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Although great care has been taken to prepare these notes there may be errors and omissions. These notes are no substitute for attending lectures and scrutinizing the suggested and required readings. Enjoy.

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Introduction

There are three forms of organizations in Canada:
1. *Corporation* – a separate person in law
2. *Partnership* – two or more persons coming together to do business with a view to profit
3. *Sole-Proprietorship* – where one individual undertakes a venture in the area of business

Corporations themselves take many different forms and may exist under federal or provincial statutes:

a) *Business Corporation* – created for the purpose of undertaking a business enterprise;
b) *Not-for-Profit Corporation* (without shared capital) – structure is the same as business corporations except it has members instead of shareholders and its purpose is to undertake some charitable or community cause;
c) *Cooperative Corporation* – a special form of corporation structured in order to assist its members in the accomplishment of certain objectives or purposes;
d) *Condominium Corporation* – created in order to accommodate individuals of limited means to become owners of real property;
e) *Credit-Union* - created in order to assist persons in financial services

Each of the corporations is created by a special statute enacted be the federal or provincial government. There are still other types of corporations and these are those created by special statute:

f) *Special Act Corporation* – created to further some sort of government enterprise (CRTC or Universities, for example).

There is a Constitutional issue with regard to the creation of corporations. In the early 1900s there was a great deal of questioning revolving around whether the federal or provincial powers could supervise and control corporations. The question of capacity to carry on a business was also an issue. There was a divided jurisdiction – both levels of government have the power and authority to supervise and control the corporations. This is, however, subject to the local law of the places in which the corporation operates. Virtually every corporation is endowed with the capacity of a regular person – can do all of those things that a natural person can do. Through the agency of natural person's the corporation as the principal will create agents who will undertake work for them. *The corporation has all the capacity of the natural person.*

In every corporation we have:
1. The corporation with a personality all of its own;
2. A number of individuals (officers, employees, managers, etcetera) who are all separate persons where fiduciary relations and obligations arise;
3. Corporation functions through the agency of a natural person – it is imperative to consider the law of agency as such

The Law of Agency involves consideration of authority. A principal appoints an agent to undertake certain acts for and on behalf of the principal and in order that those acts may be performed, the principal endows the agent with the authority to do those things necessary to accomplish the objectives of the principal. An agent binds the principal to a contract with a third party so long as s/he acts within his or her scope of authority. Nearly all transactions are dealt with agents in some capacity.

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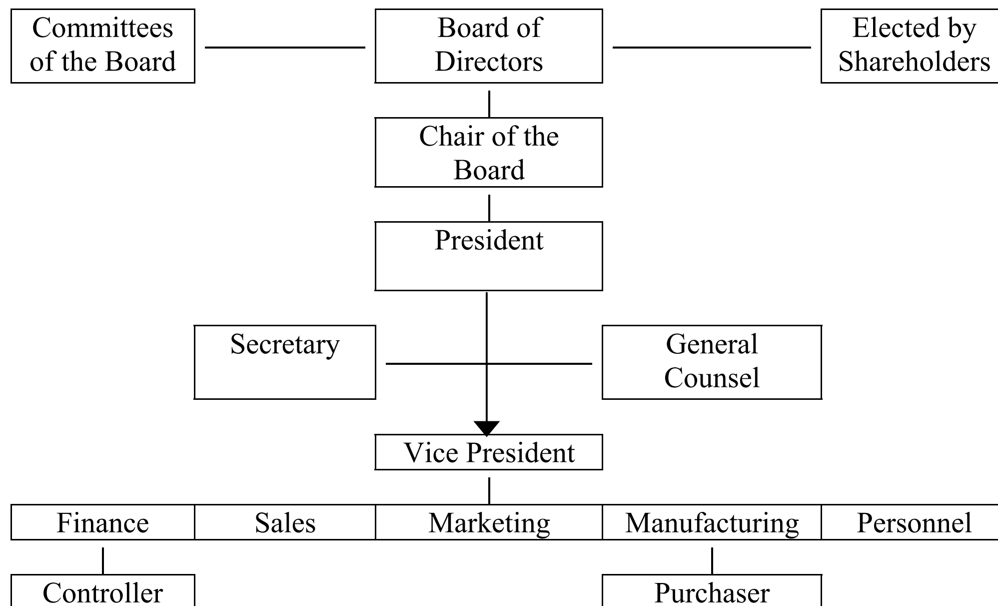
The Corporation – A Schematic



If any of the agents are to accomplish the corporation's objectives, there must be some real, implied, unusual, and ostensible authority to undertake the necessary acts. Every agent is either an employee or an independent contractor – if the agent is an employee, then the employer will be liable for the conduct of that agent while acting in the course of his or her employment. On the other hand, if the individual is an independent contractor, the principal corporation will be liable only to the extent of those acts committed by the agent while acting within the scope of his or her authority.

In a Sole-Proprietorship if one uses a name other than his or her own name, then s/he is required to register that name under the *Business Names Act*. The reason for this is the requirement of disclosure to police the transactions in this particular area.

It was not until 1970 that the legislature allowed an individual to incorporate. We now have the single person corporation where a single person can incorporate.

A partner is at one and the same time the principal and the agent of all other partners. The *Partnerships Act* governs partnerships in the province of Ontario and it is virtually the same in every jurisdiction.

Limited Liability Partnerships

Available only to professionals once registered, the members of these partnerships are granted a certain limited immunity from liability. A partner is not liable personally for the nonfeasance and/or misfeasance of other partners except if that person is liable for those other persons under his or her own supervision and control. Each person is responsible for his or her own misfeasance and nonfeasance. Note: there is no way that a lawyer may avoid liability with dealings with the client.

Inadvertent Partnerships

In the course of business one thinks in terms of lining up with other business entities and undertaking parallel action with them to achieve some purpose. The term that is ordinarily applied to that activity is a joint venture where two or more business entities will share responsibilities to complete an undertaking.

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What happens when things go sour? Is a third party entitled to pursue a joint venture entity where the direct entity has defaulted? An inadvertent partnership may be found – a court may independently make a determination as to whether or not a partnership exists regardless of any disclaimer that the parties may have made.

Volzke Construction v. Westlock Foods (1986): This case indicates the type of scheme entered into by business parties to pursue a relationship in order to avoid potential liabilities. A major tenant of a shopping center entered into an arrangement to provide financing and undertake administrative acts etcetera. The general contractor went bankrupt and the creditor claimed against the tenant claiming that it was liable for all of the obligations of the contract relying on the assertion that it was a partner. The court analyzed the circumstances and reviewed the responsibilities of both parties and concluded that they did, in fact, satisfy the definition of a partnership. As such, inadvertently the directors of Westlock exposed themselves to wider liability by way of its relationship with the contractor.

671122 Ontario Ltd. v. Sagaz Industries Canada Ltd. (2000) ON CA

Facts	Holding	Ratio
o An officer of a corporation, off on his own, was engaged in conduct contrary to the fiduciary relationship with his employer. The employer had employer the individual to negotiate contracts for it o Was the individual an employee or an independent contractor? o The individual bribed an official of another company o This company then sued the employer company on the basis of a vicarious liability	o Despite the waiver/disclaimer on the contract, the court upheld that the individual was an employee because he was an integral part of the business operations o The characterization between employer and independent contractor will have ramifications for the resulting liabilities and relationships that may there arise (ie agency and company liability).	o The court will look at the actual business relationships between people and characterize them as either employer and independent contractor despite the wording of a contract

The law of agency is of fundamental importance and applies to every aspect of a lawyer's work.

Partnerships

In a partnership relationship each partner is both principal and agent to the others and, thus, each is personally exposed to all the liabilities of the others. Moreover, the liability may subsume personal assets where creditors enforce debts.

Limited Partnership – a person may be a limited partner, that is, the exposure to liability may be no more than the amount invested in the partnership business. The individual is not exposed to total and absolute liability. However, this protection exists only insofar as the individual does not take part in the decision-making process and such conduct of the business.

The Structure of the Partnerships Act

Part I – Nature of a Partnership – how to determine the roles and liabilities of those involved in the corporation and how to apply particular sanctions.

Part II – The relation of partners to persons dealing with the firm. How does liability arise between the firm and the third parties?

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Part III – Relation of Partners to One Another – the various duties and obligations of the partners to one another are spelled out. The central concern is that at one and the same time, every partner is the principal and the agent of the other partner.

Part IV – Dissolution of a Partnership – it is easy to create a partnership and some are created inadvertently. However, it is not east to dissolve or terminate a partnership. Spells out those steps that must be taken by the partners to give notice of dissolution to third parties. Disclosure is one of the magic words of corporate/commercial law – there is an obligation to make disclosure whenever there are fundamental changes to the business composition. Where disclosure is not made, then penalties shall be imposed.

Part V – Limited Liability Partnerships – permits professionals to establish a 'limited partnership' and provided that this is advertised and disclosed the liability of the individual is limited. Disclosure is made by registration and the requirement that the letters LLP follow the name of the firm.

Corporations

There is special legislation that permits the creation of different kinds of corporation. There are co-operatives (structured in the same fashion as a not-for-profit, but is created and enjoys advantages because of its objectives) – the members employ it as a vehicle to serve their own interests, not for profit, but to effect savings where distribution is made based on the amount of business that each person has made in the cooperative; joint-ventures – nothing other than a partnership except that it is a separate entity or creation (two separate organizations moving in parallel lines to reach the same objective profits are pooled and then shared);

Volzke Construction v. Westlock Foods (1986)

Facts	Holding	Ratio
o A major tenant of a shopping center entered into an arrangement to provide financing and undertake administrative acts o The general contractor went bankrupt and the creditor claimed against the tenant claiming that it was liable for all of the obligations of the contract relying on the assertion that it was a partner	o An inadvertent partnership has been created o Page 15 – a summary of indicia creating an inadvertent partnership	o The court may find an inadvertent partnership even where the parties had not intended to enter into a partnership

Pooley v. Driver (Rotman Page 15)

Facts	Holding	Ratio
o Moneylender wanted to avoid being characterized as partner o They entered into an agreement declaring that they were not partners, but the lender only a creditor of the firm	o Persons may say they are not partners, but they may have a relationship such that all of the indicia of a partnership exists	o The court will analyze the business relationship and undertake to examine the true circumstances in order to determine the nature of the relationship that exists

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Corporations and Companies – If you are referring to an incorporated company then use the term corporation. A corporation is a separate person in law while a company ought not to be used in such context.

Salamon v. Salamon (1897) Eng HL

Facts	Holding	Ratio
o Saloman created a corporation and transferred the assets of his business to the corporation, which undertook the business o Saloman took debentures in exchange for the assets and set up securities to relieve himself of liability o Company went bankrupt and Saloman exercised his security rights leaving none for the creditors	o A corporation is a separate juridical entity o Separate from the officers, employees etcetera o The laws were created to permit Saloman to do precisely what he did o No creditor should complain because before doing business with a corporation one should do work to determine its status and history	o A corporation is a person separate from the officers, employees, creditors etc., o You don't enter into a business relationship unless there is due diligence performed

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The Constitution (Canadian & Corporate)

The division of powers between the federal and provincial authorities and the nature of the Canadian Constitution is reflected in every constitution of a corporation – the basic document that identifies the framework from which something is created. Issues arose as to the right of the federal and provincial authorities to make enactments relating to corporations.

Reference in the Matter of the Incorporation of Companies in Canada

A corporation is to be considered a separate person for the purpose of legal analysis.

Bonanza Creek Gold Mining Company v. The King (1916) AC

The law of the state in which the corporation has been created confers capacity upon that corporation so that at the moment that its articles are issued that corporation is created as a person and endowed with the capacity to carry on a business anywhere in the world. It is, however, subject to any of the rules and regimes where it wishes to conduct business.

Citizens Insurance Company v. Parsons (1881) ON JCPC

The general power of parliament is sufficiently broard to permit the incorporation of companies. Each jurisdiction have overlapping jurisdiction and each is entitled to incorporate companies and impose certain restrictions of a general nature.

John Deere Plow v. Wharton (1914) BC JCPC

A federal company is endowed with the capacity to undertake business wherever it is so permitted worldwide. A province has no authority to prevent a federal company from undertaking its business within its boundaries. It does have the authority to impose rules of a general nature on that federal corporation.

Multiple Access Ltd. v. McCutcheon (1982) SCC

This case deals with the application of insider trading rules set out by both provincial and federal authority. The overlap was considered by the SCC and held that there was nothing anomalous of there being this overlap. It was within the competence of both levels of government and no question arises so long as these rules are not in conflict with one another. The federal rules, however, do take precedence over the provincial rules.

R. v. Agat (1998) Alta Prov Ct

Issue: whether a corporation may rely on section 7 of the *Charter*. The corporation as a natural person is entitled to rely on the provisions of section 7 in the interest of furthering the prosecution of criminal offenses.

The Corporate Constitution

The corporation enjoys all of the privileges of a natural person. The Constitution is a framework within which the affairs of the organization are organized. What are the values that a corporate constitution endeavors to entrench or enshrine?

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There are four documents, each of which are fundamental instruments to the composition of the corporation:

1. *Statute of Incorporation* – the statute under which the corporation is incorporated;
2. *Articles of Incorporation* – Device Employed to Create a Corporation – for example, articles issued by the provincial ministry;
3. *By-Laws* – the by-laws of a corporation are entrenched to the extent that special steps must be taken in order to change them and they may be relied upon by all persons working within the corporation; and,
4. *Unanimous Shareholder Agreement* – an agreement made by all of the shareholders of a corporation whereby they assume direct responsibility for certain assets of the corporation's management. This is not available to a public offer nor do you get one if there are more than half a dozen shareholders. This removes some of the powers of the directors and vests them in the shareholders. The reason for this is that there will be special circumstances regarding the personalities of the shareholders that must be taken into account.

The solicitor will be approached by a number of persons for the purpose of incorporating some venture. At that point, the solicitor ought to understand the circumstances and come to know the individuals quite intimately. These measures should be taken so that the documents in the corporate constitution can most accurately reflect the wishes and true structure of the corporate body.

Corporate Law in Canada is built upon four major principles:

1. *Corporate Personality* – characterize a corporation by personality the same way you would a natural person, analyze legally by analogy to the behaviour of a human being;
2. *Managerial Power* – managers are those persons who have the corporation's business in its control. The moment an investor begins talking about managerial control s/he begins to fetter the managerial power. Daily operation ought to occur independently;
3. *Majority Rule* – if you happen to control a corporation by virtue of a holding in excess of 50% of the voting shares you are in a position of majority and may control the corporation. Decisions should be made democratically among the enfranchised; and,
4. *Minority Protection* – every corporate constitution must take into account those mechanisms whereby those who do not own a majority of the voting shares will be accorded some measure of protection from injury.

The Groups in Interest

The primary function of a corporate constitution is to prescribe how the internal corporate government is to operate and to balance the competing interests of the internal groups. Some groups are external and their interests receive limited recognition.

External Groups

1. *General Public* – Nearly every citizen is affected by large corporate movements;
2. *Investors* – These are persons whose rights and interests are often protected by legislation, but this does not eliminate or negate the need for private ordering within the corporation;
3. *Government* – Regulates the corporations and the businesses that they undertake;
4. *Employees* – There are certain protections afforded by the government; and,
5. *Creditors* – Capital providers and inventory providers that have an interest in the well-being of the company until they are paid.

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Internal Groups

1. *Directors* – Set policy with the role of governance. Determine where the company is headed and what policies should be implemented to come to a particular result. The director is responsible for submitting a budget and selecting a president who will undertake the administration of the corporation in accord with the policies of the directors;
2. *Officers* – The policies are implemented by the officers who are employees of a corporation and serve in the hierarchy of the corporation. These employees stand below the president and they have their own responsibilities and the authority to discharge them. Each of these officers is an agent of the corporation and each functions within the authority that is vested in him or her. Officers undertaking acts within the scope vested in them are not liable for those actions; and,
3. *Employees*

Welling points out that effective control over a corporation is not depended upon the controllers owning a majority of owning shares. In most corporations, effective control is exerted by a relatively small amount of shareholders owning a minority interest. Although the shareholders elect the directors, the directors have no direct responsibility to the shareholders. The director's duty is owed to the corporation and every decision that is taken must be made in the best interest of the corporation. It is only in very rare situations that the director's may be required to consider first the circumstances of the shareholders.

Corporate Constitutions in Action

Canadian Jorex Ltd. v. 477749 Alberta (1991) Alta CA

Facts	Holding	Ratio
o Directors of a corporation decided to cancel a meeting of the shareholder after having called it	o Issue: Do director's have the power to cancel a meeting of the shareholders once it was called? o Under the CBCA the directors have residual power to manage the affairs of the corporation o Since there was no explicit provision preventing the directors to cancel, they were entitled therefore to cancel	o Directors have a general duty to manage the corporations affairs under the CBCA limited only to specific exclusions in the corporate constitution

Roles v. 306872 Saskatchewan Ltd (1993) Sask CA

Facts	Holding	Ratio
o A director demanded production of certain accounting records of the corporation as per his entitlement o The director was subsequently terminated and by the time of the motion he lacked status to enforce the right	o A director has the opportunity to examine certain records of the corporation, which are ordinarily confidential and may not be disclosed for particular reasons o The motion was dismissed, but not without the following comment	o A director has the opportunity to examine certain records of the corporation, which are ordinarily confidential and may not be disclosed for particular reasons

Types of Corporate Constitutions

1. *Charter Corporations* – enacted by executive act;
2. *Special Act Corporations* – Constitution is embodied in private legislation enacted to create them;
3. *Letters Patent* – Corporation created under letters patent;

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4. *Contractarian Corporations* – Involve a memorandum of association made by the entrepreneurs who become the shareholders. That memorandum of association becomes the incorporating instrument and slightly different rules of interpretation there apply; and,
5. *Division of Powers Corporations* – Differentiated by CBCA and OBCA and the method of exerting powers is expressed in the legislation.

Distinction Between By-Laws and Articles of Association

The central difference is that each is an entrenched Constitutional instrument, but it is easier to change a by-law than it is to change the articles of incorporation. Each involves formalities and having to justify the change.

Particular Institutional Provisions (Private Ordering)

Jacobsen v. United Canso Oil & Gas Ltd (1980) QB

Facts	Holding	Ratio
o An Alberta corporation issued supplementary letters providing that no shareholder was entitled to vote more than 1,000 shares o The restriction prevented the applicant from exercising all of the rights enjoyed by him o There was only one class of share	o *Issue*: Was the restriction on the shareholder unconstitutional? o Corporate law holds that the rights within the class must be equal o The provision is discriminatory and could not be upheld violating the presumption of equality	o Corporate law in Alberta holds that the rights within the class must be equal and various voting rights within a particular class is discriminatory

There can be any number of classes of share with different rights attached to them. Under the legislation of all of the provinces, a corporation incorporated in one province may apply to federal authority for the issuance of articles of continuance. Once issues, that corporation becomes a federal company and no longer subject to provincial regulation

Jacobsen v. United Canso Oil & Gas Ltd (1980) SC

Facts	Holding	Ratio
o An application made to the province of Nova Scotia and corporation received articles in the province of Nova Scotia, thus becoming a Nova Scotia company and no longer an Alberta company	o The decision in Alberta no longer had any application. Under the laws of Nova Scotia there was authority permitting the restriction on votes being case by the shareholders o Applicant argued oppression – it was unfair to limit his right	o The laws of Nova Scotia permit a restriction on voting rights within a single class o A shareholder must live with the limitations s/he is aware of when entering into a shareholder's agreement – a reasonable person ought to make an informed judgment at the time of entrance

Bowater Canadian v. R.L. Crain Inc (1987) ON CA

Facts	Holding
o If a move was undertaken to remove a director, that director's share would be multiplied by three o In effect, there is protection for the removal of a director	o Such a provision is perfectly alright o A company may provide for the augmenting of voting rights o An augmented increase in the number of shares is permissible

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The Corporation as a Legal Person

The central fact of corporate law is that the corporation is a separate legal entity. This separateness relates to all persons in association with the corporation no matter what their function, status, or capacity may be. The key concept in corporate law is expressed in CBCA s.15(1): *A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person*. A corporation once incorporated may do anything that a natural person may do. CBCA 45(1): *The shareholders of the corporation are not, as shareholders, liable for any liability, act or default of the corporation except under subsection 38(4), 146(5), or 226(5)*. If the shareholder plays a role as a director, officer, or employee than s/he may be held liable.

Salomon v. Salomon (1897) Eng HL

Facts	Holding	Ratio
o Saloman created a corporation and transferred the assets of his business to the corporation, which undertook the business o Saloman took debentures in exchange for the assets and set up securities to relieve himself of liability o Company went bankrupt and Saloman exercised his security rights leaving none for the creditors	o A corporation is a separate juridical entity o Separate from the officers, employees etcetera o The laws were created to permit Saloman to do what he did o No creditor should complain because before doing business with a corporation one should do work to determine its status and history – perform due diligence	o A corporation is a person separate from the officers, employees, creditors, directors etc., o You don't enter into a business relationship unless there is due diligence performed

The courts have declared that the *Salomon* principle is the basic principle of modern business. One of the questions that was raised in *Salomon* had to do with Salomon having few equity shares. All of his interest in the corporation was as a secured creditor. The court did not mind this – a shareholder is entitled to create a corporation and purchase one share at a minimal price. This question of thinned incorporation has troubled the court for some time.

Practical Consequences

How does the corporation get the job done and pursue its objectives? The corporation does this through the medium of natural persons.

Bolton Co. Ltd v. Graham and Sons (1956) Eng CA

Lord Denning: The state of mind of corporate managers is the state of mind of the company and is treated by the law as such. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case.

Daimler Co. v. Continental Tyre and Rubber Co. (1916) Eng HL

The acts of a company's directors, managers, secretary, and so fourth, *functioning within the scope of their authority* are the company's acts. Thus, if you have a corporate officer (or other agents of a corporation) and they are functioning within the authority vested in them by and through the corporation are the acts of the corporation.

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Macaura v. Northern Assurance Company Ltd (1925) Eng HL

Facts	Holding	Ratio
o An individual was the owner of a large estate where timber was felled and sold to a corporation owned by the individual o Those trees were insured, but in his name and not that of the corporation o There was a fire and all the trees were lost – Macaura claimed under the insurance policy, but the insurance company refused payment because they were, at the time, property of the corporation	o The insurance company right to refuse as the corporation is a separate person requiring a policy of its own o Insurer was entitled to deny liability	o An individual may not impart their own personal rights to a corporation that they own 100% - the corporation is a separate person

Kosmopolous v. Constitution Insurance Co. of Canada (1983) ON CA

Facts	Holding
o A Greek immigrant not accustomed to local custom or business received poor advice from an insurance agent o K sold his business to a corporation and did not see the difference between himself and the corporation o Insurance was taken out and issued in Mr. Kosmopolous' name rather than the corporation o Corporation was a one-director one-shareholder corporation	o *Issue*: Did K have an insurable interest o Because of the close relationship between K and the corporation that he created, one could pierce the corporate veil and see that K had an insurable interest in the assets of the corporation o Zuber could see no distinction between K and the corporation, which he wholly owned and considered as his own

Kosmopolous v. Constitution Insurance Co. of Canada (1987) SCC

Facts	Holding	Ratio
o Same as above	o Could the corporate veil be pierced as done by Zuber in the Court of Appeal? o On the basis of insurable interest, K did have an interest and his claim should be honored o The direct connection between the corporation and the sole shareholder was so intimate that the court was entitled to find that K had an insurable interest	o As a general rule a corporation is a legal entity distinct from its shareholders o McIntyre: The identity between a company and the sole shareholder and director is such that an insurable interest in the Company's assets may be found in the sole shareholder

Everything turns on *Saloman v. Saloman* whereby the corporation is characterized as a person with the legal characteristics and attributes of a person. Two sections of the CBCA to focus on are especially relevant: Sections 15(1) and 45(1). Corporations function through the agency of natural persons – it is essential to understand the law of agency. A large part of the time has been devoted to attempting to avoid the characterization in *Saloman*.

Lee v. Lee's Air Farming Ltd. (1961) NZ JCPC

Facts	Holding	Ratio
o Lee was the principal shareholder and chief exec of a corporation o Lee was killed while crop dusting and a claim was made under the NZ Insurance Act	o Court reaffirmed *Salamon*: the corporation is separate and distinct from Lee. Lee held a number of positions within the corporation – one of which was	o One individual may undertake any number of roles within a corporation o "A man acting in one capacity can give orders to himself in another

o Insurer refused payment on the basis that he was not an employee, but an executive and not entitled	that of a worker. o One individual may serve in various capacities in a corporation at the same time	capacity … a man acting in one capacity can make a contract with himself in another capacity”

The corporation is a major instrument of enormous flexibility. One individual has the opportunity to take up roles in various capacities and, in effect, acting from the point of view of the corporation as a number of individuals.

Berger v. Willowdale (1983) ON CA

Facts	Holding	Ratio
o President’s job was to ensure that the sidewalk in the shop was kept free of ice o Employee fell and hurt herself – she sued corporation and the president	o President of the corporation was held liable to an employee in negligence for having failed to do his duty o President was personally liable to the plaintiff. o The president owed particular duties of a personal nature and failed to exercise those duties	o Both the corporation and the individual guiding mind of the corporation may be held liable in tort

The Corporate Veil

Very frequently circumstances will exist where a corporation has done something that has caused damage to others. The only way to secure any compensation is by reaching through the corporation and holding the individuals responsible. On its face, this would appear contrary to CBCA s.45. Piercing the corporate veil is important because the corporation will often employ a subsidiary to undertake acts that it will not undertake itself (outsourcing the ‘dirty work’).

Clarkson Co. Ltd v. Zhelka (1967) HC

Facts	Holding	Ratio
o Clarkson was seeking to find assets sufficient to find creditors o The principal of the corporation had transferred property to his sister o An attempt was made to pierce the corporate veil and recover the value of the property transferred to the sister	o The court was unable to make a link and the case was unsuccessful o If a company is formed for the express purpose of doing a wrongful or unlawful act, or those in control direct a wrongful thing to be done, the individuals as well as the company are responsible to those to whom liability is legally owed	o Both the corporation and the guiding minds (individuals) may be held liable for the wrongful actions of the corporation

Littlewood Mail Order Stores Ltd. v. Inland Revenue Commissioners (1969) Eng CA

Facts	Holding	Ratio
o Not Done	o The courts can and often do draw aside the corporate veil. They can pull off the mask and look to see what really lies beneath. The legislature has shown the way and the courts should follow suit.	o Whiteside thinks Denning is ensanguine in making his observation – the corporate veil can only be pierced with difficulty, not ease

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Transamerica Life Insurance Co of Canada v. Canada Life Assurance (1996) On Gen Div

Facts	Holding
o Not Done	o There would be a 'just and equitable' standard in determining whether the corporate veil might be pierced o It will be pierced in the case of 'fraudulent and improper' conduct

Welling, The Governing Principles

"Deep Rock Doctrine" – The judge in this case would have held Salomon liable because Salomon invested very little of his own money in the corporation (he created debt owed to him by the corporation, which resulted in him seizing the corporate assets).

De Salaberry Realties Ltd v. M.N.R. (1974) FCTD

Facts	Holding	Ratio
o Developers would incorporate a number of companies and assign a different function to each; each a subsidiary to a parent o The principal attempted to avoid taxation and other regulations claiming that these were all separate corporate instruments	o Regulators considered all of them to be a single entity o Each 'subsidiary' is a principal and agent of the others at the same time (partnership). o There was an attempt to avoid tax liability through the subsidiary and they should be lumped together	o Purposeful subsidiary creation can be characterized as a partnership for the purpose of regulation

How does one assign a personality to the corporation? The character and entity of a corporation can have assigned to it the character and entity of its guiding minds.

Big Bend Hotel Ltd. v. Security Mutual Casualty (1980) SC

Facts	Holding	Ratio
o President and shareholder insured the hotel and fire occurred mysteriously o Insurance company learned this individual had done the same thing years earlier – Insurers suspected arson	o The fact that the president and sole shareholder had previously been in the same situation was a material fact that must be disclosed to the insurer in order that it may be weighed by the insurer	o The court may attribute the personality of the principal officer to the corporation o The burden is on the individual to disclose material facts.

Implications of Piercing the Corporate Veil

Full Disclosure versus Due Diligence – To what extent is the insurer expected to undertake an inquiry? The court has held that the burden is on the individual seeking insurance to disclose material facts – failing to do so is a breach of an insurance policy. The personality of a corporation is attribute to any person who is in complete control of the corporation.

Purpose of Piercing the Veil – The purpose of the corporate veil is to poke through the fabricated device of the corporation as an entity to shield the *individual guiding minds* of the corporation. The purpose of piercing the veil is to go beyond the corporation and find liability in those individuals who committed some wrongful act.

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Corporations as Agents and Partners

The corporation as a natural person may be an agent for a principal or a partner in a firm – this occurs quite frequently in order to avoid the personal liability in a partnership. The only liabilities arising out of the work in a firm will be directed to the corporations and not the individuals. In the following cases the courts relied on sound principles of agency law.

Smith, Stone and Knight v. Birmingham Corporation (1939) Eng KB

Facts	Holding	Ratio
o Involved a claim for compensation against a municipality o *Issue*: Whether the parent of the corporation whose property was expropriated might bring a claim – whether parent and subsidiary might be considered as one and the same for the purpose of considering compensation	o How does one determine whether a parent is responsible for the acts of the subsidiary and vice versa o Six Criteria (122): Indicate whether it was owned, controlled, managed, financed, etc by the parent	o The court will not treat parent and subsidiary as separate entities in law if a sufficient nexus can be found between them (6 criteria).

Sun Sudan Oil Co. v. Methanex Corp (1992) Alta CA

Facts	Holding	Ratio
o Court invited to treat parent and subsidiary as single entity	o Court would not pierce the corporate veil – the subsidiary had been create for sound, legitimate business purposes functioning separately and not as the agent of the parent	o Evidentiary problems arise when attempting to prove the basis for piercing the veil

DHN Food v. Tower Hamlets London (1976) Eng CA

Facts	Holding	Ratio
o Claim for compensation by several companies o Companies relied on each other and share profits	o If several companies were considered, they were in effect a partnership functioning in the same manner relying on the others and sharing profits	o The corporate veil could be pierced in the case of a partnership and all the corporations can be treated as a single entity

The Partnerships Act Section 2: Partnership is the relation that subsists between persons carrying on a business in common with a view to profit.

Enron is a clear demonstration of the temptation of unscrupulous individuals to use the corporate vehicle for improper purposes – to mask practices that might protect funds etcetera. These individuals set up partnerships and subsidiaries to do the 'dirty work'. Sometimes even the most skillful auditors and accountants do not follow the trail to the subsidiaries and partners created by a corporation. This is a consequence that over years nobody realized the Enron statute committed to play. Due diligence involves undertaking the kind of investigations necessary to determine the true facts and circumstances and not be misled by what is apparent or obvious.

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The corporation is a separate juridical person in law having all of the capacity of a natural person functioning through the agency of natural persons. The CBCS states the legal consequences through ss. 16 and 45 of this proposition of a corporation enjoying the capacity of a natural person. Without these declarations, business as we know it today would not exist – people would not be prepared to accept the risk involved in business enterprise if they were to be held personally responsible for a corporation's default. The cases we have dealt with thus far revolve around the idea of reaching behind the statutory protection afforded by the CBCA and piercing the corporate veil. The other aspect of this is to note that the agent acting on behalf of the corporation is not personally liable for his or her acts if they are performed within the scope of their authority given to them by the corporation.

An individual engaged within the work of a corporation will not be held liable because the law recognizes that they are the alter egos of the corporation and it is the corporation that ought to bear the responsibility. However, if an agent should act outside the scope of his or her authority and particularly if the agent serves his or her own private interests he or she will be held liable. There are no clear criteria in determining, however, when and how the corporate veil ought to be pierced.

The fact is that there has to be weight given to business efficacy, which is making things work. The judiciary does not want to make decisions that will slow down the economy or upset markets.

Corporate Personality: Innovative Approaches

How does the question of piercing the veil arise from time to time?

Garbutt Business College Ltd. v. Henderson Secretarial School Ltd. (1939) Alta CA

Facts	Holding	Ratio
○ A person (teacher in the plaintiff corporation) resigned, incorporated another corporation and conducted a rival business through the other corporation ○ Device to avoid a restrictive covenant – the resigned was not to undertake similar business for a number of years	○ The defendant corporation was nothing other than a device employed by the individual defendant to avoid the constraints imposed by a restrictive covenant	○ The court will disregard corporate identity and hold individuals liable where the primary purpose of the corporation is to avoid restrictive covenants

Einhorn v. Westmount Investments (1969) Sask QB

Facts	Holding	Ratio
○ Application to strike out a statement of claim on the basis of no cause of action ○ The individual defendant said that he was not personally liable, but rather the corporation was responsible ○ Defendant's demuned corporation of its assets, rendering it judgment proof once they discovered an action would be brought against it	○ The individual defendants were wholly in control and acted to serve their private interests and not those of the corporation and, therefore, could be held liable	○ Courts can look beyond the façade of a corporation and pierce the corporate veil ○ If private individuals misuse the corporate to defeat the interests of others unfairly and unconscionably, they will in all probability be held liable (alleging fraud is evidentiary difficult)

McFadden v. 481782 Ontario Ltd (1984) HC

Facts	Holding	Ratio
○ Person employed by one corporation	○ Plaintiff claimed against the second	○ Individual defendants are not

wholly controlled by two individuals o Those two created a second corporation and transferred the plaintiffs employment to that second corporation o Second corporation proved unsuccessful and the two transferred the assets out of the second back into the first and fired the plaintiff o Terms of employment in the first corporation were transferred to the second	corporation, but it had no assets and he sought to pierce the corporate veil by suing indls o Individuals defended based on the inability to pierce the veil and the idea that a corporate officer is not liable when acting within the scope of authority o Court dismissed the defense – two individual defendants were obviously acting in self-interest to preserve their stakes in the corporation	entitled to claim an immunity by simple reason of acting within the scope of their authority – if they act in self-interest as opposed to the interest of the corporation, then they can be held personally liable.

Callon J: If an officer or director of a corporation is to be relieved it is because in so acting …

Mentmore Manufacturing v. National Merchandise (1978) FCA

Facts	Holding	Ratio
o Involved the claim for breach of patent rights o Corporation had two shareholders o Could corporate veil be pierced? Could individual officers and shareholders be held personally liable?	o There are circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course, but rather actions are deliberate, willful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to it.	o This case declares those situations where agents will be responsible for damage caused to third parties: (1) acting outside scope of authority; and (2) action self-serving.

Air Canada v. M & L Travel Ltd (1993) SCC

Facts	Holding	Ratio
o Whether or not defendant was obliged to maintain a trust account o Trust account contained prepaid amounts for air travel	o Whether knowledge and misconduct of individual officers of a corporation might be imputed to the company itself – whether officers were personally liable o Iaccobucci: The individuals acted for their personal benefit in one case and the other was willfully blind to the misconduct o Each of the individuals were liable to Air Canada	o If a person uses a corporation to further his or her own ends and if those ends do not coincide with the objectives of the corporation, the individual will most probably be held liable

Test for extra-corporate liability:
1. You must get behind the corporate veil;
2. You must find that the officers have acted outside of their authority and derived some personal benefit

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Royal Brunei Airlines Sdn. V. Tan Kok Ming (1995) JCPC

Facts	Holding	Ratio
o Not Done	o The director of the defendant corporation was dishonest and acted in a manner designed to serve personal interest, this dishonesty is imputed to the corporation. The director acting in this capacity was the corporation because of the dishonesty of the director	o Where a person acts dishonestly and misuses an office within the corporation, that individual will be held personally liable.

Transamerica Life Insurance Co. v. Canada Life Assurance (1996) Gen. Div.

Facts	Holding	Ratio
o A financial service company engaged in others for mortgages o In the process a great loss occurred, plaintiff alleged it occurred because the contracting co. did not undertake due diligence o Alleged that the relationship between the defendant and Canada Life was such that Canada Life was principal and Mortgage Services was the agent and, therefore, Canada Life (CLMS) was liable as the principal bound by the actions of the agent	o Issue: should the corporate veil be pierced? Is there a basis for holding Canada Life liable for the misrepresentations of CLMS? o Gower (text) disapproved with the freewheeling 'just and equitable' approach, which 'smacks of palm-tree justice'. o There are perfectly good reasons to establish subsidiaries, but a subsidiary established for the purpose of avoiding liability will not be protected	o A corporation will not be protected by a subsidiary created for the sole purpose of avoiding liability. There must be some valid business purpose.

Gregorio v. Intrans Corp (1994) ON CA

Facts	Holding	Ratio
o Not Done	o General statement of the rule: a subsidiary even if wholly owned will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability.	o A subsidiary even if wholly owned will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability.

Thin Capitalization

Walkovsky v. Carlton (1996) NY CA

Facts	Holding	Ratio
o Each owner of a taxicab incorporated a separate corporation o An individual was injured and claimed not only against the corporate owner of the cab, but also all those other corporations associated with the owner of the	o *Issue*: Can we pierce the corporate veil and attach the assets of all of the other corporations that are associated with it in a partnership? o Court was unsympathetic and held true to *Salomon*: the owner of the cab company did exactly what	o The judge might well have made a finding for the plaintiff had agency been pleaded – it was not pleaded, the plaintiff pleaded fraud instead o *Dissent*: Course of conduct of shareholder was obviously to avoid liability and this judge

cab.	he was entitled and expected to. The court then questioned whether we can consider that single corporation as an agent to all others.	would have found liability in the shareholder

There is a major ethical question regarding the lawyer that is asked to make a corporation judgment-proof. One of the major duties of the lawyer is to mitigate risks; does s/he go to far in making a corporation judgment proof or advising a client (defendant) to hide his or her assets?

Henry Browne & Sons v. Smith (1964) Eng QB

Facts	Holding	Ratio
o An individual who owned a yacht transferred it to a corporation and ordered work to be done o Work was not paid for and the worker sued the individual and was told he could not recover because the corporation had no assets	o There is no evidence to support the proposition that Ocean Charters Ltd. was acting as an agent to Smith.	o

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The Law of Agency

Nature of the Agency Relationship

Agency law is probably the single most important invention of the law providing the basis for all government and business. The concept is simple, but has wide ramifications.

Agency is the relationship that exists between two persons when one who is called the agent is considered in law to represent the other – that other is called the principal – in such a way as to be able to affect the principal's legal position in respect to strangers. That legal position may be affected in so far as it relates to making a contract; buying or selling goods; or, it may relate to tortuous conduct on behalf of the principal.

The relationship is tripartite: (1) Agent; (2) Principal: and (3) Third Party. The central concerns of the lawmakers are twofold:

1. *Business Efficacy* – make sure business relationships are made as easy as they possibly can be; and,
2. *Third Party Protection* – protect the third party from any losses that may be suffered by the actions of the agent.

Authority – delegated power or permission. The agent has the *authority* to act on behalf of the principal. In administrative law the term represents the power or right to enforce.

American Restatement of Agency – agency is the relationship that results from the manifestation of consent from one person to the other that the other shall act on his or her behalf and subject to his or her control and subject to the other to act.

The consensual aspect of agency is not always the case – for the protection of third parties, the court will imply an agency relationship. For example:

1. An agent of necessity
2. A person exercising apparent or ostensible authority – involves estoppel where a person allows another to represent him or her as an agent and another party acts on that representation to his or her detriment. An individual is there estopped from denying the agency relationship.

Bowsted (leading authority) – agency involves a person having express or implied authority to act on behalf of another and to bind that other by his acts or defaults.

Powell (authority) – agency deals with the person who is authorized to act for a principal and has agreed to act and has the power to affect the legal relations of his principal with a third party.

Be able to distinguish between an agency relationship and other types of relationship (trust, bailment, and etcetera). The finding of a partnership-like relationship subscribes to a whole host of rights and obligations, mostly fiduciary. Fiduciary law provides for the compensation of rights and damages. The purpose is to inform one of the rights, duties, and obligations, of officers within the corporation.

Characterizing Agency

Here we are talking about liability to third parties and 'deep pockets'. Agents are always either servants or independent contractors. The distinction is critical because the employer is vicariously liable for the torts of the agent while the employee commits a tort engaged in the *course* of his or her employment. On

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the other hand, an employer is not ordinarily liable for the torts of an independent contractor. There are certain exceptions – an employer cannot undertake a particularly hazardous undertaking to an independent contractor. The principal will be liable for the torts of an agent committed while the agent is acting within the scope of his or her authority. The principal, however, is not allowed to delegate exceptionally dangerous or hazardous tasks or an incompetent employee and etcetera. Consider the difference in terms between *scope* and *course*.

Characterizing between employee and independent contractor

1. A *servant* gives service to another on a continuing basis. The hours of work are defined and the person is ordinarily paid an hourly rate, although s/he may be paid a salary. Most importantly, the employee is subject to close supervision and control by the employer (Control Test).
2. An *independent contractor* is engaged to provide a product, which may be the provision of services, and the obligation is to provide what has been contracted for – the particular product. However, the employer has no right to supervise or direct the independent contractor as to where, when, how, or why the work should be undertaken. The employer cannot interfere with the doing of the work by the independent contractor – s/he can only insist that the product is provided in accord with the contract made between the parties.

Salmond on Employees versus Independent Contractors – a servant works under the supervision and direction of his employer while an independent contract is his own master. A servant must obey the supervisor's orders while the independent contract may exercise his or her own discretion in performing some task.

Policy and Semantics

If some harm should befall a third party as a result of the lack of ability of a servant or the failure to properly instruct, then the employer will be liable. On the other hand, a competent independent contractor will be held fully liable for any damage occurring in the provision of a service. The employer has no involvement in the production and execution of the work and is, therefore, not liable.

Note: an agent is either a servant or independent contractor. A servant may also be an agent. If that agent is endowed with the authority to undertake some act and if acting in that scope the agent commits a tort, the employer will be held liable (not vicariously), but instead because the agent is the employer's alter ego.

These various rules indicate the kind of exposure that the client suffers from – what must then be done for the corporate lawyer is to bring this exposure to the notice of the client. A series of rules, practices, and procedures are then developed to mitigate the risks without inhibiting efficiency.

Four Areas in General

1. The Nature of the Agency Relationship;
2. The Nature and Scope of the Agency Relationship;
3. The Obligations and Effects of and Agent Principal Relationship; and,
4. Partnerships and Agency

There are three key elements to the agency relationship: (1) 'authority' – the ability of the agent to represent and bind the principal to third parties; (2) 'representation' – the agent represents the principal or the agent while acting within the scope of authority is the principal; and (3) the agent is able to affect the

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principal's legal position. Note also the relationship between employers as principals and the employees as either agents or independent contractors. It is important to draw the distinction because the legal consequences are profound. Moreover, every agent is either a servant or an independent contractor.

Employment (Servant): (1) The term of employment is continuous while that of an independent contractor is sporadic; (2) The method of payment – ordinarily the servant is paid an hourly, weekly, or annual wage or salary while the independent contractor is paid a lump sum or fee based upon the terms of a negotiated contract; (3) The regularity of hours – the servant ordinarily punches a clock for a set period or fixed period of time while the independent contract functions in accord with his or her own schedule subject only to the negotiated contract; (4) Control Test – if the employer's supervision and control is very close and detailed, then it is likely that the individual will be deemed to be a servant or employee and not an independent contractor.

It is important to characterize between a servant and independent contractor for the purpose of legal consequences. For example, an employer may be held vicariously liable for the negligence of an employee (servant). The law expects the employer to control his or her servants. On the other hand, there is no liability imposed upon the employer of an independent contractor for torts committed by the contractor in the course of the duty. There are exceptions: (1) The employer is obligated to engage a competent independent contractor who is capable of doing the work; and (2) An employer may not undertake a high risk venture and avoid liability simply by engaging and independent contractor.

The principal will always be liable for any tort committed by an agent while acting within the scope of his or her authority. The 'scope of authority' looms largely in any consideration of the law of agency.

Types of Agents

1. *General Agent* – a person engaged by the principal to act in all matters relating to a particular trade, business, or calling (for example, the manager of a store is a general agent: an employee of the corporation and an agent for the purpose of managing a particular job). Usually a general agent is judged by continuity of services;
2. *Special Agent* – engaged by the principal to perform a particular act. Once performed, the agent's authority is exhausted (for example, the solicitor who is not in-house counsel or a real-estate agent or broker);
3. *Factors and Mercantile Agent* – grew out of the marketplace and the authority derives from custom. This agent is one who has possession of the principal's goods and sells those goods or pledges those goods in the market. That person has full authority to sell or pledge the goods for credit and any third party dealing with the factor will take good title even though no real authority has been vested in the factor by the principal. Where the factor is customarily selling goods, the third party will not be bound by that principal (one cannot give better title than one has). A broker is also a mercantile agent, but s/he does not have possession of the goods, as does a factor. The goal of the broker is to negotiate contracts on behalf of the principal;
4. *Delcredere Agent* – an agent that negotiates a contract between principal and third party, but then binds him or herself to the third party to the extent of ensuring satisfaction of the elements by the principal;
5. *Commission Agent* – an agent that is paid a commission on the proceeds of the transaction; and,
6. *Shipmasters, Auctioneers, and Solicitors* – more specific examples of agents.

When a contract is made the agent has fulfilled all of his or her obligations – the relationship is between the principal and the third party.

Two Major Policy Considerations

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Business Efficacy – how does one render a decision that does not impede the smooth flow of business?
Protection of Third Parties – third parties must be protected so long as they act reasonably.

Much of the law of agency is customary, deriving from the law of merchants.

One – Agency by Authority

There are a number of ways that an agent may obtain the requisite authority to bind the principal to the contracts that s/he enters into with third parties. The ways in which authority may be deemed to exist are:

1. ***Actual Authority*** – involves the principal vesting in the agent specific terms of engagement out of which the authority grows (for example, power of attorney confers actual authority by the grantor to the attorney, appointment of an office, relationship created through contract);
2. ***Implied Authority*** – the kind of authority not necessarily associated with actual in order to take the principal aside. This is what the law will deem to be necessary in order for the agent to perform the commission;
3. ***Usual and Customary Authority*** – deemed to be real authority. 'Usual' is that authority which a person ordinarily enjoys in a particular trade or business. 'Customary' is that authority which grows out of what the individual has been doing over an extended period of time. Much of this relies on the law of merchant.

Each of these types of authority may be put under the head of 'actual or real authority': the following differ:

4. ***Apparent or Ostensible Authority*** – this may be characterized by authority by estoppel. For example, where the agent characterizes him or herself as having authority where none really exists. The principal may be estopped from denying the authority of the agent where the third part acts upon an 'agents' representation. This is the case where a principal allows an agent to represent where there is no real authority granted;
5. ***Agency by Operation of Law*** – this kind of agency is now being employed in rescuer cases (for example, the shipmaster whose ship has floundered – the shipmaster will remove the cargo and, without authority, will sell that cargo – the court will imply authority and find the shipmaster an agent by necessity and the third party may find good title). The courts will imply an *agency of necessity* where a person acts as a rescuer of the principal – if something is not done by her or him with respect to the goods of the principal, the principal will suffer a loss: the principal is bound by the contract and entitled to the consideration that flows through the agent;
6. ***Agency by Ratification*** – ratification occurs when an agent enters into a contract representing to a third party that s/he is acting for the principal when, in fact, s/he has not been given authority to do so. Up until ratification the agent will be liable to the third party because s/he has misrepresented his or her authority (breach of warranty of authority). The agent will be taken off the hook and a contractual relationship will be created between principal and third party if the principal ratifies the contract created between the agent and the third party.
7. ***Agency by Estoppel*** – the elements of estoppel are: (1) a representation that is made to a party – the form of which depends upon the circumstances; (2) reliance on that representation by a third party; and (3) the third party shifts its position to its detriment. When this occurs, the person who made the representation is estopped from denying having made the representations – denying the agency relationship.

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Two – Agency by Act of the Parties

Such an agency may be either gratuitous or contractual. A person may gratuitously act to undertake an agency relationship. The gratuitous agent is under no obligation to perform the terms of the contract – s/he is not obliged to do what has been undertaken. On the other hand, the gratuitous agent has accepted to exercise all of the care and skill and requisite loyalty to the principal, as does an actual agent. The contract between the principal and agent may be expressed or implied. The usual contract rules will apply.

The terms of authority will depend upon what the parties have contracted to do, whose specific terms are often brought to the court. The solicitor, for example, drafts a meticulous retainer to limit any obligations and liabilities s/he may otherwise have to a client. The 'scope of authority' will be determined by an examination of the contract created between the relevant parties.

Corporate President – s/he is a general agent ruled by the terms of the employment contract, which sets out the scope of authority. The contract will be interpreted to determine exactly what authority the president has. The president may be given specific authorities aside from the general day-to-day duties. The corporation may be bound by the president's act whenever s/he is acting within the scope of the contracted duties and those duties may be extended to consider factors such as customary and usual practices of the employee.

Agency by Estoppel

Here we are talking about apparent or ostensible authority. This means that an agent has represented him or herself to have authority when none actually exists. If the principal is aware of the agent holding him or herself out as having authority and does nothing in preventing the agent in so doing, the principal will be seen as holding the agent out to third parties. In such cases, the principal is estopped from raising the question of the agent's authority. There are two general situations that are contemplated:

1. Where the agent does in fact have a limited authority and represents to third parties that the authority is wider than it actually is and the principal permits this to be done, the principal will be estopped from raising an authority issue. The agent represents to the third party that s/he has authority that goes beyond that which has actually been conferred; and,
2. Where the person has no authority whatsoever, but nevertheless represents to third parties that s/he does enjoy authority and the principal is aware of these operations, the principal will be held liable (the principal will be estopped from denying the authority) if s/he does nothing to advise any third party that the person is not an agent and where the principal does not advise the person to stop (the principal does not deny the person's right to make such representations as an agent).

Take care to keep in mind the elements of estoppel:

1. A representation made by an individual;
2. A reliance on that representation by a third party; and,
3. A detriment to the individual relying on the representation.

The nature of the representation may be either a statement made by the purported agent that the principle has not denied or where the agent is placed in or occupies a position that implies or suggests an authority that has not, in fact, been conferred.

Lloyd v. Smith (1912) AC

Facts	Holding	Ratio
○ A managing clerk was hired and	○ The firm of solicitors was held	○ The principal will be estopped

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his office looked like one of a very important person o He was authorized to perform some routine functions & checks o The clerk, however, acted as an advisor to third parties representing that he would take their securities and provide them with a profit from investment o The clerk looked like and acted like a lawyer	liable on the basis of the firm's giving the clerk 'authority' o The firm allowed the clerk to meet with and speak with clients without supervision and also provided him with a seemingly 'authoritative' office o The law firm was estopped from denying the authority of the clerk	from raising an issue of authority if s/he engages a person and provides that person with the means to misrepresent a role o The principal has the burden to avoid harm coming to third-parties o If a principal fails to school their employees regarding conduct in certain situations, the principal will be held liable

"Estoppel" – as applying to ostensible authority means a person who has allowed another to believe in the existence of certain facts with the result that the one person relies upon that belief the individual cannot later deny the existence of those facts if the other has suffered a detriment. The key is that the principle has allowed the other to misrepresent the authority to enjoy. If the principal does not take steps to caution third parties, the principal will be estopped.

Consider *Partnerships Act* Section 15: 'Persons Liable for "Holding Out'." Each of the parts of the various sections of the *Act* reveals an aspect of agency law. "Holding Out" implies that a person may allow another to hold him or herself out as a partner – if that individual suffers a loss the person is estopped from denying that s/he is not a partner.

Persons liable by "holding out"

15 (1) Every person, who by words spoken or written or by conduct represent himself or herself or who knowingly suffers himself or herself to be represented as a partner in a particular firm, is liable as a partner to any person who has on the faith of any such representation give credit to the firm, whether the representation has or has not been made or communicated to the persons so giving credit by or either the knowledge of the apparent partner making the representation or suffering it to be made.

If there is nothing done to advise individuals that this person is misrepresenting him or herself, then the firm will be held liable.

Lloyds Bank v. Chartered Bank of India

Facts	Holding
o Not Done	o A third party dealing in good faith with an agent acting within his or her ostensible authority is not prejudiced by the fact that as between the principal and the agent the agent is using the authority for his benefit and not of the principal

Ramma Corporation v. Prove 10

Facts	Holding	Ratio
o Not Done	o Three elements of estoppel 1. Representation 2. Reliance upon Representation 3. Alteration of the parties position	o The important factor is on determining when and how the misrepresentation occurred o The agent must be acting in a manner consistent with the usual role of the agent

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Ferguson Bros. v. King (1902) AC

Facts	Holding	Ratio
o A clerk held himself out as having authority to sell timber, which was inconsistent with the ordinary duties performed by that clerk	o There was no liability on the part of the principals o The third party was aware that the clerk was acting outside of his authority	o A third party may not rely on the doctrine of estoppel where s/he knows that an agent is acting outside his or her scope of authority

Ratification – a person who has no pre-existing authority and represents him or herself with acting on behalf of the principal to provide him or her with a benefit, the agent will be deemed to have authority to undertake the act about which the third party had become involved. There are two factors involved:

1. The protection of the interests of the principal; and,
2. The protection of the third party.

The third party will take good title of the goods contracted in such a case and the principal may not complain – the proceeds of the sale will be passed back to the principal. The standards are objective and the agent must act in good faith for the benefit of the principal. The law presumes that the agent is acting in a reasonable manner. The burden of proof would be on the claimant – the owner.

From a general point of view, this kind of authority is often referred to in 'rescuer cases' – whether or not a person is entitled to be compensated if s/he acts in order to rescue a third party? Is the rescue person entitled to claim against the rescuer for negligence or improper conduct? Take the example of a Windsor man who pushed a car out of the way of a railway train steaming ahead with a passenger in it and surely saved a life, but his own car stalled on the track and was irreparably damaged. The insurance company refused to reimburse the rescuer.

Agency Arising out of Cohabitation – if two persons are cohabiting, the spouse may pledge the credit of the other individual even though there is no pre-existing authority and the other will be liable. This has been extended to include partners of all kinds and must relate to the purchaser's acquisition of 'necessaries'.

When a person engages a business activity, the law imposes an obligation to ensure that no third party comes to harm. There are very few social activities that are not founded upon the law of agency – it is critical especially for an understanding of company law.

Canadian Laboratory Supplies Ltd v. Engelhard Industries (1979) SCC

Facts	Holding	Ratio
o CanLab regularly bought platinum from Englehard – the purchasing agent was a man named Snook o Mr. Cook enjoyed the authority to sell, but not to purchase materials o Cook was, however, a paymaster and taking advantage of that role he contacted Englehard and advised him that 'Giles' was undertaking secret work requiring substantial quantities of platinum o Whatever platinum was not used in the operations would be sold back to Engelhard for reprocessing	o *Issue*: Could Engelhard rely on the representation made by Cook as having the proper authority to act as he did? o Policy of the Law: hold the person who undertakes a business activity liable to third parties if the undertaking would result in harm – the initiator of the activity would have to take reasonable steps to avoid or limit the harm coming to third parties o There were three representations upon which Engelhard relied:	o **Dissent**: There was no 'holding out' by CanLab to Engelhard up until 1966. Cook was a 'rogue' and misused his office as a junior employee. Nothing about his role would suggest to Engelhard that he was authorized to do what he was doing. Great difficulty in determining whether Snook's referral of Engelhard was a representation upon which Engelhard might rely. Conclusion: *Snook did not occupy so high a position as to justify Engelhard*

○ Cook negotiated that 'Giles' would directly sell the unused platinum ○ Under this arrangement, orders were continued to be suppled ○ CanLab paid for a quantity of platinum and then 'Giles' sold back the platinum not required ○ Effect: CanLab paid for all of the platinum including those subject to the fraud – this continued for seven years amounting to $800,000 ○ CanLab sued Engelhard in conversion – Engelhard had no authority to sell or buy back the platinum	1. Cook implied he had the authority in 1962 to make deals; 2. In 1966, Engelhard expressed some concern about late payments by CanLab for the quantities of platinum that were being delivered to it – Snook was not able to provide a reason for the late payments, but referred Englehard to Cook an agent; 3. In 1968, when Engelhard became concerned about the situation its senior officer called the Vice Pres of Ops of CanLab directly who referred Engelhard to Cook (Cook would provide all of the answers).	*relying upon a representation made by him.* Engelhard should be liable up until 1968 at which point holding out was made. ○ **Majority**: The sales agent of CanLab did occupy a sufficiently important position that a third party commercial organization was entitled to rely on any representation made. In 1966, Snooks said Cook had the authority to act as he did and Engelhard is entitled to rely on that representation. Engelhard liability stopped in 1966.

Whiteside: it is surprising that the dissent did not pick up the following. Snook was the person with whom Engelhard had always dealt. The original inquiry was about late payments. The problem that Engelhard complained of to Snook was corrected by Snook. This correction ought to imply to the court that Snook had a sufficient position and authority within the corporation that a third party may rely on his representation. Snook was a high enough ranking officer of the corporation able to legitimately make representations for the corporation. Senior management of CanLab had directed Snook to act as he did – he acted within that capacity. Senior management held out Snook to deal with major customers. This is consistent with corporate practice.

There is an obligation upon everyone who initiates an activity to exercise control. Where the party fails to exercise control, liability will be properly imposed. Note: today the cost of this litigation would come close to the figure of $3-4 million. Whiteside suspects that had there not been other influences at play the officials of both organizations would have instructed counsel to settle. There ought to have been, at the very least, a system in place whereby one could match purchases against inventory – had this been done a shortage would have been discovered. This point relates to the issue of control.

Estey J (In CanLab): Modern commerce at practically all levels and sectors operates through the corporate vehicle. That vehicle itself, by conglomerate grouping and divisionalization, has become increasingly complex. Persons, including corporate persons, dealing with a corporation must for practical reasons be able to deal in the ordinary course of trade with the personnel of that corporation secure in the knowledge that the law will match these practicalities with binding consequences. Both corporate sides to a contractual transaction *must be able to make secure arrangements at the lowest leve*l at which adequate business controls can operate … Obviously some employee must be placed in charge of buying, selling, financing, and another in charge of accounting, and so on, and each must have the authority necessary to deal responsibly with his counterpart in other trading and governmental organizations. (Review Text page 205)

There ought not to be a burden on a third party dealing with a corporation. Consider the "Indoor Management Rule" – you do not as a third party have to ensure that the person you do business with has properly, within the corporation, obtained the proper authority to act and deal.

If the individual who is subject to the representation does not act consistently with the role that s/he adopted, the third party acting reasonably should be making inquiries. The employer must be constantly vigilant.

Indicia a Defendant may use to indicate powers and authority of an individual:

1. Title of the individual;
2. Usual course of conduct in that corporation; and,

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3. Custom in the field

A third party dealing with a corporation is entitled to deal with a person, regardless of position in the corporate structure, so long as it is the usual course of conduct and satisfies business efficacy.

Duties Arising from an Agency Principle Agreement

1. *Performance* – the agent agrees to perform the terms of the contract. In a gratuitous agency, the agent is not so liable. However, a failure to perform constitutes a breach of the contract;

2. *Obedience* – the agent must comply with the principal's instructions. The agent must do the act in accord with the specifications that have been imposed by the principal. Moreover, the agent must not find him or herself in a conflict of duty, loyalty is owed to the engaging principal – the agent is obligate to act for the benefit of the principal. Activity outside scope will render agent liable;

3. *Standard* – the agent must employ the same care and skill employed by other agents in similar positions and fields;

4. *Delegatus Non Protestus* – the agent may not delegate his or her authority except in certain very narrow circumstances. For example, a lawyer may delegate certain tasks to a student, but implied is close supervision and the nature is supposed to be administrative tasks and not those crucial to the administration of the agency. The principle behind this is that the principal is a fiduciary and a fiduciary may not delegate;

5. *Respect for the Principals Title* – the agent must do nothing that reflects adversely upon the title of the goods and merchandise entrusted in his or her care or the position of the principal;

6. *Accounting* – the agent must account for all of the principal's property that s/he comes into possession with in the performance of the agency. Every trustee holding a fiduciary position is under this obligation;

7. *Fiduciary Duty* – there is a fiduciary duty that arises meaning that the agent must not find him or herself in a conflict of interest situation and, furthermore, the agent must not be in a position of a conflict of duty. In other words, you cannot act on both sides of the deal at the same time. One may not act as vendor and purchaser, or mortgagee and mortgager in a transaction. One of the central concerns is that corporate officers observe a strict ethic.

Fiduciary Duty of the Agent

There is a fiduciary duty that arises meaning that the agent must not find him or herself in a conflict of interest situation and, furthermore, the agent must not be in a position of a conflict of duty. In other words, you cannot act on both sides of the deal at the same time. One may not act as vendor and purchaser, or mortgagee and mortgager in a transaction. One of the central concerns is that corporate officers observe a strict ethic.

Loyalty works itself out in two ways:

1. *Conflict of Duty* – No agent (fiduciary) may permit him or herself to engage in a conflict of duty – the agent who is employed by a single person owes all of his or her loyalty to that one principal. The Rules of Professional Conduct acknowledges that this does exist;

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2. *Conflict of Interest* – no fiduciary may employ his or her position for personal gain or personal property. No fiduciary is entitled to use the property of the principal for her or his profit. The term property includes knowledge and information.

Rules of Professional Conduct – Rule 2
Conflicting interests include, but are not limited to, the financial interests of the lawyer and the duties and obligations of the lawyer to a client. Note: 75% of complaints against lawyers are for the failure to communicate with the client as to the status of their file. It is good *marketing* to let the client know the status – the client will then know that you are working for them and they will then talk about it. Moreover, a lawyer shall not advise to both sides in a dispute or act where there is likely to be a conflicting interest.

Balanced Budgets for Brighter Futures Act
Responsible Choices for Growth and Accountability Act

The agent must fully inform the principal of his or her own intentions. If the agent fails so to do and uses the information to his or her own benefit, two things happen:
1. The principal is entitled to refuse payment to the agent for services rendered by the agent; and,
2. The agent is liable to account for all of the profits that have been realized from the venture and deliver them to the principal because they have been earned through the use of the principal's property.

This ethic is so strict that even if the principal could not take up the opportunity, the agency will nevertheless be so obligated and liable for the accounting. Even if the principal realizes a windfall, accounting is required.

Boardman v. Phipps (1967) 2 AC 46

Facts	Holding	Ratio
o Trustee saw, because of investments made by the trusts, an opportunity for investment o Info came to trustee because of his work as such – information owned by the trust o There was some discussion concerning the trustee and others taking steps to enhance the value of trust holders o Trustees went out into the market and acquired substantial holding on their own account and minimal holdings on the account of the trust o The value of this holdings increased substantially	o HL said that even though the trust profited handsomely and even though the trustees were motivated by the desire to aid the trust and the trust could not by itself engage in the investment, since the knowledge employed by the trustees was the property of the trust these lawyers were in breach of the trust – conflict of interest o Lawyers were obliged to account for all of their profits and deliver those profits to the trust o Trustees did not lose their entitlement to compensation	o Denning: the law is that the trustee have not disentitled themselves from any compensation – these lawyers should be entitled to some compensation for their efforts, but they should still be held to the obligation of accouting

Regal (Hastings) Corp. v. Gulliver (1967) 2 AC 134

Facts	Holding	Ratio
o Regal Corp was put up for sale o In order to enhance marketability	o Directors required to deliver up all the profits earned as a result of	o Even though the principal has realized a substantial gain as a

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the directors acquired interest in other theatres with personal funds o The directors realized a profit o Regal Corp was then sold o An examination of the history of the Corp showed that the action of the directors was a breach of trust o New owners brought an action against the former directors alleging breach of trust, use of corporate information etc.,	the transaction o The directors were in breach of trust	result of the conduct of the fiduciary and unable to undertake the investment itself, the fiduciary is nevertheless liable to account for the trust and deliver up all of the profits to the principal

When the court at the proceedings had been initiated it said the directors could have avoided all of these problems by holding a shareholders meeting and putting before the shareholders a proposal and obtaining approval there from.

Principal's Duties

The principal is obligated to pay the agent even where s/he has not benefited from the agent. The principal does not fall under the obligation to pay the agent if s/he has failed to perform; committed a breach of a fiduciary duty; or, if the agent has committed an illegal act or failed a test of loyalty. The principal must indemnify the agent – repay for any disbursements and costs of agency.

The principal is entitled to dismiss the agent or claim for the usual remedies for breach of contract. The remedies that are available to the agent (payment of fees, enforcement of obligation to indemnify, a set-off against any claim of money owed to the principal, and a *solicitor's lien*) are varied.

A settlement of a claim or dispute made with an agent for the other side is good and valid. Any notice or admission made by an agent while acting within the scope of his or her authority is notice to and an admission by the principal. This rule is applied with great frequency in proceedings before the courts.

Torts Committed by Agents

In the case of the agent/principal relationship, the principal will be liable for torts committed by the agent while the agent is acting within the scope of his or her authority. The liability in such cases is direct and not vicarious because the agent is seen as the principal while acting within the scope of his or her authority. This authority includes ostensible or apparent authority. A great deal of litigation in this area involves whether the agent, at the time of the tort, was acting as a servant or an independent contractor. If the actor is an independent contractor and it is established at the time of the act that at the time of the act the independent contractor was an agent, litigation turns to whether the independent contractor was acting within his or her own authority – this arises fairly frequently in proceedings before the court. As such, it is very important to characterize the relationship that existed between the parties at the time act occurred.

Crimes Committed by Agents

If an agent commits a crime while acting within the scope of the authority vested in him or her and if the principal has directed the commission of the offense, then there will be joint and serverally liability as between the principal and the agent. The principal will be liable as is the agent. On the other hand, if the agent has gratuitously undertaken an act, which has resulted in the commission of an offense without the knowledge of the principal, the principal will not be liable. However, where a third party suffers damage then the principal will be held liable in tort.

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Tesco Supermarkets Ltd. v. Nattres (1971) HL

Facts	Holding	Ratio
○ A supermarket clerk breached a by-law in a store owned by Tesco Supermarkets Ltd.	○ *Issue*: Whether the conduct of the clerk could be imputed to the owner of the supermarket ○ Lower Courts found it could as the owner embodied the corporation and, therefore, the commission of the offense was the act of corp ○ HL – No. The law will not ascribe the state of the agent's mind to the principal.	○ The mens rea that is required to found a criminal conviction will not be ascribed from the agent to the principal ○ The law does not ordinarily impute the agent's state of mind to the principal unless the principal has directed the agent to commit the offense (joint and severally liable)

Leonards v. Asiatic Petroleum (1915) AC

Facts	Holding	Ratio
○ Not Done	○ A corporation must act through the agency of natural persons – if one can identify a natural person who is performing a role which embodies the essence of the corporation, then the state of mind of that individual will be ascribed to the corporation ○ The corporation is seen to be that individual	○ If the individual while performing the act is seen to be the corporation so that in that way a corporation may be held liable for a criminal offense that requires proof of mens rea – this is founded upon the corporate agent who is acting within the scope of his or her authority when the act is committed

The problem is to differentiate between those agents that are performing acts that embody the spirit or essence of the corporation and those that do not. Circumstances could be such that (as in CanLab) the role of the agent is of such importance that his or her acts can be seen as embodying the essence of the corporation. In such cases, the act of the agent may be ascribed to the corporation.

HL Bolton Engineering v. TJ Graham (1956) Eng CA

Facts	Holding	Ratio
○ Not Done	○ Denning: the corporation is like a human body – some people are mere servants (the hands of the corporation performing the work); others occupying a high strata are the directing mind and will of the corporation (the president and CEO)	○ Any offense committed by the mind of the corporation is going to result in liability to the corporation ○ The corporations state of mind is going to be determined by reference to those people who are acting as the corporation

It is a matter of determining the role of the person who committed the act at the time of its commission. The state of mind of any individual, who is fundamental to the operation of the corporation, will be found to be the state of mind of the corporation itself. Where those individuals roles are at the very center of the corporate being, such as the determination of top policy, then their state of mind will be deemed to be that of the corporation. If that state of mind reveals the requisite mens rea in the commission of the offense, then the corporation may be found equally guilty in the commission of an offense.

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Partnerships and Agency

Partnership is an elaboration of agency – agency with bells on. The corporation is a juridical person employing agents in order to undertake its mission. A partnership is no such separate person and has no separate personality, nor is it treated as a separate entity except for certain purposes: For the purpose of proceedings in the court, a partnership is treated as a special separate entity. The central result of a partnership is that every partner becomes jointly and severally liable for all of the obligations incurred by and in the partnership. Every partner is liable for the acts and defaults of every other partner while those other partners are acting in the course of the partnership business.

There are three major areas of partnership:

1. Creation of a partnership;
2. Scope of the relationship that exists amongst the partners and its effects; and,
3. Termination of a partnership.

The consequences arising out of a partnership are very significant. There are a number of advantages and disadvantages that arise out of the partnership structure. The advantages relate to taxation, financing, and organization.

One – Creation of a Partnership

Partnerships Act s. 6 is the critical section of the statute that deals with the nature of the relationship.

'Power of partner to Bind Firm'

6. Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member, bind the firm and the other partners unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom the partner is dealing either knows that the partner has not authority, or does not know or believe him or her to be a partner.

An inadvertent partnership arises where two people undertake a venture to achieve some goal by acknowledging each other's function in the scheme. To avoid the title of partnership, the parties involved may attempt to make a declaration that they are not to be deemed partners arising out of the venture. Such language is not worth the paper that it is written on. The court will determine, regardless of disclaimer, whether the partners have committed themselves to a partnership, which impacts on their financial circumstances and liabilities.

Pooley v. Driver

Facts	Holding	Ratio
○ One party would contribute capital to the business of the other ○ The agrt made gave the lender certain rights to determine the way in which the business ought to be carried out – most especially for repayment of the monies advanced the lender could take a share of the profits of the enterprise	○ Issue: Was the lender a partner of the other company? ○ Despite the denial of the partnerships, a partnership did exist ○ Court relied on *Partnerships Act* section 3 where a share of the net profits of an enterprise will render the parties as partners of the firm	○ *Partnerships Act* section 3 provides rules for determining the existence of a partnership ○ Sharing of profits is prima facie evidence of the existence of a partnership ○ Even though the parties may deny a relationship, that denial in and of itself is not determinative

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Partnership Act

Section 2 – Partnership is the relation that subsists between persons carrying on business in common with a view to profit.

Section 3(1) – The holding of property in common in itself is not determinative of a partnership

A.E. LePage v. Kamex

Facts	Holding	Ratio
o LePage's agent entered into a commission agreement with a member of a syndicate o The syndicate owned an apartment building o The agreement provided for an exclusive listing o Associate did not approve of signing into the agreement and denied liability of the listing o LePage sued the members of the syndicate on the basis that they were a partnership and one of the members signed the agreement acting as agent for the others	o The mere holding property as tenants in common was not in and of itself determinative of a partnership This case has been argued since its determination because the members acted as partners do	o The holding as tenants in common is not sufficient in and of itself for the finding of a partnership

Section 3(3) – Indicates the types of relationships that will grow out of and between the partnership of firms and third parties.

Section 5 – Defines the meaning of the word 'firm'

Section 15 – A person may not actually be a partner, but if s/he has held out to be a partner or is a silent partner, such a person will be equally liable for the debts and obligations of all the other members.

Two – Scope and Effects

Every partner is vested with the authority to undertake the business of the firm and may bind and hold liable all other parties.

Section 6 – Note the use of the words 'the usual way business'

Section 7 – Partners are bound by acts undertaken on behalf of the firm – those of an authorized agent of the firm (even an agent who has been held out by them as having authority even where none exists).

Section 8 – deals with where a partner pledges to the 'firm'

Section 9 – Effect of notice that firm is not bound by an act of a partner where it is agreed between the partners to restrict the powers of the partner. The restriction will be operative only if you give third parties notice of that restriction.

Section 10 – Liability of partners is joint and several. In so far as third parties are concerned, each partner is jointly and severally liable to the third party.

Liability will be imposed upon the firm and the partner if one appears to be acting in the ordinary or customary way of the firm's business.

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When a partnership is established it is necessary to register it under the *Business Names* Act. Disclosure is the basis upon which all of our business undertakings are conducted.

Section 11 – Tort Liability – An agent will render the principal liable if s/he commits a tort while acting within the scope of his or her duties.

Limited Liability Partnership – So long as the members of the firm disclose to the public that they are an LLP, a partner will be liable for the debts of the firm but will not be rendered liable for any of the liabilities incurred by any other members of the firm.

Section 16 – Admissions and representations by partners are imputed to the firm and all other partners. Such admissions and representations must be made while that individual is engaged in the ordinary course of the firm's business. If the person is acting inconsistently with that ordinary course, the firm and the partners will not be bound.

Section 17 – Notice to the partner who habitually undertakes the business of a firm. Any notice by the third party to the firm will be given if it is delivered to that acting partner. That individual will be given notice, but also notice in writing will be given to all other members of the firm who are recognized in the business file or under the Business Names Act.

Sections 20-31 – Provide a statutory regime determining the nature of the relationship of the partners towards one another. The partners will be bound by that agreement either express or implied.

An essential feature of a partnership is that with regard to major questions, unanimity is required. When the parties do make an agreement they will expressly provide for the way in which decisions are taken.

Section 24 – Absent a partnership agreement the rules relating to partners are set out in that section.

This section should remind us of the law of agency. Every partner is liable for indemnification – every partner is liable. No partner is entitled to remuneration for managing the business. No new partner may be introduced except with the unanimous consent of all of the partners.

The obligation to indemnify exists amongst the partners. A further obligation to pay interest on advances made by the partners. Every partner is entitled to participate in management – this rule is subject to change in the interest of efficiency. No partner may be remunerated for any service rendered by her or him to the partnership.

Section 25 – No majority may expel a partner. Unless there is a provision in the partnership agreement regarding the mechanism for expelling a partner it may not be done except in accordance with the statute itself.

Fiduciary Duty

Section 28 – Imposes an obligation upon each partner to render account to the others for 'secret profits'.

Section 29 – If a partner has employed partnership property for the purpose of personal profit, s/he is liable to account for profits earned and deliver those profits to the firm.

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Section 30 – Duty not to compete. If a partner is carrying on the same business as the firm, s/he must account for all the profits that are earned and those must be delivered to the firm. The profits become those of the firm itself.

Section 31 – If a partner should assign his or her interest in the firm to a third party, that third parties rights are very strictly circumscribed. The relationship between the partners is a confidential relationship – there is a mutual trust that has grown out of the period of the working relationship between them.

Even though a partner may assign his or her interest to a third party, that third party will not enjoy all of the rights of a partner. The assignee, for example, may not share in the management of the partnership. The assignee is not entitled access to the partnership accounts. Also, the assignee is not entitled to see the partnership books. The assignee's rights are severely limited only to the property interest in the share of the partnership that has been assigned.

One of the major considerations whenever one is organizing a business enterprise is the possibility in the future of one of the members encountering 'stormy' days. In those cases, you want members of the firm to be bound to a mechanism that will protect the other members of the firm in the partnership. First, the most important act of the lawyer is to inform the parties as to what lies ahead and give some indication as to the best form of business association. Second, the lawyer should point out the problems that may be encountered to certain eventualities.

In reviewing the *Partnerships Act*, what we are doing is reviewing the law of agency. The policy of the law is to protect third parties while at the same time supporting a regime that will promote business efficacy.

In every relationship, one must examine the nature of the relationship with great care and from that examination one may be able to determine what the true relationship is.

When it comes time to advise with respect to dissolution it is of the utmost importance to abide by the following provisions absolutely. For example, public notice must be given so third parties are made aware of the subsequent or impending dissolution.

Three – Termination of the Corporation

Dissolution in a partnership or agency is extremely important and involves the application of a series of rules to ensure disclosure. No third part should suffer any harm because s/he did not know that another partnership has dissolved. Note: A silent partner is equally liable as any declared partner.

Dissolution is given a separate part in the Act because of its impact on not only third parties but also the members of the firm itself. Each partner wants to make sure that s/he knows the extent of liability. A partner also wants to be assured that there will be no continuing exposure once s/he has stepped out of the firm. If the partnership has been totally dissolved, then there are not the problems that arise where the business conducted by the partnership is not wound up.

Section 32 – The expiry of a fixed term.

A partner may submit a notice of withdraw indicating a desire to withdraw from the partnership. All of the ordinary rules with respect to holding out will continue.

The withdrawal of a partner has major tax consequences. What the partners ordinarily do is provide that a withdrawal by a partner will not occur except at the time that the fiscal year will end for the partnership.

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Section 33(1) – If a partner should die or if a partner should be declared bankrupt, the partnership is dissolved. This simply mirrors the ordinary law of principal and agency.

It is essential that the provisions of the *Powers of Attorney Act* be complied with even though a partner has become a mental incompetent. A failure so to do may result in serious inconvenience. The power will continue even though the principal has become an incompetent – this does not apply in business transactions.

Section 34 – Where the partnership is dissolved by some act rendering the business of the partnership illegal.

The difficulties of a voluntary termination lie here:

Section 35 – The basis upon which the court may terminate a partnership. There is little litigation that arises over the *Partnerships Act* except with respect to this section. The incidence of applications arising out of this section is quite high. This section provides that a partnership may be dissolved on application by a partner on several grounds. Review them. Each of the grounds upon which a court may dissolve a partnership are:

1. Difficult to prove;
2. Take a long time; and,
3. Expensive.

Grounds for Dissolution may include:

A. Mental Incompetence;
B. Permanent Incapacity;
C. Conduct Prejudicial;
D. Persistent Breach of the Partnership Agreement;
E. Conducting Business at a Loss; and,
F. Just & Equitable so to do.

Section 36 – I would devote the better part of one or two classes to this rule if I had time. But since I don't have time I won't even review it at all.

Section 44 – Rule for Distribution of Assets. Parties are obliged to pay in the proportion that they are entitled to share profits. The assets of the firm are then to be employed in the paying of the debts and liabilities of the firm to persons who are not partners (such as a person who has advanced assets to the firm).

Section 44(2)(b) – In paying each partner what is due to him or her, the partner will be entitled to be paid if monies were loaned

Limited Partnerships

A partnership where there is a general partnership who is liable for all the debts and obligations of the firm. There may be coupled with the general partner a limited partner who invests money in the business, but takes no part in the management of the business or its affairs. The only right the limited partner has is to examine the books of the firm. That individual is liable only to the extent of the monies invested by her or him in the firm. None of that individual's personal assets are at risk as a result of the liabilities of the firm. Two conditions:

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1. There must be public registration of the limited partnership, which identifies the general partners as well as the limited partners; and,
2. The registration must disclose the investments made by the partner.

The limited partner will continue to enjoy that immunity so long as s/he refrains from exercising advice as to the direction of the firm. There must be a clear disclosure so that personal liability is limited.

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Corporate Obligations

Deals with those situations where a corporation has been committed to some aspect of liability and assumed some obligation because of the actions of the agents employed by it. A corporation as a juridical person is liable for the torts of its servants so long as the acts are committed in the course of the servant's employment. As such, it is important to consider whether the tort occurred while the servant was acting in course. If those acts are committed within the scope of the authority of the agent, the principal is liable for those actions. These cases turn on what constitutes the scope of authority. The corporation is not liable for the acts of its independent contractors unless they are agents acting within the scope of authority, but there are certain exceptions:

1. A corporation may be liable if it has employed an independent contractor whose capabilities and qualifications fall short of those required by the task; or,
2. A corporation may be liable if it hands off a non-delegable risk (a job to which the inherent risks are such that they may cause harm to the general public).

Offenses and Corporations

A differentiation must be made between those offenses that require proof of mens rea and those that do not. The question is whether or not the mens rea of the actor may be imputed to the corporation. The jurisprudence considers the 'identity' – the actor must be a person whose role or function within the corporation is such that the individual may be seen, at the time of the act, as the corporation itself. Policy plays a very large role in this determination.

Rule of Probability – If A exists and B exists, then C must exist.

Nizer – when you come to these situations keep a sharp eye out for any conduct that indicates that an individual cut corners or took deliberate steps to make the facts shady. If you can find some element that indicates bad faith, or some attempt to shield or cover up, then the court will lean in your favour to make findings for a result favourable to your client.

Rhone v. Peter Widener (1993) SCC

Facts	Holding	Ratio
o Widener had caused a shipping accident and the owner was sued by the parties for damage o The owner invoked legislation, which imposes a limitation of liability on the owner unless it can be established there was actual fault or privity (something personal or blameworthy) – simple negligence is deemed not sufficient to impose liability	o *Issue*: Whether the master of the Widener was, at the time the accident occurred, the directing mind of the corporation, thus permitting the court to declare that his state of mind and actions were those of the corporation o Question of mixed law and fact o This determination involves an examination of the hierarchy of the company – how far down may we go to determine that a person may be acting as the corporation itself? o A corporation must act through the agency of individuals o In delegating, there is an obligation on the employer to assure that the agent is competent to do the work o It is also necessary that there be procedures in place whereby performance of that individual is monitored	o If a person represents the mind and will of a corporation in undertaking a certain function, that person's actions may then be imputed to fulfill the mens rea requirement for a crime o The actor, however, must be the person who has the capacity and decision-making authority in matters of policy

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There are several individuals who are the corporation in connection to acts undertaken by them within the scope of their authority. *Conclusion*: The individual must have been delegated decision-making power in the relevant sphere of corporate activity. This working conclusion is not wholly adequate as there are many people to whom such authority is given. Only those who actual make the policy are those to whom we can liken as the corporation – this is very difficult to apply. Policy in this context refers to the establishment of a procedure, rules, a regime, which assures that every aspect of the business is monitored. Most people who have committed the acts that cause harm or damage to others do not fall within this definition. Key Factor – the capacity to exercise decision-making authority on matters of corporate policy rather than merely giving effect to such policy in an operation of crisis.

Policy – Make budget: Administration – Spend the money

The concern in this case was that it may have set the bar too high. If individuals exercise a function, which render them as being the corporation, then the corporation will be held liable for any breach that occurs.

Canadian Dredge & Dock v. The Queen (1985) SCC

Facts	Holding	Ratio
○ A matter of high policy was involved ○ Defense – each of the individuals was acting in fraud of the corporation; they were acting solely for their own benefit; and, they were acting outside the scope of the employment	○ See page 170 para 2 "The principle… scope of his authority" ○ The identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of operation assigned to him by the corporation.	○ The identification doctrine arises where the Crown demonstrates: (1) The directing mind acted within the scope of the authority assigned; (2) the individual was acting not totally in fraud of the corporation; and, (3) the action was by design or result partly for the benefit of the company.

The principles of agency law are essential for an understanding of corporate obligations. The separate personality of the corporation is influenced by the actions of the corporation as the corporation acts through the agency of natural persons. In tort, corporate liability is the same as it is for natural persons and there is no need to distinguish as the master will be held vicariously liable. It is important, however, to draw the distinction between a servant and an independent contractor. Insofar as contract is concerned, the employer will be liable only if the agent is acting within the scope of his or her own authority. The agent will be seen as acting as the alter-ego of the principal.

Where there is a mens rea ingredient, the court may determine that the actor is the corporation and the corporation may be held criminally liable. The issue is how far down the hierarchy one would go to determine whether an individual actor may be seen as the corporation.

Whiteside Summary: In each case involving criminal liability involving the corporation, the actor is also criminally liable. If the actor is seen to be undertaking actions within his or her scope of authority whose consequence to the corporation is substantial, and if the general public have a certain expectation arising out of the actor's conduct or place reliance on the conduct, then the mens rea of those actors will be imputed to the corporation and the corporation will be held liable. However, nothing clear-cut will be found in this area. There are statutes that impose direct liability on the corporations as well as the actors. For example, directors are held personally liable under the *Bankruptcy Act*.

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R. v. Waterloo Mercury Sales (1974) Alta QB

Facts	Holding
o Sales manager instructed mechanic to turn back odometer o Sales manager had no real managerial functions o Defense – manager was acting contrary to specific instructions	o Corporation was found criminally liable – used car manager in this instance was the very embodiment of the corporation and his mens rea became that of the corporation

R. v. Fitzpatrick Fuels (2000) Prov Ct

Facts	Holding	Ratio
o One person corporation as sole shareholder etc., o Employee soled liquor to a minor o Corp charged with offense	o The *Act* under which the offense was committed was public welfare legislation – strict liability offense o The sole employee acted within the scope of the criteria set out by Estey – action was partially to the benefit of the corporation	o Corporations are 'staples' in the delivery of modern congress – essential for that purpose and must be rigidly controlled – because of this there is an obligation to employ trustworthy staff and supervise that staff

Restrictions in the Corporate Constitution

There are a number of ways that a corporate constitution may be limited. Note special act corporations and the restrictions there imposed:

Communities Economic Dev Fund v. Canadian Pickles Corp (1991) SCC

Facts	Holding	Ratio
o A special act corporation – the corporation under the statute was directed to make loans to businesses in certain kinds of underdeveloped areas o In making the loan, the corporation demanded personal guarantees be given by the principles of the defendant – there was a default o Defense – loans had been made and they were ultra vires the corporation as the corporation was engaged in business in a jurisdiction not defined within the corporate constitution	o The doctrine of ultra vires is applied to common law corporations, those created by statute, memorandum corporations, letters patent corporations, as well as special act corporations o Special Act – created by a statute of the particular jurisdiction in which they are functioning o Due diligence requires that one undertake to uncover how a corporation has been incorporated o The loan was ultra vires. However, there was unjust enrichment	o Courts have consistently applied the doctrine of ultra vires to special act corporations if they undertake an act outside the scope of the legislation o All cases of ultra vires involves an interpretation of the instrument that creates the corporation o Corporation acting outside the scope of it constitution acts ultra vires

The demand for a personal guarantee so often creates an illusory veil for the very reason to incorporate. Lenders often demand an instrument exposing the individual personally liable for the obligations of the corporation. Personal guarantees are often required – the individual is not immune from litigation where a personal guarantee is given.

Re Jon Beauforte (London) Ltd. (1953) ER

Facts	Holding	Ratio
o Corporation was incorporated to manufacture gowns	o The plaintiff suppliers were well aware that the corporation was not	o A corporation acting outside of its instrument of incorporation is

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○ A decision was undertaken by the managers to turn to the manufacture of veneered panels	carrying on a business, which had been authorized by its instrument of incorporation ○ Plaintiff ought to have know that the defendant was acting ultra vires – constructive notice – there was a public record indicating the corporation's authorized business activities	acting ultra vires

There is some statutory relief now that applies to corporations that fall under the general corporate acts. However, when dealing with a corporation that does not fall under this scheme, you should always obtain as a matter of due diligence a credit report with the essential information.

Re Ashbury Railway (1875) – constructive notice was imposed upon a party because the court held that it should have examined the public records to determine the objects of the corporation.

Statutory Reform – CBCA

6(1) Articles of incorporation shall follow the prescribed form and shall set out, in respect of the proposed corporation, **(f)** any restrictions on the business that the corporation may carry on.

15(1) A corporation has the capacity, and, subject to this Act, the rights, powers and privileges of a natural person.

18 A corporation … may not assert against a person dealing with the corporation … that, (a) the articles, by laws and any unanimous shareholder agreement have not been complied with, (d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or has no authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer, or agent, except where the person has or ought to have by virtue of his position with or relationship to the corporation knowledge to the contrary.

Canadian Constitutions – Some Residual Problems

Alberta Gov Telephones v. CRTC (1989) SCC – the corporation was *ultra vires* its powers.

Welling – these issues very often boil down to an evidentiary problem. How does one find out whether or not there is evidence within the corporate framework that will prove the allegations contained in the claim? One may get an order directing the production of all materials.

Proving Corporate Contracts in Canada – To what extent may a corporation prejudice third parties by citing a failure to comply with procedure? Is it possible for a corporation to deny liability on the basis that internally some rule was not followed?

Panorama Developments Ltd. v. Fidelis Furnishing Fabrics (1971) ER

Facts	Holding	Ratio
○ Vehicles rented from an agency by corporation and then used for personal purpose ○ Argued that corporate secretary did not enjoy usually authority to rent vehicles of the kind ○ Case deals with ostensible	○ Such an individual has ostensible authority, the corporation has put the individual into a position that enabled him to commit frauds – company liable ○ The scope of authority is often a simple matter of interpretation and	○ One must determine what it is that s/he does on behalf of the corporation – the individuals functions and duties may be such that some type of authority if enjoyed by the individual that will bind the corporation

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authority	from that interpretation inferences are drawn	

The term 'Usual Authority' is key. Consider CBCA section 18 regarding the term 'usual'.

Freeman & Lockyer v. Buckhurst Park Properties (1964) Eng CA

Facts	Holding
o Individual played the role of managing director of a firm o The managing director is the CEO of the organization o This person entered into a contract with an architectural firm, which bound the defendant to that firm o The other members were aware of the individual's conduct – he knew that he was representing himself as managing director and doing those things a managing director ordinarily does	o Other members were estopped from denying the actors apparent authority o Four conditions bearing on agency by estoppel: **(1)** that a representation of authority is made to a third party; **(2)** the representation is made by persons with 'actual' authority; **(3)** someone is induced into contract by that representation; and **(4)** the company must not be deprived under its articles from entering into the contract

How far down the totem poll must we go to identify a person who may be identified as the corporate identify. If you can identify an officer who represents the corporation in some area of the corporate business and that person has the ability to make decisions with respect to some area without supervision, that person may be held to respond during the course of proceedings. Even though that person is not involved in policy making, that person will be seen as the corporate identity.

Broker – the broker must be very careful, as s/he owes a duty to both principals. The brokers role is often determined by the custom of the marketplace. Each person talking to the broker must understand that what is said will be conveyed to the principal. As such, a fiduciary duty is owed to both principals. This duty remains the same regardless of the discrepancies of sophistication between the two principals. However, there is a heavier responsibility on any fiduciary that is dealing with an unsophisticated principal.

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Incorporation and Pre-Incorporation Transactions

Incorporation

1. Registration

The date upon which a corporation comes into existence is that date which is set out in the certificate pursuant to CBCA section 9.

CPW Valve v. Scott (1978) Alta CA

Facts	Holding	Ratio
o *Issue*: Whether a purchase order had been issued by a newly formed corporation before it had come into existence	o The P.O. had been issued before the corp came into existence and, hence, neither party was bound by its terms	o Parties will not be bound by a contract made with a corporation prior to its existence

2. Corporate Constitution – Minimum Requirements

CBCA section 6 – sets out those things that must be set out in the incorporation of a corporation. Any restrictions that the incorporators seek to impose must also be included.

The reference to the corporate constitution and the articles of incorporation may be misleading. The articles of incorporation are only a part of the constitutional documentation of the corporation. The statute under which the corporation is created is an element of its constitution. The by-laws provide the basic framework under which the corporation will act. The unanimous shareholder agreement is fundamental – an agreement made by the shareholders have the corporation comes into existence. This agreement is a control mechanism available only in a small, private non-offering corporation. This agreement is not possible in a large widely-held company. Once the shareholders become active in management in some capacity, the burden/liabilities of the corporation may be imposed upon them.

3. Continuance: Corporate Emigration and Immigration

You may have an Ontario Corporation that decides that it would be better served as a federal corporation. The Ontario corporation may apply for 'articles of continuance' and so long as it satisfies federal requirements, those articles will be issued and it will become a federal corporation and bound by federal statute and no longer by the provincial legislation. The sections referred to are 187(1) CBCA involving immigration; and, 188 CBCA involving emigration permitting a corporation to apply to another jurisdiction for continuation. These articles are employed very frequently to advance business purposes.

4. Amalgamation: Corporate Combination

Mergers and Acquisitions represent a major portion of business law. Amalgamation involves a merging of two corporations that come together and are absorbed to become a single corporation. This has major and dramatic consequences. The effect of amalgamation is that each of the amalgamating corporations loses its identity and becomes absorbed into the new corporation. In so doing, each corporation retains all of its rights and assets, as well as all of its liabilities. The liabilities of each become in the aggregate those of the amalgamated corporation. Relevant sections are CBCA ss. 181 and 186. The corporations that wish to amalgamate must be domiciled under a single jurisdiction – no international incorporations!

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The Corporate Name

You ought not to select a corporate name that is similar to another so as to cause confusion – the matter of passing off arises with respect to the selection of the corporate name. It becomes very difficult to find a name that is acceptable. Filed with an application for incorporation must be a name that is not 'confusingly similar' with any other. This often becomes so frustrating that many corporations register a numbered corporation and then register a trade name under the Business Names Act. However, registering a confusingly similar trade name under this Act, which is confusingly similar to another business, you might get a cease and desist letter.

Pre-Incorporation Transactions

1. Introduction

The entrepreneur acts on behalf of the corporation to be incorporated. Assume that a contract is made to a supplier made by the entrepreneur on behalf of the corporation to be incorporated.

2. Common-Law Position

No contract can come into existence if it purports to be made on behalf of a corporation that is not yet in existence. At common law the contract is null and void.

Kelner v. Baxter (1866) Eng CP

Facts	Holding	Ratio
○ Wine was ordered by entrepreneur ○ Negotiations were on the basis of a proposed incorporation ○ When the P.O. was issued, it was issued in the name of the corporation and it did not contain the word 'proposed' ○ Corporation never came into existence ○ Entrepreneur was sued	○ Entrepreneur is liable based on breach of obligations ○ Both parties were contracting with each other as principals – each intended that the other be held liable for any breach that might occur under the terms of the contract	○ Where parties contract with each other directly and intend personal liability – personal liability will be given

Black v. Smallwood (1966) Aust HC

Facts	Holding	Ratio
○ Both parties believed that the corporation had already been incorporated	○ Neither party considered the other to be personally bound – nobody could be personally liable	○ Where parties contract in the belief of being under the auspice of corporation, no personal liability

3. Statutory Reform

CBCA ss. 14(1)-(4) are very telling – they provide a scheme upon which a contract formed before a corporation comes into existence may be adopted.

Section 14(1) – A person who enters into a contract before a corporation comes into existence is personally liable to any third party and is also entitled to all of the benefits arising from a contract.

Section 14(2) – The corporation, after it comes into existence, may within a reasonable period of time adopt the written contract made before incorporation, in which case the agent drops out (no longer liable to the third party and no longer receives a benefit). There is nothing more specific or definitive for the word 'reasonable'.

Section 14(3) – An application may be made to the court for a declaration apportioning liability between the agent and the corporation – this application may be made even thought he corporation has adopted the contract. The reason for this is that there is a recognition that the third party may have entered into the contract on the strength of the credit worthiness of the agent. A third party may apply to the court declaring joint and severally liability as between the agent and the corporation. Whiteside knows of no case where this section has ever been applied. The reason for this provision is that the third party may feel insecure as to the credit of the corporation.

Section 14(4) – Individual may avoid liability of the contract. Individual will be liable unless there is an express provision stating that the agent will not be liable.

An argument may be made that the third party may not release the agent from liability, but this is subject to pre-contractual negotiation.

Szecket v. Huang (1998) ON CA

Facts	Holding	Ratio
o Not Done	o CA dismissed the reasoning undertaken in Westcom o If you've got a situation where contracts are made before a corporation comes into existence, the section 14 provisions may be adopted and the contract may become a valid and enforceable instrument	o CBCA 14 may be applied to pre-incorporation contracts in order to make them binding

Shelf-Corporations – To avoid the time delays that occur between pre-incorporation and certification, shelf-corporations are often created and given to clients for quick incorporation. This, in some ways, negates the need for CBCA 14.

Landmark Inns of Canada v. Horeak (1982) Sask QB

Facts	Holding	Ratio
o Not Done	o In order for the agent to take advantage of 14(4), the contract must contain an express provision whereby the agent (promoter/entrepreneur) is relieved of liability	o An agent wishing the escape liability must include such a clause through an express provision pursuant to CBCA 14(4)

In every transaction, most certainly in corporate/commercial law, document all of the circumstances (flow, expectation of parties, what was done, why it was done, where it was done). These dockets will prove invaluable in the event of any dispute arising between the parties.

Exam Hint: CBCA section 14, which deals with the problem of agents entering into contracts with third parties on behalf of corporations to be incorporated. An organization should be organized even before it comes into being. An individual representing that there will be a corporation incorporated holds themselves out to personal liability for those contracts entered into.

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Corporate Management

Role of Management

The two kinds of corporation (public and private) are vastly different. The differentiation between the two kinds of corporation (structure, management, etc.,) is essential. A small non-offering corporation is like an 'incorporated partnership' – there is a fiduciary relationship between and amongst those privy to the corporation. The fiduciary obligations are of paramount importance and they do not exist, generally, within large offering corporations.

Every corporation must have a board of directors. The role of that board must be understood. The BOD is responsible for policy-making and governance; its role is to supervise the management or administration of the corporation. A tension exists between the BOD (policy-makers) and the officers of the corporation (administrators).

1. Governing Principles

Even within smaller corporations, the managers are professional managers – persons who come to the corporation with a wide and intense range of experience. Their knowledge is such that they control the corporation – the assertion is that directors no longer control the corporation, but rather professional managers do. There are three generic groups that one finds within a corporation:

1. Those with a proprietary interest in the enterprise (shareholders and financial contributors);
2. Those who exert power over the enterprise (determine the strategic plan); and,
3. Those who act with respect to the enterprise (corporate agents who implement the policies that have been established by the BOD).

The shareholders have lost control over the corporation. This observations applies to an offering and is generally correct.

2. Myth and Reality

Generally applicable to the public offering corporation. The key person in most large corporations is the CEO – the person who determines the way the corporation's objectives may be achieved. The CEO sells to the BOD the ideas and methods of implementation. Ordinarily, the CEO will sit on the board. The determination of a company's objective strategies and direction requires considerable study of the organization's strengths and weaknesses and its place in the competitive environment, careful, time consuming, penetrating analysis of market opportunities, and a matching of the organizational capacities to meet and serve the changing requirements of the market. What the corporate commercial lawyer must do, from the moment someone enters the office, you being talking with them in detail about their corporation and environment etcetera.

The role of the BOD can be summed up as follows: (1) Discern policy; (2) Ask Questions; and (3), CEO Selection.

Questions must be asked that flush out the true facts. Oftentimes, the lawyer does not get the real facts – the curse of corporate lawyering is wishful thinking. There are relatively few principles that guide us in the practice of law.

Poor management gives rise to takeovers. Where management has not been able to secure the true value of the enterprise. The takeover artist recognizes this and takes over the stock, introduce their own managers, and the corporation flourishes.

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Review the recommendations of the Dey Commission (245).

There is a recognition that risk-management is an art that is not generally very well practiced. One of the major concerns of the corporate/commercial lawyer is risk-management. The job of the lawyer is to find a way of limiting the risk so that if things do not go as well as expected, the loss is going to be controlled. Every venture involves risk – lawyers are obliged to determine how it is that the client may minimize risk using available and legal techniques.

3. Source of Management Power

CBCA 102: The directors shall manage the business and affairs of the corporation

OBCA 115: The directors shall manage or supervise the management of the business and affairs of a corporation

How do the directors manage and supervise? Generally, the delegation of their authority to agents.

CBCA 121: **(a)** The directors may designate offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3);
(b) a director may be appointed to any office of the corporation; and,
(c) two or more officers of the corporation may be held by the same person

The Dey Committee recommended that (12) a person may not be held liable for something unless the scope of his or her duty is clearly delineated.

Management Positions

1. Qualifications

There are certain minimum standards that a corporate director must require. The majority of the BOD must be rested Canadians.

CBCA 116: An act of a director of officer is valid notwithstanding an irregularity in his election or appointment or a defect in his qualification

Morris v. Kanssen (1946) Eng HL

Facts	Holding
○ Not Done	○ *Issue*: Was there a valid election of directors as to permit those elected to act on behalf of the corporation?

2. Elections and Appointments

There must be at least three directors in a public offering corporation. In any other corporation, there may be only one director. There are provisions in the statute that would allow that one individual to function on his or her own as an ordinary board would. The first directors are usually named in the application for incorporation. Those individuals usually organize the corporation and then will be replaced by those who will hold the office permanently – this is a mechanical procedure.

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Sometimes, particularly in a not-for-profit corporation, you will want to stagger the elections of directors so that there is a steady flow and change, which is desirable because it is often difficult to get rid of a director in these corporations. A staggered process may eliminate the deadbeats in favour of fresh-meats.

CBCA 121 – cumulative voting: this provision is significant in that it allows a single shareholder to apply all of his or her shares to one candidate.

The Dey Committee pointed out that there was no formal procedure where the effectiveness of any individual director could be determined. The committee recommended that a formal procedure be established where the effectiveness of particular directors could be determined. There is a very substantial gap between the expectations of a director and their performance.

CBCA 124 – there is no indemnification if an officer is in breach of his or her duty to the corporation. An agent is not entitled to indemnification if they are in breach of their duty.

Manager's Legal Obligations

The Minimum Standard of Care

CBCA 122: Every director or officer of a corporation in exercising his powers and discharging his duties shall, **(b)** exercise the care, diligence and skill that a reasonably prudent person would exercise in such circumstances.

In Re City Equitable Fire Insurance Co. (1925) CA – it is necessary to consider the manner in which the work of the company is distributed. One ought never to act on behalf of the corporation without having the knowledge required to be had by a director.

Soper v. Canada (1998) FCA

Facts	Holding	Ratio
o A corporation failed to withhold income tax owed by employees, an obligation imposed by the *ITA* o In order that the provision be enforced, the draftspersons imposed personal liability upon directors to ensure that withholding was in fact made, if not made the directors would be held personally liable o There was a saving clause in the provision of the statute **227.1(3)** almost mirroring the standard of care from the CBCA o Defendants offered a number of excuses for their failure	o *Standard of Care*: directors and officers may rely on reports submitted to them provided that they may reasonably have confidence in the diligence and knowledge of those persons submitting the reports o A director need not exhibit in the performance of his or her duties a greater degree of skill and care than may reasonably be expected from a person of his or her knowledge and experience o The test for the standard of care is both objective and subjective o The criteria applied to determine whether standards have been properly applied do not generally apply to professional standards o The positive duty to act arises where a director obtains information that might lead one to conclude that there is or may reasonably be a potential problem with remittances. Once the director becomes aware, s/he is under a duty to act – make appropriate inquiries etc.,	o The personal qualifications of the individual will be taken into account in determining whether the proper standard of care was exercised

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Every court of law, and by extension every corporation commercial lawyer, deals with the problem of the 'business judgment rule'. The rule involves a court determining that it must not substitute its discretion for that of business manager. They have come to the position where they hold that a manager will not be liable so long as they may establish that they have taken an informed decision.

The courts in the United States refer to the decisions taken by business managers – these individuals are knowledgeable about the circumstances and are best able to undertake business decisions. Risk-taking, which is part of business, must be factored into the decisions that are made by the courts. Businesspersons will take initiatives that are fraught with risks, this is the nature of business. For this reason, judges recognize that they may not substitute their discretion for that of the businessperson.

3. Insider Trading Rules

Insider, by definition, is a person within the corporation whose role is such that s/he may obtain confidential information, which if known to the public, would affect the value of the shares. Insiders are the officers and directors of the corporation, but this is expanded to include persons employed by the corporation in a confidential relationship (solicitors and other counsel).

The 'Kimber' Report (1965)

The ideal securities market should be a free and open market with the prices therein based upon the fullest possible knowledge of all relevant facts. As such, the person who engages in insider trading breaches both his/her fiduciary duty to the public and a statutory duty. The use of any confidential information must be accounted for and returned to the corporation. The inside trader is also liable to any individuals who may have suffered a direct loss by reason of the trader having employed confidential information and thereby sold securities of the corporation.

CBCA 131 – it is an offense (civil) to use specific confidential information for one's own benefit. This is information, which would if known, affect the value of the security. The inside trader is liable to compensate any individual that has suffered as a result of the action. The inside trader is liable to account for any profit to the corporation.

The statutes typically set out four different types of rules:
1. A statutory civil liability to the corporation;
2. A reporting requirement;
3. A statutory civil liability to other traders in the marketplace; and,
4. A statutory offense.

Every statute contains a provision, which prohibits insider trading and creates the cause of action in favour of the corporation and persons who have suffered a loss. In administrative terms, the securities commissions require disclosures to be made by all insiders of any dealings, in their part, of the securities of the corporation. This return of information becomes public knowledge so that the public becomes aware of insiders unloading their securities.

Tongue v. Vencap Equities Alberta Ltd (1996) Alta CA

Facts	Holding	Ratio
○ The shareholders offered their shares to the directors ○ The offering price was nearly 1/3 the value of the shares, known to	○ *Issue*: Was there an obligation to inform and disclose the 'real' value of the shares? ○ The release was not worth	○ You cannot springboard from confidential information to your own personal benefit

the directors – aware of confidential information indicating the shares were under priced o The directors had some concern and asked the sellers to sign a release	anything because the releasers were asked to sign the document without being informed of the circumstances	

4. Miscellaneous Statutory Duties

The statute has dealt with those cases where there is a deliberate non-attendance at a meeting by a director. A director will be bound by a resolution adopted by her or him at a regularly constituted meeting of the board. If the director does not wish to be bound, s/he should either refrain from voting or vote against the motion. The director is obligated to review the minutes of the meeting. Within ten days, the director having seen that a motion was adopted at a meeting where s/he was not present must write to the secretary expressing his or her opposition. Failing this the director will be held liable for the consequences of the motion. Directors and officers are exposed to specific statutory obligations. The two to be identified, among others, are:

CBCA 118(2) – where the directors issues shares for consideration other than money they will be personally liable if the consideration was less than the fair value in money. In other words, the value of the consideration expressed in terms of money will be taken into account. If the consideration is worth less, then the directors will be liable for the difference.

CBCA 119 – a director is liable for paying wages that remain unpaid to employees for a period of six months. A director should ensure that there is some means of periodic check on the performance of managers to ensure that certain obligations are met.

This entire regime is by way of imposing a burden on the directors of the corporation to do what is right. The powers of the directors are restricted to do all in their power to advance the interest of the corporation. Every action by a director will be measured against these standards – this is the question that is always asked in broad terms.

Managers' Fiduciary Obligations

1. The Nature and Source of the Obligation

It is very unlikely that any person who is at the center of the corporate obligation is not charged with fiduciary obligations to the corporation. This arises as a result of the power or influence that is enjoyed while a member of the corporation.

The obligations of loyalty and selflessness are employed upon every agent of a corporation. We must consider the 'conflict of interest' where the director has an interest in a company, which is dealing with a company for which or in which s/he is employed. In such a situation, the fiduciary is caught in a conflict of interest situation and any dealing therein made are voidable.

Review Note 2 (287)

A trustee is constrained in his or her ability to deal, in his or her personal capacity, with the beneficiaries or with the trust property.

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Lac Minerals v. International Corona Resources Ltd. (1989) SCC – every case will determine whether or not any particular person who obtains a particular role is in such a position in which a duty will be imposed on him.

A director, or any officer, is entitled to declare an interest in a transaction – this request must be made in detail.

2. The Limited Scope of a Particular Power

This deals with the phenomenon of the takeover bid. The takeover is usually the result of what is being perceived to be as poor management by the target company. This has a very disruptive effect on the employees and all other persons associated with the target company. The directors, when they learn of creditors buying up shares, know that the creditor once acquiring control is going to rid the corporation of the directors. There are a number of things one might do to avoid a takeover. The question arises as to whether or not the steps taken by the directors are self-serving, undertaken for an improper motive, or undertaken in the best interests of the corporation.

CBCA 25(a) – Subject to the articles, bylaws, and any unanimous shareholder agreement, shares may be issued at such times and to such persons and for such consideration as the directors may determine

Shares may be issued in sufficient numbers as to outvote those shares required a takeover. In this fashion, a takeover bid may become frustrated. Where this is done to prevent the director from being 'turfed' out of office, then it may not be allowed. Question to ask: Did the directors act in the best interest of the corporation or merely to save their own skin?

Hogg v. Cramphorn Ltd (1967) Eng ER

Facts	Holding
○ Directors issued sufficient shares to dilute those that had been acquired by the creditor ○ The court considered the action that the conduct of the directors was ultra vires their power as it was exercised for an improper motive	○ Directors considered themselves to be acting in the best interest of the corporation ○ Court directed that another meeting of the shareholders be held at which time the shares, which had subsequently been issued, could not be voted

Teck Corp Ltd. v. Millar (1972) BC SC

Facts	Holding	Ratio
○ The plaintiff had purchased a sufficient number of shares in the corporation to confer control ○ The directors of the corporation had been in negotiations in another company to undertake mgmt before the attempt to takeover ○ The directors had issued shares to wipe out the majority control that had been acquired by the plaintiff	○ The action of the directors was taken for the best interest of the corporation ○ It was not for any improper purpose that the directors awarded the contract to CanEx ○ The judge adopted the following test: Directors must act reasonably (requires the imposition of an objective test) and in good faith; they are entitled to consider the	○ Directors must: 1. Act reasonably – objective standard, act for the best interest of the corporation by evaluating the history of the takeover company 2. Act in Good Faith – act in a manner that protects the interests of the corporation

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	experience, reputation, and policies of the party taking over	

"The directors must act in good faith. Then there must be reasonable grounds for their belief. If they say that they believe there will be substantial damage to the company's interest, then there must be reasonable grounds for that belief. If there are not, that will justify a finding that the directors were actuated by an improper purpose" (298) – "Proper Purpose" Doctrine

Existing shareholders have a pre-emptive right to purchase shares that are being offered. Subject to the articles of pre-emptive rights, directors are free to issue shares if and when to whom they wish.

Howard Smith v. Ampol (1974) ER

Facts	Holding
o Not Done	o Where it is found that directors have issued shared to thwart a takeover bid with the sole purpose of keeping themselves in power is an action that will not be tolerated

Lee Panavision v. Lee Lighting (1992) Eng CA

Facts	Holding	Ratio
o Directors entered into a long-term contract with a third party o New shareholders attempted to get out of that transaction	o Because the directors had entered into a long-term agreement knowing that they would soon be ousted, they were preventing future shareholders from directing	o Directors may not deny shareholders the opportunity to manage the company with a new board if they know they are on the out and out.

3. Conflict of Duty and Duty

It is common for the same person to be a director of more than one corporation.

Levy-Russel Ltd. v. Techmotiv Inc (1994) ON HC

Facts	Holding	Ratio
o Corporation was a bankrupt o A director approached the receiver and purchased an asset of the corporation from the receiver o Price was a favourable one and it was alleged that it was below the price that it should properly fetch on the open market o Alleged that there had been a form of conspiracy – they had arranged to create a situation where the property would be sol at a fraction of true value	o *Issue*: Had the directors disclosed their interests in the transaction to the board? o The directors put themselves in an impossible position where they were acting in their own interest and dealing with the corporation o The only way to do so would be to make full disclosure to the board and have the board approve their actions o In most of these circumstance, it requires not only approval by the board, but also the shareholders of the corporation	o Directors must make disclosure o Review this case and make notes on it

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4. Conflict of Interest and Duty: Interests in Corporate Contracts

The rule against acting in one's self interest is very clear. If a director enters into a contract while acting in his or her self-interest, the transaction may be void or the individual may have to account to the corporation. There must be a consent by the beneficiary to the trustee otherwise the transaction is voidable at the instance of the beneficiary.

Northwest Transportation v. Beatty (1887) ON JCPC

Facts	Holding	Ratio
o A director of NW owned a steamboat and sold it to the corporation – the price was fair, the co. required the vessel and the transaction was advantageous from every point of view o A shareholders meeting was called to approve the transaction o The shareholders approved the transaction, but the approval depended upon the defendant director's majority vote o Beatty's vote carried the motion	o *Issue*: Whether the transaction was voidable and could be voided even though there was an approval given by the shareholders; and, whether or not the shareholders vote could and should be set aside because it was the vote of the director that carried the motion. o JCPC: A shareholder has a right to vote his or her shares in whatever way they please – there is no obligation to consider the interest of the corporation or other shareholders, they may be as selfish as their inclinations may hold them to be o This was a valid transaction o In this case, the corporation received something of value from the director. There was full and valuable consideration passing between the parties, which was considered to be highly significant by the board	o A shareholder has a right to vote his or her shares in whatever way he or she pleases – there is no obligation to consider the interest of the corporation or other shareholders, they may be as selfish as their inclinations may hold them to be

Holder v. Holder (1968) All ER

Facts	Holding
o Trustee had acquired knowledge of circumstances having to do with the property of certain land o Trustee acquired the land	o *Issue*: Should transaction be set aside o Although he did acquire knowledge of the properties of the land while engaged as a trustee, the beneficiary placed no reliance on this individual o The strict rule is to avoid potential abuse – there was no abuse

Note: There is no very clear-cut rule that can be applied to solve these problems. The jurisprudence is quite varied, so it is important to characterize the situation and its abuse before proceeding with an analysis of the circumstance.

CBCA 120 – Whenever a fiduciary is interested in a contract, there must be disclosure. Nearly all institutions contain conflict of interest bylaws that target disclosure to deal with these situations.

Pages 311-314 – Proposed re-draft, just skim.

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Gray v. New Augarita (1952) ON JCPC

Facts	Holding
o Not Done	o The fiduciary must make a complete description of the nature of the transaction in which s/he is involved and his or her interest

5. Other Conflict of Interest and Duty

Bray v. Ford (1896) Eng HL

Facts	Holding
o Not Done	o It is an inflexible rule that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict

Nizer: At some point something might have been done or said by an individual, which indicates that the fiduciary duty has been broken – an indication that a director is acting in his or her own self-interest while in the conflict of interest position. The conduct is sufficient to prejudice the minds of the triers of fact.

Cook v. Deeks (1916) ON JCPC

Facts	Holding	Ratio
o The 'appropriation' of a corporate opportunity o The individuals were employed by the corporation and saw the opportunity to take up some business the corporation would have otherwise took up on its own account – the business was taken away from the corporation o The individuals earned a profit o A meeting of the shareholders was called and they, together, owned 75% of the issued and voting shares – the rest of the shareholders were invited to approve	o *Issue*: Whether or not the defendants were in a fiduciary relationship to the corporation and, if so, whether the company was entitled to claim the benefits of the contracts negotiated by the defendants. Also, whether or not the ratification by the shareholders involved approval and denied the defendants to claim the benefits of the contract. o The individuals were fiduciaries and not entitled to appropriate a corporate opportunity for their own purposes and are, therefore, accountable to the corporation o Although as NW Trans had held that the defendants were entitled to vote their shares as they wished, the meeting called in this case was a nullity – the corporation derived no benefit whatsoever from the transaction; the corporation had, instead, lost the opportunity to undertake the business that had been appropriated by the defendants	o In NW the shareholders are entitled to approve the transaction if there is, in fact, good consideration flowing from the transaction o The shareholders may not approve a transaction where there is no good consideration or where the corporation has actually lost an opportunity as a result of the actions of the defendants

Even though the corporation participates in the acquisition, the defendants are taking the benefit that the corporation would have enjoyed had they purchased all of the shares. Note: the corporation must receive a/the benefit. Even though shareholder approval is given it will be ineffective if the corporation receives

nothing in return for the action undertaken by the fiduciary. There must be a full disclosure indicating the precise nature of any proposed transaction.

Regal (Hastings) v. Gulliver (1942) HL

Facts	Holding	Ratio
○ The directors of a corporation owned theatres and realized that they might enhance the value of the shares if they were to acquire a number of theatre leases with the view of being able to sell the corporation and the assets to a buyer – the additional leases would enhance value significantly ○ The corporation had not capital with which to acquire the leases ○ 4 directors decided to advance the capital to support the acquisition ○ This permitted the corporation to be sold at a handsome profit ○ The directors then themselves earned a substantial profit from the transaction ○ The corporation was taken over by a third party who then discovered the role played by the 4 directors and realized that the directors had used information they obtained while acting as directors of the corporation, using it to acquire the leases and, thus, profiting themselves – a claim was brought ○ Corporation acquired all of the profits earned by the 4 directors	○ The directors acquired the information as directors and were, thus, in a fiduciary position ○ The information was used so that the individuals could profit themselves and were, thus, liable to account for the profits and deliver them to the corporation ○ It mattered not that they acted in good faith, that the corporation derived a profit, or that they themselves derived a profit ○ The solicitor, however, did not learn of the opportunity while he was in a fiduciary position to the corporation – he got the information from the directors who invited him to participate ○ The solicitor himself should have been liable for an accounting and a delivery of the profits ○ Could the shareholders have approved this in a meeting? Consider the *Cook* case above.	○ Even though the beneficiary could not itself enter into the transaction, the fact that the fiduciary did so requires the fiduciary to account and deliver ○ Trustees are prohibited from taking up an opportunity available to the beneficiary or using information obtained while serving as trustees ○ If a fiduciary should receive information from a source other than the trust itself, then the fiduciary is not prohibited from using that information for his or her own benefit.

Boardman v. Phipps (1967) All ER

Facts	Holding
○ Trustees bought shares for the co. with their own money and derived a benefit	○ Fiduciaries who put themselves in a conflict of interest and duty must give up the profit derived ○ Knowledge is information – it is no defense to argue that the corporation would/could never take up the opportunity

Peso Silver Mines v. Cropper (1966) SCC

Facts	Holding	Ratio
○ Involved the purchase of mining claims ○ The plaintiff was engaged in the business of acquiring speculative mining properties ○ It was offered the opportunity to acquired the claims at a time where the defendant was a member of the board of directors ○ The corporation decided not to acquire the	○ When was it that the defendant acquire the information knowing that it would be of some profit to himself? ○ This did not occur until long after that he left the	○ In order to impose responsibility or liability upon the fiduciary it is necessary to establish that: (1) S/he acquired the information at the time that s/he acted in the capacity; and, (2) When

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claims and rejected the offer ○ The defendant left the employ of the corporation and a number of months later is was brought to his attention that the claims were being offered to a group to which he was a member – the group purchased the claims and the corporation Peso brought an action for accounting and delivery ○ Basis – Cropper became aware and knowledgeable about the existence of the claims while the director at Peso	employ of Peso, by this time he had forgotten completely of the offer made to Peso some time earlier ○ It is impossible to say that the defendant claimed the interest by reason of being a director and in the execution of a director's duties	acquiring this information the fiduciary was acting within the scope of the authority vested in her or him

Canadian Aero Service v. O'Malley (1974) SCC

Facts	Holding
○ The president and another person while in the employ of the corporation undertook a review of conditions in a South American Republic in order to determine whether or not an aerial survey may be there undertaken ○ They resigned and set up their own company, this company set up a bid that was in competition of that file by Canadian Aero ○ Two individuals, thus, acquired information while in a fiduciary role and then used the information to acquire their own contract	○ *Issue*: Four issues (326) ○ The diversion of corporate opportunity (appropriation) – (327) "The pervasiveness of a strict rule in this area of the law" ○ Reference to Boardman, Industrial Development, and Corporate Opportunity Doctrine ○ The breach of trust survives a tenure of these individuals within the corporation – remains actionable literally forever ○ Information gained during the employment of the defendants ○ Honesty is no defense – even though one can establish the defendants acted in good faith, they were nevertheless found to be in breach of trust and were held liable ○ Factors considered (332)

In each of these cases, the director(s) has appropriated an opportunity that would otherwise have fallen to the corporation. They have become aware of the opportunity while in office and acting within their scope as corporate agents. The opportunity itself is property – property of the corporation. When a person learns of an opportunity s/he is acting on information that is owned by the corporation. Moreover, it matters not that the corporation was in no position to pick up the opportunity. Further, the fiduciary may also be acting in complete good faith, this does not provide a defense to their conduct. This action is framed as a breach of trust and, invariably, the word fraud will find its way into the pleadings.

R.W. Hamilton v. Aeroquip Corp (1988) ON HC

Facts	Holding	Ratio
○ Not Done	○ One must identify the individuals role in the corporation and determine whether s/he had access to confidential information or if s/he had input into policy	○ All employees are not agents of the corporation and not all officers are fiduciaries ○ An officer or manager will not be saddled with a fiduciary duty unless the position he occupies contains the power and the ability to direct and guide the affairs of the company

Quantamm Management v. Hamm (1989) HC

Facts	Holding
○ Defendant walks away from company with confidential customer information	○ If a person leaves the employ of a company and uses information, s/he may be subject to a claim of the breach of the fiduciary obligation

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Industrial Development Consultants v. Cooley (1972) All ER

Facts	Holding	Ratio
○ The corporation was denied any opportunity to undertake the work, which a director undertook on his own behalf ○ The customer would not employ the corporation – it would be impossible for the corporation to obtain the contract ○ The director resigned from the corporation alleging ill-health	○ *Issue*: Could the corporation proceed for an action on accounting considering the corporation could never receive the benefit? ○ The director had appropriated the corporate opportunity on his own behalf and was liable to account and deliver the secret profits ○ *Nizer Factor* – Had the individual made full disclosure, things might be different. Always scan the facts to see if you can find an indication of unethical action (ie alleging ill-health).	○ Regardless of any reason, there will be an accounting demanded and a delivery of the profits

The Corporate Opportunity Doctrine

The fiduciary, taking up the corporate opportunity and keeping the profits, retains those profits as a constructive trustee for the corporation. Those assets, as trust assets, may be followed into the hands of a third party. If the fiduciary creates a corporation and directs the corporation to use the information and then derives a profit by reason by such use, the corporation itself is using trustee money and may then be demanded to account.

Note: The courts do not want to impose a restraint on trade or limit competition in the marketplace.

Island Export Finance v. Umunna (1986) Eng CA

Facts	Holding	Ratio
○ The managing director resigned and set up his own company ○ He began to sell to a former customer of the plaintiff corporation	○ None of the indicia of a fiduciary obligation existed in this case	○ Every employee gains a fund of knowledge and is entitled to use it unless it is confidential

Balston v. Headline Filters (1990) Eng

Facts	Holding
○ Director resigns to set up his own business ○ Corporation made the decision not to service particular customers ○ Defendant chose to sell to the customers	○ Defendant not liable as there was no breach of duty to the former employer ○ The trustee like obligation continues throughout an individual's career

Review the four distinctions at Note 5 (page 344) based on the circumstances of the preceding kinds of cases.

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6. Ownership, Obligation and Opportunity

The central question here is, "What is property?" What may an employer claims as something that it owns and may not be appropriated by other persons?

Perlman v. Feldmann (1955) US 2nd Circ

Facts	Holding	Ratio
○ The majority shareholders of a steel company were defendants ○ During the Korean war, steel was in very short supply ○ The company was able to use its supplies in order to develop goodwill with other customers ○ The defendant sold its shares to a competitor of a corporation – the competitor bought the shares in order to acquire control and take advantage of the special market position that the corporation occupied ○ The sale was clearly for a price that contemplated the acquisition by the buyer of control of the corporation – a premium was paid for the acquisition of control ○ Plaintiff claimed an asset of the corporation had been used in order to gain the premium	○ *Issue*: Did the defendant owe a fiduciary obligation to the corporation and/or to the minority shareholders? ○ The majority shareholders had used a corporate asset for the purpose of furthering self-interest ○ The court finds in favor of the minority shareholders and orders the defendant to account and deliver the premium paid for the majority control of the corporation ○ The defendant was liable for repayment of the premium to the corporation	○ A majority shareholder is not entitled to deal with an asset without consideration of the corporation's interest in it

7. Ratification: Red Tape or Red Herring?

The shareholders are invited to adopt a resolution that ratifies and confirms all of the acts of the directors and officers for the previous year. This really does not have any legal effect, but only makes everyone feel a little more comfortable. May shareholders approve a transaction in which no consideration flowed to the corporation?

Burlande v. Earle (1902) ON JCPC

Facts	Holding
○ A director sold shares of the corporation	○ A shareholder is not barred from diverting and voting his or her own shares for a transaction s/he is involved in ○ The transaction will stand so long as the corporation properly receives consideration – the adequacy of consideration flowing must be determined objectively

The Derivative Action

The Derivative Action – very frequently the persons in control of the corporation will not authorize the action. These people are usually the persons involved and are not prepared to bring an action against the individuals because they are essentially against themselves. The statute provides that a third party non-controlling officer may do so in order to bring the action against the individual – gives the right of action

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to a third-party where the corporation is unprepared to undertake the action itself. Review CBCA 238-240.

CBCA 238 – a complainant is a registered holder or former holder of a corporate security. The complainant may be a director, officer, or former director or officer of the corporation. Any other person, by the discretion of the court, is a proper person to bring an action on behalf of the corporation – will be designated as a complainant by the court.

There must be an application made to the court to proceed with a derivative action. The marketplace is such that if the court did not exercise such control there would be a plethora of such actions every day. There are condition precedents that must be met in order to institute the action:

1. There must be reasonable notice given to the directors of the intention to bring the derivative action. It is the directors who are those persons who would ordinarily bring the action;
2. The complainant must satisfy the court that s/he is acting in good faith. The action is brought to achieve an appropriate objective of the corporation;
3. The court must be satisfied that the bringing of the action is in the best interest of the corporation – the action must bring a benefit to the corporation; and,
4. The court may make an order authorizing a complainant to bring an action and to control the proceedings where it is necessary. This may include an order giving directions as to the conduct of the action (who to sue and what steps are to be taken, for example); If a recovery is made, the court may direct that the recovery may be paid directly to shareholders rather than to the corporation (this should point to the distinction between the interest of the corporation and that of the shareholders) so as to avoid a further step from being taken; or, the corporation may be directed to pay reasonable legal fees to the complainant.

Individual shareholders, if they want to institute proceedings on behalf of the corporation, must now look to CBCA 238.

These sections are employed where the director's of the corporation refuse to bring an action against the corporation because, in essence, they would be bringing them against themselves.

Farnham v. Finhold (1973) ON CA

Facts	Holding	Ratio
o Not Done	o The derivative action embraces all actions that shareholders and others may bring on behalf of the corporation	o If you seek to bring an action on behalf of the corporation, you must proceed under the derivative action section

8. Take-Over Bids and Directors' Fiduciary Obligations

What may directors do in order to fend off or ward off a take-over bid? There are considerable and major social and ethical questions that here arise. Are the resources there associated in line with the furtherance of the community?

Two responses of target shares:

1. Issuance of additional shares so as to make control more difficult to obtain
2. Triggering of the 'poison-pill' – a provision in the corporate constitution that provides that in an event of a takeover, all existing shareholders will be entitled to vote a greater number of shares than their shareholders would indicate

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Note: British courts have used a ‘proper purpose’ doctrine to limit the director’s ability to issues new shares as a response to a take-over bid.

Note 1 (Page 381): *Chapters v. Davies, Ward & Beck LLP* (2001) ON CA

Whatever action a fiduciary undertakes must be in the best interest of the corporation.

Each case normally involves a takeover bid and the response of the director’s to that takeover. In analyzing, the issue becomes whether the director has acted in the best interest of the corporation or whether the director’s had acted to save their own position and self-interest. The best way to determine this is to determine whether the value of the shares would be enhanced by the director’s activities.

Pre-Lecture Note: Should one include a specific provision in the employment contract with respect to non-competition? Whiteside has ordinarily favoured no inclusion of such a clause – it is very difficult to draft a provision or contract that does, in fact, declare the true intention of the parties and spell out their obligations. Sometimes the very agreement itself provides an invitation or temptation to the individual signatory to do his or her best to subvert the terms of the contract. Thus, do not include anything with senior officials and rely upon the law. With junior officials, on the other hand, it may be considered a good cautionary measure.

9. The Outer Limits of Fiduciary Obligation

Do shareholders and the corporation itself to the minority owe a fiduciary obligation?

Brant Investments v. Keeprite (1991) ON CA

Facts	Holding	Ratio
o A series of subsidiaries entered into a number of relationships o A majority shareholder owed a fiduciary obligation to minority shareholders not to undertake any act reducing the value of the minority share value	o In light of the oppression remedy, there is no need to allege a fiduciary obligation on a majority shareholder for the protection of the minority o Oppression Remedy (Statutory) – *CBCA* 241	o It is unnecessary to allege a fiduciary obligation being imposed on a majority shareholder who must do nothing with his shares that might adversely affect the position of the minority o Because of the oppression remedy we need not consider the majority shareholder’s fiduciary obligation to the shareholder or the corporation

Do not neglect to consider Pearlman v. Feldman.

Canbook Distribution v. Borins (1999) SCJ

Facts	Holding	Ratio
o The operating company is owned by a parent which is in turn owned by others with parallel relations to other corporations o Operating went bankrupt and KPMG was appointed trustee o Canbook took an assignment of KPMG’s interest as trustee – they	o *Issue* 1: Whether Canbook did have standing and whether KPMG was entitled to assign its interests – it was so entitled o *Issue* 2: Did the company owe a fiduciary duty? o Such a duty was owed o There is a fiduciary duty owed by	o Any failure by the directors to take into account the interest of the creditors will have adverse consequences for the company as well as for them o The company owes a duty to its creditors to keep its property inviolate and available for the

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felt that the relationships of the company constituted a fraud on the creditors: these people had a fiduciary obligation on creditors to use their power in such a fashion as to avoid any loss being suffered	directors to creditors ○ The corporation itself has a duty to creditors – wherever a decision is taken, the interest of the creditors must be given consideration and they must not be prejudiced by the decision taken by the directors	repayment of its debts

If a corporation is bankrupt, the debts exceed the assets so that there will be nothing for shareholders, and creditors will only get some of what they are owed. This is the basis on which it is said that in or near insolvency, the creditors are really stakeholders.

We very often tend to neglect all of the consequences of the acts that we undertake. Whiteside feels that it is tragic that we have abandoned equity – it exposed all kinds of considerations relating to personal relationship etc.,

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Majority Rule

Proposition One – Shareholders control management. This simply is not the case. Any discussion of their having control is not realistic. There is a difference between a private and public company (closely held or widely held, or offering or non-offering corporation). The widely held corporation has holding members throughout the world and their ability to control management is not substantial. In a closely held corporation, the members have immediate influence and in this respect the shareholders do control management. There is not going to be a focus upon the statute.

Allen v. Gold Reefs of West Africa (1900) All ER

Facts	Holding
○ Not Done	○ Majority holders are obliged to act in a manner that benefits the company as a whole

This is a high water mark as the proposition does not hold in practice.

Greenhalgh v. Arderne Cinemas (1951) Eng CA

Facts	Holding
○ Not Done	○ There must be no prejudice done to the minority by the activity of the majority

It is basic to company law that there be majority rule.

1. Control Over Management

Those persons that hold the majority of the voting shares in a corporation have the power to elect the directors. Ordinarily these people have all the power to elect those who appoint the officers who control management.

The shareholders have no interest in the corporation property whatsoever. All they have are those rights that derive from the holding of the shares that are issued to them. They hold those shares subject to the rights that are spelled out in the corporate constitution. There are some shareholders who are deprived of the right to elect directors. The nature of the shares serves their interests and fits their own financial plans. Subject to a unanimous shareholder agreement, the shareholders have no right to manage the corporation.

Be aware that the law and approaches to practice with respect to large corporations compared to private closed corporations are as different as night and day. Public offerings versus private offerings: Shareholder control is totally different.

Election and Removal of Directors

The shareholders made by an ordinary resolute elect the directors of the corporation and they are entitled to do so subject to the internal rules for terms of up to three years. Sections 106, 107, 109, 111, and 146.

One of the most serious problems that exist in a private, non-offering, closely-held corporation is the phenomenon of ‘locked in and frozen out’. You have a situation where the corporation proclaims that nobody may issue or transfer their shares without the permission of the board of directors. No person may independently sell to a third party because that third party may then effect the management or organization of the corporation. In effect, the resolution of shares results in the possibility of refusal for

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the transfer of shares. A minority shareholder cannot change this – they do not have enough pull to elect any new director who would adopt a different resolution. A basic fundamental problem in private companies is the locked in and frozen out situation.

Every time you receive instructions from a group of persons for the creation of an organization to undertake some business venture, when you analyze the interests of those persons you might find that they are as diverse as any other group – different interests and obligations. It is the lawyer's job to analyze those. You might find that their interests come into conflict and the lawyer is obliged to propose an arrangement amongst them to compose any differences they may have and provide for the resolution of problems in the future should a problem arise.

This area is as important as any other. Further, there is a tendancy on the part of the courts today to treat a private closely held corporation as an incorporated partnership. The court is importing some fiduciary obligations into the private closely held corporation. There is an expectation that each owes a fiduciary obligation just as it exists within a partnership.

CBCA 111(3) – provides for one of the conditions or privileges of a class of share is that the members of that class will be entitled to elect a certain number of directors. The holders of such shares should know that they have the exclusive right to elect the number of directors specified.

CBCA 146(1) – provides for a group of shareholder entering into an agreement where they will pool their shares and group them in an agreed manner. Authorizes a group or shareholders to pool their shares in order to elect on or more members.

Management Proxies – a proxy is a form of agency agreement. It is an appointment of a shareholder allowing a person to vote his or her own shares.

Review the *Kimber Report* (Page 414-416). They recommend that every person whose proxy is solicited should be informed of the choices to be made and have an opportunity to specify that choice and also that there be an announcement in that solicitation that it is being posed on behalf of management.

Removing Directors

CBCA 109 – The shareholders may by ordinary resolution remove directors. The removal may be modified in a number of ways:

1. It is possible for the corporation to incorporate in its constitution some impediments to the quick and easy release/relief of directors

Bushell v. Faith (1970) All ER

Facts	Holding
o The issue was whether a by-law multiplying a director's voting share was legitimate	o If a director who was a shareholder is threatened with removal, in this case the by-law indicates that such a person would have three times their normal share for voting purposes – this voting advantage could be used to stave off dismissal

There are three consideration for the review of management performance:

1. General reports are required to be published amongst shareholders reports on a regular basis;
2. A shareholder does not have access to much information of any particular significance – the reason is that one does not want a competitor to be a shareholder to easily obtain confidential information; and,

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3. The constitution might require that any specific management position require shareholder approval

CBCA 155 – The shareholders must be called together for an annual general meeting at least once a year. Two major objectives exist:
1. To elect directors; and,
2. To receive and consider the financial statements

Access to Information – Certain corporate records must be made available to the shareholders for examination. However, none of them is such to permit any significant decision to be made by a shareholder on her or his holdings.

CBCA 103(2) – directors may pass by-laws, but these are subject to shareholder agreements. Approval will be obtained by a general meeting for the purpose of approving or rejecting.

Proposals that may be made by shareholders with respect to management initiatives – shareholders are entitled to make proposals for certain initiatives to be undertaken. These include amendments to the by-laws.

2. Control Over the Corporation

Where there is an unresolvable deadlock, there is a right of the shareholder to step in and resolve the deadlock.

CBCA 103(5) – A shareholder entitled to vote at an annual meeting of shareholders may make a proposal to make, amend, or repeal a by-law.

CBCA 102(1) – The power to manage – subject to any unanimous shareholder agreement, directors shall manage the business and affairs of the corporation – the power is in the directors.

Unanimous Shareholder Agreements

CBCA 146(2) – disagreement may be employed to keep the scales in balance. An otherwise lawful written agreement (must be consideration) amongst all the shareholders of the corporation (a small closely held corporation) or among the shareholders and a person who is not that restricts in whole or in part the powers of the directors who manage the business and affairs of the corporation is valid.

For example, the corporation has been organized to manufacture widgets. The principle shareholder lives in Florida, he is retired and sees a market, understands the process and resources required. This person is waiting for his dividend and wants to be sure that the young bucks in Windsor do not change the objective. Under the law, the directors are entitled to make decisions changing the objective. The remedy is a shareholders agreement limiting the power of the directors to make such a change.

A very common provision has to do with borrowing – the director's have the power to borrow x dollars. If additional funds are required, that decision can only be made by the shareholders and not the directors. When you take instructions, you are undertaking a very careful analysis of the needs and interest of those involved.

Reflect on the way in which you would employ a unanimous shareholder agreement to resolve the interests of the people based on their personal characteristics and interests. The lawyers obligation is to ensure that every person's interests are protected.

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The shareholders need a more direct and immediate access to power within the corporation – the unanimous shareholder agreement allows the shareholder to take some power. For example, the agreement (USA) may take back:

1. The power to borrow from creditors – the shareholders agree that only they have the power to borrow;
2. The declaration of dividends (distribution of profits) – the shareholders may themselves wish to exercise that power rather than allow the directors so to do;
3. Appointment of officers and offices – the shareholders may reserve this right in a USA

Where the shareholders take the benefit, though, they must also accept the liability that may follow. It is the solicitor that must determine what it is that the shareholders need and require to serve their interests. It is only after this determination that a formal organization may be built.

KYC – Know your client. It is only after you sufficiently know you client that you will be able to properly serve them. The lawyers role is to serve people and s/he serves them by knowing and understanding them. Once this determination is made, the lawyer can apply his or her creative skills to meet the objective. In company law, it is not the law alone upon which the lawyer depends. The 'other' areas of the law are those in which the lawyer will depend equally.

Private Closely Held Corporations

A private closely held corporation is treated as if it were an incorporated partnership. This means that all of the fiduciary obligations, confidential relationships etc., that exist within a partnership are assumed in certain private closely held corporations. This is of critical importance.

Ebrahimi v. Westborne Galleries (1972) HL

Facts	Holding	Ratio
o Not Done	o The foundation of it all lies in the words 'just' and 'equitable' o These words give the courts the opportunity to give consideration to equitable principles o Unless you know what the client's or corporation's expectations are, you are not capable of giving advice with respect to the nature of the organization that they should adopt	o The just and equitable provision enables the court to subject the exercise of legal rights to equitable considerations – considerations of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way

The fact that a company is a small one or private one is not enough. The basis of association is laid down in the articles of incorporation or in a well-drafted shareholders agreement.

The super-imposition of equitable impositions requires something more:

1. An association formed on the basis of a person relationship where the corporation has been incorporated in order to continue a pre-existing relationship. This relationship might require personal confidence;
2. An agreement or an understanding that all or some of the sleeping partners shall participate in the conduct of the business. Several persons involved should participate in the management of the business – partial control;

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3. A restriction on the transfer of the member's interest in the company so that if confidence is lost, or one is removed from management, he cannot take out his stake and go elsewhere (locked in and frozen out) – this restriction is not at all uncommon.

If there is an agreement where nobody may sell his or her shares to an outsider of the corporation, then that person is locked in to the corporation. What happens particularly when a particular shareholder cannot muster sufficient amount of votes to elect a director, that person is frozen out from management. The assignment of interests would involve a disruption of the confidential interests enjoyed by the parties.

This forces the individual to think in terms of the interests of the individual with whom one is dealing. KYC!

Naneff v. Con-Crete Holdings Ltd (1995) ON CA

Facts	Holding	Ratio
o Locked in Frozen Out situation	o At the outset, it is important to keep in mind that this is not a normal commercial organization where equity is shared according to contribution – this is a family business where the dynamics of the business are different than a normal commercial business o The fact that we have a family business does not preclude the regular remedies – bears upon the reasonable expectations of the principles	o Keep in mind the three factors listed by Lord Wilberforce 1. The relationship between the participants is particularly close 2. An agreement by the parties that all will participate in the management of the business (management may involve a number of things) – any position that may affect the conduct of the business in a reasonably substantial way 3. Restriction on the transfer of share – there is a possibility or probability of a locked in/frozen out situation

Fundamental Changes

This area of law has to do with shareholder powers. A fundamental change is a change of the corporate constitution.

If a fundamental change is considered, not only must the shareholders be consulted, but a special majority must approve the change. There is a requirement that there be a special general meeting of the shareholders and those people must be given full notice of the purpose; the proposed changed; and, the consequence of the change. When this has been done, the change will be adopted if 2/3 of the votes cast at the special meeting are in favor of the change – this is the minimum special majority that is required. It is open to the corporation to determine whether the special majority should be increased from 2/3 to some higher figure – this makes it difficult for the shareholders to change the rules and is offered for the protection of the directors.

CBCA 174(1) – The amalgamation involves two or more corporations coming together to form a single corporate entity. All of the assets of the amalgamating companies are one. The companies are required to enter into an amalgamation agreement, which determines the nature of the new corporation, the shareholdings of the new agreement – this agreement must be put before the shareholders of each corporation and then improved. Once approved, an application is put forward for the articles of amalgamation.

The laws of each jurisdiction provide that none of the jurisdictions may amalgamate companies unless and until each is subject to its own laws. In other words, Ontario may amalgamate only Ontario

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corporations and federal jurisdiction may amalgamate only federally. Thus, if a Manitoba, BC, and Ontario company wish to amalgamate, they must agree firstly on a jurisdiction. Once letters of continuance are issued to each of the corporations, they become corporations of a specific jurisdiction and they may then apply for amalgamation under the laws of the single jurisdiction.

When a corporation is issued articles of continuation in another jurisdiction, it immediately becomes domiciled in the other jurisdiction. It's being is determined by the laws of the other jurisdiction – the law where it is domiciled is it's original jurisdiction. The overriding concept to determine is domicile – status is determined by the corporation's domicile.

CBCA 187 – the importation of a company
CBCA 188 – other jurisdictions where a corporation is going to
CBCA 189 – Borrowing Powers – the directors do not need the authorization of the shareholders to borrow money, absent a provision in the USA

The principle reason for so many corporate failures in recent years has been decisions taken by the officers and directors to borrow money on terms that cannot be met in consideration of the corporation's normal cash flows. The shareholders are placed at risk because of this section – the risk is accommodated either through the USA or a pre-incorporation agreement whereby the shareholders may have the power of vetoe. The constitution or USA may require that the directors seek approval before the credit is made – provision for some vetoe power.

In other words, the general rules of the game are declared within the corporate constitution. However, within that constitution there is plenty of room for private rules and agreements to be made in order to protect the parties. This is the reason for the lawyer advising the clients before the venture takes form.

Amendment of Articles

Fundamental changes require a change in the corporate constitution. Articles of amendment are required to be issued and before these articles are applied for, they must be authorized and approved by the shareholders at a special general meeting.

CBCA 176 – provides for special protection in favor of classes or shares. Certain classes of shares may be created. One class of shares are required to be voting shares – the shareholders within a particular class are entitled to vote on or approve any proposal that is made.

There is a detailed procedure that must be followed for each of the actions – be aware that these procedures exist for the protection of creditors and the residual owners. In following these procedures there is frequently a fiduciary obligation on the officers and directors.

Control over the Minority

'Control' is not a precise or clearly defined word.

CBCA 133 – the corporation must hold a general meeting of it shareholders within 18 months of incorporation and thereafter every 15 months.

Every expectation of an individual impinges upon the expectation of others. Thus, find out what the client needs, determine whether or not it is realistic and can be accomplished. They apply legal tools to see whether those needs can be met.

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Set out in the pre-incorporation shareholders agreement is the kind of organization that will be created, the relationship of each person within the corporation, what each individual will contribute, and what each will do in support of the corporation. This agreement is a roadmap and statement of expectations and the obligation that each assumes contractually to do what is necessary to allow others to achieve those expectations. When you advise these persons as a collective, you are involved in a conflict of duty – you cannot advise one without impinging on the interests of another. Further, since the single lawyer is knowledgeable of all the parties' interest, that single lawyer should retire if there arises some internal conflict.

In preparing that agreement there are a number of elements:

1. Set out the interests of each individual in the business organization, what property is to be transferred to the organization and what is to be received in return;
2. Each individual should indicate what s/he will contribute in terms of knowledge and ability;

These elements provide a roadmap upon which the individual's role as a lawyer is going to be based. The agreement will stand as a contractual obligation throughout the history of the company. Everyone will have a different shareholder expectation – it is for the lawyer to determine what those expectations are and accommodate each shareholder's interest. The compromise or balance must be found that will permit all to work together.

The lawyer should anticipate problems, at some point there might be a falling out. A mechanism should be established to resolve such problems effectively and with a minimum of difficulty. The agreement may provide for a restriction of the transfer of shares, like a partnership, where each shareholder is involved only because of the inherent trust placed on them. This is accommodated by including within the agreement a provision that none of the shares may be sold without the approval of the board of directors – this is a 'locked in' situation.

The pre-incorporation shareholder agreement is that agreement made before incorporation and should anticipate the problems that might arise. Once the corporation is incorporated, the shareholders may come together and unanimously agree to a USA. The pre-incorporation agreement may have a provision for agree into the USA.

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Minority Protection

Exam Hint: a hypothetical may describe a situation involving a corporation and those associated and the conduct of the corporation has affected another individual. The student is invited to act for those persons to determine how they should seek redress, which involves running through a series of remedies. This type of question forces the student to determine the type of relationship, type of breach, etcetera..., Demonstrate that you know and are able to apply the various remedies.

There is a very wide range of remedies that are applied. The first question to be considered is 'standing'.

Standing

Who has standing to invoke particular remedies? The moment that there is litigation that might have a major impact on the business of a business, that individual must be sure of his or her disposition. You don't want to create a situation where the business itself suffers, if it does then everyone else suffers. The definition of a 'complainant' is critical. The court must distinguish, then, between a personal action and a derivative action in order to determine who has standing and whether leave is required (see below).

CBCA 238 – "Complainant" means:
(a) a registered holder or beneficial owner of a security of a corporation;
(b) a director or an officer or former of a corporation;
(c) the Director; or,
(d) any other person who is a proper person to make an application

The nature of the statutory representative action is held in CBCA 239. Be aware of the security called a 'debenture'. A debenture is simply a promise to pay the principle and interest upon a loan made by a third party to the corporation. A debenture is issued under a deed of trust – these support the issue of debenture and are very important as they are intended to secure the position of the injured. The deed of trust applies to provide the mortgage of property to a trustee who holds it in trust for the lenders. The trustee will then seize the mortgage assets and use that cash to pay the debenture owners.

Re Daon Development Corp (1984) BC SC

Facts	Holding	Ratio
o The lenders are secured creditors o They look to the provisions of the trust indenture for their remedy o A debenture holder applies for leave to commence a derivative action o Court refuses leave	o Is the claimant a 'proper person' to be a complainant o Only those persons who have an interest in the well-being of the corporation are entitled to be recognized as complainants, the debenture owner did not have such an interest o It matters little to the debenture holder whether the business interests are being met or not	o In every case, the court must determine whether or not the applicant falls within the definition of 'claimant'

Richardson Greenshields v. Kalmacoff (1995) ON CA

Facts	Holding	Ratio
o Shareholder acquired his shares after the act complained of	o Must a complainant have the status of complainant at the time of the	o The complainant need only have status at the time of the action and

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	act complained of?	not necessarily the act complained of

Statutory Representative Actions

The jurisdiction of the court is very broad. The judge, in exercising discretion, must be guided by usage and general principles.

CBCA 239(2) – Three conditions (Condition Precedent) must be satisfied in determining whether or not one may bring a derivative action:

(a) Reasonable notice must be given to the directors of a corporation;
(b) The complainant is acting in good faith (does the plaintiff have some ulterior motive in bringing the action); and,
(c) It is, prima facie, in the interest of the corporation that the action is brought

Note: The court may make any order that it sees fit. This imposes a heavy burden upon counsel, the lawyer who makes their appearance before the judge, must come with a solid proposal for a scheme or method in which the problems alleged may be cured. Determine what ought to be done in order to satisfy the interests of the party. The judge may, however, direct a reference to another judicial officer in order to allow a scheme to be propounded, which is then returned to the judge of the first instance who will then make the order. The derivative action can only be commenced with leave of the court – it must be obtained.

Farnham v. Fingold (1973) ON CA

Facts	Holding
o Involved the sale of the majority interest of the shares of a corporation for a premium o The same offer was not made to the purchases to the minority – they complained on the basis of *Feldman* that the majority was dealing with an asset of the corporation and they had a fiduciary obligation to share the premium with the minority shareholders	o *Issue*: Should leave have been obtained for the action? o The portion relating to the derivative action required court approval to proceed o Court allowed the motion to set aside that portion of the claim o There is a recognition of *Feldman* here even though that case might not provide an appropriate remedy, the case should be considered and apply if it is to be considered as appropriate

Characteristics of a Class Action:

1. Members of the class having a common interest
2. Breach
3. Suffering to the same extent
4. Relief being beneficial to all
5. No conflict among the members of the class

Note: Refer to *Feldman* as though it is part of the law of Ontario, authority for the proposition that the breach of an obligation by one shareholder to another is covered by the oppression remedy. The following case required a distinction to be made between a class action and a derivative action:

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Goldex Mines v. Revill (1974) ON CA

Facts	Holding	Ratio
o False statements were issued by the BOD to shareholders in advance of a special general meeting o The issue of the statement was seen at one and the same time as providing the cause of action for the shareholders as it was pertinent to the question placed before them o The corporation itself was also deprived of an informed group of shareholders	o Compare personal as opposed to a derivative actions o A number of examples of personal and derivative actions o If a derivative action is brought without leave, it will be ended o The majority must act fairly and honestly – fairness is the touchstone of equitable justice	o The majority governs, but always keep in mind that the corollary of fairness is that standard that must be considered in determining whether a majority act is to be upheld

If there is in any claim an element that involves a wrong done to a corporation, then it is the subject of a derivative action and requires the approval of the court. The court must make the determination whether the shareholders are pursuing as part of a personal claim.

Charlebois et al v. Bienvenue (1967) ON SC

Facts	Holding
o The directors had circulated a misleading information circular o The shareholders had not received appropriate information with which they could make an informed decision o The wrong done to the corporation was that the best interests of the corporation had not been served by misinforming the shareholders	o The permission of the court was required to proceed with the derivative element of the action o The majority must act fairly and honestly. Fairness is the touchstone of equitable justice o The category of cases in which fiduciary duties and obligations arise is not a closed one o The circulation of the misleading report was a wrong done to both the corporation and the shareholders – no effort was made to differentiate between the personal and derivative action

Whenever you find that the scales are not in balance, think of a remedy that deals with the fiduciary obligation. Always begin exploring the possibility that the individual with all of these benefits has overborne the other.

Armstrong v. Gardner (1978) HC

Facts	Holding
o A number of letters were sent to the directors in respect to the claim	o In the application of the conditions precedent, the language of the statute ought not be construed in too technical a fashion o So long as reasonable notice is given to the directors, this will satisfy that particular condition precedent – do not rely on such a pronouncement o In determining whether or not the proceedings are in the best interest of the corporation it is satisfactory if the affidavit's in support declare that they are based on information and belief

"*Strike Suits*" – are the persons initiating the proceedings truly acting in good faith? A strike suit is brought for the purpose of embarrassing management and intended to secure some advantage in order to secure a quick settlement.

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If it not for the judge hearing the application for leave to decide whether the bringing of the proposed action is in the interest of the company. The judge's mandate at this stage is only to determine whether it *appears* to be in the interests of the company that the action be brought.

Bellman v. Western Approaches (1981) BC CA

Facts	Holding	Ratio
o The directors were requested to bring an action to assert the interest of the corporation for breach of fiduciary duty – the directors created a committee who hired KPMG to undertake an analysis of the circumstances alleged o KPMG brought no reason for haction o Leave for derivative action was sought	o The derivative action was allowed: 1. The damages arising out of a breach of fiduciary obligation could not constitute a part of the personal action, therefore, allowing for it in the derivative action; and, 2. The terms of reference given to KPMG were too narrow and did not permit the solicitors to make an informed decision on whether or not a breach had occurred o The terms of reference assigned to KPMG were not framed broadly enough	o There is always a question as to whether the language employed is too narrow and not going to accomplish what is originally intended.

CBCA 242(1) – shareholder approval of an act is not conclusive. In other words, if there has been an alleged breach of a fiduciary obligation and the shareholders have approved the act, the approval is not a bar for the court granting permission to proceed with a derivative action. The trial court will determine whether the shareholder approval is justified.

CBCA 240 – Conduct of the Action – The needs of all the various stakeholders and interest are here referred along with the court's powers

CBCA 242(2) requires the court's approval for discontinuance of an action. The court must approve the terms of settling – this is so because they are protecting the interest of a third party.

Compliance and Restraining Orders

CBCA 247 – requires certain senior officers to take steps to remain in compliance with the corporate constitution. The complainant or a creditor may apply to the court for a restraining order or an order for compliance. If a senior officer is acting contrary, one may apply to the court to ensure compliance.

This section is intended to provide a summary proceeding to require a large group of person's within the corporation to observe the obligations of the corporate constitution.

Re Goldhar and Quebec Manitou Mines Ltd (1975) ON Gen Div

Facts	Holding	Ratio
o One person was a director of two different corporations whose interests were adverse o An application had been made by a	o Was the director in breach of his fiduciary obligation? o The compliance section was not appropriate for making a	o If there are any elements in such a proceeding that demand close analysis – an intense inquiry – section 247 is not appropriate, the

shareholder for an order directing that director to cease and desist o The complaint involved the directors acting, allegedly, in bad faith by serving their own interests	determination of substantive matters o The application was refused and he directed that the applicant's proceed by way of derivative action o The nature of a fiduciary breach that arises out of a director being part of two boards o A juridical issue cannot be resolved in a summary proceeding	plaintiff must find another basis to challenge what is being done in the corporation

It is not at all uncommon for a corporation to engage former public people to serve on their boards. These people often serve on a number of boards that are highly influential in directing the policy of other corporations of which they are a part. This issues has never been solved definitively.

The Oppression Remedy

CBCA 241 – this involves an act by the corporation that has the effect of resulting in oppression or unfair prejudice. The parties that are entitled to bring the action include security holders, creditors, directors, and officers. The complainant makes the application and there are wide ranges of orders that may be demanded by the court.

This is a summary proceeding in the sense that it commences on application being made to the court.

1. Identify those persons that are entitled to institute the action;
2. Indicate those circumstances that provide the application of the remedy; and,
3. Identify what it is that is required to keep the scales in balance – the remedy that most suffices.

Not much has been written on this subject – very frequently there will be a falling out within a corporate plan. This is the sort of thing that should be anticipated in taking instructions for the corporation. The lawyer should assume that there would be a falling out. Going to the law creates a tension and has an adverse effect on the well-being of the corporation. A mechanism should be created pre-incorporation that would have already examined the possibilities and created channels/mechanisms for recovery.

When an application is made to the court, you have failed as a lawyer – these kinds of things should be anticipated and there should be some consensual agreement made to resolve the issue through a mechanism beforehand. The remedy is sought in the course of the agreement between the party – a full blown oppression remedy trial may go on for months on end.

These cases involve situations where parties have undermined the legitimate and reasonable expectations of a shareholder or creditor. It is for the lawyer to determine what it is that the client's expectations are and then record those expectations in some appropriate fashion – the best way is the development of memoranda circulated amongst the parties involved.

Redekop v. Robco Construction Ltd (1978) BC SC

Facts	Holding	Ratio
o Majority shareholder had an interest in two corporations and used the corporation for his own purposes – the subject corporation	o Who must be oppressed? o The various definitions of the parties who were entitled to claim under the oppression remedy and	o A conflict of interest situation is harsh and wrongful and may be enough to found an action inciting the oppression remedy – a director

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suffered certain losses o The applicants brought the application under the oppression remedy and were involved in a personal action in so doing – conduct of defendant resulted in a loss of value of the shares owned by them o A declaration was applied for that the defendant's conduct involved a breach of duty resulting in the earning of secret profits and a direction of an accounting and payback into the treasury of the corporation	the definition of oppression itself: o The 'Oppression Remedy' arises out of the need to satisfy the expectations and needs of the shareholder members o Robillard used the corporation for his own purposes – travel allowance and other benefits: these circumstances were not sufficient to warrant the Oppression Remedy o Critical fact involved Robillard having engaged in the affairs of a competitor to the detriment of a subject company: conflict of interest situation	of one company is at liberty to become a director of a rival company, but it is at the risk of an application under CBCA 241 if he subordinates the interests of the one company to those of the other

The oppression remedy is a very neat and effective way of bringing the parties to the table to get their differences resolved.

Meyer v. Scottish Co-Op (1959) HL

Facts	Holding
o Not Done	o Oppression involves a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members

Gignac Sutts v. Harris (1997) ON Gen Div

Facts	Holding	Ratio
o Solicitors to a corporation had not yet rendered their account	o Any creditor not yet receiving their account will be regarded as a proper complainant with legal standing	o The court is flexible in finding a proper complainant with standing.

Westfair Foods v. Watt (1991) Alta CA

Facts	Holding
o Not Done	o The protection of the court will be extended only to those circumstances that involve an expression of reasonable expectation – if an applicant's expectations are unreasonable, they will not be protected o The basis of the oppression remedy is to protect against any intrusions upon *reasonable expectations*

820099 Ontario v. Harold Ballard (1991) ON Gen Div

Facts	Holding	Ratio
o Ballard and Smythe were directors of MLG – the assets of MLG were being used for personal use	o Ballard was ordered to serve a term of imprisonment as this was a criminal offense o The remedies that are available to a judge by application are very wide, judges are given tremendous latitude and he is entitled to exercise real ingenuity in the application of those remedies	o Strict probity is required between the corporation and an officer of the corporation itself

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Brant Investments v. KeepRite Inc (1991) ON CA

Facts	Holding
o Not Done	o Evidence of 'bad faith' is not an essential – if one can adduce the evidence it will certainly influence the mind of the court, but it is not absolutely required

Ebrahimi v. Westbourne Galleries (1972) HL

Facts	Holding
o Done Before	o A certain duty or regime, both legal and equitable, are imposed on the parties that should satisfy the needs of the parties o The incorporated partnership imports all of the fiduciary obligations of a partnership upon the principals of the organization

RE Ferguson v. Imax Systems (1983) ON CA

Facts	Holding	Ratio
o There was a husband and wife, close friends, and other friends all having confidence and trust in one another o The husband and wife had a falling out that created enormous problems for everybody involved o The husband and other directors adopted a special resolution that had the effect of changing conditions attached to the shares in the capital had by the wife – she was not able to participate in the growth of the corporation: she was given shares in exchange with those she held not permitting her to participate in the management of the corporation's assets o Wife claimed that they were trying to oppress and force her out o A special meeting was called to amend the constitution with the effect of changing her position o This is the typical 'squeeze out' case	o The applicant had the onus of establishing oppression o The section must be given such a wide and liberal interpretation as to ensure the accomplishment of its objectives, which are to prevent people from overbearing others for dealing unfairly o The court focused on the fact that this was a privately held company o This was the culmination of a series of events – oftentimes the culminating event is relatively minor in nature (the conduct specifically complained of may not be extreme in an objective sense): it is the cumulative effect of deliberate attempts to unfairly oppress or prejudice the interest that is actionable o *Goldex*: The majority must act both fairly and honestly o The attempt to deny the applicant of participation is the basis for this particular action	o The cumulative effect of deliberate attempts to unfairly oppress or prejudice the interest is actionable where the individual attempt would appear to be ineffectual o Bad faith is not a necessary element, although it is a critical element

Certain kinds of conduct provide prima facie evidence of oppressive conduct. Note, the conduct need not be dramatic and may be deliberately subtle. One must look through the surface to determine the impact of such conduct:

1. A lack of corporate purpose for the impugned conduct – if the defendants are not able to show that it was done in furtherance of the interest of the corporation it will he considered oppressive;
2. A lack of good faith – if they were dealing with the applicant unfairly;

3. Any conduct that discriminates amongst the shareholders of the corporation – if an attempt is made to change the articles of the corporation or enter into an agreement with the majority shareholders that differentiates unfairly, that is prima facie;
4. Lack of adequate disclosure – a person (an insider) fails to make disclosure of sensitive confidential information might give rise to an oppression remedy: one must comb the facts and identify what kind of conduct has been undertaken that may give rise to a remedy; and,
5. The presence of non-arm's length transactions

Baxter v. Baxter (2000) ON SCJ

Facts	Holding
o Husband and wife had a falling out o Wife refused to renogotiate the lease owned by the husband	o This conduct was found to be vindictive

Joncas v. Spruce Falls Power (2000) ON SCJ

Facts	Holding
o Not Done	o Employees were classified as complainants for the purpose of classifying themselves as complainants, but since they had no standing they could not take advantage of the oppression remedy.

Hercules Managements v. Ernst & Young (1997) SCC

Facts	Holding	Ratio
o Financial statements were allegedly prepared that were inaccurate o Shareholders argued that they themselves suffered and also the inaccuracy prevented them from holding the directors accountable	o If they had come to an opposite conclusion it would have imposed an impossible burden on the corporation – the auditors would be liable to every shareholder bringing a claim that an error in the financials had caused a financial loss o A distinction was drawn between a situation of: (1) Duty of shareholders to call the directors to account and adopt procedures ensuring the best interest of the corporation; and, (2) Accounting procedures might be held to wrong the corporation and not the shareholders o If the financial statements were inaccurate, the wrong was done to the corporation and not the shareholders themselves o The proceeding should be by derivative action	o The inaccuracy of financial statements is a wrong committed against the corporation that requires proceeding by derivative action o You must analyze the fact situation to determine whether the wrong has been done to: 1. The corporation; 2. An individual; or, 3. Both the corporation and an individual

Remedies – a very broad range of remedies are available. Remedies imposed must treat the parties involved as well as the corporation both fairly and handily.

Naneff v. Con-Crete Holdings (1995) ON CA

Facts	Holding	Ratio
o Situation arose innocently o A father had established a business that had been a great success and	o The company was directed to be sold to the general public and the proceeds of the sale should be	o The exercise of discretion must involve 'surgically' a proposal that has the specific purpose of

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he wanted to enter into an 'estate freeze', which involved his taking of non-growth voting shares and giving common shares to his sons o Father exerted control by token of his holding the voting shares o On his death the value of the shares owned to him were limited to their face value and not the value attributable to the growth of the corporation following the decision to freeze his estate o There was a falling out and one son was forced out	divided amongst the shareholders according to their interests o *Assumption*: this decision was made without adequate advice being offered by council o On appeal, this was not the correct decision to render o The court undertakes an analysis of the exercise of discretion – the order to sell the business was wrong in principle: this was not a normal commercial business, but an incorporated partnership o The decision must affect the conduct of corporate operations as little as possible	rectifying the oppression that is being complained of o It must affect as little as possible the ongoing nature of the business itself and must not disrupt the business operations o The exercise of discretion must be corrective and not punitive o Discretionary powers must be exercised with two important limitations: 1. They must *only* rectify the oppressive conduct; and, 2. They may protect only the person's interest as shareholder, director, or officer o The courts must not interfere with the structure or nature of a corporation in order to impose the oppression remedy o The court may only impose a remedy that is specific to the problem itself

Not only was this an incorporated partnership, but it was also a special relationship because it involved family relationships. The judge poses that he is entitled to apply different rules in order to meet the interests of the parties.

RE Peterson and Kanata (1975) BC SC

Facts	Holding
o Not Done	o A roadmap is laid out for the parties with the proviso that if difficulty is encountered the court will provide further directions

Classes of Shares

Every corporation is required to have at least one class of shares. Classes of shares have particular characteristics attached to them. For example, some classes may be provided with the right to veto major and fundamental changes within a corporation.

CBCA 176 – the holders of a class of shares are entitled to vote separately on proposals to amend the articles if such an amendment affects their class of shares. If there is a proposal to amend the articles in a fashion to change the conditions of a class of shares, the members of that class may vote on the proposal.

CBCA 183 – an amalgamation, being a major fundamental in the corporation, entitles the holders

CBCA 189 – there is a provision for class vote if it is proposed that a major part of the corporation's undertaking is slated to be sold. The holders of particular classes may vote. However, even though the members of that class of shares do not have a vote associated with the conditions of the shares, they will be given one in the circumstances here enunciated.

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Note: shares need not carry with them a right to vote – a person need only buy the shares aware of the substantial limitation. It is a trade-off, though, as there is some other advantage that, to them, might be more important than the right to vote (situations that change the expectations of the shareholders):

1. Any proposal that will change the conditions under which a class of shares is held will require a class vote;
2. A proposal that shuffles the hierarchy of shares (preference shares – a share with preference over another) will require a class vote (the hierarchy is what renders a share profitable, so such a chance would be important); and,
3. Any proposal that deals with the creation of additional capital with redemptions, new classes of shares will carry with it the right to vote as a class

These changes alter the conditions for which a shareholder entered into his/her original agreement.

Appraisal Remedy

Provides the shareholder to dissent from a change in conditions of the corporation compared to the conditions upon entry. In other words, if a shareholder dissents from a proposal at a general meeting of the shareholders, that dissent carries with it the right to demand the corporation to purchase the securities held by the shareholder at a fair price. What is fair value and when should that value be determined?

If a certain act is proposed to be undertaken by the corporations BOD, the shareholders are entitled to oppose the directors' initiative. In so doing, they gain the right to offer their shares to the corporation for purchase by it. Rather than being locked into a situation that they do not approve, they are entitled to the sale of their shares to the corporation. The purpose for this is because the directors have fundamentally altered the shareholder's shares by way of a unilateral act.

CBCA 190 – there is a right to dissent and the right to apply for the appraisal remedy in certain enumerated cases:

1. A change in the provisions that restrict or alter the issue, transfer, or ownership of shares (the way in which the shares will be issued is altered);
2. Restrictions on the nature of the business to be conducted by the corporation;
3. Amalgamation of the corporation;
4. A continuation of the corporation; and/or,
5. The sale, lease or exchange of all or substantially all of the corporation's property.

Every time a decision of this kind is undertaken, there may be certain conditions that require that the measures be undertaken. Each of these represents a means by which the corporation may accomplish some larger end. The use of the appraisal remedy is fairly mechanical and unexciting. Note: a dissent by the shareholders triggers the remedy, which requires the corporation to determine the fair value of the shares as of the date immediately before the adoption of the particular resolution was dissented from. Questions arise as to how to determine 'fair market value'.

Jepson v. Canadian Salt Co. (1979) Alta SC

Facts	Holding	Ratio
o Not Done	o There is no particular form of dissent that is required to institute the appraisal remedy o The court will ensure that the rights of the dissenter are fully	o The appraisal remedy exists to provide a mechanism whereby differences may be resolved by an orderly process without interfering with the operations of the company

	protected – the common law will protect the minority against the majority from abuse	– otherwise, shareholders would have to take other steps that are cumbersome and difficult to enforce

Manning v. Harris Steel (1985) BC CA – if merely one shareholder dissents, that one dissent will be treated as though it is a dissent for all.

RE Montgomery and Shell Canada (1980) Sask QB

Facts	Holding	Ratio
o A widely held corporation o An application was made to determine the fair value to assign to the shares held by the dissenter	o In order to determine the value of each particular share, the asset value technique/method is not appropriate in the case of a widely held corporation because it is not likely to be wound down	o NY Judge: The elements that are to enter such an appraisal are net asset value, investment value, and market value – all three factors are to be considered considering the circumstance at each case

One should draw on each of these methods in order to determine what is to be fair market value. In a widely held corporation whose shares are traded on a major exchange, the market value should be that value applied in the appraisal remedy. In order for a proposal to be adopted, it requires a 2/3 vote for a fundamental change.

Endicott Johnson – the preference is to lend all three methods to achieve a satisfactory result. Estey concludes that the best method is to take the market value.

Belman v. Belman (1996) ON Gen Div

Facts	Holding
o Not Done	o The onus is on the dissenter to establish that the market value will not yield fair value

RE Cyprus Anvil Mining Corp v. Dickson (1986) BC CA

Facts	Holding	Ratio
o Appeal from a judgment fixing value of the shares of the dissenters	o The trial judge applied a mechanical formula not accounting for the judgment factors that must be determined for value o 4 ways to evaluate: 1. Market Value; 2. Net Asset Value; 3. Investment Value; and, 4. Combination of the Three	o No method that might provide guidance should be rejected

An inherent problem with appraisal is that one may have a different result based on a judge's predisposition because we are talking about a subjective valuation. 12 different judges may provide 6 different valuations.

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LoCicero v. BACM Industries (1986) Man CA

Facts	Holding
o Not Done	o There is a difference of opinion between the trial judge and the CA judge

Lake Erie Northern Railway v. Brantford (1917) SCC

Facts	Holding
o Not Done	o Where legislatures provide for the taking of property, it must be presumed it is intended the fair value should be the reasonable value to owner and not market value o Sentimental value may not be taken into account when fixing the value to the owner – this arises particularly in expropriation cases

A lack of information available to a shareholder inhibits the ability to enforce rights.

Investigations, Audits and the Director

A lawyer called upon to enforce a remedy must always have an objective in mind and be in the position to offer to the presiding judge the kind of remedy that should be applied.

CBCA 229 – Court may order an investigation
CBCA 238 – Court may order intervention by a director
CBCA 162 – Court may order an audit

CBCA 214 – Court may order the liquidation and dissolution of a corporation or any affiliates

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Corporate Capital Structure

Debt v. Shares

There are two types of securities: debt and equity/share capital. What the entrepreneurs will do in creating a capital structure is create a form of security that is saleable. Lawyers are heavily involved in the creation of the appropriate type of security by investigating the market.

The money that is borrowed by the corporation must be repaid by the due date spelled out by the terms of the loan. The cost of the loan is deductible for tax purposes and exempt as an expense. Note, however, that every debt must be paid. The relationship between the debtor and the creditor is contractual – terms that are spelled out in the contract they make.

Equity is created by the action of an individual paying into the corporation and receiving shares in the capital of the corporation. The debt capital creates a debtor/creditor relationship that is rooted in corporate law as a property relationship. The shareholder receives certain bundles of rights from the corporation that are attached to certain shares held by the shareholder. The directors are entitled to issue shares for the purpose of raising capital. Every time that the directors issue shares, they change the shareholdings to those people that shares had previously been issued – they change the rights and interests of prior shareholders.

The ingenuity of those creating the securities is 'dazzling' and intended to appeal to some segment of the investing community. For this reason, within the same corporation one may find a wide array of securities, each class of which contains different rights, duties, and obligations.

In addition to debt and equity securities, there are also derivative securities. Derivatives are founded upon some other object of value. For instance, one might invest in a series of securities whose values lie in the fluctuating value of other securities.

A debt security may function like an equity security in that the holder may enjoy some rights that are ordinarily associated with equity securities. For instance, in certain situations debt security holders may have the right to vote and participate in the policy making of the corporation.

Debt Capital

How is the corporation infused with capital?

Trade credit may be relied on quite heavily – ride on the back of a supplier by taking on an inventory and delaying payment for some time. A number of bankruptcies occur when individuals rely, as a form of credit, on the inventory supplied by the supplier.

Bank Loans provide an infusion of capital – if the bank is going to accommodate their needs, the individual might be required to provide a personal guarantee, which obliterates one of the major reason for incorporation (escaping personal liability).

Bonds, Debentures, and Mortgages may provide finances through the value of the various instruments.

There is no real definitive description of a debenture – it is simply an acknowledgment of a debt owed to another party. The creation of debentures can become a very sophisticated operation. Debentures may be 'convertible' that is a right accorded to the holder that at some future point in time the debt may be

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converted into equity. This may be valuable where a person may be prepared to advance a great deal of capital – the person may take a security, but the individual wants something more. The person, if the corporation is successful, wants to later take up an equity position (a share of the profits). At the option of the debenture holder, s/he may convert the debenture into shares so that the holder may participate in the success of the corporation.

Debt Finance

There are various forms of debt finance:

1. *Borrowings*;
2. *Trade credit*;
3. *Bank loans* are divided into two general categories:
    a. *Short-term* – usually created by a revolving line of credit; and,
    b. *Long-term* – usually very substantial in nature and involve security where the bank might require a security interest in the corporations receivables, its revenues, and/or a share in the corporation's assets;
4. A *commercial paper* involves the issue of short-term notes to carry one over a very short period of time (two to three days); and
5. *Bonds* and *Debentures* are the forms of debt security that are most frequently found and traded on the market. These are nothing other than evidence of indebtedness. Long-term bonds, providing for repayment over years, are always secured. Debentures, on the other hand, may or may not be secure. The national trust company holds these assets under the terms of a trust indenture.

Debentures

Floating charge – hangs over all of the assets of the corporation, but does not inhibit the corporation from using the assets, selling them, and acquiring fresh assets. It is only upon default that the trust company may step in and seize particular assets. The charge has the effect of providing security while allowing the borrower to use assets according to the needs of the corporation. Debentures may be subordinate to another set of debentures that are subject to some other floating charge.

Attached Terms – Debentures may have a number of terms attached to them. A particular feature might be whether or not an individual may pay off the entire debt owed at any point in time (this is an attractive feature of some mortgages, for instance). All of this involves the notional and actual negotiation of the terms during contractual formation.

Sinking Funds – One of the terms of the debenture may be that the borrower is obliged to create a fund and pay into the fund out of earnings in order to build up the fund so that it is sufficient, theoretically, to (at some point in time) pay off the debt.

Convertible Debenture – the borrower may have the option of converting a debt into equity.

Warrants – a method of raising capital giving individuals the right to purchase shares at particular rates until some point in time.

Very frequently the borrowings of a corporation are a severe deterrent to potential investors. This is a concern that is expressed everyday by financiers. Borrowings can become a crushing burden and become reasons for the disposition of assets by the corporation.

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Share Capital

Share capital is an intangible moveable asset. The intangible asset is a very difficult asset to pinpoint and protect. Functionally, share capital is nothing other than a bundle of rights that may be exerted within the corporation by a voter/shareholder.

CBCA 24(1) – Shares of a corporation shall be in registered form and shall be without nominal or par value; and, (3) Where a corporation has *only one class of shares*, the rights of the holders thereof are equal in all respect and include a number of rights (right to vote, receive any dividend, receive property upon dissolution).

The corporation may have a host of classes of shares. As such, at least one class must carry with it each of these rights to shares: at least one class must have the right to vote, for instance. So long as one class contains a right, then none of the other classes must have such rights.

It is unlikely that any class of share might not carry with it any one of these rights, but some do exist and they provide value in their inducement for investment. Different rights are created to accommodate the needs and expectations of different classes of prospective investors. Shares are created to accommodate the needs of prospective classes of investors.

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