

## AGENCY

- Where one party, on behalf of another party, is able to enter into binding legal arrangements with 3<sup>rd</sup> parties
- **Actual Authority:** Principal bound if agent has authority.
  - **Express:** Arising from words of an agency agreement (explicitly or by inference)
  - **Implied:** (1) **Usual:** What this particular principal has allowed this particular agent to do in the past;  
(2) **Customary:** authority *type* of agent has by custom.
- **Ostensible Authority:** Even without actual authority, agents may still act on a principal's behalf. **IF**
  - **Representation:** Principal must make or permit a representation *re* the agent's authority.
  - **Reliance:** 3<sup>rd</sup> party reasonably relies on rep.
- **Policy:** Aimed at **least-cost avoidance** of losses and protecting **3<sup>rd</sup> party reliance**.
- **Breach of Warranty of Authority:** Claim by 3<sup>rd</sup> party against agent. **IF** agent makes a (1) **false** (2) **representation** they have authority to bind principal; (3) 3<sup>rd</sup> party relies on rep. to their detriment = expectation damages.
  - 3<sup>rd</sup> party may have claim against principal (agent had ostensible authority); OR agent may be liable to 3<sup>rd</sup> party even if the principal is not (if no ostensible authority).

### Duties of the Agent to the Principal

- **Note:** Duties are **implied terms** of K; can be varied expressly or by circumstances.
- **General Duty:** To perform obligations under terms of agency agreement and according to instructions of principal. Remedies=K (damages, specific perform., termination).
- **Reasonable Care:** dmgs. Standard is normal skill/diligence.
  - **Pros** held to standard of reasonably competent doc/etc.
- **Fiduciary Duties:**
  - **Duty of Loyalty:** General duty to act in principal's **best interests**. Two specific prohibitions:
    - **Conflicts of Interest:** Remedies: accounting of profits, void contract, damages, injunction
    - **Secret Profits:** Remedy is accounting of profits.
  - **Duty Not to Delegate:** Damages and injunction.
    - **Exception:** If delegation is expressly or implicitly permitted. Permission may be implicit if it is **reasonable** to read it in (e.g. reasonable to allow delegation of ship repair to craftsmen).
  - **Duty to Keep Proper Accounts:** Remedy is an evidentiary presumption against the agent.

### Duties of the Principal to the Agent

- **Remuneration:** usually reqs. **express** provision, as agency relationship can be gratuitous. (**except**): implied where assuming gratuitous action isn't reasonable in circum.
  - **Performance:** To be remunerated, agent must be performing all required obligations.
  - **Effective Cause:** To be remunerated for a contract/sale/etc, agent must be its effective cause
    - **Note:** "Exclusive" agencies don't require this. But exclusivity usually requires an express term.
- **Pay Expenses and Indemnify Against Losses:** Required that the (1) agent be acting within the scope of actual authority and (2) the expenses not be incurred as a result of agent's fault.

### Termination

- **By Act of the Parties:** If agreement provides for termination, agreement governs. If it doesn't, by default agreement is unilaterally terminable by either party.
  - If relationship = employment, reasonable notice may be required.
- **By Operation of Law:** **bankruptcy; frustration; death.**

### Ratification

- Principal can ratify K agent didn't have authority to make. **IF**
    - Party entering K **purported to be agent** of the principal.
    - Principal **in existence** and **ascertainable** at time of K.
      - **Note:** Corp. not incorporated at the time of K formation fails test.
    - Principal must have **legal capacity** at the times of contract formation and ratification
  - Ratification must be **express**, either by conduct or acquiescence (e.g. by performance)
    - **Note:** If a principal is trying to take advantage of the third party by waiting to see if future conditions are favourable before choosing to ratify, that waiting may be acquiescence.
  - The principal must have **knowledge** of all relevant facts (this may not include minor details)
- **Conseq.:** K becomes retroactively valid (if no defects make invalid)
  - **Relates Back:** The ratification is retroactively effective back to the time of contract formation.
    - *i.e.*, 3<sup>rd</sup> parties liable for breaches made prior to ratification date.
  - **Sue and be Sued:** Principal can sue 3<sup>rd</sup> party and be sued.
  - **No Breach of Warranty of Authority:** The agent isn't liable to the 3<sup>rd</sup> party for this breach.

- **Agent Liability Relief:** The agent isn't liable to the principal for exceeding her or his authority.
- **Principal Duties to Remunerate/Idemnify Apply** to K.

### Undisclosed Principal

- Undisclosed principal can disclose agency relationship and assume contract's benefits/obligations. **IF**
- 3<sup>rd</sup> party must **not** have been looking to the **agent alone** to perform K, *i.e.*: (1) **Terms** of K requires that only agent perform; OR (2) **circumstances** indicate 3<sup>rd</sup> party clearly intended to K with the agent alone.
  - e.g. The contract has some **personal aspect** or is for the **services** of the agent
  - e.g. The third party would not have contracted if the **principal's identity were known**.
- **Rights of 3<sup>rd</sup> Party on Disclosure** (or Discovery): 3<sup>rd</sup> party may sue principal or agent (as party to K). In an action by the principal, 3<sup>rd</sup> party may use against the principal any rights or defences exercisable against agent (e.g. debts, duress, etc)
  - **Sayeed:** Critic banned from theatre; agent buys tix; discloses; refuses to honour tix; court sides with theatre.
- **Policy:** Protecting the mutual benefit of both parties; preventing **unjust enrichment** of either party.

### Liability of Principals for Torts Committed by Their Agents

- **Test:** Principals liable for their agents' torts if the agents acted within their scope of authority.
- **Scope of Authority:** The fact that the principal did not specifically grant authority for the tort is no defence. The question is whether the agent was doing the sorts of things that one normally does in carrying out the agent's mandate? (e.g. Clerk drawing up documents for law firm [*Lloyd v. Grace*])

### SOLE PROPRIETORSHIP

- **No Separate Legal Entity:** *Business* can't own property or K.
- **Liability:** Proprietor owns all assets, party to all K, carries all liability for business activities, & liable to creditors for business debts. No distinction b/w business assets and proprietor assets; both obtainable in court action
- **Management:** Proprietor has control and final decision in decision-making (*but*, creditors may impose restrictions in K).
- **Formation/Dissolution:** no formalities req.–just start/stop
- **Business Name Registration:** (**BCPA s.88**)
- **Funding:** Typically with proprietor's personal funds, trade credit from businesses with which the sole proprietorship trades, and loans from creditors (especially banks).
  - **Securities Reg.:** proprietorships are subject to disclosure requirements.
- **Why Sole Proprietorship? Simplicity and tax benefits!**
  - **Tax:** Biz expenses deductible against personal income.
  - **What About Ltd. Liability?** if biz with small # of equity investors, ltd. liability may not confer substantial benefit.

### PARTNERSHIP

#### Definition and Formation (or: Whether a Partnership Exists at All)

- **No formalities** req. to form; arises from the circumstances.
- **Def.:** **BCPA s.2**
  - **Persons:** Individuals only included in BCPA. (**s.3**)
  - **Carrying on Business:** Usually takes its plain meaning ("to hold one's self out to others as engaged in the selling of goods or services" cited in *Backman*). But consider...
    - **Common Law Test (*Gordon v. The Queen*)**
      - The occupation of **time, attention and labour**.
        - ❖ Needn't be long period (single transaction) (*Backman*)
        - ❖ Needn't hold meetings, make decisions, or enter new transactions (*Backman*)
        - ❖ Activity may be passive (receipt of rent) (*Backman*)
      - The incurring of **liabilities** to other persons, and
      - The purpose of a **livelihood or profit**
  - **In Common:** contentious part of def. *C.f.* **EXISTENCE**.
    - **Silent Partners:** Can be "in common" even if one partner does all the managing (*Backman*)
    - **Authority** of any partner to bind the partnership is relevant (*Backman, Martin*)
    - **Representations:** Do they hold themselves out as partners to third parties? (*Backman*)
    - **Other Factors:** 1 contrib. skill, knowledge, assets to common undertaking, (2) joint interests in biz property, (3) sharing profits & losses, (4) filing tax returns as partnership, (5) joint bank accts and financial statements (*Bankman*)
  - **View of Profit:** an **intent**; actual profits unnecessary)
    - **Tax motivations** for choosing partnership don't *necessarily* invalidate it, nor must profit be overriding intention of partnership, **BUT**
      - Group buys properties so they'll lose money (deduct losses from tax). Only activity. No view of profit. (*Backman*)
- **Weighing of Factors:** The above factors are not a checklist; they need to be considered together and weighed in the context of all the circumstances. (*Backman*)

## PARTNERSHIP CONTINUED

### Legal Status of Partnership

- **No Separate Legal Entity:** can't own property or party to K.
- **Consequences:** (*Re Thorne*)
  - Each partner personally liable for debts/liabilities of biz.
  - Partner cannot be an employee (b/c he is also employer)
  - Partners cannot K with partnership (i.e. can't be creditors)
- **Funding:** Partners invest equity; creditors give loans

### Name Registration

- **Registration is required** (s.81) within 3 months (s.82)
- If membership/name changes, file **statement of change** (s.83)
- **Consequences** of failing to register/file statement of change:
  - **Fine:** \$2000 fine (*B.C. Offence Act*)
  - **Liability:** Shifts from joint (the norm) to **J&S.** (s.87)
  - **Outgoing Partners Cont. Liability** to Creditors (s.84)

### Governance and Default Rules (s.21-34)

- **Default Rules** (varied by consent, express or inferred – s.21)
  - **Assumption of Equality:** Default rules based on assumption that all partners have similar contributions and rights to management and profits. If they don't, variation might be inferred.
- **Partnership Property** (s.23, s.24)
- **Capital, Profit, Losses, New Partners, Vote, Records** (s.27)
  - **Rules** subject to variation by express/implied agreement
    - (a) Partners share equally in **capitals, profits, losses.**
    - (b) Firm **indemnifies** partners for some liabilities.
    - (c) Partners get interest for capital contrib if **over** agreed \$
    - (d) Partners don't get interest for **agreed** capital contrib.
    - (e) **Management:** Every partner may take part!
    - (f) **Payment:** Partners not entitled to remuneration
    - (g) New partners can't be **added** without consent of all
    - (h) **Voting** (majority=ordinary or unanimity=const.)
    - (i) **Records:** kept at principal location & all partners must have access
- **Removal of Partners** majority can't remove except (s.28)
- **Fiduciary Duties:** Partners of a firm have a duty to...
  - **Act with fairness and good faith** (s.22)
  - **Render accounts** and full information (s.31)
  - **Account for benefits** (s.32) derived w/o consent
    - **Evidence:** Obligation arises w/o proof of competing activity.
  - **Account for profits** (s.33) from competing business.
    - **Evidence:** Obligation arises only if proof of competition.
    - E.g.:* Partner becomes director of client, doesn't disclose his entitlement to shares and stock options. This "affects" the partnership (s. 31). The client was a client from the business, so this "concerns" the partnership (s. 32). Held: not a conflict under s. 33. (*Rochweg*)
    - E.g.:* Lawyer is director of client corporations. He joins firm, corps become firm's clients. Partner agreement allows for non-legal business outside the firm if notice is given. No notice given, and some business was legal in nature. Violates ss. 31-33 (and agreement) (*McKnight*)
- **Assignment of Partnership Interests** (s.34)

### Dissolution

- **Dissolution By Act of the Partners:** (s.35)
- **On Death, Bankruptcy or Dissolution of a Partner** (s.36)
- **On Order of the Court** (breach, loss, incapacity, guilt) (s.38)

### Relationships Between the Partners and Other Persons

- **Liability in Contract:**
  - **Authority** (s.7); **Actual Authority** (s.8)
  - **No pledge of credit for nonfirm business** (s.9)
  - **3rd Party Notice of Authority** (s.10)
  - **Joint Liability for Debts:** (s.11) (& deceased partners)
  - **New & Retiring Partners** (s.19)
  - **Dormant Partners** (who don't manage) still liable (*Cox*)
- **Liability in Tort** (s.14)

### Existence of Partnership as it Relates to 3rd Parties

(or: Determining Who is a Partner)

- **Statutory Provisions on Existence:** (s.2)
- **Liability for Representation to 3rd party** (s.16)
- **Partner or Merely Creditor?**
  - **Test:** whether trade has been carried on by persons acting on the alleged partner X's behalf (**agency**). If such a relationship exists, then X is likely a partner. (*Cox*)
  - **Agreement** by the parties that they are not partners is not determinative (*Pooley, Martin*)
  - **Factors Favouring Partnership:** (*Martin*)
    - Right to be **informed** of business and **consulted**
    - Power to **veto** decisions (even if only risky)
    - **Option** to formally join partnership
  - **Sharing Profits:** Creates **presumption** of partnership (*Cox*). But, s.4(c), on their own, can rebut presumption...
  - **When Property isn't a Contribution** (*Martin - s.23*)
  - **When Lenders are Partners:** Factors suggesting a "loan" is really a partnership interest: (*Pooley*)
    - Lenders receive interest in partnership **capital/equity.**
    - Lender can **enforce partnership agreement** (control)
    - ROI **varying** with the **size** of the investment
    - **Terminate** loan agreement upon lender's bankruptcy
    - Loan's term = partnership's term (if one exists)

- **Policy:** Involving 3rd parties re: existence of a partnership:
  - 3rd party **reasonably relies** on known participant in business; may assume K w/ all participants who are jointly responsible for obligations.
    - **Exception:** Participants' actions do not suggest partnership; reliance unreasonable. (*A.E. LePage*)
  - 3rd party may advance credit on **reasonable assumption** that there is someone to pay the debt. If the "partners" are really lenders, 3rd party can't get at the assets of the business or at the "partners" personal assets.
    - *But* no knowledge of prior creditors shows no reliance on them being partners. (*Cox*)
  - **Unjust Enrichment:** If you got the profits of a business that went bankrupt but aren't liable to lenders, you profit at their expense (or at least benefit from their investment).
    - **However,** if lenders loan money based *only* on creditworthiness of known partners, then counterargument lender gets windfall [unjustly] if the unknown participant were made liable. (*Pooley*)
  - **Least Cost Avoidance:** who's in better position to avoid?
    - **Position to Assess and Control for Risk:** Persons involved in biz are in a good position to control for risk (knowledge + power); uninvolved lenders aren't.
      - **But:** Participant approached for sale of communal property. Participants have limited control over it. Court says it would be easy (low-cost) for creditor to verify state of affairs with group of participants. Risk put on creditor. (*A.E. LePage*)
    - **Lowering Overall Cost of Credit:** Making persons best positioned to avoid risk liable makes it cheaper for creditors to offer credit; more efficient overall.
  - **4(c)(iv):** If firms in financial difficulty, courts may treat new creditors as non-partners because no one would come to the aid of troubled firms – too much liability. (*Martin*)

### Subordination of Lenders for a Share of the Profits(s.5)

### Change in Partnership (including retirement)

- **Continuing Liability until Notice** (s.39)
- **Failure to Register Change** (s.84(b))

## LIMITED PARTNERSHIP

- **Rationale:** Partners may be willing to K that partners will not be personally liable. Expensive and slow to craft individual K that allow for this; i.e. an alternative form of association where it's the default. *Also: tax benefits versus corporation.*
- **Structure:** general + limited partners (s.50)
- **Formation:** filing a certificate. (s.51)
- **Protection of 3rd Parties:**
  - **Cautionary Suffix:** (s.53(1)) **Firm Name:** (s.53(2))
  - **No Services:** Ltd. partners can't contribute services (s.55)
  - **No Management:** Ltd. partners can't manag. (s.64)
    - **Liability on Breach:** Breach leads to liability as GP
    - **Officers of Corporate General Partner:** Where LPs are also officers of a corporate general partner, they may be found to be taking part in management.
      - **Specific Reliance:** It is **no defence** to say that a 3rd party did not specifically rely on the personal liability of a limited partner who engaged in management. (*Haughton, Nordile*)
      - **Distinct Action:** If a limited partner "acts solely in their capacity as officers of the general partnership" then they are not liable as limited partners (only as officers) (*Nordile*)
  - **Listed Partners; Listed Contribution** (s.51)
  - No return on capital if it makes firm insolvent (s.59)

### Relationships Between the Partners:

- **Separation of Ownership & Control:** LPs often contribute the majority of the capital (& thus "own" it), but their ability to monitor biz activity is constrained by statute; and (if there are many small contributions) may not be incentivized.
  - **Issue:** GPs may take advantage of LPs.
  - **Possible Responses:** Protective terms in partnership agreements; or **mandatory** statute rights (s.56, s.58)
- **Assignment of Partnership Interests** (s.66)
- **Admission of New Partners:** 51(4)(c), 54(2)(a), 56(d) 65
- **Share of Profits** s.61

## LIMITED LIABILITY PARTNERSHIP

- **Origins:** Some professions want LL, but couldn't incorporate.
  - **Partial Shield:** Partners not liable for malpractice of fellow partners unless directly overseeing activity
    - Partners remain personally liable for other firm debts & their own malpractice) – AB, SK, much of US.
  - **Full Shield:** *not* liable for ordinary firm debts/oblig s.104
    - Partnership may opt out in part or in full for tax.
- **No Professional Restriction** in BC; anyone can form LLP
- **Registration Required:** (see def of LLP in BCPA).
  - Extra-prov. LLPs liable as GPs if not reg. in BC. s.114
- **Name:** Must have cautionary suffix "LLP" s.100



## CORPORATION

- **Structure; Key Features; Benefits of Incorporating:** p.14
- **Jurisdictional Issues:** p.1
- **Applying for Incorporation:** (s.5-12, 19(2), 106(1), 104)
- Reincorporation and Continuance: p.1, (s.187, 188)

### Pre-Incorporation Contracts

#### Common Law

- A can **ratify** a K entered into by B on his behalf if: (**Kelner**)
  - Other person **purported to act on behalf** of person who seeks to ratify
  - Person who seeks to ratify must have been in **existence and ascertainable** at time other person purported to act on his behalf
  - Person who seeks to ratify must have the **capacity** to do the act both at the time the other person acted and at the time of the ratification.
- **Thus:** A corporation **cannot** ratify a K entered into before its incorporation date (**CBCA** = date on certificate)
  - **But** possible to enter into new K of the same substance.
- **Rule of Law:** Promoter automatically liable.
- **Rule of Construction:** Promoter bound to a pre-incorp K if parties **intended** that promoter would be personally liable.
  - i.e. promoter liable for **breach of warranty of authority**
    - **But** expt dmgs may be nominal, if **corp** is bankrupt (**Wickberg**)
  - **Kelner:** Promoter signs K for wine "on behalf of" a hotel. Hotel not yet incorporated; post-incorporation ratification invalid. Rule of law approach; promoter liable notwithstanding intent.
  - **Newborne:** Promoter signs own name on K under (not-yet-incorporated) name; wants to enforce K; court adopts rule of construction; no evidence of intent to bind promoter; promoter cannot enforce K in his own name.
  - **Wickberg:** Employee hired for non-incorporated corp by promoter. Sues for wrongful dismissal. Intent was K w/ corp; so no promoter liability via **Kelner**. Court finds liability via **breach of warranty of authority**. Damages limited (corp bankrupt).

#### Statutory Modifications Under the CBCA

- **Promoter Rule of Law Liable:** (s.14(1)); **Adoption (2); Apportionment (3); Exemption for Promoter Liability (4)**

### Legal Status of Corporations

- Corporations are separate legal entities ("**Salomon**") (s.15);
- **Implications of Separate Personality:**
  - SH can also be a (secured) creditor of corp.
  - SH can be director, CEO, employee; corp still a separate person
  - Corp owns business assets, not SHs (**Maccaura**)
- **Problem:** SHs use separate personhood to other's detriment...
  - SHs can be [secured] creditors (share equally or preempt other creditors)
  - Dividends to SHs might make corp insolvent to detriment of creditors
  - SHs can enter into K with company (conflict of interest).
  - Thin capitalization to the potential detriment of involuntary creditors
  - Persons deceived into thinking the business has unlimited liability
  - Incorporation used to avoid personal obligations (e.g. K/statute)

### Liability for Corporate Acts

- **Exceptions to the Salomon Principle:** where it is "too flagrantly opposed to justice" to apply the **Salomon** principle.
  - Exceptions to **Salomon** are rare; it has stood firm for 100+ years.
- **Agency, Alter-Ego, Puppet, Instrumentality, Sham/Cloak:** Arguing corp is **like** agent of SH; SH is liable as the principal.
  - Shareholders are shielded from liability as **shareholders**; **CBCA** does not shield them from liability arising otherwise, e.g. agency relationships.
- **Disregard of Corp. Entity by SHs or Directors:**
  - Not following corp. formalities — not using corp. name or suffix (s.251, **Tato**), failing to register (**Roydent**), not holding corp. meetings.
- **Conduct Akin to Fraud:** not **technically** fraud; req's unclear.
- **Affiliated Enterprises** (**Walkovsky, Mangan**, p. 62 re **Smith** test)

### Circumstances Where Courts More Inclined to Pierce Veil

#### Gap-Filling and Implied Contractual Terms

- Courts may disregard corporate veil to overcome gap in K language (i.e. to get a result harmonious with K); **policy:** K can't cover all; bigger K=more time/\$ to drafts/negotiate. Fill gaps to reduce **transactions costs**, or capture intention.
- **Kelner:**  $\Delta$  has non-compete K with  $\pi$ , gets wife to incorporate to compete through corp. Veil pierced,  $\Delta$  liable. (cloak/sham)
- **S.K. Econ:**  $\pi$  loans to  $\Delta$ .  $\Delta$  in \$ trouble, creates subsidiary to avoid loan obligations. to  $\pi$ . Court fills gap in loan K to cover this.

#### Corporations Formed to Avoid Statutory Requirements

- Courts fill gaps in statutes; harmoniously with their scheme.
- **Brit. Merch.:** Transport Commission only allows a person to hold one license, but multiple types.  $\pi$  has license, creates a subsidiary to get a different one. Held: Parent and subsidiary are the same person.

#### Affiliated Corporations

- **Walkovsky:**  $\Delta$  individual owner of 10 taxi companies, each 2 cabs & \$10K insurance.  $\pi$  gets hit by cab, suffers damages far in excess of insured value.  $\pi$  sues  $\Delta$ , owner, for damages. Court rejects claim — separate legal personality.
- **Mangan:** Similar to **Walkovsky**, except that  $\Delta$  is a corp with a 60% ownership stake. Court **disregards** separate personality b/w parent, child, & sibling corps.
- **Note:** **Walkovsky**=individual owner; **Mangan**=corporate majority shareholder.
- **Policy:** Courts are more willing to pierce the corporate veil when only corporate entities are being made liable. They are less willing if individuals would be made personally liable.

#### (Mis)representations of Unlimited Liability

- **Theory:** Creditors often req. higher fees from a limited liability party. Thus corps have incentive to misrepresent their liability. Legal req. for disclosure of limited liability saves creditors "screening cost." Equity investors ought to liable (even when inadvertent) on the theory of least-cost avoidance.
  - **Gelhorn:**  $\Delta$  buys cars from  $\pi$ . Mid-deal,  $\Delta$  incorporates w/o informing  $\pi$ .  $\Delta$  defaults,  $\pi$  sues SHs personally. Court pierces veil —  $\pi$  misled by  $\Delta$ .
  - **Chiang:**  $\pi$  stores watch at  $\Delta$ 's biz; fire. Ticket doesn't indicate limited liability. Court pierces veil —  $\Delta$  didn't inform  $\pi$  of corp. (*less plausible*)

- **Tato:**  $\pi$  K w/ non-existent corp (wrong name);  $\Delta$  signs K as director. Held:  $\Delta$  didn't follow formalities, treated corp as if it didn't exist; liable.
- **Roydent:**  $\pi$  has K with  $\Delta$ , but  $\Delta$  just an unincorporated division of a corp. Corp SHs made personally liable for misrepresenting nature of  $\Delta$ .

- **Failure to use the Cautionary Suffix 10(1), 10(5), 251, Tato**

### TORT: Misrepresentation and Non-Consensual Claimant

- **Wolfe:**  $\pi$  injured in sports complex, sues corps' SH  $\Delta$  in tort.  $\Delta$  found liable b/c 10(1) req. not met (no adds, signs, tax used corp. name).
- **Policy:** While courts focus on corp. formalities and "misrepresentation," aim in tort is (1) **compensation**. If biz has few assets, SH may be liable. (2) Courts particularly sensitive to claims of tort victims who were (2) **not consensually** engaged with corp; (3) **incentive costs:** Corps might incentivize risky behavior (e.g. encouraging delivery drivers to speed). Imposing liability on corp. encourages risk-mitigating behavior.

### Tort Claims Against Directors, Officers and Employees:

- Officer duty to ensure safety of employees → negligence.
  - **Berger:** Prez orders removal of ice; doesn't monitor. Employee slips. Prez liable
- **Said Exception:** Servants (directors/officers/employees) of a company who perform act in **bona fide best interests** of company are not liable for act's consequences.
  - **McFadden:** Directors move assets out of corp. & fire  $\pi$  (who can now claim no assets).  $\pi$  sues directors. **Said** exception doesn't apply (not **bona fide**). Liable.
  - **Rafiki** (B.C.): A director is personal liable **only** if acting (1) outside the scope of his authority on (2) some personal interest (3) contrary to company interests.
    - **Better off Dead:**  $\pi$  relied on  $\Delta$ 's misrep when advancing funds to the company that  $\Delta$  is an officer of. Not personally liable; no separate interest.
- **Policy:** If directors are made personally liable, they may over-spend corp. funds on "excessive insurance" (i.e. they may spend \$1,000,000 of corp's \$ to avoid \$100,000 in personal liability). This is inefficient — better to limit directors' liability.

### Oppression Remedy (s.241, PCM)

#### Personal Liability for Directors/SHs (CBCA): s.118, 119, 122

#### SHARE CAPITAL

- A share is **not an ownership interest**, but rather a **highly variable** bundle of rights exercisable against the company. (**Sparling**)
- **Essential Rights and Classes:** s.24 – 26
  - If one or more rights differ between 2 share classes, those classes are distinguished (no presumption of equality—**McClurg**)
- **Share Certificates:** s.49(1), 49(13)
- **Shareholder Register:** s.50, s.20
- **Common Shares:** Gives SH right to share in dividends and dissolution on a **pro rata** basis. Confers right to vote. No preferences.
- **Preferred Shares:** Bearing a preference over other subordinate shares
  - **Preferences:** Rights executed before subordinate shares' rights executed.
  - **Presumption for Dividends Beyond Preferred Amount:** Shares with a preference for fixed amt of dividends are presumed to **not** share in the excess.
  - **Presumption for Proceeds on Dissolution Beyond the Preferred Amount:** Preferred shares are presumed to **share equally in excess** (i.e. post-preference) proceeds. (**International Power**)
  - **Typical Preferred Share Features:**
    - **Cumulative Presumption:** If SH receives less dividends in 1 year than preferred shares entitles, remaining entitlement carries forward. (**Webb**)
    - **Non-Participating Presumption:** Participating preferred shares take their preferred amount, but **don't** share in excess with subordinate shares. (**International Power**)
    - **Convertible:** Preferred share can be converted into diff. type of security.
    - **Retractable:** SH can **require** company to purchase the share from them.
    - **Redeemable:** Company can **require** SH to sell their share to corp.
- **Other Frequently-Used Types of Shares:**
  - **Non-Voting Common:** Popular if minority wants to retain control.
    - **Dual Class Recapitalization:** New voting class of shares is created (via majority vote) & old voting class has voting right stripped. **Concern** that a majority can use this to strip voting rights from minority shareholders.
    - **Dual Class Issuance:** No problem; voting & non-voting created initially.
  - **Special Voting Shares:** Shares receiving more than one vote per share.

### Dividends

- **Cash, Specie and Stock Dividends:** 43(1)
- **Power of Directors to Declare Dividends:** 102(a), 115(3)(d), 146
- Directors have a **fiduciary duty** to consider best interests of corp when deciding whether to declare dividends.
  - **Dodge:** Withholding dividends to drive down prices (but not raise profits) violates duty to act in the best interests of corp (which requires making profits)
  - **Ferguson:** If refusal to issue dividends=oppressive (husb prevents wife from collecting after separation), directors may be **required** to declare dividends.
- **Declared Dividends Become a Debt:** Corps obligated to pay SHs as creditors.
- **Can only be paid out of profits:** Includes retained earnings from previous years.
- **Insolvency Test: Dividends Cannot be Paid or Declared** s.42
- **Record Date and Ex Dividend Date:** s.134

### Share Rights (Voting, Dissolution and Pre-Emptive Rights)

- **Voting:** presumption: one share, one vote. s.140(1)
  - **Weighting Votes:** Shares can have differently weighted voting rights. But there is a presumption of equality of shares within a class. **Conflicting case law:**
    - **Bushell:** 1 class of shares. Directors get triple vote weight. Valid.
    - **Jacobsen:** 1 class of shares. SHs can vote at most 1000 shares. Invalid.
    - **Bowater:** Multiple cl. Special cl. gets 10 votes unless held by someone other than particular SH (i.e. a transferee). Invalid. (**leading case**)
- **Dissolution:** Default right to share in dissolution proceeds **pro rata**.
- **Pre-Emptive:** If corp. issues more shares, existing SHs with a pre-emptive right may purchase **pro rata** portion of new shares. s.28 Right is **not presumed**; it must be provided for in the articles.

### Issuing Shares, Repurchase, Redeem, Series, Stated Capital Acct

- **Directors Power to Issue:** s.25(1), 115(3); **authorized limit** 6(1)(c)
- **Consideration:** s.25(3), s.25(6); **consq:** s.118(1), s.118(6), s.251
- Corp can **repurchase** its shares (insolvency test 34) but can't own shares s.30(1)
- **Redemption:** articles can allow corp to redeem shares s.36(1)
- **Director Liability:** s.118(1)
- **Series within a Class:** s.27(1), s.27(3)
- **Stated Capital Account:** s.26(1), s.38(1)

## GOVERNANCE

**Ultra Vires, Indoor Management, Objects, Powers:** s.15 – s.18

### Directors and Officers

- **Role of Directors:** manage, supervise s.102
- **Directors Appoint Officers:** officers are agents of corp s.121
- **Qualifications:** age, human, not bankrupt, residency: s.105(1)(2)(3)
- **# Dir.:** non-distrib>1; distrib>3. Articles can set #, min, max s.102(2)
- **Election of Directors:** mandatory duty of shareholders. s.106
- **Ceasing to Hold Office:** s.108
- **Removal of Directors:** by ordinary resolution s.109(1)
- **Filling of Vacancies:** s.111(1), 109(3)

### Authority and Powers of Directors

- **Management:** s.102
- **Non-Delegable Powers** (implicitly fall under 102): s.115(3)
- **Adopt, Amend or Repeal Bylaws:** s.103(1)(2), 115(3)(j)
- **Power to Borrow:** s.189(1), s.189(2)
- **Power to Issue Shares:** s.25; series: s.27; 115(3)(c)
- **Appointment of Additional Directors:** s.106(8), 115(3)(b)
- **Filling a Vacancy on the Board of Directors:** 111, 115(3)(b)
- **Filling a Vacant Auditor's Position:** 166(1), (3), 115(3)(b)
- **Calling of Annual & Special Meetings of Shareholders:** s.133
- **Appointment and the Delegation of Powers to Officers:** s.121
- **Determine Compensation of Officers:** s.125

### Directors' Power to Delegate

- **Statutory Limits – Non-Delegable Powers:** s.115(3)
- **Common Law Limits:** Courts concerned with (1) length of delegation, (2) extent of delegation; (3) to whom rights are delegated.
  - **Delegation to Management:** Directors can't delegate all or substantially all of their powers to management. But they can safely delegate powers related to ordinary business transactions. (Hayes)
    - **Degree:** Dir. can delegate power to act; but not power to govern (Kennerson)
    - **Timing:** Longer power is delegated, less likely it is acceptable (Sherman)
  - **Delegation to Outsiders:** Powers can only be delegated to persons outside corp. for limited time; & dirs can't give too many powers to outsiders. (Sherman)
  - **Sherman:** Dirs delegate "full powers" of board to committee; court restricts "full powers" to mean ordinary business transactions; removing officers, determining officers' compensation and calling shareholders' meetings not included.
  - **Hayes:** Dirs delegate underwriting & exec management to outside contractor for 20 years. Court rejects; too much power for too long. Contrary to public policy.
  - **Kennerson:** Employment K includes delegation of power to manage bookings, personnel, admission prices, salaries, K, expenses & all operational policies for 5 years. Court: confers practical control of all corporate powers. Rejected.
- **Policy:** Is the delegation freezing out SHs, putting too much power in hands other than those of the directors (who SHs elected and expect to remain accountable)?

### Removal of Officers

- **Policy:** Tradeoff between ability to remove officers & benefits of longterm K (increased security allows for lower compensation; length of term encourages officers to build human capital). **Solution:** Officers dismissible, but it'll cost (golden parachutes)
- **Breach of Employment:** Dirs can remove person from office or agency but, if from employment, person may claim damages for breach of K. (Re Paramount). Also, wrongful dismissal (Shindler)

### Directors' Meetings

- **Mechanics Follow Bylaws:** s.114 (1)(2)(5)(6)(8)
- **Resolution in Lieu of Meeting:** s.117
- **# of Meetings:** No CBCA required frequency but failing to meet for too long could lead to a breach of the duty of care. S.122(b).
- **Dissent** (due diligence): s.123; absent dir. diligence (3); defences: (4)

### Duties of Directors and Officers

- **Common Law Duties of Corporate Loyalty (Fiduciary):**
  - **Duty of Act in Best Interests of Corp. s.122(1)(a)**
    - (i) proper purpose? (within scope of authority) (ii) good in faith in best interests? but (i) maybe unnecessary: (BCSC **Teck**): If dirs. act in what they honestly believe to be best interests of corp., and if reasonable grounds for that belief, they will have acted for a proper purpose.
    - Includes duty to avoid conflicts and not to take corp. opportunities.
    - **Resisting Takeover Bids: Producers Pipeline** — onus on SHs to prove. dirs. defend: acts were reasonable in relation to threat posed and directed to benefit of corp. and SHs and not for improper purpose (e.g. entrenchment of directors). Onus: Peoples Department Store
  - **Duty to Avoid Conflicts of Interest s.120(1)**
    - Abrogated by statute with mandatory procedural safeguards of (i) disclosure; (ii) approval; (iii) transaction be fair and reasonable
  - **Duty to Avoid Corp. Opportunities**
    - Strict Rule (Regal); relaxed, broad, context rule (Peso): was opportunity obtained with corp. hat on or independently? Did corp make bona fide decision not to invest its companies funds? O'Malley Factors: office held, nature of corp. opp., ripeness, specificity, relation to opp., amnt of knowledge possessed, circumstances, private... (non-exhaustive)
- **Duty of Care: s.122(1)(b)**
  - **Fairly High Standard:** Reasonably prudent person with knowledge & experience of particular director in comparable circumstances subj-obj (Re City Equitable)
  - **"Business Judgement Presumption":** Perfection not demanded; court won't 2<sup>nd</sup> guess management decisions; IF honest/prudent/good-faith (Peoples Dpt)
  - Duty=proceed cautiously (esp. if non-urgent) & educate thoroughly (Repap)
- **Duties Cannot be Waived:** s.122(3)
- **Defence:** good faith reliance s.123(5)
- **Indemnify Corporation s.124(1)(3)(4); insurance (5)**

### Shareholder Voting

- **Shareholder Control Over Directors:**
  - **Power to Manage**
    - Dirs have general mgmt power (s. 102). Dirs are not SHs' agents; SHs cannot dictate mgmt decisions (Automatic Self-Cleaning)

- **Reallocation to Shareholders:** Only by U.S.A (s.102)
- **In Case of Deadlock:** Unclear whether shareholders have residual power to make mgmt decisions if board is deadlocked & action is req for the corp's continuing viability. In *Barron*, they just elect a new board.

- **Election of Directors:** s.106
- **Amendments to Bylaws:** s.103; proposals: s.103(5)
- **Fundamental Changes:** by special resolution (2/3 majority s.2(1))
  - **Listed Changes to Articles:** s.173
  - **Other Changes** require special resolutions:
    - Approving an amalgamation of corp. with another corp. s.183
    - **Sale or lease of all or substantially all of the corps assets** s.189(3)
    - **Continuance** of the corp. under laws of another jurisdiction s.188
    - **Liquidation** and dissolution of the corporation. s.211
- **Class Voting Rights:** s.176, 183(4), 189(7), 118, 211(3)
- **Policy for Protecting Voting Rights:**
  - **Transaction Cost Theories:** Investing carries costs. Voting rights let SHs protect that investment by preventing losses of their other rights.
  - **Market for Corp. Control:** Distributing voting shares exposes corps to the risk of takeover. This is a good thing; poorly-run corps get bought out and improved.

### Shareholder Meetings

- **Annual (133(1)) or Special (133(2)) Meetings**
- **Business:**
  - **Ordinary:** election of dirs (106(3)), consideration of financial statements, and appointment of auditors (162(1)).
  - **Special:** any business that isn't ordinary (135(5))
  - **Resolutions:** Ordinary business uses ordinary resolutions (1/2), special business uses special resolutions (2/3) s.2(1)
- **Place:** within Canada, provided in bylaws; or outside s.132
- **Quorum:** majority of voting shares (subject to bylaws) s.139
- **Notice:** > 21 days < 60 days, s.135(1), Reg. 44
  - **Record date** < 60 days, 134(1)(c)
  - **Notice of special business** s.134(6) 135(6))

### Conduct of Meetings

- **Voting:** show of hands unless poll demanded s.141(1); timing (2)
- **Minutes** (signed by meeting chair) must be kept. s.20(1)(b)
- **Meeting Chair:** Chair of the meeting must: (1) act in good faith, (2) be impartial; (3) allow shareholders to speak (for reasonable time) on any discussed matters before the meeting. (Wall)
  - **United Canso:** Vote against chair's interest; chair refuses to tabulate votes, rules that no quorum is present and adjourns. Violation of duty of impartiality.
  - **Re Marshall – no duty to look behind title:** chair doesn't have to go behind legal title of shares to see if beneficial owner's instructions have been followed.
  - **Vested Interest:** Chair's vested interest in outcome of a vote (e.g. an interest as a director) doesn't automatically make his decisions not bona fide. Go to facts.
    - **Blair:** Chair gets legal advice on how proxies should vote. Advice is incorrect, but chair acted in good faith & impartially. No breach of duty.
  - **Legal Advice** does not automatically exonerate chair; still has the above duties.

### Shareholder-Requisitioned Meetings s.143

### Meetings By Order of Court: s.144

- **Deadlock:** Where a majority shareholder wants to call a meeting to exercise a SH power (e.g. replacing directors), but minority SHs prevent the meeting from being held (e.g. by not attending, preventing quorum), courts may order a meeting. (El Sombbrero, Opera Photo) nb: UK: cdn courts more reticent to intervene.
- **Intervening in Battles for Control:** Courts will not exercise their discretion to place one of two or more contending factions of shareholders in control (Re Morris)
  - **Locking In:** Court won't change quorum if it'd lock 1 party into corp (Re Bash)
  - **Nb:** Intervening and deadlock cases are factually similar (all involve corps. with quorum reqs. such that some minority SHs must attend, but they all refuse to). This might indicate a difference in approach between Canada and UK.
- **Intervention on the Basis of Fault (Chair):** Where a chair acts inappropriately (e.g. continuing without quorum, rejecting proxies, etc), the court may call a meeting on the basis of fault. (Re Routley's)
- **Powers of Shareholders at Court-Ordered Meetings:** Courts may not grant SHs powers they'd not ordinarily have. e.g. articles=elect only at AGM, SH app for special meeting to elect directors rejected (Charlebois)

### Proxy Solicitation

- **Definitions, Rights, and Appointment:** s.147, 148
- **Mandatory Solicitation:** s.149; offence: s.149(3)
- **Proxy Circular:** s.150
- **Misrepresentation:** s.154

### Shareholder Proposals

- **Who can Submit:** Reg./beneficial SHs >1% & 6mo. 137(1), (1.1)
- **Published in Proxy Circular:** 137(2); supporting statement – 500 words (3)
- **Nominating Directors:** SHs > 5% of shares may nominate. 137(4)
- **Requirements:** 137(5)
- **Corporate Refusal:** notice 137(7); court order (8), (9)

### Financial Disclosure and Access to Records

- **Financial Disclosure:**
  - **Annual Statements:** 155, 158
  - **Auditor:** 155, 161, 162, 163, 166, 169
  - **Audit Committees:** 171(1), 171(3), 171(4), 158
- **Access to Records:** 20(1), 20(2), 21(1), 21(3), 21(9)

### Closely Held Corporations see back page

### Remedies

- Tort/K
- Fire Officers, Vote Out Directors
- Derivative Action s.239
- Oppression Remedy: s.241 (PCM Construction)
- Winding Up: s.213-214
- Appraisal: s.190
- Compliance: s.247
- Rectification: s.243