties re their identity/legal status
    4. Whether P asked individual D for a guarantee
    5. Relative degree of sophistication b/w the parties
    6. Nature of D's business
    7. *F: D entered into a contract but failed/didn't think he needed to represent that his business was incorporated (no mention in emails, invoices, on his truck, no business cards). Ps thought they were dealing with a sole proprietorship w/ a business name. Personal liability followed.*

3. **Trusts: Knowing assistance & knowing receipt**
    - **Knowing assistance**: mechanism for **imposing liability on strangers to a fiduciary relationship** who **participates in a breach** of trust by the fiduciary. Elements required to impose liability for knowing assistance:
        1. A **fiduciary duty**;
        2. **Fraudulent/dishonest breach** of the duty **by the fiduciary**
        3. **Actual knowledge** OR **wilful blindness** of the stranger **to BOTH elements 1 & 2**
            - ➢ **Wilful blindness**: subjective test. Look at the actual state of mind of the person in question & ask if they "shut their eyes because they knew or strongly suspected that looking would mean that they would know of the fiduciary relationship and the fiduciary's fraudulent conduct."
            - ➢ This is a higher level of knowledge than constructive knowledge (knowing receipt) ⇒ i.e., harder for P to satisfy this element of the test.
        4. **Participation by/assistance of** the stranger in the fiduciary's conduct.
    - **Knowing receipt**: mechanism for **imposing liability on stranger to a fiduciary to a relationshi**p, arising when a stranger receives trust property for its own benefit & is thereby enriched at the beneficiary's exponents. Elements required to impose liability for knowing receipt:
        1. Stranger **receives** trust property;
        2. Trust property received **for their own benefit** or in their personal capacity
        3. Stranger has **actual** OR **constructive knowledge** that the trust **property is being misapplied**.
            - ➢ **Constructive knowledge**: Objective test. The recipient, having knowledge of the facts which would put a **reasonable person** on inquiry, actually fails to inquire as to the possible misapplication of the trust property (i.e., carelessness = sufficient to establish constructive knowledge)
            - ➢ This requires a lower level of knowledge than wilful blindness (knowing assistance) ⇒ i.e., easier for P to satisfy the element of this test so long as they have evidence
        4. Where 3 elements are made out, stranger is **conscience-bound** to **restore** the property received (i.e., measure of restitutionary recovery is the gain D made at P's expense).

Knowing Assistance	Knowing Receipt
Liability is fault-based (lack of honesty)	Liability is receipt/restitution-based
Higher threshold of knowledge (actual knowledge or reckless/wilful blindness)	Lower threshold of knowledge required (actual or constructive knowledge)

Subjective standard (actual state of mind)	Objective standard (reasonable person would ask)

Liability based on thin capitalization ≠ mechanism to disregard corp's separate legal personality

- ***Carlton***: Thin capitalization is NOT, by itself, a valid reason to lift the corporate veil & hold the SH liable. Merely having limited money ≠ reason to lift veil.

Liability based on lifting the corporate veil

- **Piercing corporate veil** = most common way to get around corporate liability protection from the corp's owners. While it's less technical than other ways to extend liability, it is still looked at carefully.
- When courts "pierce the corporate veil," they **disregard either the separate legal personality of corporations or the limited liability of SHs** for a variety of purposes
- Courts have been more willing to pierce the corporate veil to find a corporation liable for SH or sibling corporation obligations, but less willing to do so where it would mean holding a SH liable for corporate obligations.

Kosmopoulos v Constitution Insurance Co of Canada, 1987 (overturned corp veil test)

Overturned by ONCA

R: The corporate veil can be pierced where otherwise the result would be "too flagrantly opposed to justice" (i.e., has to be unjust or opposed to justice)

Transamerica, 1996 (test to lift the corp veil)

Sets out elements for when it is unjust not to pierce the corporate veil, i.e, when the result of failure to pierce would be unjust → clarifies *Kosmopoulos*

R: Corporate veil can be pierced where the company is a "**mere facade**" concealing the true facts. Two requirements to prove mere facade concealing true facts:

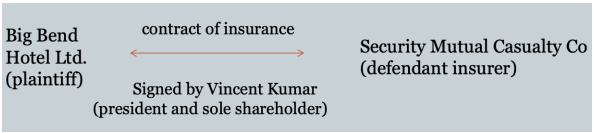
1) Must be **completely dominated and controlled** by the SHs or parent company (i.e., if you own enough voting shares that you have effective full control of the company); AND (corp has no separate existence/used exclusively as a puppet by the owner → this is not enough on its own though)
2) Must be used as a **shield for fraudulent or improper conduct** (basically, must be used as a puppet)
3) [Fraudulent or improper conduct must have **caused the loss to the P** – often not applied in corp context, except in family law context]

Big Bend Hotel v Security Mutual Casualty Co, 1980 (creation of corp for fraudulent purpose)

R: Creation of corp for fraudulent purpose = satisfies Step 2 of *Transamerica* test, i.e., corporation is "used as a shield for fraudulent or improper conduct"

F:

- P corp was owned by Vincent Kumar (owner and controller; only SH)
- Kumar used to have a different corp that owned a different hotel which burned down previously.



- For the new hotel (i.e., P, Big Bend), he got a new insurance policy. When getting the new policy, Kumar didn't disclose the other fire in the other hotel which was owned by the other corporation. Figured he didn't have to disclose since it had nothing to do with the present company.
- Therefore the insurance company agreed to insure P based on incomplete info.
- Big Bend burnt down. Insurer found out about the old hotel/old corp, claimed that they would not insure b/c of the incomplete info.

I/H: Should we pierce the corporate veil & go after Kumar personally? → **YES.**

A:
Transamerica Steps:

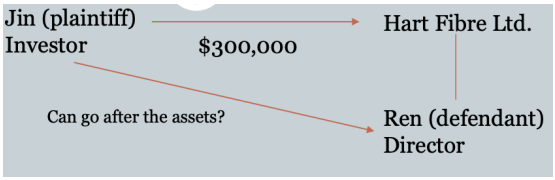
1. Was the corporation completely dominated by and controlled by the SHs and/or parent company? → YES, it was completely dominated by Kumar (even though he wasn't the owner of the previous hotel insofar as it was a different corp)
2. Was the corp used for a fraudulent purpose? → YES, it was for a fraudulent purpose b/c **failing to disclose all that info is fraud under the *Insurance Act***. He knew they'd decline or increase premium based on that info & decided not to disclose.

Jin v Ren, 2016 ABCA (use of corp for fraudulent purposes)

R: Use of a corp for fraudulent purposes (even if incorporation wasn't fraudulent) satisfies Step 2 of *Transamerica* test, i.e., corporation is "used as a shield for fraudulent or improper conduct"

F:

- D convinced P to invest $300K in his company (Hart Fibre Ltd) for shares in the company.
- P never received shares (D pocketed the $)
- P wanted investment back, D refused. P tried to go after D's assets personally.



I/H: Can P pierce the corporate veil & personally go after D for his investment? →**YES.**

A:

- Like in Big Ben, can hold liable BUT for different reasons.
  - Difference: In *Big Ben*, Kumar tried to hide behind the corporation (created the corp for a fraudulent purpose, i.e., tried to avoid the insurance).
  - Here, the corp was created above board, but the issue is that the D used the corporation to engage in a fraudulent act.
- Step 1: full control by D "controlling mind"
- Step 2: fraudulent purpose (pocketed and used it himself)
  - Can also be pierced if the entire corp isn't a fraud, but the corp is used for fraudulent purposes

Driving Force Inc (complete domination, on its own, insufficient to lift corp veil; mistake ≠ fraud or improper purpose)

R: Confirms TransAmerica that **complete domination/control is not sufficient**, on its own, to lift/pierce the corp veil (b/c, as we know from Soloman, even if it's one buddy running the business, the corp is its own person/not the SH's alter ego). All 3 elements in TransAmerica required.

R: a **mere mistake** is **NOT** enough to rise to the level of **fraud or an improper** purpose (here, Juneau made a

mistake)

F:
- P sues I Spy (D) for balances allegedly owned for leases for trucks & tort of conversion
- P also tried to sue sole SH & Director (i.e., Juneau)
- Spy had real interests separate from Juneau & all Driving Force could prove that she controlled the company as its sole SH & director (but nothing legal about this), they must also show fraud. Since they couldn't show the fraud, they can't lift the corporate veil.

I/H: Can indiv D be held liable for balances? → **NO**. Although the individual D did completely dominate the corporation (sole SH & Director), there was no fraud (didn't create the corp fraudulently, didn't use corp for fraudulent purposes). Absent satisfaction of both elements, the corp veil can't be lifted.

Aubin v Petrone, 2020 ABCA (*Transamerica* in the family law context)

Usually comes up in CS context, but Aubin is in FPS context

P doesn't have to show the case is rare or exceptional to show that there is injustice (much easier to detect injustice in FL cases)

R:

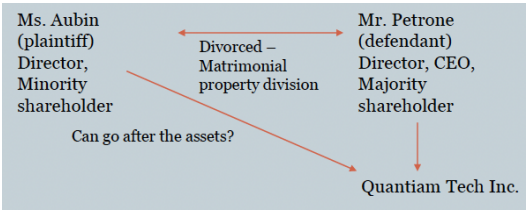
(1) **Complete control** of finances, policy, and business practices of the company
   (a) Control **includes *de facto* control**, e.g., where a person has the right and ability to change the company's directorship, or to directly influence SHs.

(2) Control **used to commit a fraud** or wrong ("improper conduct") that would unjustly deprive a claimant of their rights. However, in FL context the veil can be lifted **preventatively** (in addition to in response to fraud)
   (a) If P can show evidence that D is intentionally hiding assets behind a corp body to evade CS, SS, FP payments, Court can lift the corporate veil in a **preventative** manner.
   (b) Court says it's a "flagrant injustice" to avoid payments notwithstanding having access to significant assets and choosing to exercise corp's finances to screw over OP.

(3) **Conduct must be the reason for the claimant's injury or loss** (some type of causal link req'd)
   (a) But the reason can include an unjust deprivation of rights (e.g., right to support)

F:
- Aubin = Director & minority SH of the company; D = Director, CEO, & majority SH of company
- P & D married at time corp was incorporated
- P&D also incorporated another corp at some point to get a mortgage to purchase their home.
- D made company demand repayment & commenced foreclosure when it didn't go through.
- P tried to sell her shares back to D pursuant to a USA, but D refused to release her & did all kinds of things to retaliate against P/the divorce.

Proc Hist: In divorce proceedings, D was ordered to pay P an **equalization payment**
- No money in D's name, argued can't take the $ from him directly, only the corp.
- D had enough shares in the company for the prop equalization payment ($5million), but the Board of the corp (i.e., D & his bestie) wouldn't release the $.
- TJ put encumbrance on the shares & the buildings owned by the company ⇒ effectively made P a secured creditor



I/H: Can the court lift the corporate veil of Quantiam in aid of enforcement of the judgment granted in favour of Ms. Aubin? **YES**

A:

- Corp veil applies in fam law context too ⇒ same Q & elements apply, but misconduct may look different since it's usually about trying to get out of CS, SS, equalization payments in fam law.
- 3-step test from Arsenault (modifying Transamerica): it may be appropriate to lift the corporate veil in a family law context when:
  - (1) The individual exercises complete control of finances, policy, and business practices of the company;
  - (2) That control must have been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights; and
  - (3) The misconduct must be the reason for the third party's injury or loss
- Look at ***real* assets of the parties** post-separation → corp veil can be lifted to find that the party in question has *real* assets (i.e., in their corp despite having no $ in their bank account)
- FCSG explicitly allow court to pierce corp veil to reach assets/income from the corporation & adjust the payor's guideline income pursuant to the party's *real* assets ⇒ can make a determination whether the spouse is trying to evade financial obligations
  - This is balanced with **good business sense**
  - While FCSG only apply to CS payments, the same rationale can be applied to family prop & SS contexts.

Factors/considerations:

- Main consideration in whether corp veil can be lifted = **control**: is the spouse in a position to influence/control amount paid out by the company as income to themselves?
  - Judge found D controlled Quantiam Tech Inc, incl his own salary as CEO, power to draw money from the company in various ways, responsibility over corp's finances.
  - # of SHs: can harm other SHs if you take a bunch of money out to meet family obligations.
- **Prevention of fraud**
  - If P can show evidence that D is intentionally hiding assets behind a corp body to evade CS, SS, FP payments, Court can lift the corporate veil in a **preventative** manner.
  - Court says this is a "flagrant injustice" by avoiding payments notwithstanding having access to significant assets and choosing to exercise corp's finances to screw over OP.
- Conduct must be reason for loss:
  - "Mr. Petrone committed, attempted or threatened various wrongs against Ms. Aubin, using Quantiam as his weapon. He has consistently conveyed, through words and actions, that he will prevent Ms. Aubin from receiving additional payment in any form. He has created, and continues to present, a risk that a significant part of the family's wealth will be placed beyond Ms. Aubin's reach, frustrating her rights and flouting the authority of the court. The trial judge's assessment of the degree of that risk, and of the need for preventative action, attracts deference."
  - "The corporate veil can be lifted to correct or to prevent 'wrong[s] that would unjustly deprive a claimant of his or her rights'... 'Rights' connotes legal entitlements, including those arising under family law."

Rockwell Dev Ltd v Newtonbrook Plaza Ltd, 1972 ("improper conduct" ≠ setting litigation in motion as indiv running corp)

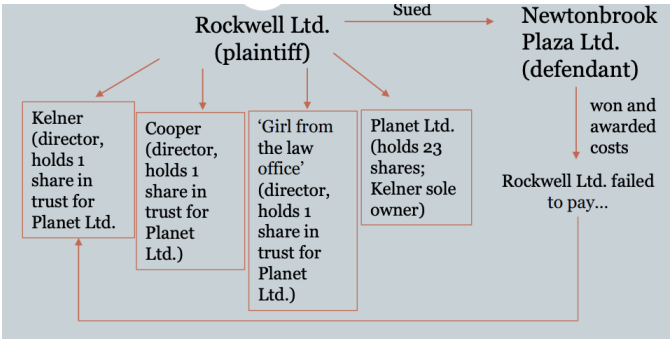
R: There must be improper conduct to lift the corporate veil, and having a single person run a company is not sufficient to constitute improper conduct.

R: Setting litigation in motion as the sole indiv running a corporation does not mean that the individual in question is the "actual litigant" and disrespect for corporate procedures alone is <u>not</u> sufficient to reach the level of fraud or "improper conduct" as outlined in *Transamerica*.

R: disrespect for corporate procedures alone ≠ sufficient to find fraud

F:

- Kelner held 1 share of Rockwell in trust for another company called Planet Ltd (Kelner is the sole owner of Planet Ltd). Other SHs held shares in trust for Planet Ltd too.
- Kelner made Rockwell litigate & bring suit against Newtonbrook for specific performance of a deal agreed to. Rockwell lost at trial & costs awarded against Rockwell.
- Rockwell failed to pay Newtonbrook plaza the costs.
- Piercing veil comes out b/c Newtonbrook tries to go after Kellner personally to pay the costs owed by Rockwell.



- No claim of fraud against Kelner BUT evidence that Kelner was behind the initial agreement + lawsuit before it fell through. Kelner did nothing by the book (board didn't pass resolutions re the deal nor litigation; failure to comply w/ corp procedures)

Proc Hist:

- Found Kelner liable = contracting party to deal AND party bringing litigation
  - Even though it was Rockwell v Newton, TJ said Kelner is the actual litigant b/c he is the cause for Rockwell bringing the action. Therefore, Kelner liable.

I/H: Should the corporate veil be lifted & Kelner be held personally liable? **NO** – doesn't meet the threshold in *TransAmerica* to pierce the corp veil.

A:

- The use of a 'one man company' for carrying on business transactions was authoritatively recognized in *Salomon*
- The property of a corporation is distinct from that of its members, and its transactions create legal rights and obligations vested in the company itself as opposed to its members
- **There must be improper misconduct to lift the corporate veil** – nothing improper about having a one-man show & there's still a corporate veil regardless if there's 1 SH or a million.
  - Recall: I spy requires complete control AND fraudulent purpose (control alone insufficient)

Rationale (Arnup JA)

- While Kelner was undoubtedly the individual who would ultimately benefit, in whole or in part, from the contract, the contract was made with the company alone
- Kelner could not have sued upon the contract, nor could he himself have been sued
- **While the handling of the corporate records was slipshod, no one was in a position to complain except Kelner himself**
- While Kelner set the process in motion by giving instructions to the company's solicitors, this does **not justify a finding that he was "the actual litigant"**
- While there was no respect for corp procedures, there was no allegation of fraud.
  - His **disrespect for corp procedures is NOT sufficient to reach the level of fraud or "improper conduct"** in TransAmerica → No lifting of corp veil.

Liability Based on Thin Capitalization → not a mechanism to disregard principle that corp is a separate legal personality

Walkoyszky v Carlton (thin capitalization ≠ lift corp veil)

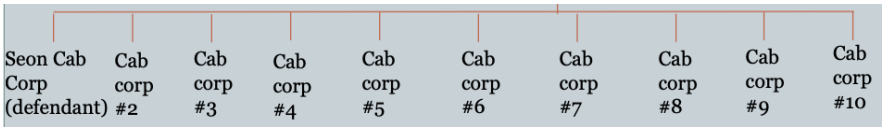
We can look at this case as a way of saying that if we aren't gonna lift the corp veil to protect someone in the personal injury context, we certainly aren't going to do this in the contractual context.

- The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability, but courts may disregard the corporate form to prevent fraud or to achieve equity
- Whenever anyone uses control of a corporation to further his own rather than the corporation's business, shuttling their personal funds in and out of the corporation to suit their immediate convenience, he will be liable for the corporation's acts

R: Thin capitalization is NOT, by itself, **a valid reason to lift the corporate veil** & hold the SH liable. Merely having limited money ≠ reason to lift veil.

F:

- P severely injured when hit by taxi owned by corp D (Seon Cab Corp) and negligently operated by indiv D.



- There were a bunch of corporate veils (one for each corp) ⇒ The D Carlton is a shareholder of 10 cab companies, including Seon, each of which has two cabs registered in its name. The companies were intentionally set up this way to shield each company for acts which were bound to arise from operating a large fleet of cars. The cab companies are alleged to be operating as a single entity with regard to financing, supplies, repairs, employees and garaging, and all are named as defendants.
- P claims he is entitled to hold the companies' SHs personally liable b/c the multiple corporate structure constitutes an unlawful attempt to defraud members of the general public who might be injured by the cabs

I/H: Does the indiv D have personal liability for the injuries suffered by the plaintiff? **NO**

A:

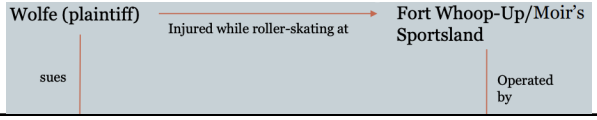
- Indiv D did **NOT** create the corp for the purposes of defrauding ppl (e.g., no purpose to evade liability)
- While the corps didn't have any $ to their names, this isn't a reason to lift the corp veil.
  - We don't punish poor corporations
- If you can prove that it was for a fraudulent or improper purpose, then you can lift the veil.

Liability Based on Total Disregard of Formality – valid way to hold indiv liable instead of corp

Wolfe v Moir (failure to meet corp name formalities = no corp liability protection)

R: "if a person chooses to advertise and to hold himself out to the public without identifying the name of a company with which he is associated, he runs the risk of being held personally liable."
SO we can hold the indiv liable notwithstanding lack of fraud (they didn't intentionally do it, they just named it wrong)

F:



- D was an officer of Chinook which carried on a roller skating business called Fort-Whoop Up/Moir's Sportsland.
- P got injured while roller skating & sued the D personally (INSTEAD of the business Fort Whoop-Up/Moir's b/c it didn't have a proper corporate name, i.e., no legal ending on the name like "ltd")
    - Sued: "Gordon L. Moir, carrying on business in the firm name and style of Fort Whoop-Up Playland and Fort Whoop-up Playland."
- Moir's solicitor took the position that the roller-skating rink was being operated by a company called Chinook Sport Shop Ltd (of which Moir was the president and secretary), and that the wrong party had been sued. However, the ticket that Wolfe received on entering the rink featured the name "Fort Whoop-Up," not Chinook Sport Shop Ltd. Plus, witnesses testified that the business was referred to as "Moir's Sport Land" in newspaper advertisements. Moir used to be a recreation director for the City of Lethbridge whose name was well-known and respected, and Moir wanted to capitalize on his name for that reason.

I/H: Can Moir be held personally liable to the plaintiff? **YES**

A:

- Under s 81(1)(c) of The Companies Act, every company shall have its name set forth in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company
- S 10(8) ABCA: A corporation shall set out its name in legible characters in or on all contracts, invoices, negotiable instruments, and orders for goods or services, issued or made by or on behalf of the corporation

Rationale (Sinclair J)

- In breach of s 81(1)(c), no mention was made of the company name either in the newspaper advertisements, or in the ticket (which could fairly be "official publications" of the company)
- The effect of s 82(1)(b) [s 10(8) ABCA] is that if a person chooses to advertise and to hold himself out to the public without identifying the name of a company with which he is associated, he runs the risk of being held personally liable
- While Moir relies on Salomon and the concept of separate corporate personality, Salomon proceeded on the basis that all of the requirements of the Companies Act,1862 had been complied with
    - However, in this case, **Moir has not established that he complied with all the formalities set out in the Act**

Vallis v Prairie Alternative Energy Solutions Ltd (disregarding separate legal personality)

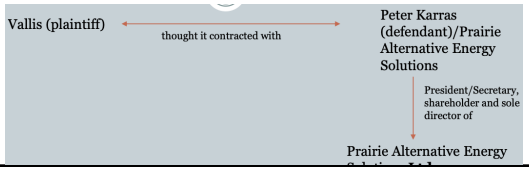
R: Restates Wolfe ⇒ hold yourself out to public w/o name of corp? Can be held personally liable. Defences based on claims of good faith or lack of dishonesty aren't available.

Factual indicia for if indiv D can be liable for contractual debt instead of the corp.

(a) The **naming of the parties** and any other indications of their contracting status **in relevant documentation, signage, or advertising** that might have come to the plaintiff's attention;
(b) **D's non-compliance with** applicable business corporations and/or trade **names registration statutes**;
(c) Any **oral exchanges** b/w the parties regarding the contracting party's identity or legal status;
(d) Whether P asked **indiv Ds** for a **guarantee**;
(e) Relative **degree of sophistication** between the parties; and
(f) **Nature of** the defendant's **business**.

F:

- D just didn't realize he needed to represent his business as incorporated.
- D entered into a contract with P for installation of a geothermal heating system, which was carried out between



November 2009 and January 2010. D was the only person with which Ps dealt.
- D failed to represent that his business was incorporated, including in emails and on invoices. There was no business name on the truck he drove and he did not have business cards. The cheque the Ps wrote out was to "Prairie Alternative Energy Solutions." As such, they believed that they were dealing with a sole proprietor with a business name. D testified that he did not use "Ltd," "Corp," or "Inc" in the name because he didn't think it was relevant.
- Judgment was entered against D corp in the sum of $4,176. The Ps maintain that indiv D should be held personally liable for it. They maintain that nothing in their dealings with indiv D alerted them to the possibility that he was acting on behalf of a corporation

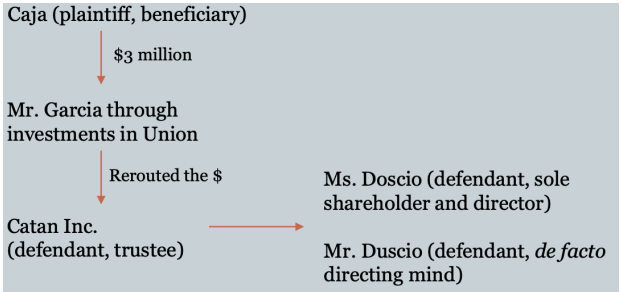
I/H: Can indiv D be held personally liable to the plaintiffs? **YES**

A:
- For a person to successfully rely on the limited liability granted by statute, they **must establish compliance with the formalities prescribed by statute**; if a person chooses to hold himself out to the public without identifying the name of his company, he runs the risk of being held personally liable (***Wolfe*** *v Moir*)
  - Under s 10(1) of SK's BCA, "Limited," "Incorporated," or "Corporation," or their abbreviations must be part of the name of every corporation
  - Under s 267(1) of the BCA, a corporation shall set out its name in all contracts, invoices, negotiable instruments, and orders for goods issued or made by or on behalf of the corporation
- There are a number of factual indicia to determine whether or not an individual defendant is liable for a contractual debt, rather than acting as agent for the corporation (Iqaluit Enterprises Ltd v Lem):
  - (a) The naming of the parties and any other indications of their contracting status in relevant documentation, signage, or advertising that might have come to the plaintiff's attention;
  - (b) The defendant's non-compliance with applicable business corporations and/or trade names registration statutes;
  - (c) Any oral exchanges between the parties regarding the contracting party's identity or legal status;
  - (d) Whether the plaintiff asked the individual defendant for a guarantee;
  - (e) The relative degree of sophistication between the parties; and
  - (f) The nature of the defendant's business.

Rationale (Whelan J)
- Karras failed to comply with the provisions of the BCA insofar as the proper identification of the business under which he was carrying on business
- **Although the failure was not dishonestly done, the law is very clear** in this regard and the facts having been clear that he failed to accurately represent the corporate status of the business, he is personally liable.
- The Individual Defendant did not hold himself out as acting on behalf of a corporation and the Defendant Corporation failed to comply with the statutory requirement around use of corporate name under the Act

Liability in the Area of Trust Law

Caja Paraguya v Garcia – knowing assistance vs knowing receipt



R: Knowing assistance: a mechanism for imposing liability on strangers to a fiduciary relationship who participate in a breach of trust by the fiduciary. **Elements of knowing assistance** (to impose liability)

(1) A **fiduciary duty**;
(2) **Fraudulent/dishonest breach** of the duty by the fiduciary;
(3) **Actual knowledge** by the stranger to the fiduciary relationship of OR wilfull blindness of the stranger to **both** the **fiduciary relationship** (i.e., #1) **AND** the **fiduciary's fraudulent/dishonest conduct** (i.e., #2); and
    (a) There must be more than just carelessness to establish actual knowledge or wilful blindness → look at the actual state of mind of the person in question and determine if that person "shut their eyes because they knew or strongly suspected that looking would mean that they would know of the fiduciary relationship and the fiduciary's fraudulent conduct"
(4) **Participation by/assistance of** the stranger in the fiduciary's conduct

Knowing receipt: liability arises from the fact that "the stranger has received trust property for its own benefit and in doing so, has been enriched at the beneficiary's expense." Elements include:

(1) A fiduciary duty (trust)
(2) The **stranger receives trust property**
(3) For **their own benefit** or in their personal capacity,
(4) with **actual *OR* constructive knowledge** that the trust property is being misapplied (can be met where the recipient, having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of the trust property)
    (a) Constructive knowledge can be satisfied if there's carelessness

Where the elements for knowing receipt are made out, the stranger is conscience-bound to restore the property received (i.e., the measure of the **restitutionary recovery** is the gain the D has made at the P's expense)

F:

- Caja, a Paraguayan pension fund, attempted to invest more than $34 million in CA investments proposed by Garcia. Bulk of the money was invested with three TP CA enterprises, one of which was Union Securities Limited.
- Ostensibly, Caja invested $14,099,000 through Union BUT in reality, just under $11,500,000 was placed with Union investments.
- With the help of his business associate Mr. Duscio, Garcia routed $3 million of Caja's funds through a bank account of Catan Canada Inc, of which Mrs. Duscio was the sole SH.

TJ: Mr D, as de facto operating mind, breached the trust relationship by pocketing some of the money (used his position as operating mind of Catan to frick Caja, the P). TJ held Mrs. D liable for 'knowing assistance.'

I/H: Did the trial judge err by applying a constructive knowledge standard in finding Ms. Duscio liable based on knowing assistance & holding her liable for knowing assistance? **YES**.

A:

Actual vs constructive knowledge

- **Actual knowledge**: not enough for stranger to trust relationship (i.e., person who's being accused of assisting) know or expect in some general way that the fiduciary is doing something fishy. They must **actually know**; HOWEVER, wilful blindness to fiduciary relationship & conduct will suffice (i.e., deliberate ignorance sufficient to constitute actual knowledge). Court will use a **subjective analysis** to determine if there's wilful blindness.
- **Constructive knowledge**: failure to inquire. Court uses **objective analysis** to determine constructive knowledge.

Knowing Assistance: higher level of knowledge required.

- Constructive knowledge b/c of Mrs. D's carelessness isn't sufficient to satisfy the requirements for knowing assistance

- "You ought to have inquired" is NOT the standard, we look at whether she **subjectively** knew of the facts & wilfully (deliberately) remained blind to them)
- TJ made no finding as to whether Mrs. D knew or suspected that the money transiting through her company was trust money that was being employed in a dishonest or fraudulent breach of trust. Instead, he described how Mrs. D "ought to have been on inquiry," BUT this is the language of objective fault or constructive knowledge, not subjective wilful blindness

- Mrs. D's mere position in the company (sole SH + director) wasn't enough to rise to the level of actual knowledge or wilful blindness for the purpose of holding her liable for the breach of trust **b/c Mr. D was the directing mind**.
  - While she agreed that "I'll sign whatever [my husband] puts in front of me," she gave no specific evidence relating to signing any cheques that could be linked to Cajubi fund
  - No cheques or authorizations executed after the Cajubi deposit were put to Ms. Duscio, and no other evidence was called to prove her signature on any relevant cheques or authorizations

Knowing Receipt: lower level of knowledge required.
- Knowing receipt uses an objective standard, not a subjective standard like with knowing assistance.
- With knowing receipt, it's sufficient to ask "would a reasonable person in her shoes had enough facts to inquire into what was going on with the trust?" If she fails to inquire AND received the trust prop for her benefit, she is liable.
  - Here, she doesn't need to have actual knowledge because we only need **constructive knowledge**, not actual knowledge.

COA ordered new trial on the knowing receipt question.

Knowing Assistance	Knowing Receipt
Liability is fault-based (lack of honesty)	Liability is receipt/restitution-based
Higher threshold of knowledge required (actual knowledge or reckless/wilful blindness)	Lower threshold of knowledge required (actual or constructive knowledge)
Subjective standard (actual state of mind)	Objective standard (reasonable person would inquire)

Review Qs: Chapter 4

QUESTION 1:

Ross is a manufacturer of an automatic steering device for yachts. He sold one such devise to Joey. The order was placed in the name of Ocean Charters Ltd., and Ross knew this at the time he accepted the order since it was clearly stated in the paperwork. After delivery of the device Ross discovered that Joey and his wife Rachel were the only shareholders of Ocean Charters Ltd., that the corporation had issued only two shares, and that its entire wealth consisted of two dollars - the cash contributed for the two shares. The money owed to Ross was never paid and he sued Joey.

QA: Advise Ross on the possible ways, if any, in which he may be able to successfully sue Joey

Answer: Q tries to get you to make a mistake re thin capitalization, but just explain that it's not applicable.

QB: Do you agree w/ corp law's rejection of thin capitalization as a basis for SH liability? Why or not?

Answer: Prof occasionally asks for them

QUESTION 2:
Ms. Marge Simpson owns 100% of the shares in Surf and Turf Industries Ltd. She recently signed a contract with a service provider as follows:

Surf and Turf Industries
Marge Simpson

The service provider is now taking the position that Ms. Simpson is personally liable on the contract. Ms. Simpson is appalled and has come to you for legal advice. "No way I'm supposed to have personal liability – that was the whole point of incorporating. I'm not a party to this contract. My corporation is!!" she tells you.

Is Ms. Simpson personally liable? Discuss.

A: Yes, she probably is b/c she didn't follow formalities (no indication that it's a body corporate).

5. Tortious, Criminal Liability, Regulatory, & Contractual Corporate Liability

RULE: Corp held liable for wrongful actions (as done by an indiv notwithstanding separate legal entity b/c, at the end of the day, corps are legal fictions). 4 types: (1) primary tortious liability; (2) criminal liability; (3) statutory/regulatory liability; (4) contractual liability

RULE 1: Primary tortious liability ⇒ attribution of tortious conduct of a director established through **corporate identification doctrine**.

1. ***Deloitte*:** To attribute the fraudulent acts of an EE to its corporate ER, two conditions must be met:
    1. **Indiv wrongdoer must be the directing mind of the corp ⇒ test in *Rhone***: tortious corporate liability & is found where the indiv who committed the tort is the **directing mind** or **centre of the corporate personality**. Ask: **has the indiv been delegated the "governing executive authority" or the company within the scope of their authority?**
        i. Indiv makes policy for the corp = likely a directing mind. Factors:
            a. High up in a corp's hierarchy,
            b. Governs executive authority over the corp,
            c. Makes policy decisions
        ii. Indiv merely implements corp policy = unlikely a directing mind. Factors:
            a. Low in corp hierarchy
            b. No executive authority over the corp
            c. Makes operational decisions
            d. Decisions the indiv makes are incidental to their role (even if they're important) & are not governing authority
        iii. In Rhone, the Captain gave instructions to other vessels, could order additional tugs, was described as part of management, "fleet captain", "trouble shooter", had training responsibilities, BUT was not salaried (but paid hourly like an EE), had his own supervisor(s), & did not govern exec authority.
    2. **Wrongful actions of the directing mind were within the scope of their authority**.

i. Test in ***Deloitte***: Was the thing they did within the scope of their authority? I.e., was the thing they did *qua* their position? (In Deloitte, the directors were directing minds *and* did the action within the scope of their authority → they were acting in the corp's best interest which is within their scope of authority as directors.

ii. **EXCEPTION** in Deloitte: wrongful action will not be within the scope of authority if the indiv **ceases to be a directing mind** (occurs when the person is intentionally screwing the corporation). Someone ceases to be a directing mind IF:

a. Action they committed was **totally in fraud of** the corporation.

b. **Action** they committed was **not, at least partly, for the benefit of the corp** (either its intended result or actual result must not be partly for the benefit of the corp – i.e., it must be intended to or actually result in benefit solely to the indiv, none to the corp)

2. ***Deloitte***: court retains **discretion** & may choose **not to apply corp ID doctrine in circumstances where it is not in the public interest** to apply it.

1. **TEST**: Where the application of the corporate identification doctrine would render meaningless the very purpose for which a duty of care was recognized, Court likely won't apply corp ID doctrine.

i. In Deloitte, denying corp liability on the basis that the indiv within the corporation has engaged in the very action that the auditor was hired to protect against would make the statutory audit meaningless.

ii. **If a professional undertakes to provide a service to detect wrongdoing, the existence of that wrongdoing will not normally weigh in favour of barring civil liability for negligence through the corporate identification doctrine**

RULE 2: Criminal Liability ⇒ established through **statute** (i.e., the CC)

1. Criminal Corporate Negligence (**CC, s 22.1**). Corp is party to offence of negligence IF…

i. **1+ representatives** acting **within** the **scope of their authority** are party to the offence; AND

ii. The **senior officer responsible** for that part of the corp's activities **departs/markedly departs from the SOC** reasonably expected to **prevent** a corp representative from being a party to the offence

➢ Rep & Sr Officer can be the same person (***Metron***)

- Even independent contractors can = reps or sr officers (in ***Metron***, indep contractor was a supervisor who didn't make sure EEs were wearing safety gear. 4 ppl were killed).
- Even reps or sr officers who die in commission of/due to commission of the offence can still attract liability to the corp (in ***Metron***, indep contractor died as a result of falling down the building w/o safety equipment & the corp was still liable even though supervisor died)

➢ Rep who is party to the offence does **not** have to be a controlling mind (***Metron***)

2. Other Criminal Corporate Offences (**CC, s 22.2**). Corp party to the offence in Q if one of its Sr Officers…

i. Had, at least, a **partial intention to benefit the corp**; **AND**

ii. The Sr Officer…

a. Is a **party** to the offence acting **within** the **scope of** their **authority**; ***OR***

b. Has the **mental state**/MR req'd to be a party to the offence **AND directs** other corp reps to do an **act/omission specified** in the offence; ***OR***

c. Knows a corp rep is/is about to be a party to the offence & **doesn't take all reasonable measures to stop** them from being **a party**.

3. Deferred Prosecution Agreements (**CC s 715.3**). Deal exchanging admission of corporate liability + a corp undertaking ← in exchange for → dropping of charges.

RULE 3: Statutory/Regulatory Liability ⇒ strict liability standard applies to establish liability *but* corp can use due diligence defence

1. **Crown** only needs to **show AR** BARD (no MR).
    a. In ***Bata***, fault was presumed BARD b/c chemicals were in the water.
2. **Burden shifts** to corp D to demonstrate **due diligence defence** (which can arise in statute *OR* CL). Due diligence defence **established if** the accused (i.e., orp's directing mind)…
    a. Relied on an **honestly mistaken set of facts** that, if they were actually true, would mean that the act or omission was innocent [i.e., subjective Q of due diligence] (***Syncrude***); ***OR***
        i. Applies if corp establishes (on a BOP) that it **could not have reasonably foreseen contravention of the statute.** Corp's actions are judged on the basis of info available at the time of the offence. (Would a reasonable person in the corp's shoes have reasonably foreseen the offence occurring in light of all the info available to them when the offence happened?)
        ii. e.g., ***Syncrude***: "There is no evidence of any mistake of fact here. Syncrude *should* have known that the proscribed conduct would occur. Bitumen would be deposited into the Aurora Settling Basin and Syncrude would not be able to ensure, i.e., make certain, that birds would not be contaminated by the bitumen in the Basin. It was reasonably foreseeable that those events could occur."
    b. Took **all reasonable steps** to avoid the particular event [i.e., objective Q of due diligence defence] (***Syncrude; Bata***). Reasonable steps include: (1) supervision or inspection; AND (2) compliance system. See **nuances** (environmental delegation & factors) below.
        i. **Supervision or inspection** (***Bata***) which doesn't have to be perfect, but just a "proper system" (***Syncrude***); **AND**
            1. E.g., In ***Bata***, the issue was brought to Marchand's attention, he knew about it for 6 months, & he did not do anything to address it
            2. E.g., In ***Bata***, CEO Bata only visited twice a year, so wasn't wilfully blind to the issue, he never even knew about the issue.
        ii. **Compliance system** (***Bata***) which doesn't have to be perfect, but just includes "reasonable steps to ensure the effective operation of the system (***Syncrude***)
            1. E.g., In ***Bata***, Marchand did not give instructions and did not make sure the instructions for clean up were followed.
            2. E.g., In ***Bata***, CEO Bata hd an experienced director on site who was reasonably expected to do compliance properly.
        iii. **NUANCE**: **Principle for environmental delegation**
            1. Legislator doesn't expect Corp Board to make decisions re every issue BUT, in the context of **environmental delegation**, the delegation must be done with a high level of care. Simply delegating tasks won't insulate a Board from liability by delegating all aspects of compliance to subordinates.
            2. In ***Bata***, this meant CEO needed **qualified experts** and **oversight/detailed reporting** to ensure due diligence.
        iv. **NUANCE**: Factors relevant to determining whether due diligence defence establishes reasonable care was taken (***Syncrude***):
            1. Nature & gravity of potential harm
            2. Foreseeability of the harm
            3. Complexity

4. Reasonable alternative sol'ns
5. Industry standards
6. Character of the neighbourhood
7. Efforts to address the problem
8. *De minimis non curat lex* = 'the law does not concern itself with trifles'
9. Over what period of time, and promptness of response;
10. Matters beyond the control of the accused, including technological limitations;
11. Skill levels expected of the accused;
12. Complexities involved;
13. Preventative systems;
14. Economic considerations;
15. Actions of officials.

RULE 4: Contractual liability ⇒ doctrine of ultra vires only available for statutory corps with public purposes (when consistent with statutory objectives), but indoor mgmt rule & tests for agency can apply to hold corp liable for breach of contract.

1. **Ultra vires** (**UV**): actions UV of corp bylaws are **NOT invalidated UNLESS** the corp = **statutory corp for special purpose** that performs UV act.
   a. **UV**: Corp does something contrary/beyond its articles ⇒ TODAY:does NOT invalidate corp action
      i. Historical CL: UV actions were grounds to **invalidate** that UV act by the corp (***Beauforte***).
      ii. Legislative reform, **ABCA s 17.3:** "**No act of a corp… is invalid** by reason only that the act is **contrary to [that corp's] articles**."
   b. **Constructive Notice**: Everyone dealing with a corp was **deemed to have notice** of the contents of all corp documentation that's public ⇒ TODAY: does not invalidate corp action
      i. Historical CL: used as a way to get around UV by claiming that OP should've known that X act was outside of a corp's powers (***Beauforte***).
      ii. Legislative reform, **ABCA s 18**: "**No person**… **is deemed to have notice**… of a document… only [because that] document has been filed."
   c. **EXCEPTION**: a statutory corp, created for a public purpose, that performs a UV act can have that act invalidated so long as invalidation is **in the public interest** (***Pickles***).
      i. In ***Pickles***, even though P's loan to Corp D was *ultra vires* (which would mean that the loan is null & void), the Court did not hold the Indiv Ds liable to pay the loan back for **public policy reasons** (i.e,. They wanted to prevent corp from acting UV b/c UV acts are contrary to the statute & its underlying purpose).
2. **Contracting with agents of the corp**: corps held liable for contracts entered into by agents so long as there is sufficient authority possessed by the agent to ground that contract. **Rule:** agency can **apply to EEs *and* independent contractors**.
   a. **Actual authority**
      i. **Actual express**: authority given orally or in writing
      ii. **Actual implied**: what is necessarily or normally incidental to the activity expressly authorized
         ➢ **RULE**: mere silent acquiescence is not enough to confer actual authority
            ○ In ***Freeman***, Kapoor had never been appointed as managing director although he acted as if he were.
         ➢ In ***Panorama***, Court does not make any definitive conclusions but says that EE likely also has actual implied authority b/c it's not unusual for him to enter into contracts.
   b. **Apparent/ostensible authority**: rep made by the Principal to the TP about the agent's authority. **TEST**: 3 conditions to find an agent has ostensible agency such that a TP can enforce, against a corp, a contract entered into on its behalf by an agent who had no *actual* authority

i. **Principal makes a rep** (express or by conduct) that someone is an agent
   - ➢ **Exception**: **mere silence**, without anything else, does NOT establish any kind of authority (***Freeman***)
     - But, in ***Freeman***, Board of Directors knew Kapoor was acting like management & permitted him to do so by not intervening as Kappor employed agents & took steps to find a purchaser.
   - ➢ **Rule**: Explicit representation not necessary; where the principal creates a situation where it's **reasonable to infer and rely** upon apparent authority, this form of representation is sufficient (***Manulife***)
     - **BUT some type of representation is necessary**: "a mere belief on the part of a third party that he or she is contracting with the principal, absent some representation to that effect, express or implied, cannot support a claim of ostensible authority so as to bind a principal."
     - **Conduct factors to demonstrate representation** (***Manulife***): ostensible agent had business card with "Manulife" on it, had to call Manulife to talk to ostensible agent, ostensible agent's office was on the same floor as Manulife, his door had Manulife logo on it, his correspondence was on Manulife letterhead
   - ➢ E.g., In ***Panorama***, EE regularly made representations on behalf of the corp & entered into contracts that come within day-to-day running of the business, the Corp represented to the P that EE had authority to bind the Corp (i.e., by giving EE his high position & title → indicated he was an agent).

ii. **Person making that rep** to TP has **actual authority** to make that rep
   - ➢ E.g., In ***Freeman***, the board had actual authority to make that rep(Articles of Association conferred full powers on mgmt on the Board)
   - ➢ E.g., In ***Manulife***, interactions that created ostensible authority were between Doirons and Demmers, but Manulife was aware of the conduct and "stood idly by and permitted Demmers, and other producers, to create this impression."

iii. **TP relies** on that rep to enter into the contract/induced by rep to enter into contract
   - ➢ E.g., in ***Freeman***, Ps were induced to believe Kappor was authorized to enter into contracts by the fact that the Board permitted him to act like a managing director.

c. **Indoor Management Rule**: Persons dealing w/ a corp are not required to inquire into the irregularity of internal proceedings. They can **assume what was presented to them was done legitimately as an internal practice in the corp** (as long as assumption is ***reasonable***) (***Canlab***)
   i. In ***Canlab***, Cook (EE in Canlab), faked procurements orders to P from D. In 1966, D calls P to ask about their account & P's purchasing agent says "oh, Cook does that, talk to him" ⇒ by talking to the purchasing agent, this was enough to put P on notice of the issue & demonstrated the purchasing agent had authority to hold out Cook as having the authority to deal with the issue.

This chapter focuses on corporate liability
Corp as a separate legal entity is a legal fiction insofar as a corporation is not an actual person that makes its own decisions and drinks coffee. Here, we aren't concerned about holding the corp liable for wrongs of indivs BUT for holding corp liable for committing a wrongful act. We treat it as if the corp committed a wrongful act. For this reason, we will have different elements for corporate liability than we would for an

individual. While we know that a corporation can't, itself, do something wrong (it doesn't make decisions), we act as if it did for liability purposes.

Corporate Liability			
Primary tortious liability	Criminal liability	Statutory/Regulatory liability	Contractual liability
Corporate ID (directing mind) Theory (Rhone, Deloitte) → you can identify the corporation for the tortfeasor & so the corporation can be held liable for the tortfeasor's action Exception (Deloitte): where the act is "totally in fraud of the corp & where the act is intended to and does result in benefit exclusively to the directing mind" Note: where "use of the corporate identification doctrine would undermine the very purpose of establishing a DOC, it will rarely be in the public interest to apply it"	No longer the "directing mind" test; see Criminal Code amendments (ss 22.1–22.2: representative & senior officer) "Representative" + "senior officer" (*Metron*)	Strict liability offences and the defence of due diligence; creating systems of compliance and policies/procedures to ensure efficacy of the system (see Bata, Syncrude)	Ultra vires & Doctrine of Constructive Notice (Beauforte; Pickles) Indoor Management Rule See ABCA ss.16,17(3), 18 & 19 Agency: Actual & Ostensible/Apparent (see Panorama, Freeman, Doiron, Canlab) Freeman's requirements for ostensible/apparent authority

Primary Tortious Liability

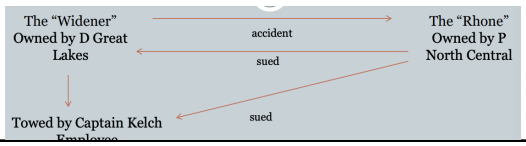
What does it take to attribute tortious conduct of a director to the corporation? (NOTE – this is NOT an extension of liability like in vicarious liability where the ER didn't do anything wrong. Instead, this is a situation in which the corporation is held liable for its wrongdoing/pretending the corporation is the wrongdoer)

The *Rhone* (attribution of liability in tort context + CID trigger)

R: Use of the corporate ID doctrine occurs if the indiv who committed the tort was the corporation's **directing mind** which hinges on whether the indiv who committed the tort had "governing executive authority"

F:

- November 1980: a moored ship, Rhône, was struck by a barge, Peter AB Widener, in the Port of Montréal.



- Widener = owned by North Central Maritime Corporation was being towed by four tugs and hit the Rhone.
- Rhone sued:
  - Great Lakes for the tort of Captain Kelch

Unless owner of a ship has actual knowledge, you can't hold them liable for acts/omissions in the navigation context:

- Ignore the words of the Canada Shipping Act, s 647(2) b/c it won't apply anywhere else: owner of a ship has the benefit of **limited liability in respect of acts or omissions in the navigation** of the ship **where** the acts or omissions occur **without** the **owner's actual fault or privity**

TJ: Acts of Cpt Kelch were to be treated as acts of Great Lakes (the company). SO, Great Lakes was not w/o actual fault or privity

I/H: Is Captain Kelch a directing mind of Great Lakes? **NO**

A:

Corporate identification theory: a way to establish tortious corporate liability.

- For a corp to be liable under CIT, EE/indiv who did the tort must be the **directing mind**/centre of the corporate personality.
- Directing mind can include any number of directors and/or officers.
- Delegation or sub-delegation of authority from the corporate centre can make an indiv a directing mind.
- Focus of inquiry must be **whether the indiv has been delegated the "governing executive authority" of the company within the scope of their authority**
  - Do they make the policy for the corp or do they just implement it? Policy = likely directing mind; merely implement = unlikely to be directing mind

Rationale (Iacobucci J):

- Cpt Kelch: gave instructions to other vessels, could order additional tugs, was described as part of management, "fleet captain", "trouble shooter", had training responsibilities, was not salaried (but paid hourly like an EE), had his own supervisor(s), did not govern exec authority.
- Court concluded, based on the facts above, that Cpt wasn't an operating mind.
  - Must look at responsibilities performed by him within the company's hierarchy. He did not govern any executive authority over the corporation.
  - Exercise decision making authority on corporate **policy.**
  - Cpt only made **operational decisions**, not policy decisions.
- While Captain Kelch no doubt had certain decision-making authority on navigational matters as an incident of his role as master of the tug and was given important operational duties, governing authority over the management and operation of Great Lakes' tugs lay elsewhere.
  - As a result, the wrongful cause of the act was not committed by a directing mind of the company. SO we can't hold Cpt Kelch liable for it.

Deloitte & Touche v Livent (CID = discretionary; ceasing to be a directing mind)

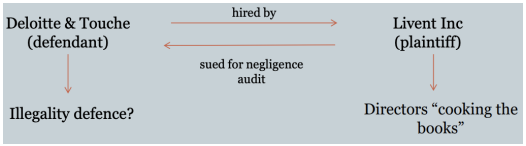
Deloitte doesn't undermine corporate attribution, it just demonstrates that attribution isn't an air-tight doctrine; courts retain discretion to refuse to apply the doctrine IF so doing is not in the public interest.

Test for corporate ID doctrine: To attribute the fraudulent acts of an employee to its corporate employer, two conditions must be met:

- (1) the wrongdoer must be the directing mind of the corporation; and
- (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority
  - **BUT** An individual **ceases to be a "directing mind" if** the action
    (1) was **totally in fraud of the corporation**; and
    (2) was **not by design**/did not result at least partially for the benefit of the corporation

- (3) **Court retains discretion** to choose not to applying corp attribution in circs where it is not in the **public interest** to apply it.
  - Corp ID theory is a sufficient basis to attribute liability, but NOT necessary.
  - If application of the corporate identification doctrine would render the purpose for which a duty of care was recognized meaningless, application of CIT "will rarely be in the public interest."

F:



- Deloitte (D) retained by Livent (P) to conduct statutory audits (statutorily required for a public company b/c this is the primary way for SHs to supervise management).
- Deloitte performed the audits negligently, failing to detect that 2 directors of Livent fraudulently manipulated Livent's financial records to make it look like it was doing much better than it was actually doing.
  - Entire point of the statutory audit is to catch someone cooking the books & Deloitte completely failed to do it.
- Livent became insolvent and, through its receiver, sued Deloitte. Livent claimed, inter alia, that Deloitte performed a negligent audit and, as a result, Livent's SHs were unaware of the company's true financial state & couldn't save the company in time.
- Court found Deloitte negligent. BUT Deloitte claimed 2 defences:
  - (1) illegality ⇒ Deloitte claims they sholud be absolved of liability since the corp did illegal conduct (i.e., cooked the books)
  - (2) liability limited w/ contributory negligence ⇒ even if not barred for illegality, Ds should only be liable for a portion of the liability, excl contributory negligence of the company

I/H: Can the cooking of the books be attributed to Livent such that it can be said Livent cooked the books and therefore committed the illegal act? **YES but NO** – The 2 directors were directing minds & did do the act within the scope of their authority, BUT application of the doctrine of judicial necessity b/c the attribution doctrine undermines the purposes of a statutory audit (failed at COA & SCC).

A: Court found that the directors were directing minds & did the action within the scope of their authority, but didn't allow the illegality defence for policy reasons.

Did the corporation cook the books? Test:

1. Directing mind of corp (Rhone)?
2. Wrongful actions of the directing mind must have been done within the scope of their authority (added by Deloitte → This addition means **it is possible for a directing mind to cease being a directing mind**).
   a. One will cease being a directing mind IF:
      i. The action was **totally in fraud of the corp**.
      ii. The action was **not by design**/iresult at least partially for the benefit of the corp.
   b. The idea here is that you can't be a directing mind of the corp if you are intentionally screwing the corporation.

Once someone ceases being a directing mind, their activity cannot be attributed to the corporation/seen as an action of the corporation.

Step 1: Directing mind? 2 directors were directing minds, acting within the sector of corporate operations assigned to them
Step 2: Their fraud was genuinely designed and executed in an attempt to assist Livent through the artificial extension of its life
Applied strictly, Deloitte would be let off the hook b/c the cooking of the books is attributed to Livent, they've done an illegal act, and either the illegality defence or contributory negligence defence would work.

Public policy:

- However, public policy weighs against imputing Livent with the wrongdoing of Drabinsky and Gottlieb

- Denying liability on the basis that an individual within the corporation has engaged in the very action that the auditor was enlisted to protect against would render the statutory audit meaningless
- **Where the application of the corporate identification doctrine would render meaningless the very purpose for which a duty of care was recognized, such application will rarely be in the public interest**
- If a professional undertakes to provide a service to detect wrongdoing, the existence of that wrongdoing will not normally weigh in favour of barring civil liability for negligence through the corporate identification doctrine

Statutory Crim Liability

Criticism: little room for the corporation to avoid statutory criminal liability (you can put enforcement mechanisms in, but it's hard to overcome)

Crim Corp Negligence, CC s 22.1

CORPS CRIMINALLY LIABLE FOR NEGLIGENCE IF:		
1+ representative(s) are **party to a crim offence**	**AND**	A senior officer **departed markedly** from the **SOC**

Corp is party to offence of negligence IF two conditions are satisfied:	22.1 In respect of an offence that requires the prosecution to prove **negligence**, an organization is a **party to the offence if**
1 corp representative acting within the scope of their authority is party to the offence *OR* 2+ corp representatives acting within the scope of their authority engage in act or omission that would make a single person party to the offence	(a) acting **within** the **scope of** their **authority** (i) **one** of its representatives is a **party to the offence**, or (ii) **two or more** of its representatives engage in conduct, whether by **act or omission**, such that, **if it had been the conduct of only one representative**, that representative **would have been a party to the offence**; **AND**
AND The responsible senior officer (for that part of the org's activities) departs or markedly departs from the SOC that would reasonably be expected to prevent a corp rep from being a party to the offence	(b) the **senior officer** who is responsible for the aspect of the organization's activities that is relevant to the offence **departs** — or the senior officers, collectively, depart — **markedly from the standard of care** that, in the circumstances, could **reasonably** be **expected to prevent a representative of the organization from being a party to the offence**.

Other Crim Corp Offences (i.e., not negligence) CC s 22.2

Corp is party to the offence if one of its senior officers… 1. Has at least a **partial intention to benefit**	22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to

the corp **AND**	benefit the organization, one of its senior officers
2a. Is a party to the offence acting in scope of their authority ***OR***	(a) acting within the scope of their authority, is a party to the offence;
2b. has the mental state req'd to be a party to the offence & directs other corp reps to do an act or omission specified in the offence ***OR***	(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; ***OR***
2c. knows a corp rep is or is about to be a party to the offence & doesn't take all reasonable measures to stop them from being a party	(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

Metron (corp rep doesn't have to be a controlling mind)

R: Crown's burden of proof jettisoned into one person who was both a representative AND a senior officer ⇒ don't need to be a controlling mind
- Note: unlikely that, before the amendment to the CC, staff supervisor would have been considered to have been a controlling mind.

F:
- Charged $90,000
- Corporation charged $200,000
- Use of motorized device called a "swing set" alongside a building. Parties weren't wearing their safety equipment. 4 people, incl the supervisor, fell 14 floors and were killed.

I/H: Can Metron, the corporation, be held criminally negligent notwithstanding the fact that the staff supervisor wasn't a controlling mind? **YES**. criminal liability of a corporation has changed under the CC. Don't need to be a controlling mind, just need a corp rep.

A:
Criminal liability of supervisor's act:
- Criminal liability established based on def'n in 22.1
- Conduct that attracted liability to Metron = staff supervisor (i.e., staff supervisor was the representative).
  - Even though he was killed, he met the def'n.
  - He was an independent contractor, but still met the def'n.
- Change to CC means that criminal liability is much easier to attract as soon as someone does a criminal act and a senior officer doesn't do anything to stop that act.

Sentencing Principles under CC for corporations who are Ds:
- Any advantage realized by the organization as a result of the offence;
- The degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- Whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- The impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- The cost to public authorities of the investigation and prosecution of the offence;

- Any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence
- Whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct; and
- Any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Deferred Prosecution Agreements (AKA Remediation Agreements), CC s 715.3

- **DPA**: deal exchanging admission of corp liability + corp undertaking ←→ the dropping of charges.
- Have not seen this yet in CA.
- Corporate compliance tool **only** available in **econ offences** (i.e., does not apply to situations of bodily harm or death)
- Crown can enter into a deferred prosecution agreement w/ a corp → idea is striking a deal exchanging an undertaking (on the corporation's part) and the dropping of charges (so that the corporation isn't charged)
    - Establishes undertaking on the part of the corporation wherein they **admit liability** & right what they've done
    - If undertakings are fulfilled, then the charges are dropped & no criminal prosecution will proceed.. If undertakings aren't fulfilled, then the charges will continue to be laid.
- **Purpose**: encourage voluntary compliance & disclosure
- **Crown considers**: evidence, public interest, & prospect of conviction. to determine whether to do a DPA.

Regulatory Offences

Context: We look at strict liability in regulatory statutes
Crown only needs to show actus reus (no MR)
Burden shifts to D to demonstrate due diligence defence (i.e., to the corporation).

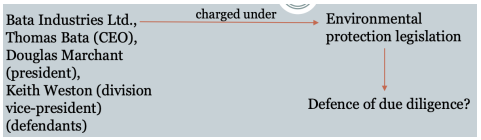
R v Bata Industries Ltd (objective elements of due diligence defence + principle for enviro delegation)

Note: due diligence can arise either from (a) the statute *OR* (b) the CL

Standard for defence of due diligence (i.e., the reasonable steps):
(1) Was there **supervision** or **inspection**?
(2) Was there a **compliance system**?

Principle for environmental delegation: Legislator doesn't expect Board to make decisions re every issue, but in context of environmental delegation, there needs to be very careful delegation (here, CEO had need qualified experts and made sure that there is oversight/detailed reporting). Board can't insulate themselves from liability by delegating all aspects of compliance to subordinates.

F:
- Two officers of the ON Ministry of the Environment visited a Bata Industries Limited shoe manufacturing facility located in Batawa, ON and noticed a large barrel storage site containing toxic chemical waste. They observed that many of the barrels were rusting and, in some cases, were leaking toxic chemicals



onto the ground. Chemical waste was not stored in accordance with requirements of the environmental regulation
- Bata Ltd, as well as its directors (Thomas Bata, Douglas Marchant, and Keith Weston) were charged with six offences, four under the Environmental Protection Act and two under the Ontario Water Resources Act

I/H: Can the Defendants successfully raise the defence of due diligence? → **NO** for Bata, Marchand, & Weston; **YES** for Thomas Bata

A:
AR: engaging in activity that releases materials that get in the water
- AR proven BARD ⇒ Fault presumed from result that toxic chemicals were in the water

What standard applies to successful defence of due diligence?
- (1) Was there supervision or inspection?
  - Here, was there a pollution prevention system?
- (2) Was there a compliance system?
  - Here, was there a way to make sure that directors and supervisors could make sure there was compliance, see how the system was working, & see if the system can be improved

Principle of environmental delegation
- Don't expect board to make <u>all</u> decisions, but they can't insulate themselves from liability by delegating all aspects of compliance to subordinates
- Can't exclusively delegate when it comes to environmental regulation.

Thomas Bata (CEO) → established due diligence → in the circs, he was entitled to the assumption he was addressing enviro concerns & was entitled to rely on that assumption until he became aware of an enviro issue
- Only visited 2x per year
- Not wilfully blind
- Responded to matters brought to his attention promptly & appropriately
- Placed experienced director on site
- Never became aware of an enviro issue

Marchand → did <u>not</u> establish due diligence
- Greater responsibility than Mr. Bata; the problem was brought to his **personal attention** and was **aware of it for at least six months** of the period alleged in the charges
  - Although he was aware of it, he didn't do anything to address it.
- "... due diligence requires him to exercise a degree of supervision and control that 'demonstrated that he was exhorting those whom he may be normally expected to influence or control to an accepted standard of behavior'"
- "He had a **responsibility** not only **to give instructions** but also to **see to it that those instructions were carried out** in order to minimize the damage. The **delay in clean-up showed a lack of due diligence**..."

Weston (on site manager) → did <u>not</u> establish due diligence.
- Aware chemicals were being used
- Couldn't rely on business judgment rule (will discuss later in course → essentially, if judgment as director was reasonable, the courts won't second guess the judgment). This was <u>not</u> honest error of judgment, but one that attracts liability b/c he failed to meet SOC
- Was responsible as "on-site" director; simply dismissed first quote relating to remediation of the problem; cannot stand behind the advice he received from Mr. De Bruyn because the latter was "grossly overloaded" with responsibilities
- To establish the defence of due diligence, he'd have to personally inspect on a regular basis, i.e., 'walk-about' & **if delegating, he would've had to give the delegate training necessary for the job and he'd have to receive detailed reports** from that delegate

Corporation liable
- Corporation fined $120,000
- Court said corporation could not indemnify the individual Ds (but this portion was appealed, corp was able to indemnify the indiv Ds)

R v Syncrude Canada Ltd (subjective element of due diligence defence)

Due diligence defence met if the accused…

1. Relied on an **honestly mistaken set of facts** that, if they were actually true, would mean that the act or omission was innocent [i.e., subjective Q of due diligence] (***Syncrude***); ***OR***
   a. Applies if corp establishes (on a BOP) that it **could not have reasonably foreseen contravention of the statute.** Corp's actions are judged on the basis of info available at the time of the offence. (Would a reasonable person in the corp's shoes have reasonably foreseen the offence occurring in light of all the info available to them when the offence happened?)
2. Took all reasonable steps to avoid the particular event [i.e., objective portion of due diligence defence]: when it comes to an "act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system."
   a. Supervision or inspection (***Bata***)
   b. Compliance system (***Bata***)

Relevant Factors to determine whether due diligence defence establishes reasonable care was taken (i.e., to determine whether objective Q was satisfied)

1. Nature & gravity of potential harm
2. Foreseeability of the harm
3. Complexity
4. Reasonable alternative sol'ns
5. Industry standards
6. Character of the neighbourhood
7. Efforts to address the problem
8. *De minimis non curat lex* = 'the law does not concern itself with trifles'
9. Over what period of time, and promptness of response;
10. Matters beyond the control of the accused, including technological limitations;
11. Skill levels expected of the accused;
12. Complexities involved;
13. Preventative systems;
14. Economic considerations;
15. Actions of officials.

F:

- Related to Syncrude's oil sands bitumen tailings ponds
- An investigation revealed that several hundred waterfowl were trapped in bitumen on the surface of the Basin; all but a few of those birds died
- Syncrude was subsequently charged with **failing to store a hazardous substance in a manner that ensured that it did not come into contact with any animals**, contrary to s 155 of *Alberta's Environmental Protection* and Enhancement Act, AND **charged with depositing a substance harmful to migratory birds in an area frequented by migratory birds**, contrary to s 5.1(1) of *Canada's Migratory Birds Convention Act*.

I/H: Is Syncrude liable? → **YES**. I.e., was there (a) AR and (b) a due diligence defence available? → **NO.** Syncrude is liable for the statutory offences as charged and has not established the defence of due diligence.

A:

- Depends whether due diligence is taken by the directing minds ⇒ Acts of directing minds = acts of the corporation.

- "The defence of due diligence will be available in a prosecution for a strict liability offence 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. R. v. Sault Ste. Marie (City) at p. 1326.
- The defence would apply if Syncrude established on a balance of probabilities that it could not have reasonably foreseen the contravention of the statutes. Syncrude's actions must be judged on the basis of the information available to it at the time of the alleged offence.
- "The defence would also apply if Syncrude established that it took all reasonable care to avoid the contraventions.
    - ... Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. R. v. Sault Ste. Marie (City) at p. 1331." [emphasis added]

Factors that bear on establishing due diligence defence:

- Gravity of potential harm → here = number of birds lost in context of population + potential snowballing of a bird deaths if nobody follows the statute
- Complexity →
    - very complex & therefore req'd a high level of expertise;however, in a situation like this, the company should address the risk OR have access to expertise to address the risk & here, the people delegated weren't sufficiently experts to do so + their system to address the risk was shitty (they didn't properly comply and the sounds went off at the wrong time so the birds died)
    - "The [Bird and Environmental Team] experience is valuable but it is not sufficient basis for an effective bird deterrent program."
    - "While Syncrude had documents that set out procedures for bird deterrence, the documents are not in any way comprehensive and do no reflect the complexity of effective bird deterrence."
    - There was no formal schedule; Syncrude did not have enough cannons to achieve the density required by the documents; it had cut back substantially on the number of deterrents; staff had been reduced
    - They started late and did not have sound cannons deployed before the bird landings were discovered
- Reasonable alternative sol'ns → no real industry standard for bird deterrents at the time, but there were a number of reasonable alternatives as described by the expert witness. While some of the options were very expensive/difficult, there were still other options available to Syncrude that they didn't take.
    - "The evidence here, while disclosing no real industry standard for bird deterrence, offered a number of reasonable alternatives. The most obvious alternative was to have sufficient equipment and staff ready for deployment of adequate deterrents no later than early April. Shell Albian Sands Muskeg River Mine and Suncor were both able to commence deployment in early April in 2008. These operators also had more comprehensive written procedures, oversight by individuals with appropriate training and advance planning and preparation of equipment. I am not suggesting that Syncrude was required to adopt either of these systems, simply that there were reasonable alternatives available."
- Foreseeability → D only required to take steps that are reasonably foreseeable.
    - Test is whether a reasonable person would have known of the circumstances that make it more likely that migratory birds will land on the tailings pond in the spring. But test does <u>not</u> require D to have foreseen every possible failure.
    - "It was apparent that deterrents should be in place as early in the spring as reasonably and safely possible and that they should be deployed as quickly as reasonably possible. Syncrude did not deploy the deterrents early enough and quickly enough. This failure can be attributed to the absence of an effective documented procedure, inadequate training and expertise, the reduction in staff, the late hiring dates, delay in getting staff to work and not having equipment ready soon enough. Syncrude's reduction in the number of deterrents and the decision to stop using booms bring into question the

effectiveness of the deterrents even if they were in place. There is no evidence to suggest that these acts or omissions were in any way the product of scientific or expert analysis."

De minimis non curat lex = 'the law does not concern itself with trifles'

- Court says it's fine to say that the violation of the statute was so minor that it doesn't impact the public interest, but the protection of the birds in the statute/following the statute was <u>not</u> de minimis.
- Syncrude didn't violate the act in a trifle, but in a significant way.

Contractual liability

2 main issues in contractual liability:

1. Doctrine of *ultra vires*
2. Contracting w/ agents of the corporation

Ultra vires

- **Ultra vires:** Body corp doing something beyond its powers/acts beyond its powers
  - Previously, in the CL, ultra vires actions were grounds to **invalidate** that UV act by the corp.
- **S 17(3)**: invalidation on grounds of UV has been legislated out of the act (i.e., no longer grounds to invalidate corp act on grounds of UV).
  - No act of a corp… is invalid by reason only that the act is contrary to its articles
  - So even acting outside of its powers isn't a ground for invalidating the act.
- **Constructive notice**:
  - Former CL: People who dealt with a corp deemed to have notice of the contents of all docs that remain public ⇒ had to make the docs public & ppl dealing with the corp were **deemed** to have notice of the docs (i.e., even if you didn't look at the docs, you were deemed to have done so).
    - This was a way around invalidation through the doctrine of *ultra vires*
  - S 18: legislated out the constructive notice work around of ultra vires
  - SO we have NO GROUNDS to say that someone has constructive notice of the corp's articles (you aren't deemed to know you have knowledge. Have to have actual knowledge).
- **Exception** to the principle that UV does <u>not</u> invalidate an act by a corp: a statutory corp for special purpose who performs a UV act can have that act invalidated (***Pickles***)

Jon Beauforte (London) Ltd Re (old CL UV rule)

Old rules:
UV: acts done UV by a corp can be invalidated.
Constructive notice: ppl in dealings w/ corporations are <u>deemed</u> to have read the corp's articles/constitution & therefore aware of whether the corp had done something UV.

F:

- D Company's Memorandum of Association objects clause: "To carry on business of costumiers, gown-makers and related activities…"
- Subsequently the D Company started making veneered panels without amending the objects clause
- D Company entered into several contracts related to the veneer business including with a fuel supplier for use in the veneer factory
- Subsequently, the D Company went into liquidation and its creditors, including fuel supply company sought to collect on their outstanding debts

I/H: Is the contract UV & therefore null and void? →YES.The transaction was ultra vires Jon Beauforte (London) Ltd because the business for which the fuel was provided was beyond the scope of the company's memorandum of association.

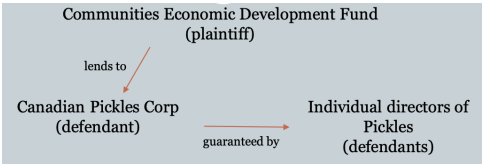
A:

- Didn't have actual knowledge corp was acting UV, but they were held to have constructive notice of the content of the company's articles.
- Court holds that they had notice the company was that of veneered panel manufacturing & therefore what they were doing at the time was UV. BUT b/c they had constructive notice it was UV, they didn't have the ability to say that the contract is invalid & they should be paid out by the company.

CEDF v Canadian Pickles Corp (SCC) (Statutory corporation for special purposes exception to UV invalidation/ABCA s 17(3)/18)

R: Notwithstanding the principle that UV is no longer applicable, UV will continue to stand as a ground to invalidate the act **IF the corporation is a statutory corporation for public purposes** and invalidation of the Act is consistent with the Act's objectives/the public interest.

F:



- P (CEDF) was a lending institution for development of "remote & isolated" communities in MB
- The CEDF was created by statute, which provided that the CEDF was to encourage the economic development of "remote and isolated communities."
    - s 9(7) of the Act: "No loan shall be made under this Act or financial assistance given under this Act if the making or giving thereof contravenes any provision of this Act."
- CEDF loans money to the Corporate D (notwithstanding s 9(7)); the loan was guaranteed by the Individual Ds (if company defaults, indiv Ds personally agree to pay back)
    - BUT Corporate Ds operations were not really in a "remote" area, being located approx. 20 kms outside of Winnipeg
- D defaults, P goes after indivs.

I/H: Is the loan to D Corporation UV? → **YES**. Made in contravention of s 9(7) of the Act
Are the indiv Ds liable as guarantors? → **NO**. **Not** liable to repay the loan for **public policy reasons** (i.e., prevent the corp from acting UV which, in this case, would be contrary to the statute and its underlying purposes)

A:

- D argues it's all UV b/c CEDF could only give loans pursuant to the statute (can only give loans to business in remote & iso communities) → i.e., violation of statute & therefore UV.
    - Court agrees it is UV BUT indiv Ds aren't liable & burden is on the lender to explain.
- Purpose of these corps is to protect public interest & created by statute to carry out that purpose within the powers of the statute, so we shouldn't allow them to work outside of the statute. If they do that, we should hold them accountable.
    - Goal: punish the lender for breaching the statute
    - Bigger public interest is to protect this from happening through deterrence. While the taxpayer is left 'holding the bag' in this case, the thought is that this will deter corporations from doing this.
    - Court says that general abolition of UV makes sense BUT the original purposes (protection of creditors by ensuring company's funds to which creditors must look for payment weren't dissipated in unauthorized activities & to protect investors) are frustrated. Subsequent statutory and case law developments have made the doctrine a protection to no one and a trap for the unwary.

- UV may be present wrt corporations created by **special act for public purposes** in order to protect the public interest b/c a company created for a specific purpose by an act of a legislature ought not to have the power to do things not in furtherance of that purpose.
- Regardless, the court says that the wording of the guarantee was the reason Indiv Ds weren't held liable.

Contracting w/ Agents of the Corporation

DO NOT CONFUSE WITH AGENCY IN PARTNERSHIP. THIS TEST IS TOTALLY DIFFERENT

Agency: fiduciary relationship which exists b/w 2 persons, one of whom (principal) expressly or impliedly consents that the other (agent) should act on his behalf so as to affect his relations with TPs, and other of whom similarly consents so to act or so acts

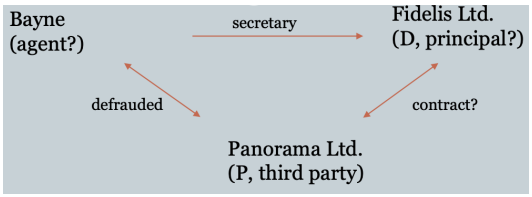
The types of agent's authority:

1. Actual
    a. Actual Express: authority given orally or in writing
    b. Actual Implied: what is necessarily or normally incidental to the activity expressly authorized.
2. Apparent/ostensible: rep made by the Principal to the TP about the agent's authority

Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd (ostensible authority)

R: An EE whom regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business will bind the corp. Any abuse of power/misconduct on the part of that EE to enter into a contract does not obfuscate corp liability.

F:



- Committed fraud by order cars from Panorama
- Panorama sued Fidelis for the amount owing on the cars.
- Cars were rented by Bayne on letters describing Fidelis as the contracting party & signed by Bayne as secretary of Fidelis.
- D, Fidelis, claimed Bayne had no authority to rent the cars.
- TP, Panorama, wants to hold a corporation liable for a contract re cars. Corporation doesn't have its own hand to sign contracts, so a human always signs the paper. The Q here is whether the human had the authority, as an agent of the corp, to do that & therefore bind the corporation as a principal?

Proc Hist: TJ says Bayne was the agent. Denning, in this appeal, affirms.

I/H: Can the TP hold the Corporation liable for the contract? → **YES**. Corp liable under contract.
Did EE have authority to bind the Corp under the contract with the TP (i.e., P)? → **YES**. EE had **ostensible authority** to bind D Corp & P.

A:

- Based on the facts and circumstances, parties intended for the contract to be b/w P & D Corp
- D Corp is obligated to pay under the contract if EE had actual authority or ostensible authority

Does a "corporate secretary" have the authority to bind the corporation?

- Regularly enters into contracts on behalf of corps, makes reps on behalf of corps, etc. so they may be regarded as having authority to do things on behalf of Fidelis, such as signing contracts, that fall within the normal course of what a corp secretary does.
- He is an officer of the company with extensive duties and responsibilities, not a mere clerk.

- He **regularly makes representations** on behalf of the company and **enters into contracts** on its behalf which come within the **day-to-day running of the company's business** ⇒ demonstrates that he may be regarded as having authority to do such things on behalf of the company. **He is certainly entitled to sign contracts connected with the administrative side of a company's affairs**, such as **employing staff**, and **ordering cars**, and so forth. **All such matters now come within the ostensible authority of a company's secretary**. Accordingly I agree with the judge that Mr. R.L. Bayne, as company secretary, had ostensible authority to enter into contracts for the hire of these cars and, therefore, the company must pay for them."
- D Corporation represented to the Plaintiff that Bayne has the authority to bind the corporation when they appoint Bayne to the position of corporate secretary, by giving him this title, they have clothed him with authority
- The fact they appointed Bayne as secretary was a signal to the world that Bayne is an agent. Thus, there is ostensible authority.
- Court doesn't discuss other types of authority, but TM says that you could argue that Bayne also has actual implied authority b/c it's not unusual for these types of arrangements to take place.

Freeman & Lockyer v Buckhurst Park Properties (Mangal), Ltd (test for deciding on whether a person is an agent of a corporation)

Don't confuse this test for the test for agent in the partnership context.

TEST: 3 Conditions to find an agent has apparent/ostensible authority such that a TP can enforce against a corp a contract entered into on its behalf by an agent who had no actual authority

1. Principal makes a rep (express or conduct) that someone is an agent.
2. Person making the rep to TP must have **actual authority** to make that representation.
3. TP relies on that representation.

You can create ostensible authority by conduct but MERE SILENCE w/o anything else is NOT enough to establish any kind of authority.

- 1 Director, Kapoor, acted as if he were the managing director of the company BUT he wasn't actually appointed by the board as the managing director; i.e., was not formally the managing director (contrast to Panorama where agent was formally the corp secretary).
- W/o express permission of the Board, Kapoor employed an Arch firm (P) to do work on the estate they were to by. Firm did the work, wanted to get paid, and Buckhurst (corp D)did not pay them. Firm sued Buckhurst.

Proc Hist: Buckhurst liable, appealed.

I/H: Was Kapoor an agent of Buckhurst such that the corp he purported to enter into with the Ps on behalf of the D? → **YES** – Kappor had apparent authority to enter the contracts on behalf of CD (corporate D)

A:

Actual authority:

- IF the Board had formally appointed Kapoor as managing director, like in Panorama, we could easily apply that same analysis.
- HOWEVER, Kapoor was never actually appointed.
- Court says that mere silent acquiescence is not enough to confer actual authority (formal resolution of appointment required; the board merely knowing what's going on isn't enough)

Ostensible/apparent authority:

- Whether principal, by a representation or conduct to the TP, indicated that the agent can act on the principal's behalf and enter into a contract?
- The representation conferring ostensible authority can take many forms:
  - More common form = conduct
  - Less common form = oral
  - Conduct signals that one is an agent.

- Board knew Kapoor had been acting as managing director &, by allowing him to do that, by acquiesence wasn't ostensible authority but it <u>was</u> enough to represent that Kapoor was the agent with ostensible authority.

4 requirements for a finding that a principal has represented to a TP that an agent has apparent/ostensible authority (note – this is a UK case and we only care about the 3 requirements)

1. Rep to a TP by the corporation (principal) that the agent has ostensible authority/rep that the agent had authority to enter, on behalf of the company, into a contract of the kind sought to be enforced was made to the TP
    a. But corp is a legal fiction and can't itself make that representation. Issue: who makes the representation that the agent has ostensible authority?
    b. Application: The board of directors knew Kapoor had throughout been acting as managing director in employing agents and taking other steps to find a purchaser; by permitting him to do so, they represented that he had authority to enter into contracts of a kind which a managing director or an executive director responsible for finding a purchaser would in the normal course be authorized to enter into on the company's behalf
2. The rep must be made by a person (or persons) who had **actual** authority to manage business of the company either generally or in respect of those matters to which the contract relates.
    a. Application: The articles of association conferred full powers of management on the board
3. Contractor relied on the representation to enter the contract ("was induced" to enter)
    a. The plaintiffs were induced to believe Kapoor was authorized by the company to enter into contracts on behalf of the company for services in connection with the sale of the Estate

Doiron v Manufacturers Life Insurance Co (COB Manulife Financial) (mere belief ≠ agency, but conduct can = agency; agency applies to EEs & indep contractors)

R: Mere belief isn't enough to establish agency, but a reasonable belief based on a representation is sufficient.

R: Factors to establish a reasonable belief by conduct: business card with corp's name, corp letterhead on indiv's letters, have to call the corp to talk to the indiv, being on the same floor as the corp, having corp logo on indiv's door.

R: Agency test can apply to independent contractors (in addition to EEs)

F:

- Demmers was an independent contractor and not an employee of Manulife: Demmers was performing services as a person in a business on his own account: contract with Manulife reflected this intention; it was a "non-exclusive" relationship; payment by commission; paid for his own office and staff; Manulife had no control over day-to-day operations
- Had manulifes business cards, logo, etc.

Proc Hist:

- TJ finds apparent authority
- On appeal, Manulife argued that if he had apparent authority, he had such authority to act on behalf of Devon Capital Company on which behalf he entered into the investment contract with the Ps.

I/H: Whether Manulife is liable for the Plaintiffs' losses resulting from the Devon investment?
Whether Demmers was an agent of Manulife?

A:

No argument present for actual authority

- Demmers did not have 'actual' authority: "Clause 3(b) of the 'Producer's Agreement" specifically prohibited Demmers from entering Manulife into any contractual relationship. All Demmers could do under the

agreement was solicit insurance applications, he could not actually approve them…. Demmers was not an agent of Manulife, and had no actual authority to bind Manulife

BUT, he did have apparent/ostensible authority according to TJ (which they didn't appeal)

- Court confirms and applies the test in Freeman & Lockyer
  - "Even though Demmers had no actual authority to bind Manulife… the Doirons had every reason to believe that he did… when they decided to invest in Devon, they reasonably believed they were investing in a Manulife product."
- "The law of ostensible authority does not require an explicit representation of authority. It is found **where the principal has created a situation such that it is reasonable to infer and rely upon the apparent authority of the person**. The appellant conceded in argument that Manulife had **cloaked** Demmers with ostensible authority in this case."

Test: Step 1 → Principal makes a rep (express or conduct) that someone is an agent.

- Factors important in creating ostensible authority: Demmers' Manulife **business card** that identified him as a financial planner; to call Demmers they would have to first **call a Manulife office**; Demmers' **office located on same floor** as Manulife, where Manulife promotional materials prominently displayed; his door had the Manulife logo on it; correspondence from Demmers was printed on Manulife letterheadPerson making the rep to
- Promotional activities: Manulife provided agents with Manulife promotional material and ran promotions with pictures of agents with Manulife logo

Test: Step 2 → TP must have actual authority to make that representation.

- The interactions that created ostensible authority were between Doirons and Demmers, but Manulife was aware of the conduct and "**stood idly by and permitted Demmers, and other producers, to create this impression**."

Test: Step 3: TP relies on that representation.

- On the basis of these representations, Doirons sought out Demmers' advice, and relied on it to invest in Devon which led directly to their loss

On the appealed Question:

- TJ didn't find that Demars represented the investment to be a product of Manulife, but TJ did find (from circs) that the Ps were reasonably entitled to infer they were investing w/ an investment product of Manulife than some other random company
- Court agrees that w/ the Appellant that **"a mere belief on the part of a third party that he or she is contracting with the principal, absent some representation to that effect, express or implied, cannot support a claim of ostensible authority so as to bind a principal."**
- BUT they agree with the trial judge: "The trial judge appears to have concluded from all of the surrounding circumstances that what Demmers did was purport to contract on behalf of Manulife. Given the misrepresentation as to who the principal really was and the ostensible authority conveyed by Manulife to Mr. Demmers, his finding that Manulife was bound by virtue of ostensible authority is supportable. We find no palpable and overriding error warranting appellate intervention."

Conclusion: Ps thought that the investment was w/ Manulife & b/c Demmars didn't say it wasn't a Manulife product + the circs made it such that explicit claims of affiliation w/ Manulife wasn't necessary & implicit was sufficient. Devon Capital Co was <u>not</u> the true principal of Demmars. Instead, Manulife created – by conduct – a rep (that the product was a Manulife product) that the P reasonably relied on.

CanLab v Engelhard (indoor mgmt rule)

Complex facts, but the principle remains the same that we need to see representation by the principal about the agent's authority. Here, principal was trying to recover damages & the question was – until what point in time can P get damages?

R: Indoor management rule: Persons dealing w/ a company or corp are not required to inquire into the irregularity of internal proceedings. They can assume what was presented to them was done legitimately as an internal practice in the corp (so long as that assumption is reasonable)

F:

- Note – usually P is a TP in agency cases, but here, the Principal is the P.
- P has longstanding business relationship with D (who is a TP – this is weird because the TP is normally the P in these cases)
- P buys platinum from D, manufactures the platinum, and then P sells the scraps back to D.
- D&P were defrauded by Cook the Crook (fake name "Giles"). Cook was an EE in P's sales department and, later, supervisor of inside sales. Cook faked procurement orders on behalf of P from D.
    - Purchase orders were legit b/c Cook used the letterhead.
    - Tricked D to accept scraps directly from the fictitious customer, Cook.
- 1962: Cook contacted D claiming that: P's customer, a scientist named "Giles", was conducting some "secret" process for which platinum would be required. D agreed to ship platinum ordered by P and to accept scrap returns directly from "Giles" and make payment for the scrap returns directly to "Giles"
- 1966: D calls P to make inquiries about their account. D's rep speaks with P's purchasing agent who directed D to speak with Cook about the matter.
- 1968: D's president inquires about P's operations & the fraud by Cook is discovered.
- Ended up litigating b/c they were trying to figure out who owns the scraps & who has to pay for them
    - Result: P sues D for conversion (ended up with something that doesn't belong to you) → issue is that D has the scraps but P wants the money for those scraps OR the scraps so that they can sell them

I/H: Is D liable to P in conversion of Canlab's platinum? If so, what's the extent of D's liability (i.e., is it liable for P's whole loss?) → **YES,** but recovery limited to Oct 1966 (majority; dissent says limit to Oct 1968),

A:

Conversion issue (not our focus):

- Court finds conversion has taken place. P has legit title to the scraps.

Until what point is D liable for damages to P for the conversion? → hinges on agency → Was the EE that was informed of the issue in 1966 an agent of P and, therefore, P was put on notice? OR does VP Operations have authority on behalf of P?

The issue:

- When the fraud begins in May 1962, "there is nothing in the record to show that Canlab as principal had placed Cook in a position to hold himself out as having authority to arrange" the transactions in question
- Cook was a sales agent and not a purchasing agent; he had neither the actual nor ostensible authority to make this kind of agreement
- No representation made by Canlab to Engelhard that Cook had authority to enter into this kind of agreement
- Q: Did Canlab make such a representation in 1966 or 1968?

Majority:

- Damages should end in 1966 b/c in 1966, P's agent made a representation in its communications with D in 1966. P knew about it b/c EE can be treated as P's agent.
- "Did Snook occupy such a position in the organization of Canlab… so as to effectively hold out Cook as having the authority to deal with Engelhard in the matter of expediting payment to Engelhard for the

platinum purchases…"? ⇒ Yes, he did have that authority. SO from 1966 on, it's reasonable to assume P knew about the fraud & therefore damages shouldn't extend further.
    - Since EE was informed, we can assume P was informed. Therefore, damages should stop here → Notice to EE was effectively notice to P as to what was going on.
    - EE represented to D that Cook was the person to consult about the matter: Cook was said to be the person to see regarding D's complaint, Cook was approached, and by McCullough's doing as directed by Cook, the complaint was remedied…. This, in my view, operates as an affirmative holding out by P through a responsible and appropriate representative, of Cook's status in connection with the platinum dealings, both the direct purchase by P from D as well as the system for repurchase by D from Giles; and this holding out took effect in law from the aforementioned conversation which occurred on the 11th of October 1966."
- **Indoor management rule**: Persons dealing w/ a company or corp are not required to inquire into the irregularity of internal proceedings. They can assume what was presented to them was done legitimately as an internal practice in the corp
    - E.g., if someone is a director, you can assume they were legitimately or legally appointed to a director.
    - I.e., Court doesn't expect D to look into the internal operations of P. Since P represented Cook as being the right guy, then that's that – D was fair in assuming P did it right.

Dissenting in part:
- No representation by P wrt EE being an agent → i.e., "purchasing agent" doesn't lead to the attribution of EE's authority to P. Therefore, recovery should terminate in 1968 when the VP found out.
- Disagrees that P made a representation in 1966 b/c EE was "**merely a purchase agent** in the purchasing department and there was **no evidence of any back-up authority** by which he could hold Cook out as having power to compose the difficult, as raised by Engelhard, in settling the accounts."
- For a finding of ostensible/apparent authority to be established, the representation must be made by someone with "actual" authority; Snook did not have such authority so representations by Snook would not be enough to establish ostensible/apparent authority

Practice Qs:

1. Does the directing mind theory dictate when a corporation is bound by a contract? Why or why not?
    a. No
    b. The theory, originally for crim liability, but today used in tortious context.
2. Are special Act corporations bound by the doctrine of ultra vires?
    a. Define UV
    b. Explain it was abolished by 17(3)
    c. Exception of special purpose
3. Elaine is a clerical assistant who works for ABC Ltd., a company which provides moving services in Alberta. Elaine received a phone call from Jerry who was looking to hire ABC Ltd. to do a move within Edmonton. Elaine explained that she held a management position with ABC Ltd. and was authorized to provide a quote over the phone. After speaking with Jerry and getting a list of the items which needed moving, Elaine provided Jerry with a quote, in the form of an offer, which underestimated the cost of the job. Jerry immediately accepted the offer. Kramer, the CEO of ABC Ltd., is appalled and has come to you for legal advice. "My worry is this: Elaine told Jerry that she was a manger and yes, managers do have my authority to provide quotes. However, Elaine herself is not a manager and had no business calling herself that". Provide Kramer advice on whether ABC Ltd. is bound by Elaine's actions.
    a. Contractual liability
    b. Bound if E had actual authority or apparent/ostensible authority.
    c. Define actual & apparent/ostensible

d. ABC only made E a clerical assistant, so she didn't have actual authority (neither express nor in course of business → Kramer explicitly said it's only the role of a manager to enter into contracts).
e. SO it's ostensible authority if anything
f. Apply Freeman test:
    i. No rep by Principal → E tried to make the rep herself.
    ii. No rep by someone with actual authority → She's merely a receptionist. BUT you could argue that putting someone on the phone w/o supervision, ABC created the perception that E has authority (weak argument, but you can). By itself though, this likely isn't enough.
    iii. Reliance wasn't on someone w/ actual authority

6. Corporate Governance

1. Role of Directors = **manage** or supervise mgmt of **business & affairs** of the corp (***ABCA* s101(1)**)
2. Directors & officers have a **fiduciary duty *and* DOC** in discharging their duties. Directors/officers can be personally liable for breach of fiduciary duty &/or DOC. Claims about fiduciary duty/DOC MUST be within the context of a BUSINESS decision (***Peoples***).
    a. **DOC** = exercise care, diligence, & skill that a **reasonably prudent** person would exercise in comparable circumstances (***ABCA* s122(1)(b)**) [objective test]. Was the DOC breached?
        i. **DOC ≠ breached** where the **business judgment rule** is satisfied. Show director/officer's decision…
            1. Followed a **reasonable process**: directors acted **prudently** & on a **reasonably informed** basis (***Peoples***)
                ➢ **Afford deference** to business decisions of directors taken in good faith & in performance of functions they were elected to perform by the SHs (***BCE***)
                ➢ While deference is afforded to directors, their decision must be of reasonable process & substance. To satisfy DOC, Board must adequately inform themselves of the all the circumstances they know or ought to know about. May include the role of decision makers in a potential deal, sufficient time to consider, prior notice, reading agreement in question, etc (***Van Gorkum***)
            2. Was of **reasonable substance**: decision(s) **fell within the range of reasonable options** in light of **all the circs** about which the directors/officers **knew or ought to have known** (***Peoples***).
                ➢ **Afford deference** to business decisions of directors taken in good faith & in performance of functions they were elected to perform by the SHs (***BCE***)
        ii. **If DOC was breached → Basis for Liability** = stakeholders must establish that they suffered **direct damage** as a result of the breach of the DOC.
        iii. **Defence to breach of DOC → professional opinion exception/defence**: Not liable if the director/officer relies in good faith on the **opinion or report** of a **professional** whose **professional or expertise lends credibility to a statement** made by that person (***ABCA*, s 123(3)**).
            1. **BUT** need to truly be a professional & acting in their capacity as a professional (***Peoples***) → claimed that EE, the VP of finance, was a "professional." Court says that VP of Finance was not an accountant subject to regulatory overview of any

professional organization & did not carry independent insurance coverage for professional negligence so he was NOT a professional in the meaning of s 123(3).

b. **Fiduciary duty** ("duty of loyalty" – ***Peoples***)= act **honestly** and in **good faith** in the **BIOC** (***ABCA* s122(1)(a)**) [subjective test] *[see types of fiduciary duty detailed below]*
   i. Fiduciary duty in s 122(1)(a) is **only the corp**, **not** the **creditors** (***Peoples***).
   ii. **Types of breaches** include: conflicts of interest, abusing position for personal gain, breaching confidentiality, failure to serve corp selflessly, honestly, & loyally (***Peoples***).
   iii. Depending on "**all the circumstances**" of a case, board of directors ***may* consider interests** of SHs, EEs, suppliers, creditors, consumers, gov'ts, & environment (***Peoples***)
      1. **BUT** true question is about the **BIOCs** (***BCE***)
      2. Interests of **SHs** are **not determinative** of the BIOC (***BCE***)

Specific Breaches of Fiduciary Duty to the Corp:

1. **Taking Corp Opportunities**: directors taking a business opportunity that belongs to the corp for their personal benefit. Law has developed:
   a. [OLD CL] ***Cook v Deeks***: taking corp opp is a **distinct breach of fiduciary duty** & **indiv liability lies** when directors take corp opps
      - **Taking corp opp occurs when**: there is (1) **Intentional concealment** of info & (2) **deliberate use of influence** (2) to **exclude the corp** from the opportunity (4) ***while* trusted** with conduct of affairs of the corp.
   b. [**EXCEPTION** → STATUTORY REFORM] ***ABCA*, s 16.1**: **articles of incorporation or USA can include a waiver** for breach of fiduciary duty for taking corporate opportunities
   c. [**CURRENT CL TEST**] **Corporate opportunity doctrine** (***Aero, Matic***)
      - **Element 1: Belonging** → "A director or a senior officer is precluded from obtaining for himself…any property or business advantage either **belonging to the company** or for which **it has been negotiating**." **Factors include** (***Aero***):
         - ➢ Position of office held
         - ➢ Nature of the opportunity
         - ➢ Ripeness of opportunity (i.e., how advanced it was)
         - ➢ How specific opp was (how far along were the negotiations? Is there a contract already, or is it a remote possibility?)
         - ➢ Amount of knowledge possessed by director (BUT this isn't determinate & specific knowledge isn't required)
         - ➢ Circumstances in which it was obtained
         - ➢ Time in the continuation of the fiduciary duty where the alleged breach occurs *after* the termination of the relationship with the company.
         - ➢ Above list is open (***Matic***)
      - **Element 2: diverting** a **maturing business opportunity** (to oneself or company of oneself) (***Aero***)
         - ➢ Maturing business opportunity = the conflict must be a real possibility, more than a theoretical conflict (***Matic***)
      - **Element 3**: which his **company is actively pursuing** (***Aero***)
         - ➢ "Actively pursuing" = broad; encompasses situations in which the corporation is considering pursuing an opportunity (not limited to a particular process, potential pursuits suffice) (***Matic***)
      - Nuances:
         - ➢ Do **NOT have to prove** the corp would've received the contract ***but for*** the taking corp opp, just have to show maturing business opp the corp was pursuing was taken (***Aero***)

- ➢ **Manner in which the opp came to the knowledge of the director ≠ determinative** (***Matic***)
- ➢ **Fiduciary duty will survive if director leaves the corp** → directors can't claim they aren't liable b/c the aren't in the company anymore). Directors are "precluded from [taking corp opps] even after [their] resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for [themself] the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired." (***Aero***)
- ➢ **Claims of distinguishable proposal ≠ no breach of fiduciary duty** → Directors cannot claim that a distinguishable proposal is sufficiently different that there isn't a breach of the duty (***Aero***).

2. **Self-Dealing Transactions (SDTs)**: when corp transaction benefits an indiv director
   a. **Self-dealing contracts** (SDCs) **at CL**: are those where director has **personal interest** that **conflicts with corp interests** (***Aberdeen***)
      - **Remedy for SDCs at CL = void *ab initio*** b/c no one with a fiduciary duty **shall** be allowed to enter into contracts where personal & corp interests conflict (***Aberdeen***)
        - ➢ **Exception:** self-dealing contracts can be **affirmed or adopted by the corp** (***Beatty***)
   b. **SDCs in ABCA, s 120(1)**: directors/officers **must** disclose **material interests** in writing or via minutes.
      - Defining **material interest**
        - ➢ ***Dimo***: broad, but must include a significant **financial** interest that is yours. Absent a significant financial interest to oneself, there can't be a requirement to disclose under s 120 b/c it's not a self-dealing transaction.
        - ➢ ***Zysko***: broadens *Dimo* def'n beyond financial → **any** possibility a director could **benefit more than *de minimis*** from a contract
      - **Disclosure required whenever** director/officer's involvement **might be relevant to the corporation's decision making process**. Includes situations where… (***Zysko***)
        - ➢ a corp would undertake additional due diligence to determine whether the contract or any of its terms is truly in its best interest of the corporation
        - ➢ corp would assign another director or officer to handle the negotiation
        - ➢ Corp would change decision-making process in light of the officer/director's interest
      - **Remedy for SDCs in *ABCA*** = court can **set aside contract and/or require accounting of profits** (**s 120(9)**)
        - ➢ **Remedy = discretionary.** Whether court sets aside *or* requires accounting of profits depends on **whether the contract was fair & reasonable** (***Dimo***).
          a. Fair & reasonable → likely order counting profits (In ***Dimo***, contract for loan was fair & reasonable, so they didn't set loan aside)
          b. Unfair & unreasonable → likely set aside (In ***Dimo***, the interest rate was not fair & reasonable, but the lower court changed it such that the contract was fair & reasonable)
             i. If contract for loan is set aside, person losing out likely has a claim in unjust enrichment to collect remaining principle (***Dimo***)
        - ➢ **Exception:** directors or officers can comply with **s 120** to permit SDTs. Requirements:
          a. **Disclosure in writing**/minutes (s 120(1)) ***OR*** **general notice** to the directors (s 120(7))
          b. **Approval by the appropriate body** (according to the articles)
             i. If articles don't say you need approval ⇒ you don't need approval.

ii. If articles require approval by the *Board* ⇒ interested director **cannot** vote (s 120(6))
iii. If articles require approval by *SHs* ⇒ interested director **can** vote his shares as an SH (this is b/c you are wearing your SH hat; resembles ***Beatty***)

c. Show proof that the contract is **fair and reasonable** to the corp at **time it was approved** (s 120(8))

➢ **Exception:** directors/officers who fail to comply with s 120 before entering into an STD can comply with the **"whoops" provision** in **s 120(8.1)**. Requirements:

a. Director MUST be acting honestly & in good faith can access the provision; AND
b. Stat requirements:
i. Contract must be **confirmed or approved** by **special resolution** at a **meeting of the SHs**
ii. **Disclose to SHs** BEFORE contract is approved
iii. **Show contract was fair** to corp

3. **Competing Director**: Sitting on boards of competing companies or having an ownership interest in another company that's competing with the corporation on which one serves as a director. Difficult to prove. To assess the validity of a competing director complaint, look at (***Sports Villas***):
   a. (1) is there **actual competition**?
      - **More than sitting on multiple boards** (Mere fact director sits on multiple boards **≠ sufficient** (***London***))
      - **Disclosure of confidential information** from one company to the competing company (***London***) *OR* **actual risk** of disclosure of confidential information (***Sports Villas***)
      - **Proprietary interest required** ⇒ Information sharing of generic information or general technologies/programs ≠ unique proprietary information (***Sports Villas***)
   b. (2) **Balance public interests** within the full context of the circs in which the claim of competition has arisen to determine whether competing director claim *should* succeed (***Sports Villas***)
      - E.g., ***Sports Villas*** was 220km west of the proposed golf course (which included far fewer facilities than Sports Villas). Can't really say there's much competition. Public has interest in golf 220km away.
4. **Take Over Bids**: company buys another company (often results in mass replacement of directors & top mgmt). **To avoid liability in a take over bid situation**… (***Maple Leaf***)
   a. (1) Establish a **special committee** of directors who are not SHs & not family members to **guard against conflicts of interest**
   b. (2) Ensure the **sufficient substance** of committee ⇒ Was the committee **truly independent**?
      - Did directors act in the **BIOC**?
        ➢ BJR applies (Court won't substitute its own judgment so long as Board acted honestly, reasonably, & informed.
        ➢ Directors must consider all circs
        a. BIOCs extend **beyond financial interests** to SHs/EEs/etc
        b. Consider more than a single SH group
        c. In family business situations, considerations of family dynamics (like blocking bids) *may* be relevant in determining the BIOC (In ***Maple Leaf***, the fact the family would not vote in favour of the bid helped guide the BIOCs)
      - Did **senior management** have a **significant role in sale negotiations** w/ potential bidders?
        ➢ No? → conflict of interest less likely.

- ➢ Yes? → finding of conflict = context dependant
    a. Sr mgmt = member of special committee + has a vote on the bid ⇒ conflict more likely
    b. Sr mgmt ≠ member of special committee + no vote on bid ⇒ conflict less likely
    c. Golden parachute (getting a bunch of $ during takeover even if you aren't CEO) = conflict less likely (this was the case in ***Maple Leaf***)
    d. Sr mgmt can be involved in negotiations & report to the special committee w/o conflict so long as they leave the special committee to discuss & make a final decision (***Maple Leaf*** finding)

5. **Possibility of fiduciary duty from Directors to SHs**: **No general fiduciary duty** b/w Director & SH simply b/c of the relationship. **3 situations** wherein directors ***may*** owe fiduciary duty to SHs (***Tongue***):
    a. Directors acting **outside** of their **ordinary duties**
        - ***Tongue***: One director's action of telling the Ps to give him shares for a certain $ and then turning around and negotiating a sale is outside of the director's ordinary duties & therefore creates a fiduciary duty.
    b. Directors **purchase shares** from SH (immediate duty)
        - Substance is determinative; form is irrelevant (i.e., doesn't matter if it's direct, indirect, intermediary, etc.). In ***Tongue***, insider trading was sufficient.
    c. **Other** grounds (test) → look at the **relationship** and determine **whether it's appropriate to attach fiduciary duties** to the particular circumstances.
        - In ***Tongue***, directors had information that SH's didn't have but should have had. This created a fiduciary duty such that the release from liability the directors had the SHs sign was not valid. SHs had no way of knowing that directors were planning to insider trade.
    d. See also "statutory duties" (***Zwierschke***)
6. **Statutory duties**: In addition to the CL and *ABCA*, other statutes that can give rise to duties of directors to SHs (***Zwierschke***)
    a. In ***Zwierschke***, ***Income Tax Act*** established fiduciary duty flowing of directors to SHs.

Director/Officer Liability in tort to TPs:

1. **Inducing Breach of Contract**
    a. **7 elements** to show intentionally inducing breach of contract (***Pocklington***):
        i. **existence** of a contract;
        ii. **knowledge** or awareness by the defendant **of the contract**;
        iii. a **breach** of the contract **by a contracting party**;
        iv. **D induced the breach**;
        v. D, by his conduct, **intended to cause the breach**;
        vi. D acted **w/o justification**; and
        vii. P suffered **damages**.
    b. **Said v Butt defence** for directors in cases of inducing breach of contract (***McFadden***): An agent will **NOT** be liable for causing a breach of contract to the TP if they…
        i. Were acting ***bona fide*** to the corporation (in **good faith**)
        ii. Within the **scope of their corporate authority** (qua position)
        iii. To cause or procure a breach of contract **between the corporation and a TP** (e.g., the TP and the TP's ER)

2. **Negligence**: the key question is whether a director/officer can be held personally liable for their negligent misrepresentation, but there are divergent lines of authority & significant development in the law on this question.
    a. Development of law of negligence:
        i. ***ScotiaMcLeod*** (1995, ONCA): pro-director approach that emphasizes corp as a distinct legal entity. Under ScotiaMcLeod rationale, it is **very difficult to hold directors personally liable UNLESS you can show (a) fraud or (b) that they committed negligence outside of their role as director of the corporation** → effect: broad protection for directors as long as they did what they did within their duties as corporate officers. Case "appears to support the conclusion that directors and officers are not liable for simple negligence causing pure economic loss."
        ii. ***ADGA*** (1999, ONCA): not a negligence case (intentional tort), but signals move away from *ScotiaMcLeod*. **Directors/officers always responsible for their torts, even if they acted in good faith in the interests of the corp & within their corp duties** (*but* Said v Butt defence available).
        iii. ***NBD Bank*** (1999, ONCA): upheld *ADGA* rationale in negligence case. **Directors & officers responsible for their tortious conduct even if the conduct was in the context of a bona fide act for the benefit of the corporation & no matter if they were the directing mind or not**.
        iv. ***Blacklaws v Morrow*** (2000, ABCA): restates ScotiaMcLeod → **must show, at a min, indep tort entirely outside their capacity as director/officer to show ordinary negligence**.
        v. ***Hogarth v Rocky Mountain Slate Inc*** (2013, ABCA): majority opinion matches *ScotiaMcLeod* & *Blacklaws*, BUT concurring opinion matches *ADGA* & *NBD Bank*. Concurring opinion increasingly adopted in AB.
            1. Majority (applying *Scotia McLeod* & *Blacklaws*): directors do not have personal liability for negligent misrep b/c that alleged negligent misrep didn't exhibit a tort separate from their role as directors.
            2. **Slater's concurring** (applying *ADGA* & *NBD Bank*): Slatter used **Anns-Cooper DOC analysis** to find that directors didn't owe a DOC & shouldn't be liable for negligent misrep.
        vi. **Current law in AB & ON applies *Hogarth's* DOC analysis *but* often still mentions *Scotia McLeod*** (very unsettled area of law)
    b. **Scotia McLeod/Blacklaws** rule: **Directors are protected from personal liability UNLESS**
        i. their actions are **fraudulent**, deceitful, dishonesty, or lack authority/ done **outside of their role** as director
        ii. "To hold the directors… personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation"
    c. ***ADGA/NBD Bank/Hogarth/Abt Estate*** test: Directors can be liable for tortious conduct even if they're acting in the BIOC (***ADGA***) if they violated their DOC (***NBD***, ***Hogarth*** (Slater's concurring opinion), ***Abt***):
        i. Was there a ***prima facie* DOC**?
            1. **Foreseeability**: Could the D **reasonably foresee** that P would **rely** on the representation?
                a. Factors that do not (alone) negative *prima facie* personal liability (***Hogarth***):
                    i. Negligent act committed while engaged in business in corp.
                    ii. Indiv was not pursuing any personal interest
                    iii. Conduct was in BIOC

b. Factors that are of weight in the analysis (***Hogarth***) (weighs to prima facie // weighs away from prima facie)
    i. P voluntarily dealt w/ corp // P had corp relationship imposed on it
    ii. Expectations of the parties
    iii. Direct involvement // indirect involvement
    iv. Tort was "independent" // tort was within scope of director's capacity
    v. Nature of tort (intentional? negligence?)
    vi. Physical damage // economic damage
2. **Proximity**: was the **reliance reasonable** in the circumstances?
    a. Extent of reliance (how much did P rely on D's reps?) (***Hogarth***)
    b. Reasonableness of P in that reliance (was it reasonable to assume D was personally responsible?) (***Hogarth***)

ii. Do **policy considerations** militate away from a DOC?
1. E.g., limited liability? Separate legal personality? Victims should be compensated? Tortfeasors should be accountable? (***Hogarth***)

Indemnification of Director/Officer by the Corp

General rule: **ABCA, s 124**: **corporations can indemnify current or former officers**/directors and their heirs against costs, charges, and expenses in which the director is involved by reason of being a director as long as they acted **honestly & in good faith with a view to BIOCs** (see also ***Blair***).

- Defining **honestly & in good faith** with a view to BIOCs:
    - Following legal advice ≠ determinative. It is not sufficient (on its own) to find a director acted honestly and good faith but it is a consideration (***Blair***)
    - The BIOCs must be judged in light of the **relevant act** (which is not necessarily going to be the litigation. In ***Blair***, the relevant act was whether it was in the BIOC to not count proxy votes not whether litigation was in the BIOC)
- **EXCEPTION**: if bylaws **do not allow** for indemnification, then directors cannot be indemnified (***Blair***)

General rule: the **only source of jurisdiction** to prohibit or order indemnification is in ***ABCA* s 124** (***Bata***)

- If a prohibition from indemnification or order to indemnify does not satisfy section 124, the court does NOT have jurisdiction to make that order.
- Probation orders cannot stipulating indemnification.
    - In ***Bata***, TJ imposed a probation order on Bata stipulating payment of fines *and* prohibiting Bata from indemnification of their directors who were held personally liable for negligence. ONCA overturned on the basis that probation orders are intended to be deter & rehabilitate the entity to which the order is made. However, the indemnification clause of the probation order was targeted at the directors, not the corporation.

—

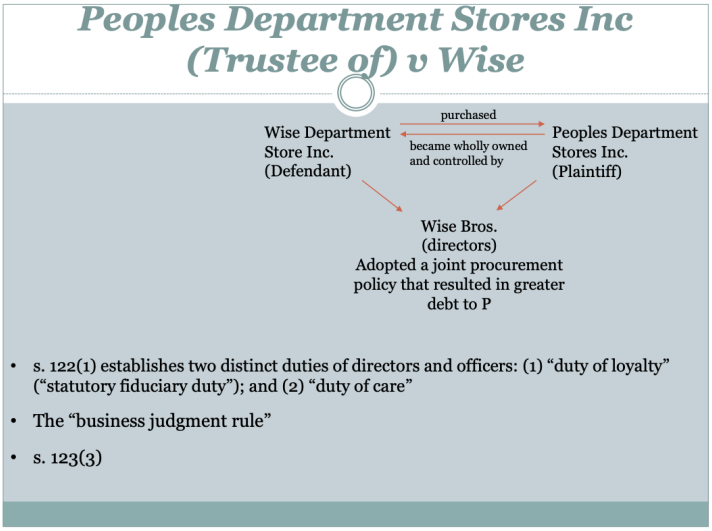
***ABCA*, s 101(1)** [ROLE OF DIRECTORS] Subject to any USA, the **directors shall manage or supervise** the management of the **business and affairs** of a corporation.

Director's Fiduciary Duty & DOC & Business Judgment Rule

ABCA: Duty of care of directors and officers
122(1) [DOC of DIRECTORS & OFFICERS] 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 to the corporation shall

(a) [**Fiduciary duty: BIOC**/duty of loyalty] act honestly and in good faith with a view to the best interests of the corporation, and
(b) [**Duty of care**] exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
    (i) To satisfy the DOC, you can use the **business judgment rule** to show decision met your:
        (1) Reasonable process (make a decision on a reasonably informed basis & should have known everything they ought to have known)
        (2) Reasonable substance (perfection not necessary, courts shouldn't replace substantive judgment of the corp with their own BUT it has to **fall within the range of reasonable options**)

Peoples Department Stores Inc (Trustee of) v Wise (business judgment rule, professional opinion exception)



R: Business judgment rule: **DOC ≠ breached** where the **business judgment rule** is satisfied. Show director/officer's decision…
1. Followed a **reasonable process**: directors acted **prudently** & on a **reasonably informed** basis, knew everything they ought to have known to make the decision (***Peoples***)
2. Was of **reasonable substance**: decision(s) **fell within the range of reasonable options** in light of **all the circs** about which the directors/officers **knew or ought to have known** (***Peoples***). Court does not need to find perfection, just that it was reasonable.

Claims under s 122 MUST be within the context of a BUSINESS decision (***Peoples***)

Defence to breach of DOC → professional opinion exception/defence: Not liable if the director/officer relies in good faith on the **opinion or report** of a **professional** whose **professional or expertise lends credibility to a statement** made by that person (***ABCA*, s 123(3)**).

BUT need to truly be a professional & acting in their capacity as a professional (***Peoples***) → claimed that EE, the VP of finance, was a "professional." Court says that VP of Finance was not an accountant subject to regulatory

overview of any professional organization & did not carry independent insurance coverage for professional negligence so he was NOT a professional in the meaning of s 123(3).

F:

- Indiv Ds were directors of Wise Stores
- Peoples is acquired by Wise Stores pursuant to a transaction structured as an amalgamation; Indiv D become directors of Peoples
- Due to financing conditions of the transaction, Peoples could not amalgamate with Wise Stores until a parent company of Peoples had been paid in full
- Upon consultation with management of both companies, the Indiv D instituted a new joint-inventory procurement policy system to achieve greater efficiencies:
    - Wise Stores: to purchase overseas inventory and bill Peoples for its share [because less inventory is sourced overseas, Wise takes on relatively less debt]
    - Peoples: to purchase North American inventory and bill Wise Stores for its share [because more inventory is sourced in North America, **Peoples takes on relatively more debt**]
- **Result of procurement agreement is that P takes on more debt & D takes on less**
- Bankruptcy proceedings ensue & **P tries to sue D on the basis that the directors breached their DOC**.

Proc Hist: TJ finds breach, ABCA overturns

I/H: Did the Indiv Defendants breach s 122 by implementing a procurement policy favouring the interests of Wise Stores over Peoples? → **NO.** Did not breach DOC under s 122

A:

Statutory Fiduciary Duty – Duty of Loyalty – Subjective test (*ABCA*, s 122(1)(a))

- Directors do not owe a fiduciary duty to creditors under s 122(1)(a); the statutory specifies that the fiduciary duty is owed to the **corporation only**
- The debtors (the directors) may owe a fiduciary duty to creditors based on circumstances of any given case under the law, but they do not by operation of s 122(1)(a)
- "The **statutory fiduciary duty** requires directors and officers to **act honestly and in good faith vis-à-vis the corporation**. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally."
- Here, no evidence of personal interest or improper purpose → Directors were trying to solve problems relating to inventory costs & it was an honest and good faith attempt which turned out to be unsuccessful
- "... the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders""
    - "[I]n determining whether they are acting with a view to the best interests of the corporation it **may be legitimate**, given all the circumstances of a given case, for the board of directors **to consider**, inter alia, the **interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.**"

Statutory Duty of Care – objective test (*ABCA*, s 122(1)(b))

- Requires more of directors & officers than the traditional CL DOC → identity of potential P more open-ended in this provision so creditors could have a claim
- Objective standard: "Directors and officers will **not** be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA **if they act prudently and on a reasonably informed basis**. The decisions they make **must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known**."
- **Business judgment rule**: "In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate

decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made."
    - **Condition 1: decision making <u>process</u>** → directors must have acted **prudently** & on a **reasonably informed basis**
    - **Condition 2: substance – reasonableness of decision made** → decisions must be **reasonable <u>business</u> decisions** in light of **all the circumstances** about which the **directors or officers knew or ought to have known**.
- Here, directors *can* owe a DOC to creditors under s 122(1)(b) because (b) does <u>not</u> refer only to the corporation → "identify of the beneficiary of the DOC is much more open-ended, and it appears obvious that it must include creditors." Notwithstanding this finding, court concludes Indiv Ds did NOT breach the SOC associated with that duty. Implementation of joint inventory procurement policy was reasonable.

Defence When Relying on Credible Professionals (ABCA, s 123)
- S 123 provides a defence to officers & directors who, in making a decision, relief in good faith on a "report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him."
- Here, court says that the statute refers to a "profession" & the EE in question here was not a professional (he was VP of finance) and so was not an accountant subject to the regulatory overview of any professional organization & did not carry independent insurance coverage for professional negligence.

ABCA s 123(3) – professional opinion exception

123(3) A director is not liable under section 118, and has complied with the director's duties under section 122, if the director exercises the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including reliance in good faith on

> (b) an **opinion or report** of a person, including a lawyer, accountant, engineer, appraiser or employee of the corporation, whose **profession or expertise lends credibility to a statement** made by that person.

BCE Inc v 1976 Debentureholders (reiterates *Peoples*)

R: Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

R: Fiduciary duty based on BIOCs (add in here)

F:
- A group of purchasers proposed a leveraged buy-out of all the shares of BCE Inc. Under the transaction BCE would incur $30 billion of the debt to support the purchase. As part of the transaction, Bell Canada ("Bell"), a wholly-owned subsidiary of BCE, would guarantee that debt
- Bell's existing debenture holders argue that Bell's increased liability under the guarantee would have the effect of **downgrading the value of their debentures** (by average of 20%) while conferring a benefit only on the shareholders of BCE by way of a premium on market price of BCE shares (of approx. 40%)
- Debenture holders brought an oppression action under CBCA (s 241) and challenge the approval of the plan of arrangement under s. 192 as not being "fair and reasonable"

Proc Hist:
- TJ held agreement was fine.
- QCCA held BCE failed to prove the detail was fair under s 193 b/c (1) breached fiduciary duties to creditors when they approved the deal; (2) should've found some way that did not screw the debentures to that extent

- The fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation.
- All three competing bids required Bell to assume additional debt, and there was no evidence that bidders were prepared to accept less leveraged debt.
- Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

I/H:

A:
- Fiduciary duty of the directors is to the corporation, BUT this is a contextual inquiry and won't always be = to short-term profits to SHs
  - "Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear – it is to the corporation: Peoples Department Stores."
  - "In Peoples Department Stores, this Court found that although directors must consider the best interests of the corporation, it may also be appropriate, although not mandatory, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders."
  - Inquiry to fiduciary duty = BIOC!! "In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. **Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives**…It reflects the reality that directors, who are mandated under s. 102(1) of the CBCA to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. **This applies to decisions on stakeholders' interests, as much as other directorial decisions**."

Smith v Van Gorkum – DOC (deference has limits; reasonable process & substance required)

R: While deference is afforded to directors, their decision must be of **reasonable process & substance**. To satisfy DOC, Board must adequately inform themselves of the all the circumstances they know or ought to know about. May include the role of decision makers in a potential deal, sufficient time to consider, prior notice, reading agreement in question, etc.

F:
- D Corp held significant investment tax credits it couldn't offset
- Indiv D met with Pritzker, a takeover specialist, to discuss the acquisition of the D Corp
- Under the proposed deal "New T Company" was formed as acquiring corp to carry-out a "cash-out merger" with D Corp @ $55/share
- Minority SHs brought class action against the D Corp and the individuals on the Board of Directors, including the Indiv D, in response to the deal
- Called 2 meetings:
  - (1) management: only 2 management members supported. CFO objected. VanGorkum proceeded to the BoD meeting. Did not disclose the methodology by which he and the takeover guy arrived at the deal.
  - (2) Transunion's lawyers advised the directors that they may be liable if they failed to accept the offer. Directors then, based on that advice, approved the proposed merger agreement. No one read it.

Proc Hist: TJ ruled for directors on the basis the board acted in an informed manner so they were entitled to use the Business Judgment Rule. Appellate reversed in favour of Ps for fair market value of the shares ($55=lowball)

I/H: Did the indiv D breach DOC to the corp when they approved the cash-out merger? → **YES**. Indiv Ds personally liable.

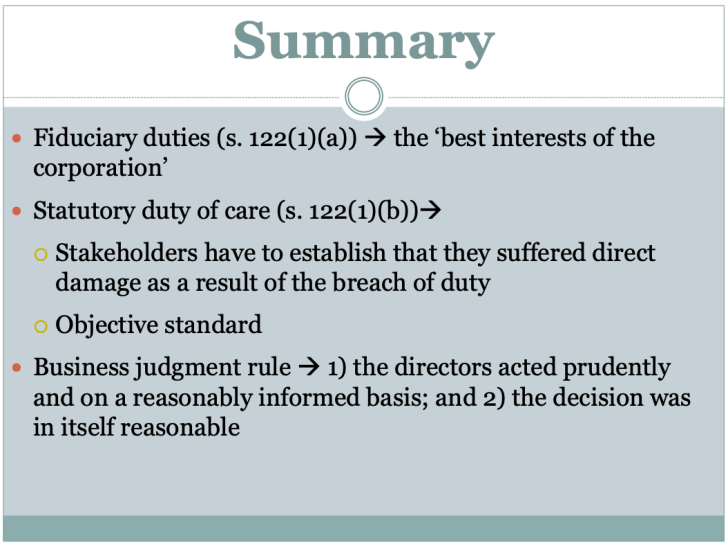
A:

- USA only has the process requirement of the BJR, not two pronged like ours ⇒ This case is particularly useful for the process part, but not the content part.
- In order to determine whether the BJR should be available we look at how the directors informed themselves of all info reasonably available to them.
- Clear on the facts of this case that they did not adequately inform themselves:
  - Did not inform themselves of the CEOs role in this deal
  - Uninformed as to the real value of the shares of the company
  - Approved the merger after 2 hours of consideration, with no prior notice and without reading the agreement.
- Even though we know we should be deferential to board members with business expertise, that alone does not mean the board will get away with its decisions every time.
- Mere threat of litigation did not constitute legal advice or a valid basis upon which to pursue an uninformed course. (You could make a 123(3) argument in AB, but it probably wouldn't work because the decision is so nuts)

Majority: concluded that the directors acted on information inadequate to reach an informed business judgment as to the fairness of the offer

Dissent: Board was not grossly negligent; the beginning of the majority's "comedy of errors" is in the assessment of the competence and ability of the members of the Board; the directors were "highly qualified and well informed" and made an informed business judgment which was buttressed by their test of the he market"

Summary

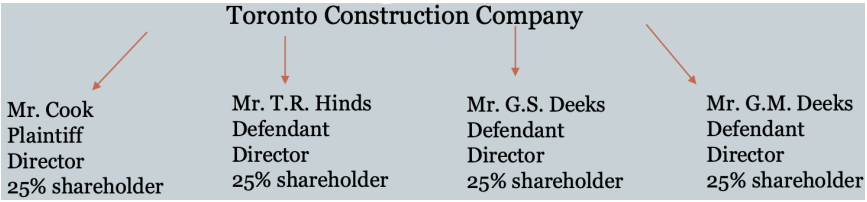


Fiduciary Duties

DOC & Taking Corporate Opportunities

Directors taking a business opp that belongs to the corp for their own benefit (stealing a corp opportunity from the company that they're on the board of).

Cook v Deeks (OLD CL law re taking corp opps → changed by ABCA 16.1)



R: Taking corp opp = distinct breach of fiduciary duty. Occurs when:
- Directors **intentionally** conceal info so that they can individually enter into corp opp **while trusted** with the conduct of **affairs of the corp**.
- Directors **deliberately use their influence** and position to exclude the corp from the corp opp.

R: Those "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**, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent."

F:
- Toronto Construction Company is a contractor that constructs railways
  - P=Cook, a Director and 25% shareholder
  - Indiv Ds=GM Deeks, GS Deeks, & Hinds; each is a Director and 25% SH
- Indiv Ds want to exclude P from a contract that they negotiate and execute with CP Rail b/c he's "unsatisfactory from a business standpoint"
- Individual Ds pass SH resolution declaring the company had no interest in the contract & CPR awards contract to the Indiv Ds acting under a different corp
  - Since Ds owned ¾ shares, they passed a resolution at a meeting of the SHs saying the company had no interest in the contract. They took contracts for themselves & didn't have liability for so doing b/c the corp waived interest in it (¾ voted in favour)
- P sues on his own behalf as shareholder and on behalf of the Toronto Construction Company

I/H: Could the 3 SHs ratify & approve the resolution & release themselves from liability? → **NO**. Indiv Ds took a corporate opportunity & cannot retain benefit of the contract; they must hold it on behalf of the company.

A:
- Guilty in the course they took to secure the contract & so can't keep the benefits of the contract for themselves; they must hold the contract in trust for the corporation.
- "…they **intentionally** concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their own favour and there was no longer any real chance that there could be an interference with their plans. This means that **while entrusted with the conduct of the affairs of the company** they **deliberately** designed to exclude, and **used their influence and position to exclude**, the company whose interest it was their first duty to protect."
- Those "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**, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent."

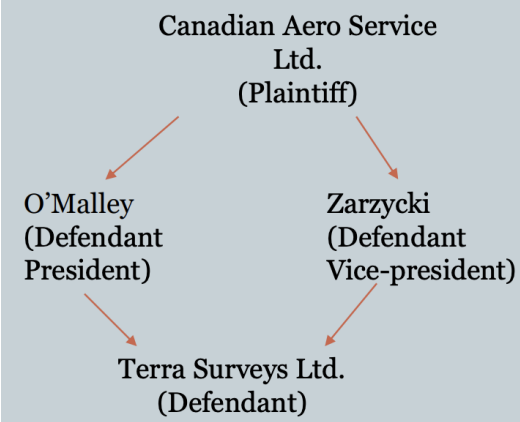
- Ds "were **guilty of a distinct breach of duty in the course they took to secure the contract**" and the contract "belonged in equity to the company and ought to have been dealt with as an asset of the company"

Waiver for Taking Corp Opportunities: ABCA, 16.1

2022 Amendments ABCA changes the law in Deeks, s 16.1: can include a **waiver** for breach of fiduciary duty of a director for taking corporate opportunity. **BUT it must be included in the articles of incorporation OR in a USA**.

NOTE: this doesn't legislate the fiduciary duty, it just **provides a "way out" for violations** of the duty (SO you can still breach duty if you take a corporate opportunity, but 16.1 provides a way out).

CA Aero Services Ltd v O'Malley (corporate opportunity doctrine)



R: Corporate Opportunity Doctrine (TEST)

1. Element 1: **Belonging** → "A director or a senior officer is precluded from obtaining for himself…any property or business advantage either **belonging to the company** or for which **it has been negotiating**." Factors include:
    a. Position of office held
    b. Nature of the opportunity
    c. Ripeness of opportunity (i.e., how advanced it was)
    d. How specific opp was (how far along were the negotiations? Is there a contract already, or is it a remote possibility?)
    e. Amount of knowledge possessed by director (BUT this isn't determinate & specific knowledge isn't required)
    f. Circumstances in which it was obtained
    g. Time in the continuation of the fiduciary duty where the alleged breach occurs *after* the termination of the relationship with the company.
2. Element 2: **diverting**
3. Element 3: to a **maturing business opportunity** which his company is actively pursuing

**do* NOT have to prove the corp would've received the contract *but for* the taking corp opp, just have to show maturing business opp the corp was pursuing was taken

The fiduciary duty will survive even if the director leaves the corp → directors can't claim they aren't liable b/c the aren't in the company anymore).

Directors cannot claim that a distinguishable proposal is sufficiently different that there isn't a breach of the duty → as long as the three elements are satisfied, taking corp opp is established.

F:

- O'Malley & Zazycki (Indiv Ds) improperly took corporate opportunity from Aero
  - Ds made a new corporation & submitted a bid that was competing with Aero
  - Both Plaintiff and Terra Surveys Ltd. bid for the contract pursuant to the tender process
  - Terra Surveys Ltd. is ultimately awarded the contract
  - Aero argues that this was taking a corp opportunity from Aero.
- Nominal directors are appointed to the board of Terra, while Individual Defendants are major shareholders in and officers of the corporation

I/H: Did the Ds take a corporate opportunity from P? → **YES**

A:

Ds are not directors, but their roles as top managers mean they can be treated the same.

- Ds were top managers, not mere EEs. For this reason, the same duty applies to them as directors.

Corporate opportunity doctrine

- Element 1: **Belonging** → "A director or a senior officer is precluded from obtaining for himself…any property or business advantage either **belonging** to the company or for which it has been negotiating"
  - Belonging is more than just continuing being employed somewhere; if the opportunity has a genesis in the corporation, there is a fiduciary duty (provided you are a director or senior officer). Here the fact that, at the time of the lawsuit/bid was already tendered, the former managers were no longer with Aero, does not undermine element 1 (i.e., belonging).
  - **Factors to determine if corporate opportunity doctrine is at play**:
    - Position of office held
    - Nature of the opportunity
    - Ripeness of opportunity (i.e., how advanced it was)
    - How specific opp was (how far along were the negotiations? Is there a contract already, or is it a remote possibility?)
    - Amount of knowledge possessed by director (BUT this isn't determinate & specific knowledge isn't required)
    - Circumstances in which it was obtained
    - Time in the continuation of the fiduciary duty where the alleged breach occurs *after* the termination of the relationship with the company.
- Element 2: **diverting** a **maturing business opportunity**
- Element 3: which his **company is actively pursuing**

Breach of fiduciary duty: director went after a maturing business opportunity that the company was actively pursuing

- Don't have to prove that but for the taking of the opportunity that the corp would've obtained the contract. Instead, **merely have to show that a maturing business opportunity was taken that the company was pursuing** (doesn't matter if it was likely the corp would get it or not).

Fiduciary duty?

- **Duty survived the departure of the 2 managers** from the company (can't claim they aren't liable b/c the aren't in the company anymore).
- Also **can't claim that a distinguishable proposal is sufficiently different that there isn't a breach of the duty**; just need to show the three elements: (1) belonging; (2)diverting; (3) maturing business opportunity (i.e., they still went after the *same* opportunity; changing a few words, or even substantially changing a bid for the same project, doesn't negate breach of the duty).

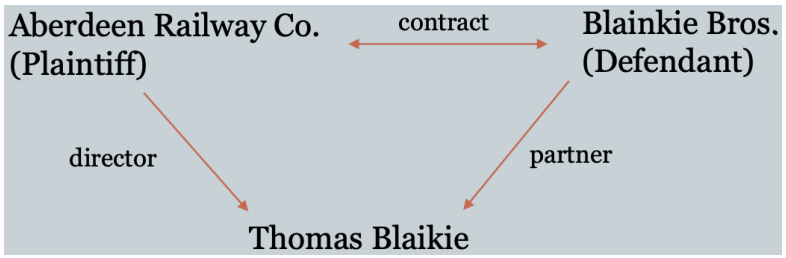
Matic et al v Waldner et al (clarifies corp opp doctrine)

R: Whether the opportunity "belonged" to the corporation → list in Aero NOT closed
R: Mature business opportunity → a potential conflict must be a real sensible possibility and more than a theoretical conflict
R: "Actively pursuing" (as stated in Aero) is quite broad. Breach can occur when it's a potential, and one that the corporation is not actively pursuing. I.e., Courts don't require the corporation be **actively pursuing** in the literal sense (they don't need to have actually submitted to a particular process; a potential pursuit will suffice)
R: (restatement of Aero) Manner in which the opportunity came to the knowledge of the director is not determinative
Purpose of the analysis is whether the opportunity belonged to the corporation in the first place in light of the high duty of good faith & loyalty held by the director.

Self-Dealing Transactions: CL

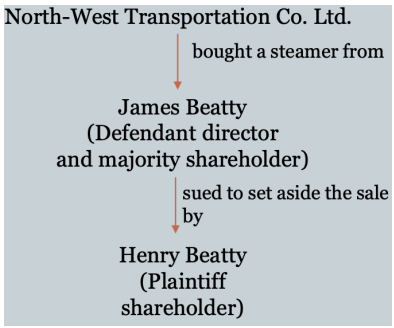
When the transaction benefits an indiv director.

Aberdeen Railway Co v Blaikie Bros (1843)



R: Self-dealing contracts are void *ab initio* b/c no one with a fiduciary duty shall be allowed to enter into contracts where they have a conflicting personal interest that conflicts with the corp interests.
F: - P enters into contract w/ a partnership (i.e., D) to purchase chairs. - At time of contract, Blaikie (one of the partners) was <u>also</u> a director of P.
I/H: Can P void the contract b/c it is a self-dealing contract? **YES**; Blaikie's role on both sides of the contract renders the contract voidable at the option of P.
A: - The director "has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect." - Blaikie's duty to the corp was to get the chairs for the least amount of $ but, at the same time, his interest in the partnership is to get the most money possible for the chairs → i.e., countervailing interests - "…he put his interest in conflict with his duty, and whether he was the sole director, or only one of many, can make no difference in principle."

North-West v Beatty (corps can adopt self-dealing contracts)



R: Corporations can affirm or adopt self-dealing contracts, so long as they are adopted/affirmed non-oppressively & non-fraudulently.
F: - Non-director SHs=Ps - Director SHs=D - P enters into a contract for the purchase & sale of a steamboat from D in his personal capacity. - Ps wanted court to set aside a sale made to P by D of a steamboat b/c D had given his shares to ppl he thought would vote in favour of the sale.
I/H: Does SH ratification of the contract insulate its validity? → **YES.** While this was a self-dealing transaction, there is nothing illegitimate under the articles of the company or law of corps to have Beatty transfer his shares to other ppl & then have them vote in favour of the contract.
A: - Restates def'n of a self-dealing transaction from Aberdeen BUT any such self-dealing can, however, be affirmed or adopted by the company so long as they do it in a fair way (i.e., as long as it's not oppressive or fraudulent). - "The only unfairness or impropriety which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant J.H. Beatty possessed a voting power as a shareholder which enabled him, and those who thought with him, to adopt the by-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and his co-directors had entered…"

Self Dealing Transactions: Legislative Response

ABCA s 120: legislative response to self-dealing transactions

Section 120: another way out of self-dealing transaction
Statutory regime for directors or officers if they intend to engage in a self-dealing transaction

ABCA s 120 requires:

1. Disclosure in writing/minutes (s 120(1)) OR general notice to the directors (s 120(7))
2. Approval by the appropriate body
    a. If the articles don't say you need approval, then you don't need approval.
    b. If articles require approval by the Board, the interested director **cannot** vote (s. 120(6))
    c. If articles require approval by the SHs, the interested director can vote his shares as an SH (this is b/c you are wearing your SH hat; this resembles Noth-West.
3. Show proof that the contract is **fair and reasonable** to the corp at **time it was approved** (s 120(8))

If you fail to comply with the above, you can use the "whoops" provision (s 120(8.1)) →

1. Director acting honestly & in good faith can access the provision
2. Requirements
    a. Contract must be confirmed or approved by special resolution at a meeting of the SHs
    b. Disclose to SHs before contract is approved
    c. Show contract was fair to company

Failure to comply with s 120(1-7) or 120(8.1) can result in a court **setting aside the contract and/or requiring accounting** of profits (s 120(9)).

Dimo v Jager – defining material interest under s 120 → **financial** interest

R: Material interest = broad, but must include a significant **financial** interest that is yours. Absent a significant financial interest to oneself, there can't be a requirement to disclose under s 120 b/c it's not a self-dealing transaction.

BUT if you are in a self-dealing transaction and you don't comply with s 120, the court can set aside the contract and/or require you to count profits (s 120(9)). However, the remedy ordered depends on **whether the contract was fair and reasonable** (i.e., discretionary remedy dependant on context). If fair & reasonable → court will likely just order counting profits. If not fair & reasonable → court may set aside.

F:

- Dimo Holdings Ltd= Wife Moeller was the sole director, offer, & SH
    - Jager = Husband Moeller was the director of the D
- P lends $50,000 to D with an interest of 50% per annum (note – high interest & is actually an illegal amount)
- P brings action to collect $30,619 of the principal (which remains unpaid)
- D argues that the loan contract should be set aside because Husband Moeller failed to disclose his material interest in the contract as required under ABCA s 120
    - B/c he failed to disclose, D (Jager Inc) argues the contract is void & so D doesn't have to pay the money back to P

I/H: Does he have a "material interest" in the loan b/c his wife was the Director of P corp? → **NO.** Mr M did not have a material interest in the P & therefore in the contract, so s 120 does not apply to the loan.

A:

- **Material interest**: broad concept that denotes a financial interest. BUT, to be a material interest, it must be **significant** financial interest
    - Can be a direct interest *or* a beneficial interest (not such a big deal), but it needs to be a **financial** interest.
- Loaning of money to D ≠ actual financial interest in the P.
    - Wife had the financial interest, but the wife having that interest is **not enough** to turn it into Husband's financial interest.
    - Even though Husband orchestrated the loan, he didn't have a material interest in the loan & so he wasn't required to disclose anything under s 120.
- Even if Court had found it was a material interest triggering s 120, s 120(9) wouldn't have required the court to necessarily set aside the contract, the court has flexibility in what they award. Court must first consider **whether the contract was fair & reasonable**.
    - If contract, not withstanding being self-dealing and failure to comply w/ s 120, the court will still look at whether its fair & reasonable to the corporation (which depends on whether or not it benefits the corporation). In such a case, the court would instead just order counting profits.

- Even if s.120 did apply, the remedy under the ABCA is permissive; the court would not exercise its discretion to set aside the contract and forgive the debt here.
- In this case, Court set aside the interest rate, but the loan itself (i.e., the contract) was fair & reasonable to corp P. Once interest rate is lowered to an appropriate interest rate, Husband & Wife Moeller had nothing to gain.
  - While the interest rate which was not fair and reasonable – this was dealt with by the Master – the loan itself was fair and reasonable; where it is fair and reasonable, the court should be reluctant to set it aside.
  - Even if the contract was not enforceable, Plaintiff would have a claim in unjust enrichment collect the remaining principal.

Zysko v Thorarinson – expands Dimo def'n of material interest → relevant involvement in decision making processes

Takeaway: direct conflict, indirect conflict, indirect material interest in another corporation (which could be financial, marital, emotion-based etc) → BUT determine by asking **would a corp change their decision-making process if they knew about the relationship?**

R: **Material interest** isn't necessarily limited to a financial interest (broadens def'n from *Dimo*).

If there's a possibility that the director could **benefit** from the contract **more than de minimis**, you should heir under s 120/require disclosure. The benefit here isn't limited to financial benefits.

R: "**there should be disclosure whenever the director or officer's involvement might be relevant to the corporation's decision making process**. This would appear to mean that if the corporation would undertake **additional due diligence** to determine whether the contract or any of its terms is truly in its best interest [of the corporation] or if it would assign another director or officer to handle the negotiations, then the contract is material and must be disclosed." → If they'd likely replace you to make the decision, you should disclose under s 120/ if they would change their decision-making process in light of the officer/director's interest, you should disclose.

A:

- ". . . it seems clear that the statute also addresses the problem of a director or officer who has no monetary interest in a person on the other side, yet who is likely to have an emotional involvement. Thus, a deal in which the corporation is negotiating with a clofse relative, or even a close personal friend, of one of the directors or officers ought to be suspect."
- "The purpose is to identify those negotiations in which a corporate manager's ability to bargain effectively on behalf of the corporation may be inhibited by some interest he has in the other side. Any personal relationship or monetary interest he may have in the other side that might be thought to be an inhibiting factor is a material interest if disclosure of the relationship or interest might be relevant to the corporate decision whether to involve the particular manager in the negotiations."
- "The authorities, in my view, disclose that the term "material" is a question of fact that extends beyond the more commonly held notion of financially material. In my view, what is meant by material contract is that if there is a possibility that the Director was to benefit from the contract **more than de minimis** then the transaction should be disclosed to the corporation."

Competing Director

Competing Director: Sitting on boards of competing companies or having an ownership interest in another company that's competing with the corporation on which one serves as a director

Difficult fiduciary duty to prove.

London v New Mashonaland (1891) (disclosure of confidential info)

R: Mere fact a director is sitting on multiple boards does not create a conflict. There needs to be disclosure of confidential information from one company to the competing company.

F:
- Competing companies.
- P wanted to prevent D from posting adverts
- P claimed he was chairman of the board, but there was no proof of that.

A:
- Court rejects the notion (even assuming P is correct and Lord Mayo is on the board) that there is anything preventing him from being involved in another company/acting as a director of another company **as long as** he doesn't disclose confidential information he got from P's company & then using it to the advantage of D company.
- "Even assuming that Lord Mayo had been duly elected chairman and director of the plaintiff company, there was nothing in the articles which required him to give any part of his time, much less the whole of his time, to the business of the company, or which prohibited him from acting as a director of another company...No case had been made out that Lord Mayo was about to disclose to the defendant company any information that he had obtained confidentially in his character of chairman…no sufficient damage had been shown, and no case had been made for an injunction"

Sports Villas Resort Inc (actual competition, actual risk of confidential info sharing, & proprietary interest)

R: Competition requires actual competition; dual directorship isn't sufficient unless there is actual competition & an actual risk of sharing confidential information.

R:Proprietary interest required for actual competition

F:
- Sports Villa Ltd. owns a golf course outside of St. John's
- Bruce and Richard Pardy (Plaintiff) directors of Sports Villa
- Mr. Dobbin and Ms. Dobbin (Indiv Defendants, directors of Sports Villa Inc which owns Clovelly Gold & which is 200+ km away from St John's)
    - Mr. Dobbin = director and SH in Sports Villa, but also has an ownership interest in Clovelly Golf Course Inc., a company that also owns a golf course in the city
- Claim 1: Competition claim; Dobbins sitting on both boards = conflict
- Claim 2: Dobbins are using corp information improperly, i.e., corporate opportunity.

I/H: Is Dobin a competing director? → **NO**. No actual competition, disclosure of confidential info, or proprietary interest in corp info. Balance of public interests also weighs away from competing director.

A:
The Competition Argument
- Question is one of **actual competition** → dual directorship in this case isn't sufficient (there isn't actual competition).
- We need to discourage breach of fiduciary duty, but we also need to recognize that there are limited directors to go around & there's really no reason to not have directors on multiple boards unless there is actual competition & therefore an actual risk of sharing of confidential information.

- To assess the validity of the complaint we look to (i) whether there is **actual competition** between the Sports Villa and Clovelly and not simply the fact of Mr. Dobbin's dual directorship; and (ii) the **balancing of public interests** within the full context of the circumstances in which the claim of competition has arisen
    - Sports Villas is approximately 220 km west of the one in St. John's; the distance between the golf courses and the the different types of facilities at each suggests the two courses cater to different markets
    - Unless Ps can establish that Clovelly nonetheless actually competed with the Sports Villas golf resort there can be no basis to find that Mr. Dobbin put himself in a position of conflict through his ownership in Clovelly, which would make the Individual Defendants ineligible for membership on the board of Sports Villas

The Proprietary Interest Argument

- Ps argued that once Terra Nova was established, Sports Villas was intending to occupy the field (i.e., be the only developers of golf courses). Claim that the business model would be such that Sports Villas would operate all golf courses & this is taking corporate opportunity.
    - Court rejects. no evidence of this agreement and no SHs agreement; "there were supporting and coherent reasons for the judge's inference that there has been no understanding respecting future golf course developments"
- Ps also argued that Mr. Dobbin used confidential "proprietary information" belonging to Sports Villa in breach of his fiduciary duty (including: marketing programs, operational procedures, and management systems which have confidential proprietary information & therefore breaches Dobbin's fiduciary duty)
    - Court rejects: no confidential information, no evidence to show programs/procedures/systems that were unique or that Sports Villas created (nothing new added to the market here, so there's no leg to stand on wrt the proprietary, confidential information argument).
- Court says that Directors should should exercise a degree of sensitivity and caution in regard to the use of legitimate corporate information and opportunity uniquely possessed by one of them. BUT information sharing of generic information/generic programs doesn't confer a proprietary interest because that would not be **unique** proprietary information.

Take Over Bids & Defensive Tactics by Management

Take over bid: company buying another company
Hostile take over bid: company buying out another company by force

Maple Leaf v Schneider (ONCA) (1998)

When there is a takeover bid, top management will be replaced. Therefore, directors have an inherent conflict of interest in the case of a takeover bid (because they'll be replaced). Thus, Directors must decide whether to approve the takeover bid & therefore likely lose their jobs (even though the takeover bid might be in the best interest of the company).

R: First step to cover one's ass in the takeover situation → establish a special committee of directors who are **non** SHs & **non** fam members.
Second step: ensure sufficient substance of committee
(1) Did the directors act in the best interests of the corporation?
(2) Should D's senior management have been permitted to have a significant role in the sale negotiations with potential bidders?

F:

- Schneider was a family business & the SHs were all family members
- Maple Leaf trying to buy out Schneider; hostile takeover attempt by Maple Leaf to take out Schneider
- ML announced its intention to buy out shares (i.e., do a hostile takeover).

- At first, ML offered $19/share, then raised it to $22/share. In response, board of Schneider established a special committee
- Family had an idea of who they wanted to sell the company (if at all), so fam rejected the bid & told the special committee that they would rather take a competing offer from Smithfield Foods (a competitor) who were offering $25/share.
    - BUT after Smithfield put in the $25 offer, Maple Leaf put in a $29 offer.
- ML offer rejected; Smithfield offer excepted even though it was less $/share.
- Majority SHs (i.e., the family didn't like the plan, particularly since a bunch of people would be fired), so they blocked the bid.
- ML goes to court arguing the deal with Smithfield should be set aside & the ML bid should be accepted.

I/H: Was there a conflict of interest by Schneider's CEO due to his participation in the negotiation process? **NO**.

A:

Special Committee: Mechanism to guard against conflicts of interest in decision making

- Argue says special committee wasn't truly independent (even though it was supposed to be), & the CEO was the chief negotiator on behalf of the special committee w/ bidders who was different to the familial interests.
    - Issue 1: position = conflict
    - Issue 2: deference to the family = conflict.
- Court rejected.

Key Qs: A bit of a process & substance question (first - did they make the special committee? Second – was the substance good, i.e., answer the two Qs below)

- Did the directors act in the best interests of the corporation? (when they accepted Smithfield bid instead of ML bid)
    - Directors are tasked w/ managing corp in the corp's interest. If this isn't congruent with the interests of some minor SHs, this does not matter; it just needs to be in the corp's interest
    - So long as there was an informed basis (i.e., acted honestly & reasonably), the court won't substitute it's own business judgment for that of the board of directors.
    - Establishing a special committee alleviated concerns of conflict of interest in the takeover context because the committee was made of people who were members of the board but non-SHs. B/c they weren't SHs & weren't particularly involved in the family, there was a sufficient amount of independence b/w the special committee & the family/SH directors.
    - As long as the special committee acted honestly, reasonably (i.e., in good faith) & was therefore informed (i.e., aware of what was going on → they knew what bids were on the table & what the family was willing to do; here, we consider <u>all</u> the circs, including that the fam would likely try to block any decision re ML).
    - Court also says that the $25 bid and $29 bid ended up having very similar tax outcomes.
    - Court says that they can't say the decision was unreasonable in light of the (1)insignificant difference in bids, (2) family's likelihood of blocking a ML bid; (3) corporate interest in maintaining the family's wishes.
        - Best interests in the corporation extend beyond $ to SHs, EEs, creditors, etc. They're guided by the best interests Q, but the concept isn't 1 dimensional (the idea is that you don't act in the best interests of a single stakeholder group).
- Should D's senior management have been permitted to have a significant role in the sale negotiations with potential bidders?
    - ML argues senior mgmt shouldn't have been involved at all, but does his loyalty to family & position as CEO amount to a conflict of interest & therefore breach his fiduciary duty to Schneider?
    - Court says that this depends on the role of the person in question:
        - If Sr mgmt is a member of the special committee, there is a problem & it's not necessarily truly independent.
        - Here, CEO was <u>not</u> a member of the special committee & didn't have a vote on the matter. He merely tried to assist them because he had the highest level of inside knowledge re the

corporation. ⇒ CEO was involved in the negotiations, reported to the special committee, and then left the special committee to discuss & make their decisions in light of CEO's negotiation/reporting. CEO did not have a say in the outcome.

- Potential conflicts w/ Sr mgmt can be dealt with through a golden parachute (getting a bunch of money when you're likely to be fired as compared to if you had continued being CEO, then you can't say that that CEO had some actual conflict.
    - Here, CEO had a golden parachute (i.e., he was guaranteed to have as much money once the new company bought Schneiders as he would make currently as the CEO, so he didn't have any financial reason to actually oppose it for personal reasons).

Ironically, in 2004, Smithfield sold to ML. lol.

Other Sources of Fiduciary Obligation

Tongue v Vencap (AB) – possibility of fiduciary duty from directors to SHs

R: 3 situations wherein the directors may owe a fiduciary duty to SHs:

1. **Directors acting outside of their ordinary duties**
2. **Directors purchase shares from SH**
3. **Other grounds**

F:

- Synerlogic Inc. ("Synerlogic"). Ps, Tongue & Harrap = minority shareholders of Synerlogic
- Directors of Synerlogic = Individual Ds
- Vencap = intermediary D
- One of the Individual Ds negotiated to purchase the Ps' shares for $0.60/share without disclosing that a buyer was interested in purchasing all of the company shares for a higher price (i.e., 1.97/share)
- Ps sold their shares to indiv Ds/Vencap for $0.60/share and signed a release discharging any existing right of action and prohibiting any future action
- Indiv Ds, through Vencap, sold the shares to the buyer for $2.16/share
- Ps sue Indiv Ds for (i) breach of fiduciary duty, and (ii) insider trading [ABCA s.130 ABCA] → intermediary (i.e., Vencap) comes in b/c Ds used Vencap to buy/sell the shares.
- Ds argue that they don't owe a fiduciary duty to minority SHs (they only owe a fiduciary duty to the company) and also rely on the signed release in their defense

I/H: Do the Ds owe a fiduciary to minority SHs? → **YES**.

A:

Fiduciary duty from Director to SH?

- No general fiduciary duty b/w director and shareholders simply b/c of that relationship (you don't automatically owe a minority SH a fiduciary duty)
- BUT, the director/SH relationship **does not preclude a fiduciary duty** from arising

When a fiduciary duty can arise…

1. When director(s) are acting outside their ordinary duties
    a. One director's action of telling the Ps to give him shares for a certain $ and then turning around and negotiating a sale is outside of the director's ordinary duties & therefore creates a fiduciary duty.
2. When director(s) purchase shares from the SH
    a. Goal is that SHs don't get screwed over, so any time that a director wants to purchase shares from an SH, there's a fiduciary duty such that director shouldn't defraud them.
    b. Form doesn't matter here → direct, indirect, intermediary, etc. is inconsequential. We care about the substance, not the form.

3. On more general/broader grounds
    a. Test: look at the relationship & determine whether it's appropriate to attach fiduciary obligations to the particular circumstance.
    b. Here, the directors had information that the SHs didn't have, but should have known. Directors also pocketed the money at the expense of the Ps.

Release from liability

- When the Ps signed the release, did they know that they would be releasing their right to sue for this type of behaviour? This ended up being a fiduciary breach, and it would not have been in the Ps' minds when they signed the release.
- Even the language of the release wasn't enough to release from liability: "I realize I am giving up any profit that I might have if the shares are sold again at some point"
    - Ps figured that they were giving up the right to sue if the shares had organically, over time, increased and the Ps wanted more money.
    - However, Ps weren't signing it anticipating that the Ds had intended to secretly arrange a sale and make a ton of money.
- Even though Ps hired a lawyer, this wasn't enough to make the release from liability valid. The lawyer was using the material information available & had no way of knowing that the Ds were secretly planning to sell the shares immediately and turn a huge profit.

Other Statutory Duties

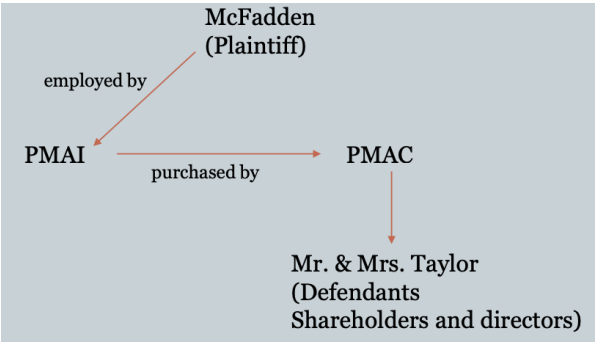
Zwierschke v Minister of National Revenue

R: Duties of directors can arise from different sources. Any duties of a director don't have to come from the ABCA or the CL, there are other statutes that can give rise to duties of directors (in Zwierschke, the Income Tax Act was found to establish a fiduciary duty flowing from the directors to the SHs)

Directors' & Officers' Liability in Tort to Third Parties (TPs)

Intentional Torts: Inducing Breach of Contract

McFadden v 481782 ON Ltd – Said v Butt defence to inducing breach of contract



R: Said v Butt defence (available to directors in cases of inducing breach of contract)

If an agent, acting bona fide, within the scope of his authority, procures or causes a breach of contract b/w his ER & a third person, he/she does not therefore become liable for inducing breach of contract to the TP

(1) Bona fide (to the corp)
(2) Scope of corp authority (qua position)

(3) Corporation is a party to the contract (e.g., in AGDA, they weren't party to the contract)

F:
- PMAC (Corporate Defendant)
- Mr. and Mrs. Taylor (Individual Defendants), directors of PMAC
- McFadden (P) was an employee of PMAC (Taylors = directors of PMAC). PMAC was acquired by PMAI.
- Indiv Ds caused PMAC to improperly transfer $32,000 to them, leaving PMAC with no money; this was held to be a fraudulent preference.
- Indiv Defendants caused PMAC to fire P without cause or notice. B/c all of the money was diverted from the Corp, P couldn't get his money for breach of the employment contract.
- McFadden sued indiv Ds for inducing breach of contract, arguing they should be held personally liable (so that he could get the money from the Taylors)

I/H: Are the Taylors outside of the Said v Butt defence & therefore liable for inducing breach of contract? → **YES**.

A:
Breach of contract: there was a contract that was known of and was breached by a contracting party and that breach was induced by Ds w/o justification.

Said v Butt defence:
- Said v Butt defence: If acts bona fide within scope of authority as directing officer & causes a breach of contract b/w the corporation & a TP, he/she does not therefore become liable for inducing breach of contract to the TP. Idea here is that conduct is justified b/c they're acting in good faith & within their authority as indivs acting in the best interest of the corp.
- If acting in bad faith or for extrinsic reasons, then the Said v Butt defence is unavailable.
- Here, Said v Butt defence was not available. Ds weren't acting in furtherance of any duties owed to the corp & were not acting bona fide/in good faith to the corp. They were using their positions to further their own purposes. In so doing, they prevented P from being able to realize the judgment against the corp for wrongful dismissal.
- ***Said v Butt only applies to inducing breach of contract (not negligent misrep)

Pocklington – elements of inducing breach of contract

R: In order to find that a defendant intentionally induced a breach of contract, seven elements must be established:
1. the 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.

Negligence

Key question: can director/officer be held personally liable for their negligent misrep?

Two divergent lines of authority: ON & AB

1. First line of authority: ***ScotiaMcLeod*** (1995, ONCA)
    - Pro-director approach that emphasizes key principle of corp law: the separation of corporations & the people who run corps (i.e., corp as a distinct legal entity).

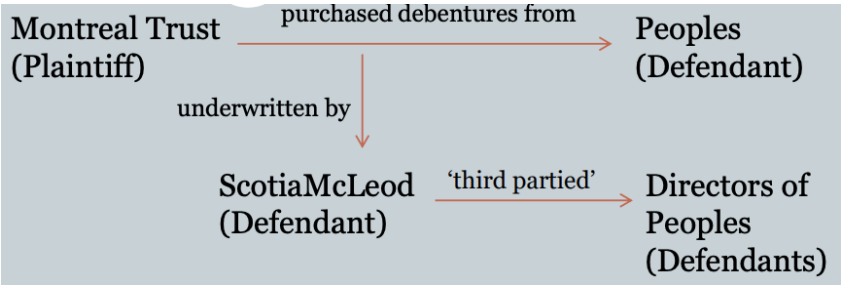
- Protects directors & officers from personal liability when negligence occurs. We shouldn't find personal liability in these situations b/c it blurs the line b/w corp & ppl behind the corp.
- Under ScotiaMcLeod rationale, it is very difficult to hold directors personally liable UNLESS you can show (a) fraud or (b) that they committed negligence outside of their role as director of the corporation → effect: broad protection for directors as long as they did what they did within their duties as corporate officers.
- ScotiaMcLeod Inc. v. Peoples Jewelers Ltd.: "appears to support the conclusion that directors and officers are not liable for simple negligence causing pure economic loss."

2. Second law of authority: *ADGA* (1999, ONCA; not a negligence case, but started moving away from ***ScotiaMcLeod***) & *NBD Bank* (negligence case that moved away from ScotiaMcLeod)
   - Hinted of a move away from ScotiaMcLeod, but facts were more similar to McFadden insofar as it was an intentional tort & not a negligence case.
   - ***ADGA***: directors/officers always responsible for their torts even if they acted in good faith in the interests of the corporation/within their corporate duties.
     - Said v Butt defence can still be available.
   - ***NBD Bank***: upheld ***ADGA*** rationale in a negligence case. Directors & officers responsible for their tortious conduct even if the conduct was in the context of a bona fide act for the benefit of the corporation. I.e., extended AGDA to negligence context.
   - Movement away from ScotiaMcLeod which says "we basically never will see personal liability" to "we will allow the idea that directors *may* be personally liable for negligence, and whether they are liable will depend on the facts of the case"
   - "directors and officers are always personally responsible for the torts they commit – whether as the directing mind or outside the scope" with the exception of successfully raising the defense of Said v. Butt (which only applies to the tort of inducing breach of contract)

Alberta context:

- *Blacklaws v Morrow* (2000, ABCA): must show, at a min, indep tort entirely outside their capacity as director/officer to show ordinary negligence (i.e., restatement of ScotiaMcLeod).
- *Hogarth v Rocky Mountain Slate Inc* (2013): directors didn't have personal liability for negligent misrep b/c that alleged negligent misrep didn't exhibit a tort separate from their role as directors. I.e., applied ScotiaMcLeod & Blacklaws to find no personal liability.
  - Slatter (concurring): while concurring on outcome, completely disagreed w/ reasoning of ABCA. Slatter took the NBD route. While directors shouldn't be held personally liable for negligent misrep, it isn't for the ScotiaMcLeod reasons. Slatter used Anns-Cooper DOC analysis to find that the directors didn't owe a DOC & shouldn't be liable for negligent misrep. While the finding wasn't different from the majority, the reasoning opens the door to application of the Anns-Cooper test instead of saying that there's no liability unless there's (a) fraud or (b) action outside of the scope of corporate duties.
- Slatter's concurring opinion has slowly been adopted by ABCA → notwithstanding this development, courts continue to apply ScotiaMcLeod (or at least talk about it). *inconsistent area of law since the COAs have allowed the full DOC/Anns-Cooper analysis or the ScotiaMcLeod analysis.
  - In both AB & ON, courts are likely to do the full DOC analysis (instead of the ScotiaMcLeod & Hogarth which says that there never is personal liability so the DOC analysis isn't necessary – unless fraud/outside of duties, then the A-C/DOC analysis is necessary.

ScotiaMcLeod (1995, ONCA) (no personal liability UNLESS fraud or negligence is outside director's role)



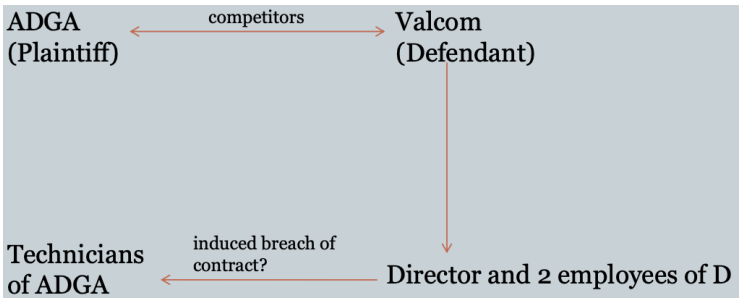
R: Practically impossible to show negligence that gives the rise to personal liability of a director unless cases of fraud or commission of negligence outside of role as director.
In the absence of findings of fraud, deceit, dishonesty, or want of authority on the part of EEs of officers, there is no liability.
I.e., directors protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company.

F:
- P = Montreal Trust. P purchased securities issued by Peoples Jewelry (i.e., D).
- Transaction was underwritten (i.e., there was an intermediary who facilitated the trade of securities). Underwriter = ScotiaMcLeod
- Montreal trust argued that the documents provided by Scotia had misrepresentations concerning Peoples' financial liabilities. Montreal Trust says they didn't have complete/correct information, so they sued Scotia as the underwriter for failing to disclose these liabilities.
- In response, Scotia added the directors of Peoples as TPs to the action, saying that the directors made the misrepresentations to Scotia (i.e., Directors misrepped to Scotia who then misrepped to Montreal Trust).
    - TJ dismissed attempt to add directors as parties to the suit on the ground that they didn't disclose a potential cause of action against the directors b/c there was no possibility to establish directors have personal liability.
    - Scotia appealed.

I/H: Can the directors of Peoples be held personally liable for negligence? → **NO**, not unless their actions are themselves 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.

A:
- "In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare... Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves 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."
- "To hold the directors ... personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation."
- Court says that they did the negligent misreps personally & not as directors Negligently involved in the negligent misrep personally

ADGA (1999, ONCA) (officers <u>can</u> be liable for tortious conduct notwithstanding acting in BIOCs)



<u>NOT</u> a negligent misrep case, but shows that ONCA started poking holes in their thoughts in Scotia.

R: Directors, EEs, officers can be liable for tortious conduct even if they're acting in the best interest of the corporation. BUT, Said v Butt defence still available (just have to make sure all of the McFadden factors are met).

F:

- (ADGA had no contractual relationship with Valcom. Valcom induced breach of contract b/w ADGA and its technicians.)
- Tender was available & Valcom wanted it.
- Tender terms req'd 25 sr technicians to win the tender. Valcom allegedly had 0 Sr Technicians, so one of its directors (i.e., McPherson) went to AGDA's technicians & poached them (we'll pay you more & if you secure the bid, you'll come work for us).
- AGDA sued Valcom for inducing breach of contract, trying to sue the director personally

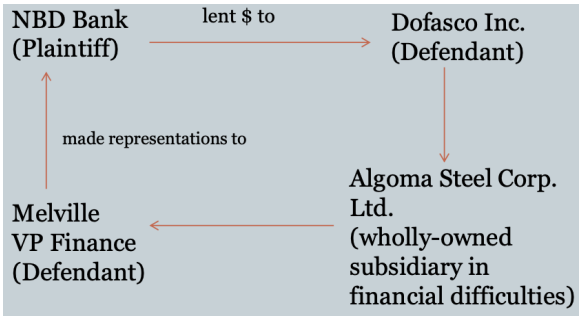
I/H: Is there a cause of action against indiv Ds personally for inducing breach of contract notwithstanding that the directors acted in the best interest of the corporation? → **YES**. Even though it was in the best interest of Valcom to win the bid, the directors should be held personally liable for inducing breach of contract b/c the Pocklington/McFadden factors are met & Said v Butt defence not met.

A:

- "The consistent line of authority in Canada holds simply that, in all events, **officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the company**, always subject to the Said v. Butt exception." → Not appropriate to extend reasoning of Scotia to mean that all conduct of officers/directors will be protected merely because they did something in the interest of the corp. Liability can still be had even if the conduct was directed in bona fide in the best interests of the corp.
- "…where properly pleaded, **officers or employees can be liable for tortious conduct even when acting in the course of duty**. That this is clearly the intent of what was being stated is evidenced by the conclusion that the action should proceed against two defendants; against whom negligent conduct had been properly pleaded."
- Application of Said v Butt defence = unsuccessful b/c Valcom was not a party to the contract (i.e., Said v Butt factors not all met). All other factors for breach of contract met, so indiv directors liable.

NDB Bank (1999, ONCA) (DOC analysis for director's personal liability in negligent misrep)

Upheld AGDA & brought it into the negligent misrep context



R: If you can show reliance & that the reliance is RF, you may be able to show DOC & therefore possibility of personal liability.

F: NBD lent money to Dofasco based, at least in part, of representations made by Melville (VP in Algoma). Algoma was owned by Dofasco. Melville/Algoma allegedly misrepped about Algoma's financial state to get NBD bank to lend money to Dofasco.

I/H: Can Melville be protected from personally liability for the negligent misrep to NBD? → **NO**. Apply ScotiaMcLeod (negligent misrep context) & ADGA (not enough to act in best interest of the corp in inducing breach of contract) & say the ultimate determination depends on a DOC analysis (i.e., brings tort law principles into ScotiaMcLeod/negligent misrep context). **Melville owes DOC, can be held personally liable**.

A:
Court tries taking ideas from Scotia and ADGA; says a full DOC analysis is required.
- Court says that even if they applied ScotiaMcLeod, Melville would likely still personally liable b/c his actions were tortious and, on the facts of the case, outside of his role as VP/made in (at least partially) a personal capacity.
- Court adopts idea from ADGA that there's no basis for protecting Melville from personal liability merely b/c he acted in the best interest in Dofasco.
- Once the Court takes both of these together, they say that a full DOC analysis is required.

Anns-Cooper analysis in negligent misrep:
(1) Was there a prima facie DOC? ⇒ prima facie DOC Found
  (a) Could the D reasonably foresee that P would rely on the representation? (i.e., RF test)
    (i) Melville should've known that P would rely on the representations
  (b) If there was reliance, was it reasonably in the circumstances? (i.e., proximity test)
    (i) Reasonable in relying on Melville's representations
(2) Do policy considerations militate away from DOC? ⇒ policy considerations rejected; DOC found.

Blacklaws v Morrow (2000, ABCA) (Adopted ScotiaMcLeod in AB).

Have to show fraud or it has to be completely outside the scope of corp responsibilities.

Hogarth v Rocky Mountain Slate Inc (2013, ABCA) (Slatter's concurring adopted light version of NBD)

R: Stage 1: Was there a *prima facie* DOC?
1. **Foreseeability**: Could the D **reasonably foresee** that P would **rely** on the representation?
   a. Factors that do not (alone) negate *prima facie* personal liability (***Hogarth***):
      i. Negligent act committed while engaged in business in corp.
      ii. Indiv was not pursuing any personal interest
      iii. Conduct was in BIOC

b. Factors that are of weight in the analysis (***Hogarth***) (weighs to prima facie // weighs away from prima facie)
    i. P voluntarily dealt w/ corp // P had corp relationship imposed on it
    ii. Expectations of the parties
    iii. Direct involvement // indirect involvement
    iv. Tort was "independent" // tort was within scope of director's capacity
    v. Nature of tort (intentional? negligence?)
    vi. Physical damage // economic damage

2. **Proximity**: was the **reliance reasonable** in the circumstances?
    a. Extent of reliance (how much did P rely on D's reps?) (***Hogarth***)
    b. Reasonableness of P in that reliance (was it reasonable to assume D was personally responsible?) (***Hogarth***)

Stage 2: Do policy considerations militate away from a DOC? E.g., limited liability? Separate legal personality? Victims should be compensated? Tortfeasors should be accountable? (***Hogarth***)

F:

- Suhan, Simonson and Powell (Individual Defendants)
- Rocky Mountain General Slate Inc. (Corporate Defendant) "RMS"
- The Individual Defendants incorporated RMS to develop a slate deposit project in B.C.
- A Limited Partnership (LP) was established as a vehicle to invest in the project; RMS was the general partner of the LP
- Simonson was a director of RMS and president of the LP
- Plaintiffs invested in the LP based on misrepresentations made by RMS in its capacity as general partner and Simonson, the director of RMS

Proc Hist:

- Trial court: yes; Individual Defendants provided the Plaintiffs with documents and information to facilitate their investment decision; a duty of care exists based on sufficient proximity and reasonable reliance

I/H: Are the Indiv Ds personally liable for negligent misrepresentation? → **NO**.

A:

Majority

- No personal liability → Statements made for purpose of raising funds for the corp, for the benefit of the corp, nothing made the representations independent from the corporation.
- "We are not satisfied that the conduct of Simonson was tortious in itself, or exhibited a separate identity or interest from that of RMS, the corporation. Here, the statements were made for the purposes of raising funds for the corporation and for its benefit. It is not sufficient to create a separate identity that Simonson himself was an officer and investor in the corporation. As pointed out in [Blacklaws], having a shareholding or other financial interest in the corporation does not translate into a separate interest for purpose of establishing personal liability in trust (para 77). Nor did the trial judge identify any aspect of Simonson's conduct in making the impugned representations independent from his activity as a corporate officer. The claim against Simonson for personal liability in carrying out the business of the corporation must fail."

Concurring opinion (Slatter)

- Personal lability of the directors can be grounded in ordinary negligence; but here the indiv Ds did not owe the Plaintiff a duty of care ⇒ Applies the test for negligent misstatement as articulated by SCC in Cooper v Hobart, with an emphasis on the role of policy analysis in establishing that a duty of care exists
- **Concurrence here is not quite all the way to NBD Bank** (wherein DOC analysis was less demanding that Slatter's DOC in Hogarth) and ADGA (which wasn't an actual negligent misrep case & so DOC analysis wasn't required).

- Factors that do not, in themselves, negate *prima facie* personal liability:
  - That the negligent act was committed while engaged in the business of the corporation (unlike in Scotia where this indicates there's no way for personal liability, Slater says that that's not necessarily true)
  - Indiv was not pursuing any personal interest (unlike in Scotia where this indicates there's no way for personal liability, Slater says that that's not necessarily true)
  - Conduct was "in the best interests of the company" (unlike in Scotia where this indicates there's no way for personal liability, Slater says that that's not necessarily true)
- Factors that indicate whether personal liability should be imposed (in light of the context of the case):
  - Whether P voluntarily dealt w/ the corp or had the corporate relationship "imposed" on it
  - Expectations of the parties (was it RF that the P would rely on what the D said?)
  - Whether the tort was "independent" (i.e., was it within the scope of the directors capacity or did it have an independent nature to it beyond the director's duties as a director; while this was more determinative in Scotia, it's not determinative according to Slatter; independent tilts toward prima facie duty)
  - Nature of the tort (is it intentional tort? Is it negligence?)
  - Whether damage was physical or economic (physical = easier to establish personal liability, economic = more difficult to establish personal liability)
- DOC analysis:
  - Stage 1: Is there a prima facie duty of care?
    - **Foreseeability** = direct involvement. Is the harm that occurred a reasonably foreseeable consequence of the defendant's act?
      - Were they directly involved in the document's creation? (leans to RF)
      - Were they directly involved in negotiations? (leans to RF)
      - Here, Director was involved in making the documents. He knew why they were prepped & knew investors would use those materials for the purpose of whether to invest in the company.
    - **Proximity** = reliance, personal involvement. Is there a relationship of sufficient proximity between the parties such that it would not be unjust or unfair to impose a duty of care on the defendant?
      - Reliance = the extent of the reliance & the reasonableness of P in that reliance.
      - It wasn't reasonable for the Ps to assume that the D was personally responsible (or would be personally responsible) for the accuracy of the documents (D wasn't personally involved enough for P to establish they'd reasonably relied on the director's representations in a personal capacity).
      - Here, tort isn't sufficiently independent to engage the director personally. Representations were made by the company and those made by the director were no different, so they weren't independent. Reliance by the investors (as taking what director had said & what's in the documents as being his own, personal representations was unreasonable). Loss was only economic. Not an international tort. No dishonesty involved. Investors knew they were dealing with a limited liability business & needed to be alive to that fact.
  - Stage 2: Are there residual policy considerations outside the relationship of the parties that may negate the imposition of a duty of care?
    - Aimed to preserve the limited liability element of a corporation as this principle is at heart of corporate law.
    - Tortfeasors should be accountable & victims should be compensated, but this has to be balanced with corporate law principles (NBD was heavy on tort principles, Scotia was heavy on corp principles, and Slatter's opinion here is a balance).

Do not have to read Deloitte for the DOC analysis – she doesn't test on this (DOC in Hogarth & NDB is sufficient for testable material). It's the latest re the DOC analysis in negligent misrep, but she doesn't teach it for DOC.

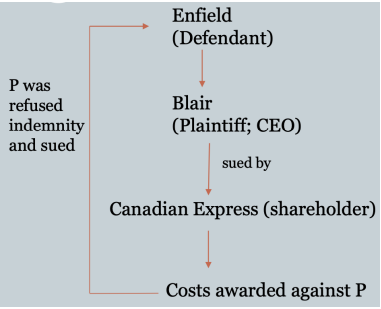
Abt Estate v Cold Lake Industrial – confirms Slatter's concurrence in Hogarth is the correct law in AB

R: Concurring opinion in Hogarth is the applicable law in Alberta (Ordinary negligence, directors for negligent misrep, but you have to the DOC analysis first (which is a higher, more strict analysis than that from NBD bank))
I/H: Personal liability found b/c director was acting in their personal capacity.
A: Applied the Anns-Cooper analysis in Hogarth (paid some homage to ScotiaMcLeod, but didn't apply it in the same way as in Hogarth)

Indemnification by the Corp

ABCA s 124

Blair v Enfield (defines "honestly and in good faith"; applies s 124)

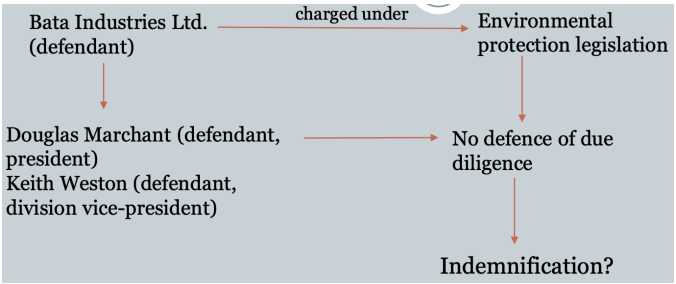


R: Directors can be indemnified by corps if found personally liable UNLESS bylaws do not allow for it.
R: Director must act "honestly and in good faith" in the impugned action to access indemnification in s 124(1)(a) (UNLESS bylaws don't allow for indemnification; if the bylaws don't allow for it, they won't be indemnified).
F: - P was director & CEO of D corp, Enfield. P was candidate for reelection to the board & chaired the meeting. - On legal advice that the proxy votes were invalid, P decided not to count proxy votes for the purposes of the board election. Those votes that weren't counted would have changed the outcome of the election, resulting in P losing the action. In the result, P declared himself reelected as CEO & member of the Board. - Canadian Express (major SH) was unhappy w/ this and challenged the result in court. Proc Hist – Case 1: - TJ ruled that proxies should have been counted; CA Express won. Costs awarded against Blair & Enfield (both were Ds in the original lawsuit) - When cost award was released, CA Express was the majority SH of Enfield & didn't want to pay the cost award, so recovery was only sought from Blair only. Blair paid & then wanted Enfield to indemnify him & pay the cost award. Proc Hist – Case 2: - P then became the P, applying under s 124 & the bylaws of Enfield, which allow for indemnification to take place, for an order that indemnification take place. - TJ says that P wasn't acting in the best interest of the corp when he engaged in the litigation (i.e., fighting CA Express over the legitimacy of the election & whether proxies should be counted wasn't in the best interest of the corp).
I/H: Did P act honestly and in good faith with a view to the best interests of the corporation in the meaning of ABCA s 124? → **YES**.

A:
Meaning of acting "honestly and in good faith"

- Following legal advice is not a sufficient condition to find a director acted honestly & in good faith. While the court considers it, it's not determinative.
- Relevant conduct & whether it was in the best interests of the corporation was about the decision not to count the proxies (had nothing to do with the litigation, it had to do with the legitimacy of the proxy voting process & counting of the votes for the election & validity of P's acts as sitting CEO in running the meeting & choosing not to count the proxies).
- Lower court was wrong in looking at the litigation process. The challenged action is the failure to count the proxy votes, which was required in his role of CEO.
- Costs incurred in defending the company against the attack against the attack by CA Express should be borne by Enfield, i.e., company should indemnify Blair b/c there was legal advice, he exercised his fiduciary duty to act in the BIOTC in addition to having legal advice. He complied with his duty to follow through on a decision as chairman & make a decision about what to do with the votes. Then, the fact he defended the company for not counting the proxies isn't relevant, but he should still be indemnified for it because he did it when looking out for the BIOTC.

R v Bata (ONCA) (only source of jurisdiction to prohibit or order indemnification is s 124)



R: The only source of jurisdiction to prohibit or order indemnification is in ABCA s 124. If the prohibition or order is not under ABCA s 124 & s 124 is not satisfied, the court does not have jurisdiction to order/prohibit indemnification.

F:

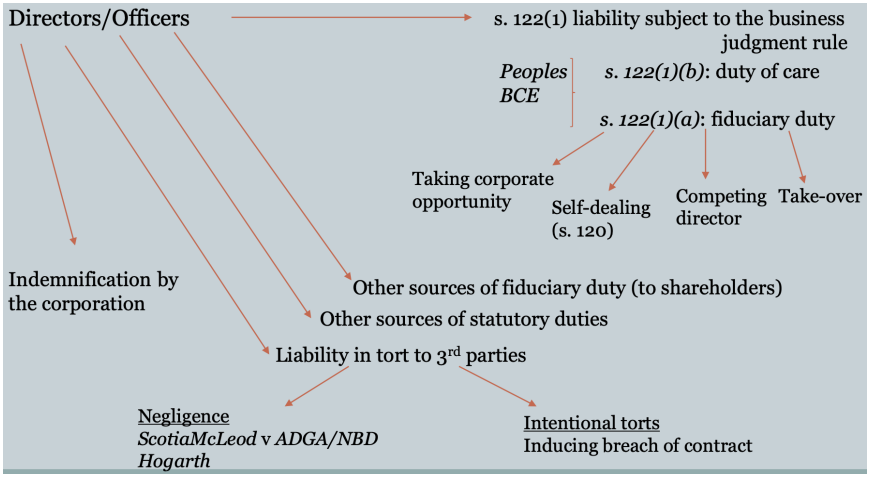
- ⅔ executives were found guilty for breaching environmental protection legislation.
- There was no defence of due diligence available.

Proc Hist: TJ added a prohibition to the order precluding Bata from indemnifying the two directors.

I/H: Did the provincial judge have jurisdiction to impose a non-indemnification order? → **NO** – the purpose of the order is not punitive.

A:

- Probation orders cannot be used to punish individual directors, only the companies.
- Order ensured indiv Ds were punished, but this is contrary to the purpose of the order – which is to punish the corporation itself.



Review Questions

1. In the context of a self-dealing transaction, directors are only obligated to disclose their financial interests and nothing more. Discuss. (she would probably make this just true or false with 100 words to explain yourself)
    a. **False ⇒ while this would have been true under Dimo, Zysko loosened the def'n of "material interest" in the meaning of s 120.**
    b. Dimo: Material interest = broad, but must include a significant financial interest that is yours. Absent a significant financial interest to oneself, there can't be a requirement to disclose under s 120 b/c it's not a self-dealing transaction.
    c. Dimo: BUT if you are in a self-dealing transaction and you don't comply with s 120, the court can set aside the contract and/or require you to count profits (s 120(9)). However, the remedy ordered depends on whether the contract was fair and reasonable (i.e., discretionary remedy dependant on context). If fair & reasonable → court will likely just order counting profits. If not fair & reasonable → court may
    d. Zysko: R: Material interest isn't necessarily limited to a financial interest (broadens def'n from Dimo). If there's a possibility that the director could benefit from the contract more than de minimis, you should heir under s 120/require disclosure. The benefit here isn't limited to financial benefits.
    e. Zysko: "there should be disclosure whenever the director or officer's involvement might be relevant to the corporation's decision making process. This would appear to mean that if the corporation would undertake additional due diligence to determine whether the contract or any of its terms is truly in its best interest [of the corporation] or if it would assign another director or officer to handle the negotiations, then the contract is material and must be disclosed." → If they'd likely replace you to make the decision, you should disclose under s 120/ if they would change their decision-making process in light of the officer/director's interest, you should disclose.
2. Directors do not owe a fiduciary duty to shareholders. Discuss. (probably would be a T/F)
    a. False – Tongue says that there are other situations where a director could owe a DOC to an SH if they do 1 or more of the 3 things set out in Tongue.
    b. Tongue: 3 situations wherein the directors may owe a fiduciary duty to SHs:
        i. Directors acting outside of their ordinary duties
        ii. Directors purchase shares from SH
        iii. Other grounds

3. SotiaMcLeod and the concurring decision in Hogarth each takes a distinct approach to the question of director's and officer's tortious liability to third parties. Describe each approach. (SM & Hogarth take the same approach – T or F?)
    a. Scotia: Practically impossible to show negligence that gives the rise to personal liability of a director unless cases of fraud or commission of negligence outside of role as director.
        i. In the absence of findings of fraud, deceit, dishonesty, or want of authority on the part of EEs of officers, there is no liability.
        ii. I.e., directors protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company.
    b. Hogarth: Application of Anns-Cooper in the negligent misrep setting.
4. What are the two main principles arising from the Ontario courts' decisions in the R v. Bata Industries Ltd. case? Explain each principle.
    a. The purpose of an indemnification prohibition must be deterrence and rehabilitation of the corporation in question, not the individuals behind the corporation. Follow the ABCA.
    b. Due diligence defence (from regulatory defences)

7. Corporate Social Responsibility

Development of CSR: (see 451 CAN for additional info re CSR).

1. Old view: SH Primacy Model (***Ford***)
    - SH Primacy Model: assumes that interests of other stakeholders (i.e., non shareholders) are antithetical to profit maximization.
    - Boards owe duties to SHs and not the general public.
        - Incidental humanitarian expenditures are permissible so long as the true role of the Board is to carry on business primarily for the profit of shareholders.
    - Board discretion must be used to best achieve the corporate end (i.e., profit maximization), and the Board cannot use their discretion to change that end.
2. The shift:
    - BIOC has shifted from a more narrow view (BIOC = SH profits) to a more broad view (BIOC = all circs that may impact the corp making a profit)
    - More broad view = corps can't conduct themselves in a way that would maximize profit w/o **taking into account ethical risks associated w/ profit maximization**
        - More broad view = CSR
        - CSR = **rational profit maximization**, acknowledging that the goal of maximizing profit requires CSR.
3. Current view: **CSR**
    - A **normative** (non-legal) obligation/commitment to human rights, labour rights, enviro protection, & combatting corruption.
    - SCR standards set by int'l instruments (*UN Global Compact, UN Guiding Princips)*
    - *UN Guiding Principles*: not legally binding (but influence courts/tribunals/etc.). Three pillars…
        - State responsibility to protect HR (+ duty)
        - Business responsibility to protect HR (+ duty, but less strong than state duty)
        - Joint responsibility to provide remedy to victims of HR violations (+ duty)
    - Human rights-related business risks:
        - Transnational tort claims

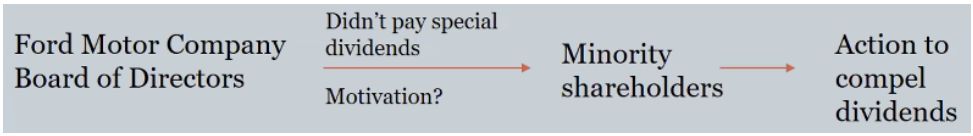
    - Misrep claims
    - SH class actions
    - Legislation in some countries (stronger in EU; weaker in US/CA)
- SHs can enforce CSR through SH proposals (*ABCA*, s 136).

SH Proposals

1. **SH Proposals**: tool available to SHs to get management decisions, require mgmt to give reasons for its decisions, require company to do anything it wishes re human rights (e.g., pass policies, refrain from engaging in business with possibility of impacting human rights).
2. Once an SH proposal is brought forward, **directors required to circulate** (***ABCA*, s 136(2)**); ***Varity***)
    a. Concern: expensive to circulate.
    b. **EXCEPTION** (***ABCA*, s 136(5)(b)**; ***Varity***) : **Requirement to circulate SH proposal can be exempted** if the proposal has been submitted by the SH **primarily for the purpose of**…
        i. **Enforcing a personal claim or redressing a personal grievance** against the corp, its directors, officers, or security holders; ***OR***
        ii. Promoting **general econ, pol, racial, religious, social, or similar clauses**.
3. Post-***Varity***, Parliament changed CBCA to have a broader exception such that the courts may allow for arguments that even though SH resolution is for a social/econ/etc purpose, it may still be related to the purpose of the business.
    a. New legislation ⇒ CBCA, s 137(5)(b.1) corp not required to circulate if it clearly appears the proposal does not relate in a significant way to the business or affairs of the corp.

CSR: Voluntary guidelines corps may follow
ESG: Environmental & Social Corporate Governance (effectively the same as CSR)

Dodge v Ford Motor Co ("old view" SH Primacy Model)



R: SH Primacy Model: Old view of the corp assumes that the interests of other stakeholders (non-SHs) are antithetical to profit maximisation. **Boards owe duties to SHs, not the general public**. While incidental humanitarian expenditures are permissible, the true role of the Board is to carry on business primarily for the profit of SHs. Discretion of Board members is about how to best achieve the corporate end (i.e., profit maximization) and the Board cannot change the end itself.

F:
- Ford Decided it wouldn't pay certain types of dividends to SH, but instead take the $ and invest it back into the corp to sell cars for a lower price – much of this was à propos Mr. Ford
- Not all board members agreed & two parties sought declaration at Court that those dividends would have to pay out & the directors couldn't just decide to reinvest in the company for those purposes (i.e., make vehicles cheaper & hire more staff).
- Proc Hist: TJ ordered declaration

I/H: Can Board make a decision to benefit the public and EEs that is to the detriment of SHs? → **NO**. Best interests of the corp requires SHs have primary importance (SH Primacy Model).

A:

- D's argument: "Although a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation." ⇒ Court rejects. Court says difference b/w humanitarian expenditure for benefit of EEs is very different from plan to benefit mankind at the expense of corp stakeholders.
- "**Shareholder primacy model**": Old view of the corp assumes that the interests of other stakeholders (non-SHs) are antithetical to profit maximisation
- The difference b/w an incidental humanitarian expenditure of corp funds for benefit of EEs & a general purpose & plan to benefit humankind at expense of others is "obvious"
- "There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public, and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carries on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."
- "...it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders, and for the primary purpose of benefiting others"

Development of CSR

- BIOC has shifted ⇒ move from a narrow view (i.e., corp making a profit) to a more broad view (circumstances that may impact the corp making a profit)
- CSR/the more broad view says that **corps can't conduct themselves in a way that would maximize profit without taking into account ethical risks associated with pursuing maximization of profit**.
- Today's CSR: Rational profit maximization, notwithstanding the primary goal of maximizing $, requires CSR.

Conceptualizing CSR

- **CSR**: corporate commitment to **human rights**, **labour rights**, **enviro protection**, **combatting corruption**
- CSR includes **normative** obligations, rather than legal obligations.
    - Not legally binding doesn't mean there aren't any risks for international corporations; there are still legal risks.
- International instruments set out CSR standards
    - E.g., *UN Global Compact* (2000), *UN Guiding Principles* (this is the gold standard re what's expected from corps re CSR).

UN Guiding Principles on Business & Human Rights (UNGP) (normative expectations on corps business, not legally binding)

- Not legally binding, but influence courts, tribunals, corp counsel, etc.
- Three pillars to the UNGP:
    - (1) **state responsibility** to 'protect' human rights within their territory in the context of corp conduct ⇒ positive duty (e.g., tribunals, laws, etc.)
    - (2) **business responsibility** to 'protect' human rights ⇒ best efforts or due diligence-style duty (not as strong as the positive duty on states; e.g., remediation processes, due diligence policies for things like a corp's supply chain).
        - Corps not directly regulated by int'l law so, instead, business have the primary responsibility to protect HR

        - The increasing complexity in a due diligence policy for a corp supply chain will result in more challenges since the business may not be totally sure what's happening down the chain.
    - (3) **joint responsibility** of states and business to provide remedy to claimants/victims of human rights violations ⇒ positive obligation to create a grievance mechanism at the company-level to allow complainants to bring claims forward about the company's behaviour, positive obligation at the industry-level to (potentially) provide an industry-wide mechanism, positive obligation at the state-level for courts to be willing to hear matters of this nature, & (potential) grievance mechanisms at the international level (e.g., OECD has grievance mechanisms)
        - **Rationale**: victims should be properly compensated for their losses/violations.
        - Remedies: monetary remedies, company promise to change policies/operations, apologies, etc
        - Reality is that it is very difficult to prove human rights claims against corporations in state courts.
        - Many claims thrown out on grounds of forum inconvenience → courts may say that the claim belongs in a different country/jurisdiction
        - Some claims struggle based on the type of legal principles → usually domestic tort principles which are difficult to meet.
        - Europe has more success (particularly the Netherlands), but people in CA & US have had bad luck.
        - Courts are currently the only legally binding mechanisms; mixed success on non-binding options b/c it can be tough to get the corp to agree to negotiate or do anything.

Human rights-related risks facing business worldwide:

- **Litigation**: while corps are likely to have cases against them kicked out, they should still avoid going to court.
    - **Transnational tort claims**: regular tort principles that apply to determine liability, not human rights standard more generally. However, in this context, business & human rights standards will determine DOC owed by the corp & will be used to determine the SOC. SOC will be based on standards set out in international docs like the UNGP.
        - So while these standards aren't legally binding, they can be treated as such by the court.
        - Hudbay: direct duty of a parent company (not a piercing the corp veil situation). Instead, found a direct duty of the parent company → this is why, when you have a complex corp structure, that you want due diligence practices to make sure all levels are acting properly. In this case, DOC included the corp's human rights & CSR policies they had shared with investors/SHs & the public.
    - **Misrepresentation claims**: when companies make misrepresentations publicly
        - E.g., misrepresentations re CSR-related disclosures necessitating consumer protection claim, false advertising, etc.
    - **SH class actions**: SHs unhappy with corp's conduct can come together & sue corp as a class.
        - Oppression remedy or derivative action
        - Implications on director's fiduciary duties → if directors fail to implement a due diligence policy or simply fail to have a due diligence policy in place, they may have breached their fiduciary duty to the company AND potentially give rise to breach of

DOC for failing to exercise due diligence (b/c value of shares decrease in light of the importance of CSR)

- **Legislation** (potential legal risk – only potential b/c this legislation in CA & US is weak. Note: it's stronger in EU)
  - US: can be criminal sanctions for human rights breaches that are severe in nature (like child trafficking, products created through forced labour).
  - CA: no legislation yet, but order in council established Canadian Ombuds for Responsibility Enterprise (CORE)
    - CORE is unique internationally – not sure of another in the world
    - CORE: Governmental entity whose role is to provide a grievance mechanism.
    - CORE hears complaints from anybody against a CA corp doing work overseas wherein the action complained of infringes on human rights standards, particularly the UNGP
    - CORE can do its own fact finding, make decisions, and is a forum to adjudicate these complaints.
  - CA case → Nevsun: HR violations alleged against a CA company. Court said tort principles are insufficient in these circumstances & CA should look directly at international customary human rights norms when dealing with these kinds of claims. These int'l human rights norms apply directly through CA CL ⇒ BUT court limited it through *jus cogens* (i.e., the most fundamental violations of human rights or criminal activity such as slavery, genocide, human trafficking)

ABCA 136 (SH Proposals)

- "The more legal part" of this particular class
- SHs have a voice, can impact corp policy, and can make a corp's life suck
- **SH Proposals**: Tool available to SHs to get management decisions, require mgmt to give reasons for its decisions, require company to do anything it wishes re human rights (e.g., pass policies, refrain from engaging in business with possibility of impacting human rights).

136(2) Directors **required to circulate** SH proposals (i.e., must bring proposals to att'n of the SHs once a proposal is brought forward
136(5) [**EXCEPTIONS** to requirement to circulate → see discussion of 136(5)(b) in ***Varity***]

Re Varity Corp & Jesuit Fathers (ABCA s 136(5)(b): exception to req to circulate SH proposals)

R: If the primary purpose of an SH resolution is promoting (1) general economic, (2) political, (3) racial, (4) religious, (4) social, or (5) other causes, the Board can apply to Court under s 136(2) for an exception to the general rule that Boards must circulate SH proposals through a management proxy circular. When the primary purpose falls under one of the 5 causes identified, the Court will grant the exemption and the corp will not have the obligation to circulate the resolution before the AGM.

F:
- App to Court was for an order to permit the corp (Varity) not to circulate the SH proposal before the AGM
  - Applied under s 136(2) pursuant to s 136(5)(b).
  - **136(5)(b)** s 136(2) **requirement to circulate SH proposal can be exempted if** it clearly appears that the proposal has been submitted by the registered holder or beneficial owner of shares (1) 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** (2) primarily for the purpose of **promoting general economic, political, racial, religious, social or similar causes**.

- Proposal at issue was put forward by 2 SHs who wanted a resolution to end the corp's investment in South Africa.
- Board says that proposal was primarily submitted for the purpose of abolishing apartheid in South Africa → argue this is a political goal that has nothing to do with the business of the corp.
- At the time of this case, CBCA had identical provision to the ABCA provision. HOWEVER, since then, CBCA has been changed and the second exemption in 136(5)(b) (i.e., promoting general, econ, pol, racial, religious, social, or similar causes) has been removed.

I/H: Can the Board receive an order permitting them not to circulate the SH proposal? **YES** – CBCA s136(5)(b) is satisfied. This is a political cause separate from the purpose of the corp.

A:
- Legislation says that if the primary purpose is one of the listed purposes, even if the purpose is laudable, a company cannot be compelled to circulate the proposal
- Note: circulation of proposals is very expensive, particularly in big public companies
- "The language of the proposal and the supporting statement leave me in no doubt that the **primary purpose** of the proposal is the **abolition of apartheid** in South Africa. As I read the legislation, the fact that there may be a more specific purpose or target does not save the proposal. That more specific purpose here is the withdrawal of Varity. The legislation makes it clear that if the primary purpose is one of those listed… the company cannot be compelled to pay for taking the first step of achieving it."

CBCA s 137
(5) A corporation is not required to comply with subsections (2) and (3) if
(b.1) it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation; *[**changed the legislation after Varity** → broader def'n means that courts more open to the argument that even though the SH resolution is for a social/econ/etc purpose, it could still be related to the purpose of the business]*

8. Shareholder Rights & Remedies

Oppression Remedy
1. Oppression remedy available where…
   - Complainant falls under def'n in *ABCA,* s 239(b)
     - Complainant is broadly defined & includes:
       - SH (typically brought by minority SHs)
       - Director or former director
       - Officer or former officer
       - Creditor
       - Any person who the court thinks is a proper person to make an App (discretionary)
   - Complaint falls under oppression def'n in *ABCA,* s 242(1): There was an (a) **act or omission**, (b) **business was carried on/conducted in a way** that, (c) **powers of the directors/corp affiliates were exercised** in a way that was oppressive, unfairly prejudicial, or unfairly disregarded the interests of any security holder, creditor, director, or officer.
2. Conceptualize oppression remedy:
   - Equitable in nature ⇒ it is about protecting **reasonable expectations** or interests, NOT about strict legal rights (***Deluce***).
     - Court has broad powers to enforce what they think is necessary to achieve fairness (***BCE***)
   - Oppression = fact-specific, context based (***BCE***; ***Deluce***).

    - To find oppression, look holistically at the relationships b/w the parties & whether the reasonable expectations of the stakeholders were violated. If so, oppression can be found (i.e., strict legal oppression of rights ≠ necessary) (***Deluce***).
3. **Threshold Question**: Can complainant extract their claim as a stakeholder (qua their position, e.g., SH) from the claims of the corporation? (***BCE***) In other words, is the harm complained of suffered by someone *qua* their position and not just suffered by the corporation as a whole? (***Shefsky***)
    - Claims are separate? → oppression remedy available.
    - Claims are not separate? → oppression remedy NOT available.
        - Loss of value in shares NEVER gives rise to claim for oppression remedy (***Shefsky***)
4. **Oppression Remedy TEST** (***BCE***; ***Shefsky***; applied in ***Imax***)
    - (1) Is there **evidence supporting the reasonable expectation** asserted by the claimant? (show the claimant had some reasonable expectation & that the expectation was violated; **objective**)
        - Conduct does not have to be illegal & does not have to result in a loss b/c this is an equitable remedy.
        - A court can infer that any stakeholder has a reasonable expectation of fairness, *BUT* this remedy is about the particular reasonable expectation in the particular situation **fact specific**
        - Factors to find a **reasonable expectation**:
            - General commercial practice;
            - Nature of the corporation;
            - Relationship between the parties; (close corp in ***Imax***: when dealing with a close corporation, the court may consider the relationship between the SHs and not simply legal rights as such. In addition the court must consider the bona fides of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority SH.")
            - Past practice;
            - Steps the claimant could have taken to protect itself;
            - Representations that have been made
            - Agreements that are in place; and
            - The fair resolution of conflicting interests between corporate stakeholders (remember that some stakeholders may have conflicting interests)
    - (2) Does the evidence establish the reasonable expectation was (A) violated and (B) that violation **falls within the terms of ABCA s 242** (i.e., ***oppressive, unfairly prejudicial, or unfairly disregards a relevant interest).***
        - **Oppression**: conduct that is "**burdensome, harsh and wrongful"**, "a visible departure from standards of fair dealing" (i.e., **bad faith**), and an "**abuse of power**" going to the probity of how the corporation's affairs are being conducted; a wrong of the most serious sort
            - In ***Imax***, action to hold the meeting to squeeze Mrs F out was intended to kick Mrs F out. This culminates in a squeezing out which is oppressive..
        - **Unfair prejudice**: conduct **less offensive than "oppression"**; e.g., squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm
        - **Unfair disregard**: conduct **less offensive than unfair prejudice**/the least serious of the three; e.g., favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant
5. Remedies (**ABCA, s 242(3)**): court has "**broad discretion**" to "**make any interim or final order it thinks fit**"
    - BUT "this discretion is not limitless" (***Wilson***)

    - The remedy may **only** rectify the matters complained of (Wilson; s 242(2))
    - The remedy is **corrective**; NOT punitive
- Court can make remedies against people *other than the corporation* as long as the remedy **only** goes so far as to rectify **only** the matters complained of (Wilson)
    - ***Wilson***: **Budd test for personal liability for oppression**
        - (1) **Director must be implicated** in the oppressive conduct (i.e., attribute the conduct to the director individually)
        - (2) Rectification of the harm by holding the director personally liable **must be "fit" in the circumstances**. **Four principles required to find personal liability "fits"**:
            1. The remedy must itself be "a **fair way of dealing with the situation**." There should be **(a) personal benefit and/or (b) bad faith**
                - ➢ Personal benefit + bad faith = likely a fit remedy
                - ➢ One or the other = less likely fit, but may still be
                - ➢ Neither personal benefit nor bad faith = very unlikely to be a fit remedy.
                - ➢ Decision to impose personal liability is not binary – fairness may require partially allocating responsibility to the corporation and partially to the director personally
            2. Remedy should go **no further than necessary to rectify** the oppression.
            3. Order must remain rooted in, informed by, and responsive to the **reasonable expectations of the corporate stakeholder**
                - ➢ I.e., won't hold stakeholder personally liable if the reasonable expectation comes from some personal reasonable expectation, it must be a reasonable expectation in one's expectations as a **corporate** stakeholder.
            4. Courts should consider the **general corporate law context**
                - ➢ Oppression is a last resort, requires a contextual analysis ⇒ if there's no other way to hold someone liable but they should be held liable, we can hold an indiv director liable on the basis of oppression if there's no other way for the claimant to get a remedy.
- ***Naneff***: The broad discretion of the court to make an order it thinks "fit" in the circumstances is subject to 2 limitations:
    - (1) must **only** rectify the oppressive conduct
    - (2) may protect **only** the person's interests as an SH, director, or officer **as such**
        - A claimant may have personal interests that overlap with corporate interests, but the court MUST separate personal interests from corporate interests.

Derivative Action

1. When to bring a derivative action:
    - ***ABCA*, s 240(1)**
        - (a) Bringing an action in the name & on behalf of a corp or its subsidiaries; OR
        - (b) Intervening in an action that a corp or its subsidiaries is a party to in order to prosecute, defend, or discontinue the action on behalf of the corp or its subsidiaries.
    - **Foss rule (*Hercules*)**: indiv SHs have **no cause of action** in law for **any wrongs done to the corporation**. If an action is to be brought in respect of such losses, it **must be brought either by the corporation itself** (through management/directing minds) **or** by **derivative action** under s 240 (wherein derivative action is brought on behalf of the corp, not on behalf of themselves as indiv SHs; they'll get nothing personally, only remedy for corp).
    - ***Brunette***: An SH should bring a claim in oppression (instead of a derivative action) when:
        - (1) there is a breach of a distinct obligation;

    - (2) there is a direct injury distinct from that of the corporation (i.e., the SH an shwo they were hurt personally qua SH in such a way that is completely distinct from the harm to the corp)
- **CANNOT** bring a derivative action upon **bankruptcy** b/c there's no corporation on behalf of whom an action may be brought (***Brunette***)

2. How to bring a derivative action: **APPLY FOR LEAVE**. Court must be satisfied that (***ABCA*, s 240(2); *Moloo***)…
    - (A) **Reasonable notice** was given to the directors of SH's intention to apply to the Court under s 240(1) if the directors do not bring, diligently prosecute, defend, or discontinue the action;
        - *(but notice not required if all the directors have been named as Ds to the action; s 240(3))*
        - *Reasonable notice doesn't need to be given* before *the application (**Moloo**)*
        - *Can file action while providing notice (**Moloo**)*
        - *Can file action and provide notice shortly thereafter (**Moloo**)*
    - (B) Complainant is acting in **good faith**; AND
        - *But this is good faith wrt the proposed derivative action only (**Moloo**)*
        - *Bad faith ≠ being upset, bringing an action, threatening to commence an action if negotiation fails (**Moloo**)*
    - (C) Proposed action would be **in the interests of the corp**
        - *Burden on P to show* prima facie *case (no BOP req'd) (**Moloo**)*

Oppression Remedy, ABCA s 242(1)

ABCA 242(1) A complainant may apply to the Court for an order under this section.
(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 is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

ABCA s 239 Complainant is a wide category; open-ended; Court can almost always let anyone bring such a claim. Usually minority SHs though.

Deluce Holdings Inc v Air Canada (SH bring oppression remedy)

R: "In my opinion, only a termination effected for the purpose of promoting the best interests of Air Ontario - for whatever reason - can constitute a "termination" within the meaning of the Agreement such as to trigger Air Canada's right to call the Deluceco shares. Having regard to the terms of the Agreement, Deluceco had a reasonable expectation as shareholder, I believe, that, in the absence of the termination of Bill Deluce's employment for reasons having to do with interests of Air Ontario …the management/shareholder relationship between Air Canada and the members of the Deluce family would remain as envisaged in the Agreement."
R: Oppression requires a case-by-case analysis looking at the reasonable expectations of the stakeholders. It is an equitable remedy.

F:

- AC and Deluce are SHs of Air ON. AC held 7 board seats, Deluce held 3.
- AC & Deluce are parties to a USA which states AC has option to acquire Deluce's shares "upon the termination of" CEO Deluce.
- Deluce argues that AC caused the Board of Directors to terminate Mr Deluce's employment so that Deluce was forced to sell its 25% of shares to AC. Deluce says this is "oppressive" under s 242 of the ABCA.
- AC states that it was entitled, under the USA, to exercise the call on the shares & buy Deluce's shares and there's nothing wrong with that conduct.
- S 242: sets out three types of conduct that would entitle a claimant to a remedy:
    - Oppressive conduct; *(strongest)*
    - Unfairly prejudicial conduct; or
    - Conduct that unfairly disregards the interest of any stakeholder *(weakest, least oppressive)*

I/H: Was AC's exercise of their majority position on the Air ON board for the purpose of acquiring the minority interest in Air ON oppressive? → **YES.** AC's conduct was unfairly prejudicial to the interests of Deluce Co as a minority SH as those interests were set out in the USA (i.e.,

Does the presence of oppression justify the postponement of the arbitration procedure pending determination of the threshold oppression issue? → **YES**. Arbitration proceedings stayed until the oppression action concluded.

A:

- Primary motivation triggering the termination was a strategy designed by AC to acquire 100% of Air ON → i.e., wanted to squeeze out Deluce Co.

Oppression?

- Oppression in the classic sense means: "lacking in probity" or "burdensome, harsh and wrongful"
- BUT, the provision itself sets out less rigorous grounds for oppression: "unfairly prejudicial" to or which "unfairly disregards" the interests of Deluceco as a minority shareholder
- While the conduct may not constitute "oppression" in the classic sense of conduct which is oppressive, it may nonetheless be conduct that's oppressive in the legislation's sense (i.e., unfairly prejudicial or unfairly disregards interests)

Oppression remedy is **equitable**

- Oppression remedy is not about strict legal rights; it is **equitable in nature** & therefore about protecting reasonable expectations (their 'interests')
- I.e., don't have to show legal right was offended by the allegedly oppressive conduct. Merely have to show that your expectations were violated
- TEST: Look holistically at the relationships b/w the parties & whether the reasonable expectations of the stakeholders were violated. If so, oppression can be found. I.e., strict legal oppression of rights not necessary.

Unfairly prejudicial

- The firing was unfairly prejudicial (the middle ground for oppression) → middle seriousness of conduct
- Acted in the best interest of AC not Air ON. In so doing, they undermined the interest of Deluce Co as minority SHs.
- "In my opinion, only a termination effected for the purpose of promoting the best interests of Air Ontario - for whatever reason - can constitute a "termination" within the meaning of the Agreement such as to trigger Air Canada's right to call the Deluceco shares. Having regard to the terms of the Agreement, Deluceco had a reasonable expectation as shareholder, I believe, that, in the absence of the termination of Bill Deluce's employment for reasons having to do with interests of Air Ontario …the management/shareholder relationship between Air Canada and the members of the Deluce family would remain as envisaged in the Agreement."

BCE Inc v 1976 Debentureholders (creditors bringing oppression remedy)

Oppression remedy rests on threshold Q: Can you extract your claim as an SH from the claims of the corporation?

R: OPPRESSION REMEDY TEST

(1) is there **evidence supporting the reasonable expectation** asserted by the claimant? (show the claimant had some reasonable expectation & that the expectation was violated; **objective**)
- (a) Conduct does not have to be illegal & does not have to result in a loss b/c this is an equitable remedy.
- (b) A court can infer that any stakeholder has a reasonable expectation of fairness, *BUT* this remedy is about the particular reasonable expectation in the particular situation **fact specific**
- (c) Factors to find a **reasonable expectation**:
  - (i) General commercial practice;
  - (ii) Nature of the corporation;
  - (iii) Relationship between the parties;
  - (iv) Past practice;
  - (v) Steps the claimant could have taken to protect itself;
  - (vi) Representations that have been made
  - (vii) Agreements that are in place; and
  - (viii) The fair resolution of conflicting interests between corporate stakeholders (remember that some stakeholders may have conflicting interests)

(2) once reasonable expectation is found, then violation of reasonable expectation must **fall within the terms of ABCA s 242** & therefore be ***oppressive, be unfairly prejudicial, or unfairly disregard a relevant interest.***
- (a) **Oppression**: conduct that is "**burdensome, harsh and wrongful"**, "a visible departure from standards of fair dealing" (i.e., **bad faith**), and an "**abuse of power**" going to the probity of how the corporation's affairs are being conducted; a wrong of the most serious sort
- (b) **Unfair prejudice**: conduct **less offensive than "oppression"**; e.g., squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm
- (c) **Unfair disregard**: conduct **less offensive than unfair prejudice**/the least serious of the three; e.g., favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant

F:
- A group of purchasers proposed a leveraged buy-out of all the shares of BCE Inc.
- Under the transaction BCE would incur $30 billion of the debt to support the purchase
- As part of the transaction, Bell Canada ("Bell"), a wholly-owned subsidiary of BCE, would guarantee that debt
- Bell's existing debenture holders argue that Bell's increased liability under the guarantee would have the effect of downgrading the value of their debentures (by average of 20%) while only conferring a benefit on the shareholders of BCE by way of a premium on market price of BCE shares (of approx. 40%)
- Debenture holders brought an oppression action under CBCA (s 241)

I/H: Have the Debentureholders been oppressed?

A:
- **Principle**: Oppression is an equitable remedy (circumstances, relationships b/w SHs, etc). Court has broad powers to enforce what they wish to achieve fairness.
- **Principle**: Oppression is fact specific; what is oppressive in one context may not be in the next.

TEST for Oppression Remedy:

- (1) is there **evidence supporting the reasonable expectation** asserted by the claimant? (show the claimant had some reasonable expectation & that the expectation was violated)
  - Not a subjective consideration, but an objective test.
  - Conduct doesn't have to be illegal.
  - Since it's all contextual, even conduct that results in a loss does not necessarily give rise to a remedy for oppression.
  - Actual illegal conduct doesn't always mean the court will find oppression remedy necessary.
  - **Factors** to find reasonable expectation:
    - General commercial practice;
    - Nature of the corporation;
    - Relationship between the parties;
    - Past practice;
    - Steps the claimant could have taken to protect itself;
    - Representations that have been made
    - Agreements that are in place; and
    - The fair resolution of conflicting interests between corporate stakeholders (remember that some stakeholders may have conflicting interests)
  - Court can infer that **any stakeholder has a reasonable expectation of fairness**. BUT oppression doesn't turn on this general expectation that everyone has *but* on the **particular reasonable expectation in the particular situation**.
- (2) once reasonable expectation is found, then violation of reasonable expectation must **fall within the terms of ABCA s 242** & therefore be ***oppressive, unfairly prejudicial, or unfairly disregards a relevant interest.***
  - **Oppression**: conduct that is "**burdensome, harsh and wrongful"**, "a visible departure from standards of fair dealing" (i.e., **bad faith**), and an "**abuse of power**" going to the probity of how the corporation's affairs are being conducted; a wrong of the most serious sort
  - **Unfair prejudice**: conduct **less offensive than "oppression"**; e.g., squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm
  - **Unfair disregard**: conduct **less offensive than unfair prejudice**/the least serious of the three; e.g., favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant
  - Thin line b/w unfair prej & unfair disregard – just make an argument. Tough to draw a line.

Application of Test

- (1) Was there a reasonable expectation:
  - Debentures holders had a **reasonable expectation** that the directors would "consider" the interests of debenture holders. Board did consider the Debenture holders interests.
  - BUT Debentures did **NOT** have a reasonable expectation that the directors would *protect the investment-grade* of their debentures. It was impossible for the Board to satisfy everyone's interests, and the Board did their best to balance everyone's interests. Unreasonable to expect the Board to act in a way that would respect the Debenture holders interests at all costs.
- (2) At best, unfair disregard would be the only possible route to an oppression remedy, but we couldn't even satisfy step 1 of the test so there's no way to get the remedy.
  - Note: if a fiduciary duty of the directors had been breached, then it would be more likely that the debentureholders would've had success.

Re Ferguson and Imax Systems Corp (application of Oppression Remedy Test)

F:

- 3 couples own the company
    - Each Mr owes 700 Class A shares. Mr. Ferguson=president
    - Each Mrs owns 700 Class B shares which are **non-voting** & **non-redeemable** (i.e., corp can't force you, subject to insolvency, to sell back your shares/you can't be squeezed out)
- Fergusons divorce.
- Mr F arranged for the group to try to squeeze Mrs F out. Held a SGM to vote on a resolution that would change the terms of the class B shares to <u>make them redeemable</u> (i.e., would allow Imax to squeeze Mrs F out)
- Mrs. F sues under s 242 on the basis that the directors were acting in a manner that was oppressive, unfairly prejudicial or unfairly disregarded her interests as an SH by pursuing the amendment to Imax's articles.

Proc Hist: TJ says lol you're out of luck.

I/H: Did the Board offend s 242? → **YES**. Court ordered that Imax forever prohibited from implementing the amendment to change the Class B shares to be redeemable.

A:

Step 1: reasonable expectation?

- Shares were non-redeemable the whole time & Mrs F had a reasonable expectation to assume they would continue to be non-reedemable.
- "…when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such. In addition the court must consider the bona fides of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority shareholder."
- Here we have a small close corporation; still controlled by the same small related group; Mrs. Ferguson's role in and work for Imax was important; there was an attempt by the other shareholders, acting in concert, and directed by Mr. Ferguson to force her to sell her shares through non-payment of dividends
- The proposal would result in redeeming the Class B non-redeemable shares; Mrs. Ferguson is the only one so affected – all other Class B holder continue to participate in the corporation indirectly through their spouse

Step 2: violation of reasonable expectation was oppressive, unfairly prejudicial, or unfairly disregards interests

- Act to hold the meeting to squeeze Mrs F out was intended to kick Mrs F out. This culminates in a squeezing out which is oppressive and unfairly prejudicial.
- The attempt to amend & squeeze her out was done in **bad faith** ("have not acted bona fides in exercising its powers to amend", so it's oppressive.

Shefsky v California Gold Mining Inc, ABCA – summarizes principles of oppression remedy

R: Not all unfair conduct rises to the level of oppression for which a court may grant a remedy. It depends on the context & is fact specific

R: Stakeholder's actual expectations are not conclusive, those expectations must be <u>reasonable</u>.

R: Not every expectation, even if reasonably held, will give rise to a remedy.

Test:

1. Does the evidence support the reasonable expectation asserted by the claimant?
2. Does the evidence establish the reasonable expectation was:
    a. Violated; and
    b. Falls within the terms of "oppression," "unfair prejudice, or "unfair disregard" of a relevant interest.
        i. BUT the harm suffered must be suffered by someone *qua* SH, not just suffered by the

corp as a whole (this is where oppression can be differentiated from derivate claims).

ii. Claims about corporate conducting causing shares to lose value are not a harm done to the SH, but a harm done to the corporation. Here, oppression remedy is not available because shares are the building blocks of the corporation & so the loss of value to a share is a harm to the corporation and not a harm to the SH.

iii. Loss of value **NEVER** gives rise to a claim for oppression remedy

R: Loss of value of shares **never** gives rise to a claim for oppression remedy ⇒ the harm suffered by the SH must be suffered *qua* SH. I.e., your interest being used to ground the claim for an oppression remedy must be wholly separate from the interests of the corporation (if not wholly separate, derivative action on behalf of the company required).

Differentiating b/w Derivative Actions & Oppression Actions

ABCA s240(1) Subject to subsection (2), 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

(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.

(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 or its subsidiary of the complainant's intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action,

(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.

Derivative action:

s.241 In connection with an action brought or intervened in under section 240… the Court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following…

Oppression remedy:

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….

Hercules Management v Ernst Young – *Foss* rule for when to bring derivative

R: indiv SHs have **no cause of action** in law **for any wrongs done to the corporation**. If an action is to be brought in respect of such losses, it **must be brought either by the corporation itself** (through management/directing minds) **or** by **derivative action** under s 240 (wherein derivative action is brought on behalf of the corp, not on behalf of themselves as indiv SHs; they'll get nothing personally, only remedy for corp).

F:

- Defendants were hired by NGH and NGA to audit financial statements
- Subsequently, both NGA and NGH went into receivership
- Ps bring action against Ds alleging audit reports were negligently prepared (can't bring an oppression claim against a TP, only against the corp. As a result, they had to bring a tort claim b/c Ds are auditors/TPs NOT the corp)
- Ps' claims for damages in tort were losses they suffered to the value of their shares; claimed that Defendants were in a contract with Plaintiffs and, under the contract, undertook to protect Plaintiff's interests

- Ds brought a motion for summary judgment to dismiss Ps actions on three grounds:
  - No contract between Ds and Ps;
  - Ds did not owe the Ps a duty of care in tort; and
  - **Claims asserted can only be brought on behalf of NGH and NGA and not by the Ps as SHs**

Proc Hist:
- TJ dismissed; claims don't belong to SHs as indiv SHs. Belongs to the corp so Ps should've proceeded in derivative action.
- Ps appealed; COA dismissed.

I/H: Can the claims against the Ds be brought personally by Ps as SHs? → **NO**. They should have brought the action on behalf of the corp through a derivative action.

A:
- **Foss Rule**: indiv SHs have **no cause of action** in law **for any wrongs done to the corporation**. If an action is to be brought in respect of such losses, it **must be brought either by the corporation itself** (through management/directing minds) **or** by **derivative action** under s 240 (wherein derivative action is brought on behalf of the corp, not on behalf of themselves as indiv SHs; they'll get nothing personally, only remedy for corp).
  - Rule comes from the principle that **corporation is a separate legal entity**. This means that SHs have their own rights/liabilities and the corp have different ones.
  - No cause of action vests in SHs merely b/c the corp was harmed.

Application:
- Ps argument fails to recognize that SHs conduct collective actions for the corporation. There is **no indiv** actions taken by the indiv SHs.
- If the collective actions of the SHs give rise to any cause of action, the cause of action & remedies below properly to the corporation, NOT the SHs.
- If SH has been directly & indiv harmed & has a personally cause of action, then they can proceed with a claim using an oppression active WHILE proceeding with a derivative action for the portion of the wrongs done to the corporation.
  - I.e., derivative & oppression actions are not mutually exclusive; SH can claim oppression while the SHs claims derivative on behalf of the corp.
  - Oppression → seeking damages done to an SH, personally.
  - Derivative → seeking damages done to the corporation (no personal claim)

Brunette v Legault (application of Hercules, when claim possible outside of derivative)

R: Claim in oppression by SH *instead* of derivative action is appropriate when:
1. Breach of a distinct obligation
2. Direct injury distinct from that of the corporation (i.e., you have to show that you were hurt personally *qua* stakeholder in such a way that is completely distinct from the harm to the corp)

R: SHs lose right to bring derivative action upon bankruptcy (b/c all rights of action belonging to the corp pass to the trustee. If the trustee does not pursue an action, a creditor may obtain court authorization to do so, but SHs still can't bring an action).

Remedies Available

Wilson v Alharayeri (Budd test for personal liability for oppression)

R: Although ABCA s 242(3) gives the court broad discretion to make any interim or final order it thinks fit, that discretion is **not limitless**.

F:

- Corp had common, Class A, Class B, and Class C shares. All were convertible into common shares.
  - Alharayeri (P) held common, Class A, Class B shares
  - Wilson (D) held only Class C convertible shares.
- P removed himself from the Board at some point. 7 Directors remained on the Board.
- Audit committee (subcommittee of Board) had 2 directors, Mr Black & the D.
- D was put in place by the Board to replace P as president & CEO. At this point, the Board, on advice from the audit committee decided to convert Class C shares into common shares ⇒ this triggers the option for conversion for <u>all</u> shares.
  - D converted his C shares to common shares
  - P gets formal notice of the conversion of D's shares from Class C into Common, BUT P was never told that he *also* has the right to convert his Class A & B shares into common shares (BUT he should've been given the right to convert them into common shares too)
  - D played a key role in events which resulted in P not converting their A and B shares into common shares
- Result: substantial dilution of P's interest in the company. P claims oppression – the fact D was ½ of the audit committee, made the recommendation, D was the only one who even had the Class C shares, and P should've had the opportunity to convert to. In not notifying him/allowing him to opt to convert = wrong.

Proc Hist

- TJ: personal liability = justified
- COA: personal liability = justified. Ds must have known (or should have known) of P's conversion rights b/c those are the terms attached to the Classes, it's in the articles. They had control over the Board & decided to deny the rights to P to make D's shares worth more.
  - Did P have a reasonable expectation that he would have the ability to convert his own shares upon the triggering event (i.e., the conversion of the C Shares)? → **YES**. Disregarded interests of P, violating s242
- Appealed on personal liability question.

I/H: Can a director or officer be held **personally** liable for oppression? → **YES**. First element of Budd test satisfied b/c D was implicated in the decision. Second element of Budd test satisfied: (a) personally liability is "fit" b/c personal benefit, (b) only went so far as to rectify the oppression & no further, (c) remained true to the reasonable expectation of P (that he would get to convert), (d) no other remedy avail.

A:

"Any order it thinks fit" = corrective remedy that goes only as far as necessary to correct the injustice of fairness.

- 242(3) gives the courts "broad discretion" to "make any interim or final order it thinks fit" <u>but</u> "this discretion is not limitless."
- BUT the discretion exists only to rectify the matters complained of (i.e., s 242(2)).
- Board says that remedy is <u>not</u> punitive, merely corrective (i.e., can correct the misconduct that's taken place, but go no further than necessary to correct the injustice of unfairness).
- Types of remedies available are all broad. E.g.:
  - (h) Order can direct corporation *or any other person*
  - (I) order compensating an aggrieved person

- In sum, can make remedies against people *other than the corporation* as long as the remedy **only** goes as far as needed to correct the misconduct.

Budd test for personal liability of directors for oppression:

(1) Director must be implicated in the oppressive conduct → i.e., have to be able to attribute the conduct to the director individually

(2) Rectification of the harm by holding the director personally liable must be "fit" in the circumstances. Four principles required to find personal liability "fits":

  (a) The remedy must itself be "a **fair way of dealing with the situation**." There should be **(a) personal benefit and/or (b) bad faith**
    - ➢ Personal benefit and bad faith are hallmarks of conducting attracting personal liability but are not strictly necessary
    - ➢ Personal benefit + bad faith = likely a fit remedy
    - ➢ One or the other = less likely fit, but may still be
    - ➢ Neither personal benefit nor bad faith = very unlikely to be a fit remedy.
    - ➢ The decision to impose personal liability is not binary – fairness may require partially allocating responsibility to the corporation and partially to the director personally

  (b) Remedy should go **no further than necessary to rectify** the oppression.

  (c) Order must remain rooted in, informed by, and responsive to the **reasonable expectations of the corporate stakeholder** (i.e., security holders, creditors, directors, or officers in their capacity as corporate stakeholders)
    - ➢ I.e., won't hold stakeholder personally liable if the reasonable expectation comes from some personal reasonable expectation, it must be a reasonable expectation in one's expectations as a **corporate** stakeholder.

  (d) Courts should consider the general corporate law context
    - ➢ Oppression is a last resort, requires a contextual analysis ⇒ if there's no other way to hold someone liable but they should be held liable, we can hold an indiv director liable on the basis of oppression if there's no other way for the claimant to get a remedy.

Naneff v Con-Crete Holdings Ltd

R: The broad discretion of the court to make an order it thinks "fit" in the circumstances is subject to 2 limitations:

(1) must **only** rectify the oppressive conduct

(2) may protect **only** the person's interests as an SH, director, or officer **as such**

  (a) A claimant may have personal interests that overlap with corporate interests, but the court MUST separate personal interests from corporate interests.

F:

- Rainbow Concrete Group = group of companies that were entirely family owned.
- P, Alex, claimed that he was squeezed out as an SH due to his parents' refusal to accept P's wife.
- Parents claimed that they squeezed him out for exclusively corporate reasons (
- Ds made no distinction b/w P as member of the family and role in the corporation ⇒ bad sign for corp.
- Evidence of bad faith ≠ essential to show oppression. The Q is whether P had a reasonable expectation to be treated a particular way as a Director & SH and if that was offended.

Proc Hist:

- Dad led P to believe that he would one day have full control over Rainbow. COA finds that this was P's reasonable expectation & that the family context must be taken into account when understanding the corporate conduct (essentially, the question is in what ways were the corporate actions influenced by familial relations?)
- Held: all three categories of oppression met by D's actions.
- Dismissal from employment: two years compensation which, based on evidence, was established at $200,000

- Remedies for oppression:
    - (1) An order restoring Alex to the positions he previously held coupled with an order removing preferred voting rights of Mr. Naneff; "This would, in effect, put Alex and Boris in charge and remove Mr. Naneff from his position of control."
    - (2) An order that the Rainbow Group of companies be placed on the market for sale on a going concern basis to the highest bidder, through an agent responsible to the Court; giving Alex and Boris an opportunity to buy the company
    - (3) An order requiring Mr. Naneff and Boris to acquire Alex's shares at fair market value and without any minority discount on the basis that Alex owns what is potentially - on his father's death - a 50% control block.
    - Justice Blair states that option 2 is fair & fit b/c the parties are treated equally → all have an equal opportunity to purchase it on the market.
    - Defendants appealed the remedy

A:

COA upholds TJ:

- Alex led to believe he would be the co-owner of Rainbow & would be a partner in the operation of the business, and after the death of dad, he would have co-complete ownership and control
- Court says that family can't take out frustration with son on his participation in the company. Court found no evidence that Alex had been partying/drinking/etc that harmed the company.
    - "Thus, in my view, this "shareholder's expectation" on the part of Alex was a reasonable one, and one which underlies the entire corporate relationship between the members of the Naneff family. It must be taken into account when assessing the conduct of the Respondents and the treatment to which Alex was subjected to at and following Christmas 1990."
- Strictures of corporate law override family desires.
- "I am satisfied, having regard to all of the evidence, that the removal of Alexander from his position of employment and from his positions as an officer of the various companies, and his exclusion from the day-to-day operations and management of the business and from participation as a director and shareholder in any meaningful way **constitute "oppression" within the meaning of s. 248 of the OBCA**. I so find. In particular, **the powers of the other family members as directors have been exercised in a manner that is oppressive, that is unfairly prejudicial to and that unfairly disregards the interests of Alex as a shareholder, director and officer** of the Rainbow Group of companies."

Remedies:

- The broad discretion of courts to make an order it thinks "fit" in the circumstances is subject to two important limitations: (1) must **only** rectify oppressive conduct; (2) may protect **only** the person's interests as a shareholder, director or officer as such.
    - If it rectifies more than oppressive conduct or doesn't protect the person's interest as a stakeholder, this is an error of law & can therefore be overturned.
    - Court notes that a claimant may have personal interests that overlap with corporate interests, but the court must separate the personal interests from the corporate interests.
    - COA finds that TJ tried to compensate P for personal wrongs, NOT only the oppressive conduct and P's interest as a director & SH
- Error 1: rectifies more than just the oppressive conduct
    - It was not to give him ownership and control while his father was still alive and to grant him a remedy which includes this possibility would go too far; "the court should interfere as little as possible and only to the extent necessary to redress the unfairness"
- Error 2: TJ erred in attempting to protect P's interest in the business as a son and *not* merely as an SH.
    - COA finds P's reasonable expectations as SH, director, & officer = P would ultimately be an equal co-owner of the business, BUT only after the death or voluntarily retainment of his father who retained ultimate control of the business
    - Sale of the company would also be unfairly punitive towards Mr. Naneff – all parties knew the intention was for Mr. Naneff to continue to control the business that he founded

- This protects much more than his interest qua shareholder, it protects and advances his interest as a son
- The just remedy would be an order requiring the Defendants to purchase Alex's shares at fair market value

Derivative Actions

Pathak v Moloo – derivative action requirements

R: Requirements to get leave from the court & then commence a derivative action:
(1) Reasonable notice:
- Doesn't need to be provided to the directors *before* the application.
- Permissible to file the action while providing notice.
- Permissible to file the action and provide notice shortly thereafter.
- Here, 4 months was sufficient.

(2) Proposed action would be in BIOC.
- Burden on P to show a *prima facie* case – no BOP required, just prima facie.

(3) Applicant is acting in good faith
- Good faith wrt the proposed derivative action only.
- Court is not concerned about past conduct of the applicant, only whether the applicant is purporting to bring the derivative action in good faith or
- Bad faith ≠ being upset, bringing an action, or threatening to commence action if negotiation fails.

F: Claims D breached fiduciary duties as Director; therefore, brings a derivative action (b/c fiduciary duties are owed to the corporation, not the indiv).

I/H: Did P fulfill the ABCA s 240(2) requirements? → **YES**. P granted leave to bring derivative action.

A: Leave required for derivative action under ABCA s 240.