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BUSINESS ORGANIZATIONS

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I. SOLE PROPRIETORSHIPS

A sole proprietor is indistinguishable from the business that he or she carries on. The business contracts are the proprietor's contracts; the torts committed by the business, or an employee of the business, result in liability to the proprietor. Personal liability of the sole proprietor is unlimited, subject to contractual limitations.

There are a few formalities in setting up the business as a sole proprietor. If the proprietor carries on business under a business name (*i.e.*, a name other than the proprietor's legal name), the name must be registered under the [Partnerships and Business Names Registration Act, R.S.N.S. 1989, c. 335](#). There is an exemption for sole proprietorships who ordinarily reside in New Brunswick See s. 2A of the ***Partnership and Business Names Registration Act*** and the **Province of New Brunswick - Exemption Designation Regulation** under that Act.

A claim brought by or against a sole proprietorship may be brought in the name of the proprietor or in the name of the proprietor and the business name, *i.e.*, "Mary MacDonald, carrying on business as ACME" (see *Nova Scotia Civil Procedure Rule 35.13*).

The income of the business is taxed in the hands of the sole proprietor. If the business sustains a loss, that loss is applied against the sole proprietor's other income. For this reason, many startup businesses may be carried on as sole proprietorships. However, the potential tax advantages must be weighed against the unlimited liability that accompanies a sole proprietorship.

II. GENERAL PARTNERSHIPS

1. Overview

Definition

In Nova Scotia, a general partnership is defined as the relationship "... which subsists between persons carrying on a business in common, with view of profit, but the relationship between members of any incorporated company or association is not a partnership ..." (see [s. 4, Partnership Act, R.S.N.S. 1989, c. 334](#)).

Legislation

General partnerships in Nova Scotia are governed by the [Partnership Act](#), *supra* (the "PA"). The PA is primarily a codification of common law principles developed in England before 1890. Indeed [s. 3](#) states that "[t]he rules of equity and of common law applicable to partnership shall continue in force, except so far as they are inconsistent with the express provisions of this Act."

Nature

The PA does not recognize a partnership as a legal entity unto itself. The underlying theory of the common law may be referred to as the "aggregate theory", in which the partnership merely represents the separate legal existence of the various partners and their collective rights and duties. However, there has been a continuing trend towards the recognition of the partnership as a separate and distinct legal unit. This may be referred to as the "unity theory". This trend is reflected in modern civil procedure rules (see [Nova Scotia Civil Procedure Rule 35.14](#)) and partnership legislation (s. 47(b) of the PA), which have permitted the suing of partners in the firm name and which have made certain distinctions between what partnership property is and how it is distributed on dissolution.

The aggregate theory continues to prevail, however. This is reflected in several other characteristics of partnership that emphasize the distinction between the unincorporated partnership and an incorporated entity (the limited liability company).

One such characteristic is that each partner is individually taxed on his or her share of the partnership's income ([*Income Tax Act*](#), R.S.C. 1985, c. 1 (5th Supp.) as amended, [s. 96](#)). Another is that each partner has unlimited liability for the debts of the partnership (although some jurisdictions permit the existence of the "limited partnership", which shall be discussed below). A further characteristic is that it is easier in law to form or dissolve a partnership than a limited company. Related to this is the theoretically simple way by which the scope and operation of a partnership may be expanded or contracted (although in practical terms, the conflicting desires of the partners may make such changes impossible).

These various characteristics, which serve to mark the distinctions between the partnership and the corporation, are of practical significance to the corporate lawyer who must weigh these factors in light of a particular client's needs and then advise as to which form of business operation is the most suitable.

Formation

The definition of partnership in [s. 4](#) of the **PA** lists three essential elements to the formation of the partnership relationship. These are:

The carrying on of a business

Section 2(a) of the **PA** defines "business" as including every trade, occupation or profession. It is important that there exists a continuing relationship in the conduct of the business;

The enterprise must be carried on by persons in common

This suggests that there must be two or more persons with the legal capacity to be partners; and

The enterprise must be carried on with view of profit

This means that a joint operation for the sake of gain must exist. A religious society or some other association formed for charitable or non-profit purposes is not a partnership.

General partnerships are not required to have written partnership agreements. Indeed it is not necessary for persons to recognize that they are forming a partnership. If a business enterprise meets the essential elements set forth in s. 4, a partnership exists.

At common law, the initial and sole test for determining the existence of a partnership was the right to share in the profits. This rule was discarded in the important case of *Cox v. Hickman* (1860), 11 E.R. 431 (H.L.). Today, the courts generally emphasize the intention of the parties as the critical determinant of whether a partnership has been formed.

Three important factors used to indicate the intention to form a partnership are:

- the right to share in the profits
- the duty to share in the losses, and
- the degree of control.

[Section 5](#) of the **PA** sets out three negative rules governing situations that do not, *of themselves*, create partnerships. It reads:

5 In determining whether a partnership does or does not exist, regard shall be had to the following rules:

- (a) joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;
- (b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived;
- (c) the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of the business, does not of itself make him a partner in the business and, in particular,
 - (i) the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such,
 - (ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such,
 - (iii) a person being the surviving spouse or a child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such,
 - (iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing and signed by or on behalf of all the parties thereto,
 - (v) a person receiving by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such. *R.S., c. 334, s. 5.*

The third rule set out in section 5(c), receipt of profits, is illustrated by five statutory examples. These three rules, which are codifications of the common law, deal with joint tenancies, the sharing of gross returns and, as mentioned previously, the receipt of profits. Perhaps the most important lesson to be learned from the negative rules of s. 5 is the need to be *fact conscious* when facing a possible

partnership situation. Each particular relationship must be carefully analyzed in order to determine whether or not the facts require the application of the laws relating to partnerships.

From the above, one can see that the facts of a particular case are determinative of whether or not a partnership exists in law. All aspects of the business relationship must be considered (*Doran v. Duff* (1953), 31 M.P.R. 39 (Nfld. S.C.)). Furthermore, one must have regard to the intention of the parties in each case, as evidenced by their express agreement or as implied by the facts, so that the real nature of the relationship is determined (*Robert Porter & Sons v. Armstrong*, [1926] S.C.R. 328). For example, intention would indicate whether a particular relationship is a partnership or merely an employer/employee situation. It may be possible to determine from the facts of a given case that a person is a partner who has not contributed anything in a material way (*Mr. W. (or No. 41) v. M.N.R.*, [1952] Ex. C.R. 416).

It is not necessary to make a contribution to capital in order to become a partner (*Boudreau v. Pierce*, (5 December 1986), Halifax SH 53173, S230/19, (N.S.S.C.(T.D.)).

In *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, Lamer J. indicated what must be shown in order to satisfy the court that a partnership exists in the absence of a written agreement between two people living together:

Because tacit, the partnership can only be revealed by a factual situation, a retrospect of the partners' behaviour. From retrospection the trial judge must be satisfied, first, that each partner has made contributions to the common fund either in money or property, or by his work. It is also clear that, in the case of concubinaries, what is put in must not simply be the contribution to the common household, such as pooling of furniture or running the household.

Secondly, their past conduct must also disclose how losses and gains were distributed. In the case of a partnership between concubinaries, this division is usually by the use of earnings for the support of the partners. Similarly, each concubinary contributes to losses to the extent that these affect the household's standard of living.

The action in this case was brought after the parties separated. Having found that a partnership existed, the trial judge ordered partition of the farm.

The *Beaudoin-Daigneault* case was distinguished by the Federal Court of Canada, Trial Division, in *Kuchirka v. Canada* (1991), 91 D.T.C. 5156 (F.C.T.D.). This case involved an appeal from a decision of the Tax Court of Canada. The plaintiff and his wife had filed income tax returns for the years 1979 to 1982 inclusive, on the basis that they were partners in the operation of a farm and of some rental properties. In his reassessments the Minister refused to recognize the existence of a partnership, attributing the income and expenses from the farm to the plaintiff and the income and expenses in respect of the rental properties to the plaintiff's wife. Strayer J. was not satisfied from all the evidence in the case as to the conduct of the parties that a business partnership existed between the husband and wife.

Beaudoin-Daigneault, *supra*, was distinguished on the grounds that it involved the application of the [Civil Code of Quebec](#) and concerned the right of a female plaintiff to share a farm that had been purchased in the name of the man with whom she was living while they were cohabiting, whereas

Kuchirka had to be governed by the law of Saskatchewan and involved the imposition of tax on income alleged to belong to a partnership. Read together, these cases suggest that the purpose for which the partnership is alleged to exist is a very important consideration for the courts.

As noted, no particular or formal steps are required for the creation of a partnership. Since this form of business involves the mutual rights and duties of individuals, it is customary and advisable to define these interests in a written instrument known as the “**partnership agreement**”.

While the partnership agreement may be implied by a court (as indicated by s. 27 of the **PA**), it is preferable that it be written. A written agreement can override many of the provisions of the **PA**.

The partnership agreement should usually set forth the following:

- the partnership name,
- the names of the partners,
- the purposes of the partnership,
- the date of the agreement,
- the location of business,
- the duration of the partnership,
- the method of dissolution of the partnership,
- the investment of each partner (realty, personalty, cash, choses in action, services),
- the sharing of profits between partners,
- the sharing of losses,
- any remuneration for service,
- management and voting powers,
- an arbitration procedure (or some other provision for resolving disagreements),
- voluntary or compulsory retirement clauses,
- procedure for the purchase or sale of a deceased or retiring partner’s interest with a method for determining value,
- the respective duties of the partners,
- accounting periods and arrangements,
- banking arrangements and the authorization to sign partnership cheques and make loans,
- the powers to hire and discharge employees and fix their salaries, and
- anything else that the legal advisor may deem necessary in the circumstances.

There is one formal requisite for the formation of a partnership that is common to all jurisdictions in Canada. This is the requirement of registration set forth in [ss. 3\(1\)](#) of the **Partnerships and Business Names Registration Act, R.S.N.S. 1989, c.355**, which reads as follows:

3 (1) No person shall as partner carry out in whole or in part in the Province any of the purposes or objects of the partnership or do any act, matter or thing as a partner, unless and until the partnership holds a certificate, called a certificate of registration, issued by the Registrar as hereinafter provided and unless the certificate of registration is in force.

The registration procedure is set out in [ss. 4-7](#) of this Act. The partners sign a declaration in the form of Schedule A, the main purpose of which is to specify the name of the partnership. Subject to some discretionary power residing in the Registrar of Joint Stock Companies ([ss. 4\(4\)](#)), a certificate of

registration is then issued. Pursuant to s. 17 of the *Partnerships and Business Names Registration Act*, an annual registration fee must be paid.

Perhaps the most important aspect of the registration requirement is what happens if one does not register. The relevant sections in this regard are [s. 19](#) (imposition of a per diem fine) and [s. 20](#) (inability to bring or maintain any action) of the *Partnerships and Business Names Registration Act*.

There is an exemption for partnerships (other than sole proprietorships and extra-provincial LLPs) registered in the Province of New Brunswick when the partnership was formed in the Province of New Brunswick. See sections 2 and 2A of the [Partnerships and Business Names Registration Act](#).

Name

The **PA** does not contain any specific requirements concerning the name of a partnership. However, [ss. 4\(2\)](#) of the [Partnerships and Business Names Registration Act](#) proscribes the use of a name that is “identical with that of any other subsisting partnership or company incorporated or unincorporated or so nearly resembling the same as to be calculated to deceive ...”. There are limited exceptions to the rule. Without cabinet approval, no partnership shall be registered with a name that contains “Royal” or “Imperial” ([ss. 4\(3\)](#)).

A registered partnership must appoint and have a recognized agent within Nova Scotia for purposes of service upon the partnership and the members thereof ([ss. 18\(1\)](#)).

2. Relations of partners to one another

Introduction

Once a partnership has been found to exist in law, it is necessary to have regard to the various legal consequences that flow from conducting business through a partnership. In order to understand the legal consequences of conducting business through a partnership, one must examine the relationships that exist between or among those involved. The first relationship to be considered is that between or among the individual partners.

The **PA** sets out the legal implications of the relationship between or among the partners in a partnership in [ss. 22-34](#). Note that, for the most part, the operation of these sections may be excluded by an agreement between the partners. This purely directive function of the **PA** with respect to the mutual rights and duties of partners is clearly indicated by [s. 22](#). That section states,

the mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

[Section 27](#) is an important section, as it states nine rules to define the relative interests and duties of the members of a partnership. Note that all of these rules, which are really the codification of the common law, are subject to any expressed or implied partnership agreement.

Management and control

As earlier noted, the relationship between and among members of a partnership is contractual in nature. Therefore partners can tailor matters of management and control to suit their individual interests. In the event they do not agree to the contrary the rules in [s. 27](#) will apply.

- Subsection 27(e) provides that “every partner may take part in the management of the partnership business”.
- Subsection 27(h) states that ordinary business matters are to be decided by majority vote but that no change may be made in the nature of the business without unanimous approval.
- Subsection 27(g) states that “no person may be introduced as a partner without the consent of all existing partners”. Therefore, the usual practice is to spell out the terms regarding the admission of new partners in a partnership agreement. An example of a term that is frequently used to do this is one that provides that a partner may nominate one or more persons to succeed to his share of the business at his death or retirement.
- Where the partners have determined their mutual rights and duties in a partnership agreement, it may be varied by the consent of all of the partners ([s. 22](#)).
- Section 28 of the **PA** provides that no majority of partners can expel a partner unless a power to do so has been conferred by express agreement between the partners.

Contributions and profits

- Subsection 27(a) may be regarded as the “rule of equality” as it specifies that all partners are *prima facie* “entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses... sustained by the firm”. Subsection 27(a) applies even if one partner does much more work than another partner. However, if one partner receives a salary from the partnership by virtue of holding an official position, this salary will not be *prima facie* regarded as profits to be shared.
- Subsection 27(b) may be considered the “rule of indemnification” and applies with respect to certain payments made by a partner or liabilities incurred by him.
- Subsection 27(c) is a rule of interest at 5% per annum for any extra capital that a partner invests in the partnership.
- Subsection 27(f) provides that “no partner shall be entitled to remuneration for acting in the partnership business”. This will apply, in the absence of an agreement to that effect, even to a managing partner (*Whittle v. McFarlane* (1830), 13 E.R. 338). This particular rule is often varied where one partner does all of the work.

Fiduciary duties

Each partner must act in the interests of the partnership and must not place his or her own personal interests ahead of those of the partnership. This equitable position is reflected in ss. 31-33 of the **PA**.

[Section 31](#) provides that partners are bound to render true accounts and full information of all things affecting the partnership to any partner or to his legal representative.

[Section 32](#) is an important section as it deals with the accountability of partners for private profits. Specifically, a partner must account for any benefits accruing from the partnership relationship that are derived without the consent of the other partners.

[Section 33](#) is an extension of this and provides that a partner must account for and pay over to the firm all profits made by him in a business of the same nature as and competing with that of the firm. This is occasionally varied with the consent of the partners.

In a decision of the Newfoundland Court of Appeal, *Gill v. Rowsell* (1988), [76 Nfld. and P.E.I.R. 1](#) (C.A.), two partners were held liable to account as a result of a breach of provisions in the *Newfoundland Partnership Act* that are comparable to sections 32 and 33 of the **PA**.

[Section 34](#) provides for the assignment of a share of partnership receipts. Where there is such an assignment, either an absolute assignment, or by way of mortgage, or redeemable charge, it does not entitle the assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs. The assignee is entitled only to receive the share of profits to which the assignor-partner would otherwise be entitled, and for this purpose must accept the account of profits that was agreed to by the partners. [Subsection 34\(2\)](#) makes it clear that in the case of a dissolution of the partnership, whether as respects all the partners or in respect only of the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners. For purposes of ascertaining that share, the assignee is entitled to an accounting as from the date of the dissolution.

The above analysis of the sections of the **PA** relating to the relations between partners indicates that the legislation has dealt with a number of the possible sources of conflict and has imposed certain duties upon the partners. However, the **PA** does not explicitly enact what the common law developed as the basis of the internal law of partnership – the requirement of utmost good faith. To some degree [sections 32](#) and [33](#) impose this fiduciary duty upon the partners, but this is really only for fairly specific situations.

The fiduciary duty requirement was a judicial creation that remains important. In *Aas v. Benham*, [1891] 2 Ch. 244 (C.A.), Lindley, L.J., at 225 stated:

It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership or from any use by him of the partnership property, name, or business connection.

An even stronger statement of the fiduciary duty requirement was made by Bacon, V.C. in *Helmore v. Smith (No. 1)* (1887), 35 Ch. D. 436 (C.A.), at 444:

[I]f fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the lifeblood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that business goes on.

The common law requirement of a fiduciary duty for each partner has been noted in Canada (for example, see *Powell v. Maddock* (1915), [25 D.L.R. 748](#) (Man.K.B.) per Galt, J. at 749).

It may thus be seen that the fiduciary requirement is an important one to recognize. The partner's fiduciary status embodies both a duty of care and skill (determined by the test of reasonableness) and a duty of loyalty (determined by the test of utmost good faith). A partner's duty of loyalty is measured by a much stricter standard than is her duty of care and skill. This is because of the close, personal nature of a partnership. Each partner is both a principal and an agent. With each partner being the confidential agent of her co-partners, it is necessary to recognize that every partner has a right in law to the information that the others possess. No partner may act at the expense of the others and no secret profit may be made to the exclusion of the others.

Thus, along with the statutory indications of how rights between partners are to be determined, it is important that, from the first exploratory discussions through formal association in partnership to the final severance of the relationship, partners be required to exercise scrupulous loyalty and good faith. It is probably accurate to note that a breach of a fiduciary duty is usually followed immediately by dissolution and an accounting of profits.

A breach of a fiduciary duty may occur even though a partnership has not yet been formed. The use of information gained during negotiations towards a partnership agreement to one's own advantage in the opinion of certain judges of the Supreme Court of Canada constitutes a breach of fiduciary duty. *See, International Corona Resources Ltd. v. Lac Minerals Ltd.* (1988), [23 O.A.C. 263](#); aff'd [\[1989\] 2 S.C.R. 574](#).

Most fiduciary duties between partners come to an end when one partner repudiates its obligations under the partnership. In *A. Ackman & Son (Fla). Inc. v. Chipman*, [\[1988\] 2 W.W.R. 257](#) (Man. C.A.) the partnership decided to sell its sole asset, a piece of development property. No acceptable offers were received, the final mortgage payment was not made, and foreclosure proceedings were commenced. The plaintiff was not prepared to honour its obligation under the partnership by paying one half of the amount due on the mortgage. Therefore, when the defendant subsequently acquired information regarding an offer to purchase the property that would result in a profit for the partnership, it was determined that the plaintiff was not entitled to be given this information. The obligation of full disclosure between the partners terminated when one partner refused to honour her obligations under the partnership.

Subsection 27(i) of the **PA** affords each partner unlimited access to the partnership books, which must be kept at the partnership's principal or only place of business.

3. Relations of partners to third parties

Introduction

In addition to setting out some of the legal principles regarding the relationship between partners, the **PA** outlines many of the legal principles that govern the relationship between a partner and a third person who deals with that partner. The principles governing this relationship are set out in [ss. 8-21](#).

Similar to the manner in which the fiduciary obligations of partners act as the basis for the internal relationship between partners, the principles of the law of agency form the basis for the external relationship between partners and third persons. Unlike the fiduciary duties of partners, however, the agency principle is explicitly recognized in the legislation.

The agency principle is of crucial importance in determining the liability of a partner. The law of partnership is so closely related to the law of agency that the former has been referred to as simply "a special application of agency." The creation of a partnership basically involves the creation of an agency relationship. This is particularly evident when the relevant sections of the **PA** are examined.

Authority of individual partners

- Section 8 of the **PA** makes it clear that every partner is an agent of the partnership and their other partners for the purpose of the business of the partnership. The act of every partner who does any

act in order to carry on business in the usual way binds the firm and their partners unless the partner so acting has in fact no authority to act for the firm in that particular matter and the person with whom the partner is dealing knows there is no authority or does not know or believe them to be a partner. In this latter case, the active partner will bind the others unless the third party with whom the partner is dealing either

- knows that the partner lacks a specific authority, or
- is not aware that they are a partner.

This section is important therefore as it sets forth the essential elements of the agency relationship:

- that the person acting is a partner;
- that the acts performed are for carrying on in the usual way business of the kind carried on by the partnership;
- that her specific authority to bind the partnership in that area has not been withdrawn.

Section 9 of the **PA** makes it clear that acts performed, or instruments executed, in the name of the firm and in a manner indicating an intention to bind the firm, by a person possessing authority from the firm to so execute the document or perform the act (whether or not the person is a partner) have the effect of binding the firm. This is a simple application of the doctrine that express authority to perform an agency act cannot later be withdrawn unless the third party has proper notice.

[Section 10](#) provides that the firm will not be bound when one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, unless that partner has been specifically authorized to do so by her other partners. This does not, of course, affect the personal liability of the partner so pledging the credit.

[Section 11](#) sets forth a clear legislative statement of the importance of a partnership agreement. This provision specifies that if the partners agree to place restrictions on their individual power to bind the firm, then any person who has notice of the agreement is bound by such restrictions. There is some problem as to what constitutes "notice", but it appears that it is a direct warning of a partner's want of authority.

Liability for acts of co-partners

[Sections 12-17](#) deal with the substantive problem of liability with regard to certain specific situations. Most of these provisions are straightforward and require little or no interpretative analysis. For example, [s. 13](#) provides that when a partner, "acting in the ordinary course of the business of the firm", does a wrongful act, the firm is liable. This is a simple application of the doctrine that a principal is liable for the torts committed by her agent. A judicial application of this principle to partnership law is provided in *Hamlyn v. John Houston & Co.*, [1903] 1 K.B. 81 (C.A.).

Pursuant to s. 12 of the Act, "[e]very partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner."

Partnership by estoppel

A person who is no longer a partner or who never was a partner may be held liable if s. 17 of the **PA** is applicable. It provides:

- that where a person has by writing or by spoken words or by conduct held herself out to be, or allowed herself to be represented as a partner in a particular firm, she will be liable as though she was a partner to any person who has on the strength of such representation given credit to the firm. This liability will exist whether or not the representation has been communicated to the creditors by, or with the knowledge of, the person so holding herself out. The case of ***Tower Cabinet Co. Ltd. v. Ingram***, [1949] 2 K.B. 397 (K.B.D.) is one in which the basic issue was whether a former partner, who left the firm, had continued to hold himself out as a partner. As the court notes, this question is always going to be resolved ultimately by an analysis of the facts in each particular case. (See also: ***Lampert Plumbing (Danforth) Ltd. v. Agathos et al.***, [\[1972\] 3 O.R. 11](#) (Co. Ct.).)
- that, as a limitation on the “holding out” doctrine, where the name of a deceased person continues to be used in the firm name after the death of that person, no liability shall attach to her or her estate.

Retirement from partnership

As the ***Tower Cabinet*** case indicates, it is important for those who retire from a partnership to make that known to those who deal with the partnership.

Sections 39 and 40 of the **PA** also deal with the matter of retirement from a partnership. Under [ss. 39\(1\)](#) a person who deals with the firm after a change in its constitution is entitled to treat all apparent members of the old firm as still being members of the firm until he or she has notice of the change. The sufficiency of notice is a question of fact. If the procedure in [ss. 39\(2\)](#) is followed (the placing of an advertisement in the Royal Gazette), then sufficient notice to all subsequent creditors who had no dealings with the firm before the date of change is deemed to have been rendered.

4. Partnership property

Introduction

It is important to determine whether property is partnership property or the property of individual partners. Partnership property may be seized in satisfaction of a judgment against the firm. It may not be seized in satisfaction of a judgment against an individual partner. However, ss. 26(2) of the **PA** allows a judge of the Supreme Court to make an order charging the partner’s interest in the partnership property and profits thereon with payment for the amount of a judgment against an individual partner.

Specific rules

[Section 23](#) relates to how “partnership property” is to be defined. [Subsection 23\(1\)](#) provides that the partnership property shall consist of ***all*** the property and rights and interests in property that were originally brought into the partnership stock or later acquired (by purchase or otherwise) on account of the firm or for the purposes of the partnership business and in the course of it. When property is classified as “partnership property”, it must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement (if any) and not for the private purposes of a partner.

The question of which property is to be brought into the partnership may sometimes present problems. The parties should provide in their partnership agreement what is to be joint or partnership property and what is to remain separate property. If they do not so provide, then their intention will have to be inferred from the circumstances, and for this purpose the following may be taken into account:

- the source from which the property was obtained;
- the purpose for which the property was acquired; and
- the use that has been made of the property.

An illustration of how such circumstances have been considered may be found in *Ex parte Joseph Neale* (1861), 45 E.R. 1029 (Ch.D.) at 1034.

The special case of devolution of land is dealt with by [ss. 23\(2\)](#). Land will devolve according to the ordinary rules of real property, but a trust will be imposed on the interest taken sufficient to fulfil the presumptions created by this section.

[Subsection 23\(3\)](#) must be related to rule (a) of s. 5 of the **PA** that states joint ownership of property does not of itself create a partnership in the thing so owned. [Subsection 23\(3\)](#) allows such co-owners to purchase other land with the profits made from the original co-ownership, and that new land belongs to them also as joint owners (*not* as partners) unless there is some agreement to the contrary.

[Section 24](#) provides that, unless a contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on the account of the firm.

Section 25 of the **PA** provides that where land becomes property of a partnership, then unless there is a contrary intention, it will be treated (as between the partners, including the representatives of a deceased partner) as personal or movable property and not as real or heritable property. It is difficult to know the full implications of this rule, but it may have significance for the conflict of laws rules in the administration of the estate of a deceased partner.

[Section 26](#) sets out certain procedural requirements concerning execution against partnership property.

5. Dissolution and winding up

Dissolution of partnership

Subject to the provisions of any agreement between the partners, a partnership is dissolved, without the necessity of any judicial order, in the following circumstances:

- Upon the expiration of a fixed term, the completion of the specific adventure or undertaking or by the giving of notice by one partner to the others where the partnership was entered for an undefined time;
- Upon the death, bankruptcy or insolvency of a partner or where a partner's share of the partnership property is charged for the partner's separate debts; and
- Upon the happening of an event that makes it unlawful for the business of the partnership to be continued.

See ss. 35 to 37 of the **PA**.

The Supreme Court of Nova Scotia may order the dissolution of a partnership in a number of situations:

- Where a partner is found by a court to be mentally incompetent;

- When a partner, other than the one seeking dissolution, becomes permanently incapable of performing that partner's part of the partnership agreement;
- When a partner, other than the partner suing, has been found by a court to be guilty of conduct that is prejudicial to the conduct of the partnership business, or so conducts himself or herself that it is not practical to carry on the partnership business, or has breached the partnership agreement;
- When the business of the partnership business can only be carried on at a loss; and
- Whenever the court determines it is just and equitable in the circumstances.

See s. 38 of the **PA**. Also see *Beacon Securities Ltd. v. 2125395 Ontario Inc.*, [2011 NSSC 207](#), on whether an application for dissolution can be stayed pending arbitration.

Effects of dissolution

After the dissolution of a partnership, the general agency authority of each partner to bind the firm ends. However, each partner can continue to bind the partnership, and the rights and obligations of the partners continue to the extent necessary to wind up the affairs of the partnership and complete any transactions that have been commenced but are unfinished at the time of dissolution. However, this limited power to bind the firm does not exist where the acts are those of a partner who has become bankrupt. See s. 41 of the **PA**.

Partner's liability on dissolution

A partner will be discharged from partnership liability when the debts and liabilities of the partnership have been paid as part of the dissolution process. On dissolution, every partner is entitled to have the property of the partnership applied for that purpose before any remaining assets are distributed to the partners. See s. 42 of the **PA**.

A partner who is retiring from a continuing partnership may be discharged from any existing liabilities by an agreement with the members of the reconstituted partnership and the creditors. See ss. 20(3) of the **PA**.

Dissolution

Upon the dissolution of a partnership, the partnership assets will be identified and liquidated in an orderly fashion to maximize asset values. Partnership obligations will then be satisfied and the residue accounted for among the partners. The **PA** allows partners to provide in the partnership agreement for the process of dissolution, realization of assets and entitlement to proceeds, following satisfaction of third party creditors. See s. 47 of the **PA**.

Contribution for shortfall

Given the unlimited liability of partners they may be liable to contribute to the partnership so that it can complete payments to third party creditors. Under [paragraph 47\(1\)\(a\)](#), partners will be required to contribute from their personal assets to the partnership in a percentage of the shortfall equal to the percentage in which they were entitled to share in the profits of the partnership before dissolution.

III. LIMITED PARTNERSHIPS

Introduction

In Nova Scotia and elsewhere in Canada, limited partnerships are created by statute and only exist if the specific statutory requirements are met. Limited partnerships are designed to allow investors, limited partners, to invest in a specified project without becoming subject to the unlimited liability of a general partner. However, except where the rules of equity and common law applicable to general partnerships are inconsistent with the **PA** and the [Limited Partnerships Act, R.S.N.S. 1989, c. 259](#) (the “**LPA**”), those rules continue to apply. See [s. 3](#) of the **LPA**.

The **LPA** does not define a limited partnership. [Subsection 4\(1\)](#) says, in substance, such a partnership may be formed to carry on any business that a general partnership may conduct. [Subsection 4\(2\)](#) requires a limited partnership to have one or more persons who are general partners and one or more who are limited partners.

Formation

A limited partnership is only formed by filing a certificate setting forth the name, character of business and other items specified in [ss. 5\(2\)](#) of the **LPA**. If two or more persons are carrying on a partnership and it is not registered as a limited partnership, it will be found to be a general partnership (*Laplante v. R.*, [1995] 1 C.T.C. 2647 (T.C.C.)).

General provisions

Most of the provisions in the **LPA** are required in order to provide rights or obligations of limited partners which are not covered by either the common law or the **PA**. These sections set out the provisions for:

- limitations of liability ([ss. 10](#) and [17](#));
- the right to inspect and make copies of the books and records and to be given true and full information about the partnership and a formal accounting of partnership affairs ([s. 11](#));
- the right to share in the profits of the partnership ([s. 14](#));
- the right to have business dealings with the limited partnership ([s. 13](#));
- the obligations of the limited partners to complete making contributions to the limited partnership ([s. 16](#));
- the admission of additional limited partners ([s. 18](#));
- the assignment of limited partnership interests ([s. 19](#)).

Rights and liabilities of limited parties

The major difference between a general partnership and a limited partnership is that a limited partner is liable for the obligations of the limited partnership only to the extent of the amount of property contributed or agreed to be contributed to the capital of the firm ([s. 10](#)). Such contributions must be in the form of cash or other property, but not services ([ss. 8\(1\)](#)).

In a general partnership, parties can participate in the management of the firm. However, generally speaking, management of a limited partnership rests in the hands of the general partner of the limited partnership ([s. 9](#)) and a limited partner can lose the protection of limited liability if she or he “... takes part in the control of the business” ([s. 17](#)).

A limited partner has the same rights as a general partner to true and full information of all things affecting the limited partnership ([s. 11](#)). A limited partner has the right to share in the profits and to have her or his contribution returned, subject to the conditions in the [LPA](#) being observed. Generally speaking and subject to certain provisions in the [LPA](#), there is equality among limited partners. [Subsection 14\(2\)](#) does permit limited partners to agree that one or more of them have a priority over other limited partners in respect of return of contribution, compensation by way of income, or in respect of any other matter. However any such agreement must be stated in the certificate filed under [ss. 5\(1\)](#).

[Section 19](#) of the [LPA](#) permits a limited partner to assign her or his interest, but the assignee has only limited rights until becoming a substituted limited partner by meeting the requirements of [ss. 19\(4\)](#). If a limited partner does not sell her or his interest, then that person may receive a return of capital contribution in the four circumstances described in [s. 15](#), subject to certain liquidity tests being met.

Rights and liabilities of general partners

General partners in a limited partnership have all the rights and powers and are subject to all the restrictions and liabilities of a partner in a general partnership. However, [s. 9](#) of the [LPA](#) does place certain restrictions on the authority of a general partner unless there has been written consent to or ratification of the specific proscribed act by all the limited partners.

Dissolution

A limited partnership is dissolved upon the retirement, death or mental incompetence of a general partner (but not a limited partner), or the dissolution of a general partner when the general partner is a corporation unless the business is continued by the remaining general partners in accordance with [s. 20](#). A limited partner is entitled to have the limited partnership dissolved and its affairs wound up where she or he has rightfully but unsuccessfully demanded the return of capital contribution or the liabilities of the limited partnership have not been paid in the circumstances contemplated by [ss. 15\(4\)](#). The settlement of accounts after the dissolution of a limited partnership is governed by [s. 26](#) of the [LPA](#).

IV. LIMITED LIABILITY PARTNERSHIPS

A limited liability partnership (“LLP”) is a hybrid between a general partnership and a limited partnership. Partners maintain the economic relationship of general partners in that they share in profits and losses of the firm. LLPs, however, limit the liability of “innocent” partners from the malpractice claims against other partners and the partnership itself. Individual partners are liable for their own acts.

The legislative scheme governing limited liability partnerships in Nova Scotia is outlined in the [PA](#) and the [Limited Liability Partnerships Regulations, NS Reg 221/2003](#). Partnership law is in the provincial jurisdiction and is codified, as described above in the [Partnership Act](#). With the increase in professional liability claims, there was a need to balance the public interest with the protection of innocent partners. LLP legislation does not limit a plaintiff’s claim against the firm or against negligent partners; it merely shelters the assets of uninvolved partners from professional liability claims.

Pursuant to the [Limited Liability Partnerships Regulations](#), only lawyers and chartered professional accountants are permitted to form LLPs (ss. 2 and 3).

An LLP is taxed in the same way as a general partnership, so there are no tax advantages associated with entering into an LLP rather than a general partnership.

V. CORPORATION LAW

1. Introduction

Sources of applicable law

Today the main sources of corporation law in Nova Scotia are the *Nova Scotia Companies Act* (the “NSCA”) and the federal *Canada Business Corporations Act* (the “CBCA”). Business corporations may be incorporated under either statute. Currently there is very little practical distinction between the provincial and federal powers to incorporate business corporations. In theory, a corporation incorporated under the CBCA cannot be precluded from operating in Nova Scotia but it is subject to laws of general application enacted by the province.

There are many judicial decisions interpreting both the NSCA and the CBCA. UK decisions are also of assistance in interpreting the NSCA.

Another important source of statutory law is the *Nova Scotia Securities Act*, R.S.N.S. 1989, c. 418, as amended (the “NSSA”). The NSSA governs the initial sale and subsequent trading of securities within the province.

Where to incorporate

There are certain practical factors that may be present in determining where to incorporate. Prior to the 2008 amendments to the NSCA, there were some features of the NSCA that made it difficult to work with and unattractive, but on the other hand provided many unique features unavailable in other jurisdictions, including the CBCA. The goal of the 2008 NSCA reforms was to remove antiquated and inconvenient provisions while retaining the uniqueness of the NSCA.

Practical differences between the NSCA and CBCA run the whole range of company law and include, *inter alia*, the following:

- ***The requirements as to disclosure of information***

The provision of the CBCA requiring the filing of financial statements has, on occasion, influenced incorporators against federal incorporation and in favour of provincial incorporation.

- ***The ability to obtain shares having the desired characteristics***

The applicable legislation, or even current departmental practice, may make it possible to obtain under one jurisdiction but not the other, shares having characteristics desired by the incorporators, as for example, shares having no voting rights or limited voting rights; shares redeemable out of capital if certain requirements are met.

- ***The cost***

The relative cost of incorporation should be considered. If the proposed company is to operate in several provinces it may be important to compare the cost of federal incorporation, followed by registration in the provinces in which it is desired to do business, with the cost of provincial incorporation followed by registration in the provinces in which it is desired to do business.

- ***The time factor***

If the time within which incorporation and organization of the proposed new company must be completed is limited, and this is frequently the case, it may be more expeditious to seek provincial incorporation rather than federal incorporation, although if electronic filing is available, both can be completed quite quickly.

- ***Public offerings***

If it is intended to offer securities of the proposed company to the public of Canada generally, and, even more so if it is intended to offer them to the public of the United States, it may be desirable to seek federal incorporation because of the greater prestige that a federal Charter carries in the eyes of some investors.

- ***Amalgamation***

It is necessary for two or more amalgamating companies to be in existence in the same jurisdiction in order to amalgamate. It has historically been more difficult for companies incorporated under the [NSCA](#) to amalgamate with each other, as this required, in addition to shareholder approval, application to the court to have the amalgamation approved. The role of the court has been to protect creditors from potential prejudice caused by the amalgamation. The 2008 amendments to the [NSCA](#) no longer require court approval if certain liquidity tests are met. The CBCA permits short-form amalgamations in certain circumstances with appropriate shareholder approvals.

- ***Types of companies***

The [NSCA](#) provides in [section 9](#) for three different types of companies to be formed: a company limited by shares, or what is usually referred to as a limited company, a company limited by guarantee, most often used for not-for-profit organizations, and unlimited companies (“ULCs” or “NSULCs”), which have been popular for cross-border tax planning purposes. Until amendments to corporate legislation in Alberta and British Columbia in the mid 2000s, Nova Scotia was the only Canadian jurisdiction to provide for unlimited companies.

Prior to 2008, ULCs could only be formed by incorporation or by amalgamation and plan of arrangement, the latter two being procedures never designed for the purpose. Special rules are now included in the [NSCA](#) for continuing as ULCs and amending the memorandum. See *E L Management Inc. (Re)*, [2004 NSSC 169](#). The CBCA provides for limited companies within its legislation and for not-for-profit organizations and charitable organizations to be formed under [Canada Not-for-Profit Corporations Act, S.C. 2009, c. 23](#).

The corporate entity

A corporation is a legal person in the eyes of the law, quite separate and distinct from the individuals who are its members. As a legal entity the corporation can own property, have rights and be subject to liabilities, and it does not hold its property merely as agent or trustee for its members and, generally speaking, they cannot sue to enforce its rights, nor can they be sued in respect of its liabilities. It makes no difference to this rule that one member beneficially owns all or substantially all of the shares of the corporation.

The House of Lords decision in *Salomon v. Salomon & Company, Ltd.*, [\[1897\] A.C. 22](#) (H.L.) firmly established the doctrine that a corporation is an independent legal entity not to be identified with its

incorporators. This basic doctrine has not been seriously questioned in Canada save in those relatively rare cases where the courts have disregarded the corporate entity.

Various theories have been developed in an attempt to explain the concept of corporate entity. Indeed one writer has counted at least 16 theories, *see* Wolff, “On the Nature of Legal Persons” (1938), 54 *L.Q.R.* 494. However, these theories can be reduced to two: the “fiction theory” or “entity theory” and the “realist theory”. The fiction theory recognizes the existence of groups but asserts that they have no real personality of their own. When the state recognizes such a group as having legal personality, it is a fictitious, artificial one. Corporate personality exists merely for legal and business convenience. In its extreme form, the theory claims that a group as such has no rights unless the state chooses to grant it legal personality. The realist theory tends to view the corporation as a group whose group activities are such as to require separate legal recognition, regardless of whether the state accords legal recognition or not.

Most writers suggest that none of the theories of incorporation can explain adequately the phenomenon of corporate entity, and they further suggest that judges have simply accepted so much of any of these theories as suited their needs. When you consider the provisions of the [CBCA](#) and the [NSCA](#) try and determine the extent to which either theory has been adopted. ([CBCA ss. 2, 5, 6, 7, 8, 9, 15, 262\(2\), \(3\)](#); [NSCA ss. 9, 26\(2\)](#); [Corporations Registration Act, R.S.N.S. 1989, c.101](#), as amended (the “CRA”), [ss. 3, 5\(1\)](#)).

Certain additional effects of incorporation are described in the applicable Interpretation Acts. [Interpretation Act, R.S.C. 1985, c.I-21, s. 20](#); [Interpretation Act, R.S.N.S. 1989, c.235](#).

The basic concept of the separate corporate entity is of primary importance today as a significant part of current corporation law is derived from, or related to it. For example, because of this concept, the assets that are sold to the corporation by the initial incorporators are now owned by the corporation and not by the incorporators. Furthermore, the incorporators in their capacity of shareholders cannot exercise any rights in connection with the property owned by the corporation. In general, when individuals transfer assets to or invest money in a corporation they lose all proprietary and other interest in that property. In return for their tangible or intangible assets shareholders receive the rights conferred upon them by their shares, and their proprietary rights are limited to their property in those shares. This is an integral part of the concept of separate corporate entity because it makes possible the complete separation of the property and rights of the company from those of its members. See *Re United Fuel Investment Ltd. and Deacon v. Union Gas Co. of Canada Ltd.* (1965), [53 D.L.R. \(2d\) 12](#) (Ont. C.A.).

As noted earlier, a major characteristic of the corporation is the principle of limited liability of the shareholders. The shareholders have no rights in the property owned by the corporation; and conversely, the corporation has no estate or interest in the property of its members. In general, a shareholder’s liability is limited by statute in connection with the corporation’s business activities to the amount paid for the shares. [See [CBCA s. 45\(1\)](#); [NSCA s. 135\(d\)](#)].

2. Pre-incorporation

Promoters

- The word promoter is not defined in either the [NSCA](#) or [CBCA](#). In *Whaley Bridge Calico Printing Co. v. Green and Smith* (1880), 5 Q.B.D. 109, 111 Bowen J.A. remarked:

The term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations... by which a company is generally brought into existence.

Modern securities acts like the **NSSA** do define promoter for purposes of that legislation. *See*, **NSSA** [s. 2\(1\)\(ai\)](#).

- Promoters have been held to owe fiduciary duties to the corporations they help create. *Gluckstein v. Barnes*, [1900] A.C. 240 (H.C.). Accordingly a promoter cannot make a secret profit on a sale of property to the corporation by either a third party or by the promoter. In the former case the corporation may rescind, recover the secret reward, or sue for damages. Where the promoter is the vendor of the property the remedy appears to depend on whether the promoter acquired the property on his or her account or while acting as a fiduciary for the corporation. If the property was acquired on the promoter's own account, the remedy is either rescission or damages for failing to disclose the interest. When a promoter acquired the property after entering the fiduciary relationship, the individual must transfer it to the corporation at the price said by the promoter. Any failure to comply allows the corporation to seek rescission, an accounting of profits made by the promoter or damages. *See generally*, Gold, "The Liability of Promoters for Secret Profits in English Law" (1943-44) V. *Univ. of Tor. Law J.* 21.
- Where applicable, the **NSSA** provides investors a right of action for damages, or alternatively a right of rescission, if a misrepresentation (a term defined in the **NSSA**) is made in a prospectus, against an issuer and, subject to certain defences, the underwriters, the directors of the issuer, experts referred to in the prospectus, and any person who has signed the prospectus, which may include a promoter (**NSSA**, [s. 137](#)). Similarly, if a misrepresentation is made in an offering memorandum, investors have a right of action for damages, or alternatively a right of rescission, against an issuer and, subject to certain defences, directors of the issuer and persons who have signed an offering memorandum describing the securities being sold, which may also include a promoter.

Pre-incorporation agreements

The common law rules continue to apply when a corporation is incorporated under the **NSCA**. At common law a corporation cannot be bound by agreements purportedly entered into in its name or on its behalf before incorporation nor can it ratify such agreements after coming into existence. Accordingly, it is impossible for a third party to contract with a corporation before the certificate of incorporation is issued.

At common law, the liability of a promoter who acts for or on behalf of a non-existent corporation is unclear. Where the individual who acts on behalf of the non-existent corporation knows the corporation is not in existence at that time, that individual may find the courts concluding the individual intended to be bound on a contract. *See, Marblestone Industries Ltd. v. Fairchild*, [1975] 1 N.Z.L.R. 529; aff'd [1976] 1 N.Z.L.R. 545 (C.A.).

The position of a promoter and the corporation is quite different under the **CBCA**. [Section 14](#) of the **CBCA** on the surface recognizes the validity of pre-incorporation agreements and provides rules to determine the liability of promoters and the corporation once it comes into existence. [Subsection 14\(1\)](#) imposes liability on the promoter who enters into a written contract in the name of or on behalf of the corporation before it comes into existence. This position is subject to any express provision in the agreement excluding promoter liability. Once the corporation comes into existence, it may adopt the

agreement pursuant to [ss. 14\(2\)](#). When the corporation does adopt the agreement the promoter is relieved from liability, unless a court orders otherwise under [ss. 14\(3\)](#). The scope of [s. 14](#) has been greatly limited by the decision in *Westcom Radio Group Ltd. v. MacIssac et al.* (1989), [70 O.R. \(2d\) 591](#) (Div. Ct.). In *Westcom* Austin J. held that ss. 21(1) of the *Ontario Business Corporations Act* ([OBCA](#)), similar in substance to [ss. 14\(1\)](#) of the [CBCA](#), did not apply when the third party intended to contract with the non-existent corporation exclusively.

3. Creation of the corporation

a) Under the [NSCA](#)

The first thing to do with regard to incorporation is to take instructions from your client — see Appendix I, the check list headed “Memorandum Regarding Incorporation in Nova Scotia”. This sets out some items that should be noted — not all of them will be applicable in every case but they are, at least, there as a reminder.

Name

It is important to settle on a ***name*** as soon as possible, since no drafting can be effectively done until the name is settled. In Nova Scotia, the name desired must be acceptable to the Registrar of Joint Stock Companies ([ss. 16\(1\)](#)). In general, a company name under the NSCA needs to be descriptive and distinctive. You may also incorporate a company using a number assigned by the Registrar if a name is not desired, i.e. 321456 Nova Scotia Limited. For certain types of professional corporations, such as medical companies, the name will also require approval from the professional regulatory body. If a company name contains a surname, this will require consent from the person whose name is being used.

You should note that if, through inadvertence, a name is approved which is that of an existing company, the Registrar has the right to require the company to change the name ([ss. 16\(2\)](#)). This is expensive and causes difficulty. The Registrar will normally reserve a name for a period of three months, to permit you to settle other questions.

Once a name is settled, you can order a seal and this takes a day or two. It should be ordered as soon as possible and you should let your client know whether the name has been approved as he or she may wish to order letterhead, cheques, company documents, etc. You may then proceed to draft the necessary documents.

Business activities

Prior to the proclamation in force on September 1, 1982, of S.N.S. 1982, c.17, s. 2, the memorandum of association had to state positively the objects of the company. Indeed most older precedents contained a list of principal objects followed by a long list of ancillary objects and powers. Counsel obtained from the client some indication of the general business activities that the company was going to pursue and drafted the widest possible objects clauses.

Companies incorporated on or after that date or existing companies that amend their memorandums of association in accordance with the legislation will have the capacity, rights, powers and privileges of a natural person, subject to the restrictions, if any, set forth in their memorandums of association. However ss. 26(9), 26(11) restrict the ability of those companies to exercise certain powers unless

approved by special resolution and confirmed by the court or conferred by their memorandums of association.

Following proclamation of these 1982 amendments, it is no longer necessary or correct to include a detailed statement of objects and powers. Indeed the memorandum of association of a newly incorporated company or one that has amended its memorandum of association in accordance with [clause 19\(1\)\(a\)](#) or ss. 19(3) will state only the restrictions, if any, on the objects and powers of the company. If there are to be no restrictions the company shall have the capacity, rights, powers and privileges of a natural person. It may or may not be desirable to include in the memorandum of association the express powers to do the acts described in ss. 26(9).

Capital

Clause 4 of the memorandum of association is the capital clause. It is unusual to set out the division of capital, if it is to be divided into common shares and preference shares, in the capital clause in the memorandum of association. The normal procedure is to set out the capital as all common share capital even though it may be divided into shares of different par value or some shares with par value and some of no par value, but you should not refer to them as preference shares. There is power in the form to change the conditions applicable to the shares and this should be done by special resolution under [s. 87](#) of the [NSCA](#). This avoids the necessity of being locked in to the preference share conditions and being able to change them only under the scheme of arrangement sections of the [NSCA](#) (*See s. 130 & s. 131*).

The 2008 amendments to the [NSCA](#) have allowed for companies to have unlimited authorized capital. Another substantive change was to allow for stated capital accounts for classes of shares under the [NSCA](#), which puts companies under the [NSCA](#) in a better position for dealing with tax driven reorganizations.

The memorandum of association must be completed by being signed by at least one subscriber. This is referred to as “person” referred to in [s. 9](#) of the [NSCA](#) and is usually a natural person and not a corporation. Opposite the subscriber’s name, the number of shares taken by the subscriber, together with the subscriber’s address, must be written or typed – the address should be the residence address although, sometimes, the Registrar will accept an office address. The number and kind of shares must be shown, *i.e.*, “One Common Share” or “One \$1.00 Share”, depending upon whether there is a difference in the number and kind of shares referred to in Clause 4 of the memorandum of association.

The total shares taken should then be written in, *e.g.* “one share”. It should be dated, and the name of a witness appears at the bottom left of that page with address and occupation. This is not, apparently, required by [s. 13](#) but it is the practice to fill in the address and occupation.

[Subsection 28\(2\)](#) requires that a statutory declaration by a solicitor of the Supreme Court engaged in the formation of a company or by a person signing the memorandum of association, as to compliance with all the requirements of the [NSCA](#), be filed with the Registrar at the time of the filing of the memorandum and articles, if any, of association.

A form of consent of those persons who have consented to be directors of the company is also required under [ss. 94\(3\)](#). This is necessary if there is more than one incorporator.

The subscriber(s) to the memorandum and the provisional directors are normally in the office of the solicitor incorporating the company. Many law firms are able to file incorporation documents electronically directly with the Registry of Joint Stock Companies.

Articles of association

If Table A Articles are used in the first instance, some other form may be adopted by having the shareholders pass a Special Resolution pursuant to [s. 23](#) and [s. 87](#). It should be noted that no special steps need be taken in order to adopt Table A Articles (*See* [s. 21](#)).

Even though you do not put the preference share conditions in the memorandum of association, you should have full instructions as to these conditions and settle the form of the preference share conditions, in order that the necessary special resolution can be passed by the incorporators, who will normally be in your own office, without delay. Similarly, the restrictions, if any, on share transfer should be settled and it should be decided whether these are to be in the form of an agreement among the shareholders or in the form of amendments to the articles of association. The first method is to be preferred for several reasons. First, there is no publicity, second, they can be readily changed by agreement of the parties and third, you do not need definite instructions immediately on the point. The setting out of the restrictions in the articles of association has the advantage that they are more rigid and less subject to change in certain circumstances. These may provide that there is to be no transfer without approval of directors, etc., no transfer without first offering to the other shareholders and there are a number of variations of the kind of restrictions that can be put on transfer of shares.

Modern securities legislation like the **NSSA** requires a corporation wishing to distribute (sell) its securities in order to raise financing to effect the sale through licensed dealers (or become licensed itself) and have approved by securities commissions a disclosure document (prospectus) making full, true and plain disclosure about the securities being sold. However, there are exemptions for registration found in [National Instrument 45-106](#). National Instrument 45-106 (“NI 45-106”) is a Rule pursuant to the NSSA. One exemption is that of a “private issuer”. The relevant sections are:

Section 2.4(1)

In this section, “private issue” means an issuer

- (a) that is not a reporting issuer or an investment fund,
- (b) the securities of which, other than non-convertible debt securities,
 - (i) are subject to restrictions on transfer that are contained in the issuer’s constituting documents or security holders’ agreements, and
 - (ii) are beneficially owned by not more than 50 persons, not including employees and former employees of the issuer or its affiliates, provided that each person is counted as one beneficial owner unless the person is created or used solely to purchase or hold securities of the issuer in which case each beneficial owner or each beneficiary of the person, as the case may be, must be counted as a separate beneficial owner, and
- (c) that
 - (i) has distributed its securities only to persons described in subsection (2), or
 - (ii) has completed a transaction and immediately following the completion of the transaction, its securities were beneficially owned only by persons described in subsection (2) and since the completion of the transaction has distributed its securities only to persons described in subsection (2).

- (2) The prospectus requirement does not apply to a distribution of a security of a private issuer to a person who purchases the security as principal and is
- (a) a director, officer, employee, founder or control person of the issuer,
 - (b) a director, officer or employee of an affiliate of the issuer,
 - (c) a spouse, parent, grandparent, brother, sister, child or grandchild of a director, executive officer, founder or control person of the issuer,
 - (d) a parent, grandparent, brother, sister, child or grandchild of the spouse of a director, executive officer, founder or control person of the issuer,
 - (e) a close personal friend of a director, executive officer, founder or control person of the issuer,
 - (f) a close business associate of a director, executive officer, founder or control person of the issuer,
 - (g) a spouse, parent, grandparent, brother, sister, child or grandchild of the selling security holder or of the selling security holder's spouse,
 - (h) a security holder of the issuer,
 - (i) an accredited investor,
 - (j) a person of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons described in paragraphs (a) to (i),
 - (k) a trust or estate of which all of the beneficiaries or a majority of the trustees or executors are persons described in paragraphs (a) to (i), or
 - (l) a person that is not the public.
- (3) Except for a distribution to an accredited investor, no commission or finder's fee may be paid to any director, officer, founder or control person of an issuer in connection with a distribution under subsection

Another exemption is that of family, friends and business associates (see s 2.5(1) of [NI 45-106](#)).

The Securities Commission can be of assistance with reporting and registrations requirements.

The names of the signatories on the memorandum and in the articles should be in the handwriting of the respective signatories.

The application is then ready for filing with the Registrar of Joint Stock Companies and it is usual to write a covering letter stating that enclosed is the original memorandum and articles of association of the company, together with the consent and notice of consent of directors and the statutory declaration of the solicitor, together with a cheque for the appropriate fees made up as follows:

- incorporation fee, and
- corporate registration fee for the first year.

The annual registration fees are found in the **CRA**.

The covering letter, the original memorandum and articles, the statutory declaration as to compliance and the consent of directors (if required) and notice of officers and directors, together with cheque in payment of the fees is sent to the Registrar of Joint Stock Companies and normally the certificate of incorporation, referred to in ss. 28(1) of the Act is issued and dated as of the date of filing of the application. This means that you may then proceed to prepare the preliminary meetings of incorporators, directors, shareholders, etc. and to prepare the other documents as of the date of incorporation. Some

law firms have entered into licensing agreements with Service Nova Scotia that allow them to file incorporation documents electronically.

These documents include:

- Notice of registered office;
- Notice of recognized agent;
- Notice of directors and officers;
- Directors and shareholders signing resolutions;
- Borrowing resolutions (a general borrowing resolution is no longer required);
- Register of directors, officers and shareholders; and
- Share Certificates.

The notices and a certified copy of any special resolutions of shareholders must be filed with the registrar. When the preliminary organizational meetings have been completed, the minute book can be prepared. It includes the Certificate of Incorporation, copy of the memorandum (or a duplicate original if you had two originals signed) and articles of association and the minutes then follow, with the register of directors and officers and register of shareholders inserted at the back of the book. The Certificate of Registration under the CRA usually follows immediately behind the Certificate of Incorporation at the front of the book.

A form of report letter is then prepared, to be signed by the solicitor concerned, reporting to the company as to the things that have been done. The minute book, the seal and share certificate book, containing the spare share certificates (if any) and the cancelled share certificates (if any, and if not filed in the back of the minute book) and, where necessary, the new outstanding share certificates in the names of the permanent shareholders (which are often kept in the minute book, depending on the corporate circumstances), will be forwarded to the company or the president or largest shareholder, who is usually the person who has retained the solicitor. The minute books may also be retained at the solicitor's office. The minute book shall be kept at the registered office of the company or such other location as is designated by the directors, or as may be set out in the articles of the company.

Each year, an annual statement must be filed by all companies, whether incorporated under [NSCA](#) or incorporated by any other Act, and registered under the **CRA** and an annual registration fee must be paid.

A copy of all special resolutions must be filed with the Registrar within 15 days from the passing thereof ([Section 88](#) of [NSCA](#)). These give notice to the Registrar and to the public as to changes in the capital structure, articles, etc. of the company. From time to time, as changes take place in the directors and officers, recognized agent or registered office, the Registrar must be notified. The writer sends two certified copies to the Registrar, who stamps one and returns it to the writer, who then files it in the minute book.

b) Under the [CBCA](#)

In general, the **CBCA** applies to every corporation incorporated or continued under it, but it does not apply to banks, loan, trust or insurance companies.

The system of incorporation under the [Canada Corporations Act](#), at least in theory, was based upon the exercise of government prerogative and the Minister had discretion whether or not to issue letters patent. This system has been replaced by a system under which incorporation is a matter of right rather than a privilege. Articles of Incorporation are filed with the Director, who is obliged to issue a Certificate of Incorporation if she finds that the articles conform to law and the conditions precedent have been met. However, the practical difference is not significant. The application of the [CBCA](#) is set forth in s. 3 of the Act.

The first point concerning incorporation under the [CBCA](#) is to determine the relevant information you will require from your client. The checklist headed “Memorandum regarding incorporation under the *Canada Business Corporations Act*” in Appendix II should be used as a guideline.

Name

If a name is available it may be reserved for a period of ninety (90) days ([s. 11](#)). Section 12 of the Act sets forth certain prohibitions in respect of corporation names. This section, together with s. 12-28 inclusive of the Regulations, should be reviewed with your client in order that the proposed name may be acceptable to the Director. There is training provided by Industry Canada for lawyers and paralegals designed to help you assist your clients in selecting a name that meets all the major criteria set out in the statutes and regulations for federal incorporations. This training is available on-line. See Industry Canada’s website for more information.

The word “Limited”, “Limitée”, “Incorporated”, “Incorporée”, “Corporation”, or “Société par actions de régime fédéral” or the abbreviation “Ltd.”, “Ltee”, “Inc.”, “Corp.” or “S.A.R.F.” shall be part, other than only in a figurative or descriptive sense, of the name of every corporation, but the corporation when incorporated may use and may be legally designated by either the full or the abbreviated form. Subject to the provisions of [ss. 10\(5\)](#) and 12(1) a corporation may carry on business under or identify itself by a name other than its corporate name.

Once a name is settled, you can order a company seal. You should advise your client whether the name has been approved as he or she may wish to order letterhead, cheques, company documents, etc. You may then proceed to draft the necessary documents.

Procedure for incorporation

An application for a Certificate of Incorporation must include the following documents:

- Form 1: Articles of Incorporation; and
- Form 2: Initial Registered Office Address and First Board of Directors;

If you requested prior approval of your name: the letter from the Director appointed under the [CBCA](#) (Director) approving your name (please enclose a copy of the NUANS® report); If you did not request prior approval of your name: a NUANS® report not more than 90 days old as well as information pertinent to the name. If you are requesting a numbered name, it is not necessary to file a NUANS® report;

Payment of the filing fee, which is less if the transaction is completed through the Corporations Canada Online Filing Centre. There is no requirement that any form of “proof of facts” (such as affidavits) be submitted with Articles of Incorporation. It is the responsibility of the applicant, not the Director, to verify that the contents of the articles meet all requirements of the [CBCA](#).

The necessary forms are available on the Corporations Canada website. Corporations Canada has also produced a "[Guide to Federal Incorporation to help small business incorporate federally](#)" to give general overview of federal corporate law under the [CBCA](#). *This is available online and it is recommended that you review this Guide before commencing the federal incorporation process.*

Registered office

The place within Canada where the registered office is situated must be included within the articles. Such place should have geographical reference to a municipality and county or district, or where the registered office is to be located in a territory without municipal organization, the geographic township and district.

Capital

The [CBCA](#) sets out certain requirements for details regarding shares, including the following:

All shares must be without nominal or par value.

The **CBCA** gives incorporators broad discretion to designate a class of shares as common, preferred or Class A or B shares, or any other designation. Some incorporators designate classes of shares simply as Class A, Class B and "other".

You do not need to place a limit on the number of shares that the corporation is authorized to issue. You do not need to specify a maximum aggregate consideration for the issuance of shares.

Restrictions may be placed on any class of shares.

Where there is more than one class of shares, the rights, privileges, restrictions and conditions attaching to each class must be specified. At least one class of shares is to be voting, there must be a class that carries the right to receive dividends and one class that carries the right to receive the remaining property of the corporation on dissolution. If only one class of shares is created, that class will carry all those rights.

Care should be taken in drafting terms of class shares because subsequent changes in those terms may permit a holder of shares of that class or series to dissent and to be paid by the corporation the fair value of the shares held by him in respect of which he dissents. ([s. 190](#)). See also s. 2 of the Third Schedule of the **NSCA** for similar provisions.

Restrictions, if any, upon the issue, transfer or ownership of shares in the corporation must be included in the articles and the nature of the restrictions specified therein. Once a provision is inserted in the articles restricting the transferability of shares, for example, any change in those restrictions will trigger the shareholder's right to dissent under s. 190. A common type of clause restricting the right to transfer shares is as follows:

No shares shall be transferred without either (a) the previous consent of the directors of the corporation expressed by a resolution passed by the board of directors or by an instrument or instruments in writing signed by a majority of the directors, or (b) the previous consent of the holders of at least 50 per cent of the shares for the time being outstanding expressed by a resolution passed by the shareholders or by an instrument or instruments in writing signed by such shareholders.

Business and powers

A corporation incorporated under the [CBCA](#) has the capacity and, subject to the **CBCA**, the rights, powers and privileges of a natural person (ss. 15(1)). Such powers may be restricted by the articles and a corporation is prohibited from carrying on any business or exercising any powers restricted by its articles. By providing that a corporation has the capacity of a natural person, (and the abandonment of the concept of incorporation by letters patent) the **CBCA** attempts to render obsolete the case law dealing with the extent to which the *ultra vires* doctrine applies to corporations incorporated by a grant of letters patent. Again, careful thought should be given to the inclusion of restrictions on the business or powers of a corporation incorporated or continued under the **CBCA** because any addition, deletion or change in the restrictions upon the business or powers that the corporation may carry on will permit the shareholders to dissent under the provisions of s. 190.

Directors

When the articles are sent to the Director, a notice of directors in prescribed form must be filed at the same time. The directors named in that notice hold office from the issue of the certificate of incorporation until the first meeting of shareholders (ss. 106(1), [\(2\)](#)).

For more details on the Directors, see “Directors” heading below.

Special clauses

The incorporators may wish to make certain provisions a more permanent part of the constitution of the corporation, which provisions will be more difficult to change at a later time. Any provision permitted by the **CBCA** or by law to be set out in bylaws of the corporation may be included in the articles. There are approximately 15 of these provisions mentioned in the **CBCA**, which may be so included or “entrenched in the articles” as that phrase is commonly applied.

Examples of these special clauses are as follows:

- **Cumulative Voting (s. 107)**

The incorporators may wish to make provision in the articles for cumulative voting in the election of directors.

- **Preemptive rights ([ss. 28\(1\)](#))**

In order to preserve a shareholder’s proportionate dividend, liquidation and voting rights, the articles may provide that no shares of a class shall be issued unless the shares have first been offered to the shareholders holding shares of that class, and those shareholders have a preemptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others. For a detailed discussion of this topic, *see* Hay, “The Shareholder’s Pre-Emptive Right: Prevention of Director Abuse in New Share Issuance” (1984), 9 *C.B.L.J.* 2.

- **Purchase of Corporation’s Issued Shares (s. 34-36)**

The incorporators may wish to restrict the power of the corporation to purchase its own shares. For example, the power given under s. 34 is not restricted to the common shares of the corporation.

Each incorporator must normally sign the duplicate originals of the articles of incorporation and the fee is sent to the Director. If the duplicate originals conform to law, the Director is required to issue

the certificate of incorporation (s. 8). This certificate may be dated as of the day the Director receives the articles or as of any later day specified by the incorporator. The corporation comes into existence on the date shown in the certificate of incorporation.

After the certificate of incorporation has been issued, the minutes of the preliminary meetings of directors, shareholders, etc., and the other required documents may be prepared.

A corporation must prepare and maintain certain corporate records either at its registered office or at any other place in Canada designated by the directors; such records include the articles, bylaws, unanimous shareholder agreement (if any), minutes of meetings and resolutions of shareholders, notices concerning particulars of the directors and changes of directors, and a securities register. The securities register must record all securities issued by the corporation in registered form indicating the name and address of each person who is or has been a security holder, the number of securities held by each and the date and particulars of the issue and transfer of each such security (ss. 50(1)).

The corporation must also maintain adequate accounting records, and records containing minutes of meetings and resolutions of the directors (ss. 20(2)); these may be kept at either the registered office or such other place as the directors think fit (ss. 20(4)). The **CBCA** provides that where accounting records are kept outside Canada, accounting records adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis must also be kept at the registered office or some other office in Canada ([ss. 20\(5\)](#)). Such accounting records, to satisfy the requirements of the [Income Tax Act](#), would also have to contain enough information to enable the corporation's income tax liability to be calculated. Notwithstanding the foregoing, the [CBCA](#) now allows, subject to other Canadian legislation such as the *Income Tax Act (Canada)*, that a corporation is permitted to keep certain corporate and accounting records at a place outside of Canada if the records are accessible electronically at the corporation's registered office in Canada (ss 20 (5.1)).

It is not essential that separate books should be kept for all or any of the prescribed information. In many cases, companies having few shareholders keep these records in a separate section of the book that contains the minutes of the proceedings of the shareholders.

Non-public corporations governed by the CBCA have to establish a securities register detailing all individuals with "significant control" over the corporation (ss 21.1). The new share register requirements pertain to all individual shareholders, registered or beneficial, who have significant control, direct or indirect, over the corporation. An individual will be considered to have significant control over a corporation if he or she owns, controls or directs (whether directly or indirectly, such as through a personal holding company or otherwise) an amount of shares:

- carrying 25% or more of the voting rights attached to the corporation's outstanding voting shares, or
- constituting 25% or more of the fair market value of the corporation's outstanding shares.

Significant control will also be deemed to exist when an individual has influence over a corporation that, if exercised, would result in control in fact of the corporation. By way of example, individuals with the right to nominate or name a majority of the board of directors (regardless of whether such individuals are shareholders) would be considered to exert significant control over a corporation. Each individual who holds jointly, or acts jointly or in concert with others, in respect of shares meeting the 25% thresholds will also be considered a significant controlling shareholder.

The shareholder register is not available to the public, but the information in the register is available to all shareholders and creditors of a corporation who provide the corporation with an affidavit confirming they will only use the information for certain prescribed matters relating to the corporation's affairs. A CBCA corporation must also provide the information from the register to the director appointed under the CBCA upon request.

The CBCA rules will not apply to non-CBCA corporations. However, Nova Scotia is in the process of following the federal lead in this area, although the adoption of the Nova Scotia amendments to the *Companies Act* is uncertain.

Once the minutes and other required documents are prepared, then prepare the register of directors, the shareholders' ledger, and the register of transfers. The banking and signing officers' resolution can be prepared at this time as well. Upon completion of the organization proceedings, if any "officer directors" are to remain in office, it is customary to have them sign a transfer in blank in respect of their qualifying share or shares and a form of direction as to dividend distribution or a declaration of trust.

In the case of certain corporations, additional steps may be taken at the time of organization, such as the purchasing of assets and allotment of shares in respect thereof, the issue of shares, the appointment of transfer agents and other matters.

Each year a corporation governed by the **CBCA** must file an annual return with Corporations Canada and in each province where it has registered as an extra-provincial company.

c) **Disregard for the corporate entity**

Judicial disregard

Today, modern corporation statutes provide that the issuance of a certificate of incorporation by an appropriate government official operates as conclusive proof of corporate existence. *See*, CBCA ss. 9, 256(2); NSCA [ss. 26\(2\)](#), 28(1). As well in *Salomon, supra*, Lord Halsbury remarked:

Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon.

Notwithstanding these clear pronouncements, subsequent courts have sometimes ignored the separate corporate existence and held the owners or controllers personally liable. However, the often conflicting judicial decisions provide little guidance and furnish few intelligible principles concerning when personal liability will be imposed. Typical of this judicial approach is Lord Denning's comment in *Littlewoods Mail Order Stores, Ltd. v. Inland Revenue Commissioners*, [1969] 3 All E.R. 855 (C.A.) at 860.

The doctrine laid down in *Salomon's* case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group

accounts and the rest. And the courts should follow suit. [The subsidiary corporation here] is the creature, the puppet, of Littlewoods in point of fact: and it should be so regarded in point of law.

Often the courts resort to colourful language such as sham, cloak, alter ego, and pierce or disregard the corporate veil to describe their conclusion that personal liability will be imposed. This is not helpful. For example, what does it mean to pierce or disregard the corporate veil? When are you justified in concluding that a judge has pierced or disregarded the corporate veil?

Sometimes the courts fail to distinguish between whether they are disregarding the separate corporate existence or finding the corporation an agent of its owners or controllers. Consider the following comment by Thompson J. in *Clarkson Co. Ltd. v. Zhelka et al.* (1967), [64 D.L.R. \(2d\) 457](#) (Ont. H. Ct.), at 470.

If a company is formed for the express purpose of doing a wrongful or unlawful act, or if when formed, those in control expressly direct a wrongful thing to be done, the individuals as well as the company are responsible to those to whom liability is legally owed.

In such cases, or where the company is the mere agent of a controlling corporator, it may be said that the company is a sham, cloak or alter ego, but otherwise it should not be so termed.

Each case will turn on its own facts. See, for example, *De Solaberry Realities Ltd. v. M.N.R.* (1974), [46 D.L.R. \(3d\) 100](#) (Fed. Ct. T.D.), aff'd. (1976), [70 D.L.R. \(3d\) 706](#) (C.A.); *Jodrey's Estate v. Nova Scotia (Minister of Finance)*, [\[1980\] 2 SCR 774](#).

If corporations are organized in a group for certain commercial or tax reasons, Canadian courts are unlikely to later disregard the separate corporate entity for the benefit of the shareholders. *See, Kosmopolous v. Constitution Insurance Co.*, [\[1987\] 1 S.C.R. 2](#).

Statutory disregard of the corporate entity

The federal parliament and provincial legislatures have often gone much further than the courts in refusing to accept the separate existence of corporations. One important example of this for corporate counsel is the associated corporation rules in the federal *Income Tax Act*. These rules must be borne in mind by the practitioner in any corporate tax planning. They are complicated rules and they are more wide sweeping than ever before following amendments passed in 1988 to associate corporations in situations perceived by the federal Department of Finance as being abusive. To take one example, if two or more corporations are associated then the benefit of the small business deduction which provides a lower effective rate of tax in special circumstances will be lost or shared.

The associated corporation rules are found in s. 256 of the federal *Income Tax Act*. Similar legislative provisions may be found in many of the provincial labour relations statutes. For example, [ss. 1\(4\)](#) of the Labour Relations Act, R.S.O. 1990, c. L.2. provides that where, in the opinion of the Board, associated activities or businesses are carried on by more than one corporation under common control or direction, the Board may treat the corporations as constituting a single employer for the purposes of the Act. There are many other examples of this legislative intervention. The role and nature of such provisions should

be borne constantly in mind in attempting to understand the status and limits of the independent corporate personality.

There are many provisions in corporation law statutes that place personal responsibility on directors and deprive them of the protection of the separate corporate entity. For example, s. 119 of the **CBCA** makes the directors of a corporation personally liable to employees of the corporation for all debts not exceeding six months wages payable for services performed for the corporation while they are directors. For additional examples, see. [s. 118](#) of the **CBCA** but note carefully [s. 123](#), which provides some defence for the innocent director. Liability for directors and others is also to be found in the [Income Tax Act](#), which provides in [s. 242](#) that an officer, director or agent of a corporation guilty of an offence under the Act is personally guilty of and liable on conviction to the punishment for that offence if he directed, authorized or participated in its commission. There are further provisions in taxation and other legislation as well that impose personal liability on directors. For example, in certain circumstances, [s. 227.1](#) of the [Income Tax Act](#) imposes personal liability, on a director of a corporation if it has failed to deduct, withhold or remit taxes as required by the Act. However, a director will not be personally liable unless certain statutory requirements are met and the person has failed to exercise the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

4. Corporate power and capacity

Introduction

Historically, the **NSCA** required a corporation to list the objects or purposes for which it was incorporated. Corporate acts beyond its objects and power were *ultra vires*. One writer, Gower, remarked that:

The original purpose of the ultra vires doctrine was twofold. First, to protect investors in the company so that they know the objects in which their money is to be employed; and, secondly, to protect creditors by ensuring that the company's funds, to which they must look for payment, are not dissipated in unauthorized activities.

Beginning in the 1900s, the *ultra vires* rule came under increasing attack.

Reform of the *Ultra Vires* Rule

The [CBCA](#)

The *Proposals for a New Business Corporations Law in Canada* outlined three major problems in relation to *ultra vires*:

- limitations on a corporation's legal capacity;
- the tendency of objects clauses to mislead outsiders as to current activities of the business; and
- the difficulty of conferring adequate protection upon shareholders against unauthorized transactions, while at the same time safeguarding the interests of the creditors.

These problems have been addressed in the **CBCA**. The **CBCA** deems all companies to have "the capacity and, subject to [the Act], the rights, powers and privileges of a natural person" ([ss. 15\(1\)](#)). It is further provided that the right of any such company to carry on particular types of business or to

exercise particular powers may be restricted by express provisions in its articles of incorporation ([ss. 16\(2\)](#)). [Subsection 16\(3\)](#) protects the interests of third parties, *i.e.*, creditors, for example, who have contracted with a company in good faith without knowledge or reason to know of any limitation or restriction on the company's powers. The subsection does this by providing that no act of a corporation "... is invalid by reason only that the act or transfer is contrary to its articles or this Act". The doctrine of constructive notice is also largely abolished by [s. 17](#).

The effect of these provisions appears to be that any restriction or limitation in a corporation's constitution may be asserted only in dealings between the corporation and someone who has knowledge or reason to know of that limitation or restriction. The articles of incorporation are much simpler and far less likely to deceive. Creditors are protected because all otherwise valid contracts will be valid, even if restricted by the articles of incorporation unless the creditor has knowledge or ought to have had knowledge of the restriction. At least this appears to be the position, if not, why were the words "by reason only" inserted in [ss. 16\(3\)](#)?

A complainant, including a shareholder or a creditor may seek relief against transactions not authorized by the corporation's constitution by applying to the court for an order restraining a corporation from carrying out the restricted transaction pursuant to [s. 247](#).

The [NSCA](#)

The situation in Nova Scotia for companies incorporated under the [NSCA](#) is less clear. A company incorporated on or after September 1, 1982 will have, subject to the [NSCA](#), the capacity, rights, powers and privileges of a natural person according to [ss. 26\(7\)](#) and [\(8\)](#). "[S]ubject to this Act" creates certain statutory restrictions on the company, for example, such as not having corporate existence or capacity outside Nova Scotia for functions exercised outside of Nova Scotia that are required to be exercised in Nova Scotia ([ss. 26\(15\)](#)).

A third party who has contracted with the company in good faith and without knowledge of its restrictions seems to be protected by [s. 30](#), which was proclaimed in force on September 1, 1982. Under this section, a company or guarantor of an obligation of the company may not assert against a person dealing with the company that the memorandum of association has not been observed. For example, the contract relates to an area outside of a restricted area of business activity. In this case, the third party seems to be protected except where the person has or ought to have knowledge to the contrary.

It is unclear, however, whether or not the company can use the *ultra vires* doctrine as a defence against the claims of a third party since the [NSCA](#) contains no provisions similar to [ss. 16\(3\)](#) of the [CBCA](#). A judicial interpretation is required on this point.

For companies incorporated before September 1, 1982, the *ultra vires* doctrine may be applicable in its full force. To avoid this situation, the company must change to a company which has, pursuant to [ss. 26\(7\)](#), the capacity, rights, powers and privileges of a natural person. The change must be completed by way of a [clause 19\(1\)\(j\)](#) alteration to its memorandum of association.

A company incorporated under the laws of any jurisdiction other than Nova Scotia which applies for and is granted a Certificate of Continuance under the [NSCA](#) must function pursuant to the laws of Nova Scotia ([ss. 133\(1\)](#)) and shall be governed in all respects by the provisions of the [NSCA](#) ([ss. 133\(3\)](#)). Accordingly, the provisions mentioned above dealing with *ultra vires* acts would be applicable to such a company.

5. Corporate financing

Introduction

Business corporations require funds for two main purposes:

- to acquire assets, and
- to pay liabilities.

Initially a corporation will require funds to acquire plant, machinery, equipment, raw materials or inventory and to engage new staff before the corporation is in a position to commence operations. Once the business is established additional funds will be required on an annual basis for expansion and payment of liabilities.

In general, there are two main sources of financing available to a corporation. They are:

- internal, and
- external sources.

It is obvious that internal sources are only available to established businesses. Internal sources include retained earnings, cash retained for depreciation, issuance of rights to existing shareholders and borrowings within a group of associated corporations. External sources include sale of shares to the public, sale of bonds or debentures to the public, sale of secured notes or unsecured notes, bank borrowing and private placement of securities.

Terminology

Introduction

The three basic elements common to all business enterprises are

- the risk of loss,
- the power of control, and
- the participation in the profits of the business enterprise while it is a going concern and in its assets on the dissolution of the enterprise.

In a business corporation, the allocation of these three elements is effected through the “capital structure” of the corporation. Depending upon the classes of securities issued, their terms of issue and relative amounts in the capital structure, it is possible to share each element in an infinite number of proportions.

The term “securities” is used in corporation law to cover a wide variety of corporate instruments that may be subdivided into two classifications:

- Equity securities, which create a shareholder relationship; and
- Debt securities, which create a creditor-debtor relationship between the holder of the security and the corporation.

Equity securities

The term equity securities is applied to the shares of a business corporation. Most business corporations have one or more classes of shares as part of their capital structure. A “share” is the interest of a shareholder in a corporation measured by a sum of money and made up of various legal and equitable rights and obligations. It should be noted that shares are the only form of security issued by a corporation that does not result in the creation of a creditor-debtor relationship. When a person becomes a shareholder, she ceases to have any further proprietary rights or interest in the consideration that she gave for the shares. This point is emphasized by Lord Wrenbury in *Bradbury v. English Sewing Cotton Company Limited*, [1923] A.C. 744, 767:

A share is, therefore, a fractional part of the capital. It confers upon the holder a certain right to a proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in a winding-up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. The aggregate of all the fractions if collected in two or three hands does not constitute the corporators the owners of the capital—that remains the property of the corporation. But nevertheless the share is a property in a fractional part of the capital.

Lord Wrenbury’s definition of a share leads one to the conclusion that all of the shares of all classes make up the “legal capital” or “share capital” of the corporation. The vague word “capital” means different things to different people depending on the context and the sense in which the word is used. To the business person the word capital means the assets employed to conduct the business activity. To the accountant, it means the capital referred to in the liabilities side of a corporation’s balance sheet. To the corporation lawyer, it may mean either the authorized or issued share capital of a corporation.

The authorized capital is the amount of share capital which the corporation, by its basic constitutional document, is authorized to issue. It is usually expressed as a dollar amount in the case of shares having a par value, such amount being the product of the par value multiplied by the number of shares. In the case of shares having no par value the authorized share capital is often expressed simply as the number of shares authorized with no dollar amount specified. The issued share capital or “stated capital”, as it is called under the [CBCA](#), is that part of the authorized share capital that has been sold to the shareholders. It is normally stated as a dollar amount being the product of the par value multiplied by the number of shares issued in the case of shares having a par value, and the consideration actually received in the case of shares having no par value.

The par value concept has been described by one leading academic writer as “a concept which is useless, confusing and outmoded”. This view is supported by the drafters of the *Proposals for a New Business Corporations Law for Canada* (Vol. I, pp. 97-101), who concluded that par value shares are undesirable for the following reasons:

[[Section 24\(1\)](#) of the [C.B.C.A.](#)] prohibits the issue of shares with par value because par values are arbitrary and misleading. If an investor buys 1,000 shares of \$1 par value in a corporation with an issued capital of 10,000 shares of \$1 par value the true measure of his investment is not \$1,000 but a 10% share in the business, the value of which must necessarily fluctuate as the fortunes of the business change. He is unlikely to have paid exactly \$1,000 for his shares, nor will \$1,000 represent their current market value or liquidation value. A share is simply a proportionate interest

in the net worth of a business. Par values obscure this reality, while the concept of a share without par value precisely embodies it (though the words no par value are, strictly, redundant). What matters to an investor is the proportionate size of his investment in a corporation, not the arbitrary monetary denomination attributed to that investment. Par value may be especially misleading to an unsophisticated investor. A share with a par value of \$5 might well appear to be a bargain at \$2, even though the share is in fact worthless. ...

At a time when it appears to be the policy of both government and the business community to encourage wider ownership by Canadians of shares in Canadian corporations, we think everything possible should be done to eliminate practices likely to mislead.

No par shares also give greater flexibility in arranging a corporation's capital structure. A corporation with no par shares trading at so high a price as to hinder their marketability can easily split these shares into a larger number of shares, each of which will still be of no par value. Correspondingly, if the market price has fallen below the issue price, a corporation can raise additional capital by issuing additional shares at the current market price ...

Another reason for abolishing the concept of par value is our wish to eliminate the accounting and disclosure problems which result from it. Much confusion has been caused in the past by such terms as "paid-in surplus", "contributed surplus" and "distributable surplus" which have been used to reflect the amount in excess of par value received by a corporation upon the issue of its shares. Terms like these have cluttered and confused many a corporate balance sheet. Par value leads to a great deal more confusion when corporations are allowed to purchase their own shares. Each such purchase leads to problems of accounting for and reflecting the "profits" or "losses" arising when the shares are purchased at prices different from par. As will be seen later in this Part, we have relaxed the traditional prohibitions against corporations purchasing their own shares. We have decided that this progressive step should not be marred by the accounting confusion which would result from retaining the archaic and meaningless concept of par value.

The **NSCA** continues to allow for the issuance of par value shares. ([ss. 10, 26\(17\)](#)). Par value shares can be useful to practitioners in circumstances where shares are being exchanged for one another and the parties want to document that the par values are the same for each.

Capital accounts

A **CBCA** corporation is required to maintain a capital account for each class or series of shares issued by the corporation (**CBCA** [ss. 26\(1\)](#)) and to add to the appropriate capital account the full amount of consideration it receives in issue of the share (**CBCA** [ss. 26\(2\)](#), subject to [ss. 26\(3\), \(4\)](#)).

A **NSCA** corporation is required to add the aggregate amount of the consideration it receives for the issue of no par value shares to the appropriate capital account of the company. If the shares are par value shares, the total par value amounts shall be added to the capital (**NSCA** [ss. 26\(17\), 51\(13\)](#)). The 2008 amendments to the **NSCA** introduced the concept of capital accounts into the **NSCA** ([ss. 26\(17\)-\(23\)](#))

and allow for the addition to the capital accounts similar to the [CBCA](#) by special resolution, including for the capitalization of contributed surplus and retained earnings.

It is important to quantify capital from a corporate law perspective because the amount in the capital account serves to limit the ability of a corporation to make payments to shareholders ([NSCA ss. 51\(5\)-\(13\)](#); [ss. 110\(5\), \(6\)](#); [CBCA ss. 34\(2\), 35\(3\), 36\(2\), 38\(3\), 42, 44](#)).

Classes of equity securities

Equity securities (shares) may be subdivided into various classes with different rights attaching to the classes. Shareholders rights fall into the following three major categories:

- right to dividends;
- right to a return of capital on a winding up, or on an authorized reduction of capital; and
- right to attend and vote at meetings of shareholders.

Historically the classes of shares of a corporation were designated as either common or preferred shares. This terminology still remains under the [NSCA](#); however, it is not readily applicable under the [CBCA](#).

a) Common shares

In the historical nomenclature, common shares represent the residual interest of the holders thereof in the assets, earnings and control of the corporation. If the corporation prospers, the increase in value accrues to the common shares since the preference shares are normally given a fixed dividend rate. On the other hand, if the corporation suffers losses, in liquidation the common shareholders will bear the burden of such losses since the preferred shares normally receive a return of capital before the common shareholders receive anything. Using the historical nomenclature, is it possible to have more than one class of common shares or, for that matter, to have no class of common shares?

If a [CBCA](#) corporation has only one class of shares, [ss. 24\(3\)](#) indicates the rights of the holders are equal in all respects and include three basic rights: voting, dividend and liquidation. The point is made indirectly in the case of a [NSCA](#) company under [NSCA ss. 26\(16\)](#).

b) Preferred shares

Preferred securities have been described as “compromise securities”. They are an attempt to endow the investor with certain vague and unenforceable rights against the earnings of a corporation without giving her a lien on the earnings. The preferred security holder is not a creditor of the corporation. She has no security as one might get with the purchase of a bond or debenture. For example, a bondholder usually would be secured with a specific charge on real property of the corporation. A debenture often is secured by a floating charge over all the assets of the corporation.

A corporation cannot issue secured preferred shares in the sense that they have some right of return of capital that is equal or superior to the rights of creditors to payment of their claims. Preferred shareholders are risk-takers who are required to invest capital in the business and who can look only to what is left after creditors are fully provided for. They rank behind creditors but before common shareholders (if specified) on a voluntary or involuntary dissolution of the company. This is a big disadvantage. In addition, the preferred shares can usually be redeemed at the company’s option, which can be particularly frustrating in prosperous times.

A preferred shareholder usually does not participate in the increased earnings of the corporation. Her opportunity for gain is restricted, her chance of loss is greater than the bondholder or debentureholder but less than the common security holder.

In summary, a preferred shareholder always remains a shareholder. The only difference between her and the other shareholders is that her rights are different to the extent of the preferences or limitations expressed in the preferences share conditions. Although she does get certain preferences, she has to relinquish some of the normal rights of a shareholder. For an interesting fact situation that raised the question of the distinction between a preferred share and a debt obligation, *see, Kippen v. Bongard, Leslie & Co. Ltd. et al.* (1977), 1 B.L.R. 57 (Ont. Sup. Ct.).

The distinguishing feature of a preferred share is that it is a share that gives the holder some preference or priority over the holders of shares of another class. No one particular preference, such as a preferential dividend, is required for a share to be a preferred share, and if a share carries any preference whatsoever, no matter how slight, it may properly be considered a preference share. The degrees and kinds of preferences are almost limitless. They depend upon the particular financial conditions at the time of creation and the individual circumstances of each corporation.

Under the [CBCA](#), classes of shares, if any, must be set out in the articles. New classes of shares may be created by special resolution pursuant to the provisions of [section 173](#).

Under the [NSCA](#), preferred shares may be created by the memorandum, the articles or by a special resolution—*supra*. ([NSCA ss. 2\(o\), 50, 51](#); Table A, [ss. 50, 51, 68](#); Third Schedule, [s. 2](#); [CBCA ss. 2\(1\)](#) (“series”), 6(1)(c), 24, 27, 39(1), 49(10)-(11), 173(1)(e)-(k)).

Becoming a shareholder

The [NSCA ss. 26\(2\)](#) provides that the subscribers to the memorandum of association of a company shall be deemed to have agreed to become members of it, and on its registration shall be entered as members in the register of members which each company is required to keep pursuant to ss. 42(1) of that Act. In addition, [section 10\(c\)](#) provides that, in the case of a company with share capital, each subscriber must state the number of shares she takes, not being less than one ([ss. 10\(b\)](#)), together with her address and occupation. The effect of a similar provision in the UK *Companies Act* has been held to be that on registration of the company, a subscriber automatically becomes a member and holder of the shares for which she has signed, even if the company omits to fulfil its duty to put her on the register of shareholders or to allot the shares to her. *See, Evans’s Case* (1867), L.R. 2 Ch. App. 427. When the company not only fails to allot any shares to the subscriber but allots them all to other persons, then the subscriber apparently is limited to a suit against the company for breach of contract. *See* Gower (3rd ed. 1969), p. 375. The incorporators of a corporation under the [CBCA](#) are not required to subscribe for shares and, accordingly, it does not contain a provision similar to [ss. 35\(1\)](#) of the [NSCA](#).

After incorporation a person may become a shareholder in one of three ways. These are:

- by agreeing with the corporation to become a shareholder;
- by taking a transfer of shares from an existing shareholder; or
- by operation of law, for example, by transmission in the event of death of a shareholder.

See generally, [NSCA](#), [ss. 26\(2\), 26\(17\), 34, 35, 44, 45, 94\(2\)](#). Table A, [s. 5](#); [CBCA](#), [ss. 24, 25\(1\), 26, 40, 48\(2\)](#) (“holder”), (“security”), 49(1), 50, 241(3)(k), 245, 257(3).

Consideration for shares

The consideration for the issue of shares may be in money or money's worth. Both the [NSCA](#) and the [CBCA](#) give corporations power to issue and allot shares in payment or part payment of any real or personal property purchased or otherwise acquired by the corporation or any service rendered to the corporation. The consideration may be the transfer of property or may be past services rendered to the corporation.

Financial assistance in connection with purchase of shares

Today, most modern corporation law statutes permit financial assistance to be given in some circumstances provided that the financial interests of shareholders and creditors are protected. In certain cases, a corporation may provide financial assistance without specific statutory restrictions on its ability to do so.

The NSCA historically contained restrictions on financial assistance in section 110(5) and (6), as of June 1, 2008 these sections were repealed. [Section 110A](#) specifically permits financial assistance to any person for any purpose.

6. Shareholders

Introduction

As earlier noted, a share gives the holder a proportionate interest in control, distributions and assets remaining on liquidation of a corporation.

Majority rule is a fundamental concept of corporation law. A person who acquires shares in a corporation is deemed to have agreed to submit herself to a decision of the majority at meetings of the shareholders of that corporation in connection with all issues that are within the jurisdiction of and are dealt with at such meetings.

Minority shareholders are protected by the common law right of discussion, the rights which they have under the relevant corporation statute, the articles and bylaws of the corporation, and under the general law.

In general, subject to any statutory provision to the contrary, so long as the majority acts in good faith in connection with the matters dealt with at duly constituted meetings, which are within the jurisdiction of such meetings, the decisions of the majority will be binding on all the shareholders and express the position of the corporation.

Shareholders have a rather restricted role in corporate decision making, either because the articles of association provide such authority in large part to the directors (as under the English [*e.g.*, [NSCA](#)] system), or because the incorporating statute dictates that the directors shall manage the business and affairs of the corporation (*e.g.*, [CBCA](#)). In general, shareholder powers may be broken into two categories:

- the power to annually elect directors and appoint auditors (by way of ordinary resolution that requires the support of a simple majority); and
- the power to effect fundamental changes (*e.g.*, the amalgamation of the corporation or company with another corporation or company) (by way of special resolution that requires the support of

two-thirds of the votes cast in the case of a [CBCA](#) corporation and three quarters of the votes cast in the case of a [NSCA](#) company).

Shareholders must also approve the creation or amendment of all by-laws (in the case of a [CBCA](#) corporation: [ss. 103\(2\)](#), [\(5\)](#)) or articles of association (in the case of an [NSCA](#) company: [ss. 20\(1\)](#), [s. 21](#), [ss. 23\(1\)](#)).

See generally, [NSCA](#), [ss. 83-90](#), [92](#); Third Schedule, [ss. 8](#), [9](#), [12\(3\)](#); Table A, [ss. 74-106](#); [CBCA](#), [ss. 103\(5\)](#), [132](#), [133](#), [134](#), [135-146](#), [147-154](#), [173-179](#), [183](#), [188\(1\)\(3\)\(4\)\(5\)](#), [189\(2\)-\(7\)](#).

Voting and related matters

Introduction

Generally, unless the terms of issue of shares provide otherwise, each share entitles its holder to one vote ([CBCA ss. 140\(1\)](#); [NSCA](#) Table A, [ss. 96\(1\)](#)). Where a corporation has more than one class of shares, voting rights may differ between classes; however, voting rights within a class must be equal: *Bowater Crain Ltd. v. R.L. Crain Inc.* (1987), 62 O.R. (2d) 752 (C.A.). In respect of certain fundamental changes (*e.g.*, the sale of all or substantially all the property of the corporation), each share carries the right to vote (whether or not the share otherwise carries the right to vote) ([CBCA](#) [ss. 189\(6\)](#); [NSCA s. 135A](#), Third Schedule [s. 12\(1\)](#)), and that change may have to be approved separately by the holders of each class by a majority of not less than two-thirds of the votes cast in respect thereof ([CBCA](#) [ss. 189\(7\)](#); [NSCA s. 135A](#), Third Schedule, [ss. 12\(1\)](#)).

Notice

The Table A articles of association, [s. 81](#), refers to notice being given to members “entitled to be present at the shareholders’ meeting...”. The [CBCA](#) provides much clearer rules concerning who is entitled to notice and to vote at shareholders’ meetings ([CBCA ss. 134](#), [138](#)).

Annual and other meetings

i. Annual

Every corporation is required to hold an annual general meeting of shareholders within the time frame specified in the governing legislation ([CBCA](#) [s. 133\(a\)](#); [NSCA ss. 83\(1\)](#), Table A, [ss. 74](#), [75](#)). Normal business at an annual general meeting involves the following:

- election of directors ([CBCA ss. 106\(3\)](#), [NSCA](#), Table A, [s. 84](#));
- appointment of the auditor unless exempted or dispensed with ([CBCA](#) [ss. 162\(1\)](#), [163\(1\)](#); [NSCA ss. 117\(1\)](#), [118](#)); and
- consideration of the corporation’s financial statements and auditor’s report, if any ([CBCA ss. 155\(1\)\(b\)](#); [NSCA](#) [s. 121](#), Table A, [s. 84](#)).

The notice and quorum requirements are specified either in the statute or constitutional documents of the company ([CBCA ss. 135\(1\)](#), [139\(1\)](#); [NSCA](#) Table A, [s. 81](#), [85-87](#)).

ii. Special meetings

A corporation may also hold special meetings at which any business may be transacted, provided proper notice has been afforded shareholders. Usually special meetings are called by the directors when there is a need to require approval of the shareholders to a major corporate matter such as the amalgamation of the corporation. ([CBCA s. 133\(b\)](#), [183\(1\)](#); [NSCA](#) Table A, [s. 76](#)). Special meetings

can also be requisitioned by the appropriate percentage of shareholders. ([CBCA s. 143](#); [NSCA s. 84](#), Table A, [s. 76](#))

iii. Court ordered meetings

Under the [CBCA](#), the court may order that a shareholders' meeting be held ([CBCA ss. 144\(1\)](#)). In addition to "impracticability" it may order a meeting to be called "... for any other reason". The [NSCA](#) does not contain a provision like ss. 144(1). In *South Shore Development Ltd. v. Snow* (1971), [19 D.L.R. \(3d\) 601](#) (N.S.S.C.(T.D.)), Jones J. held that there is an inherent power in the court to direct the holding of a meeting of a company.

Both the [CBCA](#) and [NSCA](#) provide for resolutions in writing signed by all the shareholders entitled to vote at a meeting being as valid as if passed at a meeting. ([CBCA](#) ss. 142(1)(a); [NSCA ss. 92\(1\)](#)).

Conduct of meetings

The actual conduct of shareholders' meetings is largely within the discretion of the person chairing the meeting. On this topic *see generally*, Jenkins, *The Conduct of Canadian Meetings Company Law and Common Law* (Toronto, Butterworth & Co. Ltd., 1983).

[Subsection 137\(1\)\(b\)](#) of the [CBCA](#) gives a shareholder who is entitled to vote at a meeting a right of discussion. *See also*, *National Dwellings Society v. Sykes*, [1894] 3 Ch. 159 for a discussion of the common law position. The chairperson of a meeting has a duty which has been decided by Carthy J.A. in *Blair v. Consolidated Enfield Corp.* ([1993](#)), [15 O.R. \(3d\) 783 \(C.A.\)](#) as "one of honesty and fairness to all individual interests, and directed generally toward the best interests of the company." *See also*, *Blair v. Consolidated Enfield Corp.*, [\[1995\] 4 S.C.R. 5](#).

In order that the business transacted at a shareholders' meeting may be valid it is necessary that all provisions as to calling of the meeting be carried out exactly. The articles of association or bylaws usually contain a provision that accidental omission to notify any shareholder shall not invalidate the business of the meeting. If all the shareholders waive, in writing, notice of the meeting, this would correct any irregularities as to notice. Where a meeting is held without proper notice and one of the shareholders did not sign a proxy or waiver nor consent to the business transacted, such business is invalid. *See Anderson Lumber Co. Ltd. v. Canadian Conifer Ltd.* (1977), [77 D.L.R. \(3d\) 126](#) (Alta. Sup. Ct. App. Div.).

Matters coming before a shareholders' meeting are ordinarily dealt with by the moving and seconding of a motion which, after reasonable opportunity for discussion, is put to a vote. A motion duly passed becomes a resolution. Subject to any provision in the governing statutes, or in the by-laws of a company, ordinarily resolutions are decided by a majority vote. Subject to the statute and the provisions of the constitutional documents, each issued share carries the voting right of one vote. A shareholder has the right to refrain from voting and he or she has the right even if he or she has voted but before the result of the vote is declared by the chair to change that vote if it is by show of hands. If the vote is by ballot, the shareholder has the right until the time the ballot is handed to the chair or the scrutineer. A shareholder may either attend and vote in person at meetings or may appoint another person to act as proxy.

Voting at shareholders' meetings is usually by show of hands or by ballot. If a vote is by show of hands a shareholder has only one vote irrespective of the size of her shareholdings and a shareholder holding proxies has only one vote no matter the number of proxies she holds. A representative appointed by a corporate shareholder may vote on a show of hands.

A shareholder has the right to demand a poll but if there is a vote by a show of hands the demand must be made as soon as the vote is over and once a poll is demanded a vote on a motion by a show of hands becomes a nullity. In the absence of the demand for a poll, the chair's declaration that a vote is carried is final.

Once a demand for a poll has been made it cannot be withdrawn without the consent of the meeting. A poll is generally taken by ballot or in such manner as the bylaws provide and if there is no provision in the bylaws, as the chair may direct. On a poll every shareholder has a vote for each share, subject to any rights attached to any class or classes of shares.

For a detailed discussion of the powers of a chairperson to adjourn meetings of shareholders, *see, Byng v. London Life Association Ltd. et al.* (1988) 42 B.L.R. 280 (U.K.C.A.), especially the judgment of Sir Nicolas Browne-Wilkinson V-C.

The proxy voting system

The AG's Committee on Securities Legislation, Ontario, 1966, defined an "instrument of proxy" as "an instrument in writing whereby a shareholder of a company appoints another person to attend and act on her behalf at the meeting of shareholders in the same manner and to the same extent as if the shareholder himself were present at the meeting."

At common law, shareholders in a business corporation were not allowed to vote by proxy. Today proxy voting is regulated by both corporations and securities statutes.

Both the [CBCA](#) (s. 148(1)) and the [NSCA](#) (s. 85 B(1)) allow all shareholders to vote by proxy and the person appointed does not need to be a shareholder.

Under the [CBCA](#), management is required to solicit proxies from shareholders except where the corporation:

- a) is not a distributing corporation; and
- b) has 50 or fewer shareholders entitled to vote at a meeting, two or more joint holders being counted as one shareholder.

([CBCA](#) s. 149(1)(2)). Management of a [NSCA](#) company is only required to solicit proxies if the company is a reporting issuer within the meaning of the [NSSA](#). ([NSCA](#) s. 85C) A solicitation must be accompanied by a form of proxy in required form, notice of meeting, and a management proxy circular which contains detailed information about the corporation, proposed transactions and individuals nominated for director positions ([CBCA](#) ss. 148(1), 150(1), regs. 32-43; [NSCA](#) ss. 85C, 85D, reg. 3).

Although a complete discussion of the concept of "reporting issuer" is beyond the scope of these materials, the definition of "reporting issuer" in the [NSSA](#) includes, inter alia, an issuer that has filed a prospectus and obtained a receipt pursuant to the [NSSA](#), a company whose existence continues following a statutory amalgamation, arrangement or other procedure where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least 12 months, and an issuer who is declared to be a reporting issuer in an order made by the Commission.

When a shareholder solicits proxies from other shareholders the legislation requires a dissident's information circular in prescribed form to be sent (**NSCA ss. 85D(1)(b)**) Proxies may be solicited under the **CBCA** without sending a dissident proxy circular if fewer than 15 persons are solicited and in certain other prescribed circumstances. (**CBCA s. 150**)

See generally, **NSCA ss. 85A-85F, 86**, reg. 5; **CBCA ss. 140(2), 147-154**, regs. 32-43.

Shareholder proposals

Under corporation statutes and the common law, the range of action open to shareholders to control the internal government of the corporation is limited. Aside from the law itself, one of the biggest problems facing the shareholder is the reality of today's corporate life. It is clear that in large corporations the focus of decision making has shifted so much from directors to senior management, that in practice the shareholders' opportunities to influence critical corporate decisions are minor. As a matter of law, however, there are some particularly contentious problem areas of shareholder democracy. They include access to shareholder meetings; range of permissible discussion at meetings; lack of any requirement for sending out post-meeting reports to shareholders as to what transpired at the general meeting; management control of proxies (*see infra*); election of directors (*see infra*). Getz, in ***The Structure of Shareholder Democracy***, Ziegel, Vol. 2, Ch. 6, at p. 239, considers these issues and the article should be consulted for further detail.

Professor Getz states that the range of action that may validly be decided upon at a meeting of shareholders is defined by the operation of two separate principles — the principle of constitutionality and the principle of notice. It must be borne in mind that under the **NSCA**, it is permissible for the Articles of Association to provide that the shareholders can themselves manage the affairs of the corporation although the Table A articles provide otherwise. There is considerable scope for planning the affairs of a close corporation under the **NSCA**. Compare the provisions of **ss. 6(2), 102(1) and 103(5)** of the **CBCA**.

The notice principle requires that all items to be acted upon at the shareholders' meeting be properly identified and described in sufficient detail to permit shareholders to form a reasoned judgment concerning such items, *see, Re Hampshire Land Co.*, [1896] 2 Ch. 743.

Under the **CBCA**, the statute and regulations govern the identification of items and the quantum of detail required. *See, CBCA ss. 135(5)(6), s. 149, 150* and **CBCA Regs. 32-36, 42**. For a decision on the quantum of detail required "... to permit shareholders to form a reasoned judgment concerning the matter ...", *see Re Ardiem Holdings Ltd. et al.* (1976), **67 D.L.R. (3d) 253** (B.C.C.A.).

The articles of a company incorporated under the **NSCA** may distinguish between "special" and "other business" and provide that the general nature of special business' must be set out in the notice of meeting (*see also, ss. 135(5)(6)* of the **CBCA**). Furthermore, in the absence of statutory provisions, management cannot be compelled to include in the notice any reference to proposals other than its own; nor is it under any obligation to make reference to any non-management view of the matters to be discussed.

At common law, management can take whatever steps it considers appropriate to explain and advocate its proposals, and may use the corporate machinery and assets for this purpose. The management of a corporation at common law was under no obligation to make any reference, in any of the documents sent out by it, to any non-management view of the matters to be discussed (*see, Campbell v. Australian*

Mutual Provident Society (1908), 24 T.L.R. 623), nor to include in a notice of meeting any proposals other than its own (*see*, Gower: *Modern Company Law*, 3rd ed., 1969, at p. 479). This placed shareholders wishing to have a matter discussed at a meeting at a serious disadvantage because the meeting could not effectively do anything not fairly comprehended by the notice of meeting. Both s. 9 of the Third Schedule to the [NSCA](#) and [s. 137](#) of the [CBCA](#) accordingly seek to provide a suitable alternative by enabling a voting shareholder, at the expense of the corporation, to communicate with her fellow shareholders on certain matters of common concern and also to bring up at any meeting anything the shareholder is permitted to communicate under the Act.

The machinery of [s. 137](#) permits a shareholder in a corporation to which the proxy provisions of the [CBCA](#) apply to have a proposal included in management's proxy circular ([ss. 137\(2\)](#)). The shareholder is only entitled to have her proposal included if she gives adequate notice of it ([ss. 137\(5\)\(a\)](#)). Paragraphs (b) and (e) of s. 137(5) are designed to make it clear that the shareholders' meeting is not an appropriate forum for discussing personal grievances or life in general, while paragraphs (c) and (d) are intended to protect management and the shareholders generally from being harassed by repetitious discussion of stale matters. By s. 137(7) a corporation must notify any shareholder whose proposal it refuses to circulate, while subsections (8) and (9) allow either party to seek the court's assistance.

[Paragraph 137\(5\)\(b\)](#) allows shareholder proposals to be omitted from management proxy circulars where "it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers, or security holders". What is the interrelationship between [ss. 103\(5\)](#) and [137](#) of the [CBCA](#)? If a proposal is passed by the shareholders is it binding on the board of directors? Does the answer depend upon the subject matter of the proposal?

Access to corporate records

Shareholders and creditors of a [CBCA](#) corporation are given wide access to corporate records. These include: the articles, by-laws, unanimous shareholders agreement, minutes of meetings and resolutions of shareholders, notice of directors and changes therein, and the securities register ([CBCA s. 21](#)). Interested persons may inspect the register of shareholders of a [NSCA](#) company ([NSCA s. 43](#)). Shareholders may also access the books containing the minutes of proceedings of any general meeting of a [NSCA](#) company ([NSCA ss. 90\(1\)](#)). Any refusal to provide access under the [NSCA](#) may now be appealed to the Registrar at first instances under [section 43\(5\)](#) and the Registrar may order the company to provide affidavit or a sworn declaration setting out reasons for the refusal under [section 43\(6\)](#).

The case of *Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.*, [2009 NSSC 55](#) dealt with access to financial information by a minority shareholder. Haliburton J. held at paragraph 34 to 37 set out below that the company had not established that permitting the minority shareholder to review the financial statements would be detrimental to the company:

[para 34] The onus is upon the company to establish that permitting the shareholder to examine the financial statements in question would cause detriment to the company. That onus is established both by the wording of the Statute and by the cases which have been reviewed. That onus has not been met. This is not a case where the respondent is a competitor of the company, nor is the respondent an agency or trade group seeking to have the information for the purpose of publication. There is no suggestion that Mr. Bryant has applied to see additional financial information on the company for any illegal or improper purpose.

Evaluating the shares and assessing the management of a joint stock company is a legitimate shareholder exercise.

[para 35] The Respondent, Paul Bryant, will not be barred from viewing the financial statements of the subsidiaries. The applicant has not established the risk of detriment to the company which would result from that examination.

[para 36] The information which must be disclosed to the shareholder is the information enumerated in the third schedule. That is to say with respect to each company its statement of income, statement of retained earnings, statement of changes to financial position and balance sheet.

[para 37] While I have already expressed my own view that the financial information contained in these various statements is of no interest to the public and is of no use to persons other than the shareholders, I am prepared to grant an appropriate order binding Mr. Bryant to share the information with no one other than his accountant and/or his solicitor. Other shareholders may have the same interest in gaining information about the value of their shares as has Mr. Bryant and accordingly, upon filing a letter with the court in this application within 30 days of the filing of this decision they will be accorded the same rights and obligations as Mr. Bryant. An order which will include those share holders will issue after 30 days.

This case was appealed to the Nova Scotia Court of Appeal. The appeal was allowed in part on other grounds. See *Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.*, [2010 NSCA 17](#).

7. Directors

Introduction

A corporation must have a board of directors with at least one director ([NSCA](#) s. 93; [CBCA](#) ss. 102(2)). A [CBCA](#) corporation that has offered its securities to the public and continues to have them outstanding must have at least three directors, and two of them must not be officers or employees of the corporation or its affiliates.

Under both the [NSCA](#) and the [CBCA](#), the first directors are named at the time of incorporation ([NSCA](#) ss. 94(3); [CBCA](#) ss. 106(1), [\(2\)](#)). The [CBCA](#) makes it clear that these persons act as directors until the first meeting of shareholders and thereafter directors are elected by ordinary resolution ([CBCA](#) [ss. 106\(3\)](#)). Under the [NSCA](#) regime, directors are elected in accordance with the company's articles of association ([NSCA](#), Table A, s. 116).

Under the [NSCA](#), [ss. 94\(1\)](#), a person must consent in writing to act as a director and her name must be included in the list of persons who have consented to be directors of a company. This list must be delivered to the Registrar of Joint Stock Companies pursuant to [ss. 94\(3\)](#). In [ss. 94\(4\)](#) there are limited exceptions to these statutory requirements. The [CBCA](#) provides that the election or appointment of a director is valid only if the person attends the meeting at which she is elected or appointed and does not refuse to hold office, or, if the person did not attend, either consents in writing either before or within ten (10) days of the election or appointment or subsequently acts as a director ([CBCA](#) [ss. 106\(9\)](#)). The articles of incorporation of a [CBCA](#) corporation may provide for both cumulative and class voting for

directors ([CBCA](#) s. 107, ss 109(2)). If these two exceptions to the simple majority vote rule for the election of directors in **NSCA** companies are going to be made the articles of association must so provide.

When incorporating under the [CBCA](#), after the issue of the certificate of incorporation an incorporator or director may call a meeting of directors. The directors may make bylaws and conduct all of the other business required to complete the organizational procedures of the corporation ([CBCA](#) ss. 104(1)). The introduction of ss. 104(1) of the [CBCA](#) renders unnecessary the series of meetings of directors and shareholders that formerly characterized the organizational procedures under the [NSCA](#). If the permanent shareholders are named as first directors, then the meeting of the directors need be the only organizational meeting held. If, on the other hand, office incorporators are used, then a shareholder's meeting will be required after the meeting of first directors to elect permanent directors.

It should be noted that the [CBCA](#) contains certain rules regarding the qualifications of directors ([s. 105](#)).

Note that at least 25 per cent of the directors of a [CBCA](#) corporation must be Canadian residents. However, some restrictions apply:

- If the corporation has fewer than four directors, at least one of them must be a resident Canadian ([CBCA](#) s. 105(3)).
- If the corporation is required by a federal Act or regulations to meet specific requirements respecting Canadian participation or control (e.g., corporations carrying on air transportation or telecommunications businesses), a majority (50% + 1) of its directors must be resident Canadians ([CBCA](#) s. 105(3.1)).

If the corporation is carrying on one of the following businesses, a majority (50% + 1) of its directors must be resident Canadians: uranium mining, book publishing or distribution, bookselling, where the sale of books is the primary part of the corporation's business and film or video distribution.

However, if a parent corporation belonging to one of those categories (i.e., carrying on a business referred to above, or that must meet requirements respecting Canadian participation or control under a federal Act or regulations) and its subsidiaries earn less than five per cent of their gross revenue in Canada, only one third of the corporation's directors need be resident Canadians ([CBCA](#) s. 105(4)).

Management

Directors have the legal power to manage the business and affairs of the corporation under the [CBCA](#), subject to the provisions of a unanimous shareholders agreement ([CBCA](#) s. 102(1)). The **NSCA** is silent on matters of management leaving it to the articles of association. Normally articles of association confer wide management powers on the directors (**NSCA**, Table A, [s. 147](#), 148).

Directors act by majority rule at meetings of which proper notice has been given. The notice requirements, procedure, quorum and location for directors meetings of [NSCA](#) companies are largely left to the articles of association (**NSCA**, Table A, [ss. 128-134](#)). For [CBCA](#) corporations these matters may be set out in the articles of incorporation, bylaws or left to the provisions of the [CBCA](#) itself ([CBCA](#) s. 114). Today a resolution signed by all the directors entitled to vote is as valid as if it had been passed at a meeting ([CBCA](#) [ss. 117\(1\)](#); **NSCA** [ss. 91\(1\)](#)).

Removal

A director ceases to hold office upon a resignation being submitted to the corporation ([CBCA ss. 108\(1\)\(a\)](#)). Subject to special rules in the case of directors elected under cumulative voting or class voting provisions, a director may be removed by ordinary resolution at a special meeting of shareholders ([CBCA ss. 109\(1\)](#)). For an NSCA company, s.10 of the *Corporations Miscellaneous Provisions Act* requires a special shareholders resolution to remove a director, but the director may voluntarily resign in accordance with procedures in the company's Articles.

Delegation

Powers are conferred on the board of directors collectively as a board. At common law, directors had no right or authority to delegate their powers or duties without special authority in either the governing statute or constating documents of corporation.

The NSCA itself does not provide for any exception to the general rule; however, it is normal for articles of association to permit delegation by the board of substantial powers. Note the provisions of [s. 115](#) of the [CBCA](#). [Subsection 115\(3\)](#) reserves to the board decision making power over the most important aspects of corporate management.

Neither the NSCA nor the [CBCA](#) attempts to deal with the issue of external delegation to outsiders. Would it be legally permissible for a board of directors to delegate to an outside person or management firm authority to control the day-to-day business activities of the corporation? For a discussion of this issue, *see, Long Park v. Trenton - New Brunswick Theatres Co.*, 77 N.E. (2d) 633 (1948) (N.Y.C.A.); *Sherman & Ellis v. Indiana Mutual Casualty*, 41 F. 2d 588 (1931).

The board of directors will be able to appoint officers, servants or agents but it must not delegate its responsibility for the management of the corporation. The NSCA is quite vague on the question of appointment of officers. The British concept of the managing director is incorporated in Table A, [ss. 121-124](#). The position of president – the chief executive officer under the North American corporate practice – is provided for in Table A, [s. 125](#). Similarly the offices of vice-president and chair of the board are created under Table A, [ss. 126](#) and [128](#) respectively. Is the appointment of these officers, or any officers of the company, mandatory or discretionary? [Section 121](#) of the [CBCA](#) does not require the establishment of particular offices nor the appointment of officers. However, it does provide that, subject to the articles of incorporation, bylaws and any unanimous shareholders agreement, the directors may designate the offices of the corporation and appoint officers. Officers who are entrusted with the management of the assets of the corporation are subject to fiduciary duties, and must exercise care and skill in the course of that management.

8. Duties of directors and officers

Introduction

Duties of directors have traditionally been discussed under one of two headings: (1) duty of care and (2) duty of loyalty and good faith (*i.e.*, fiduciary duty). While these duties developed at common law and in equity, they have now been partly codified in the [CBCA](#). The statutory approach has also, on many occasions, imposed these same duties on officers of the corporation. The NSCA, for the most part, continues to rely on the common law.

It is important to note that, in general, directors owe their duties to the *corporation* itself, and not to the *shareholders*: *Percival v. Wright*, [1902] 2 Ch. 421. However, occasions may exist where directors will owe fiduciary duties to shareholders: *see Vladi Private Islands Ltd. v. Haase* (1990), 96 N.S.R. (2d) 323 (C.A.).

Care and skill

At common law, the standard of care and skill is partly objective and partly subjective. In *City Equitable Fire Insurance Co. Ltd.*, [1925] 1 Ch. 407; aff'd [1925] 1 Ch. 500 (C.A.), at trial, Romer J. said:

A director need not exhibit in the performance of her duties a greater degree of skill than may reasonably be expected from a person of her knowledge and experience.

In addition, at common law a director is not expected to give continuous attention to the affairs of the corporation. The NSCA does not contain any provisions on the standard of care and skill expected of directors and officers, so the common law continues to apply.

The duty of care of directors has been codified in [paragraph 122 \(1\)\(b\)](#) of the CBCA and was considered in the Supreme Court of Canada decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004 SCC 68](#) at paragraphs 63, 64 and 67:

63 The standard of care embodied in [s. 122\(1\)\(b\)](#) of the CBCA was described by Robertson J.A. of the Federal Court of Appeal in *Soper v. Canada*, [\[1998\] 1 F.C.R. 124](#) at para. 41, as being “objective subjective”. Although that case concerned the interpretation of a provision of the *Income Tax Act*, it is relevant here because the language of the provision establishing the standard of care was identical to that of [s. 122\(1\)\(b\)](#) of the CBCA. With respect, we feel that Robertson J.A.’s characterization of the standard as an “objective subjective” one could lead to confusion. We prefer to describe it as an objective standard. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the [s. 122\(1\)\(b\)](#) duty of care, as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of [s. 122\(1\)\(a\)](#) of the CBCA.

64 The contextual approach dictated by [s. 122\(1\)\(b\)](#) of the CBCA not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions. The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, directors’ decisions can still be open to criticism from outsiders. Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that

becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the “business judgment rule”, adopting the American name for the rule.

...

67 Directors and officers will not be held to be in breach of the duty of care under [s. 122\(1\)\(b\)](#) of the [CBCA](#) if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

Indemnification and insurance

[Section 124](#) of the [CBCA](#), which was amended in 2001, provides for the indemnification and insurance of directors and officers.

It reads:

Indemnification

124. (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation’s request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

Advance of costs

(2) A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).

Limitation

(3) A corporation may not indemnify an individual under subsection (1) unless the individual

(a) acted honestly and in good faith with a view to the best interests of the corporation, or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation’s request; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual’s conduct was lawful.

Indemnification in derivative actions

(4) A corporation may with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).

Right to indemnity

(5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking indemnity

- (a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and
- (b) fulfils the conditions set out in subsection (3).

Insurance

(6) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual

- (a) in the individual's capacity as a director or officer of the corporation; or
- (b) in the individual's capacity as a director or officer, or similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request.

Application to court

(7) A corporation, an individual or an entity referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order that it sees fit.

Notice to Director

(8) An applicant under subsection (7) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

Other notice

(9) On an application under subsection (7) the court may order notice to be given to any interested person and the person is entitled to appear and be heard in person or by counsel.

[R.S., 1985, c. C-44, s. 124](#); 2001, c. 14, [s. 51](#).

A general discussion of directors' and officers' ("D & O.") liability insurance in the Canadian setting may be found in J.I.S. Nicholl, "Directors' and Officers' Liability Insurance" in L. Sarna, ed., *Corporate Structure, Finance and Operations: Essays on the Law and Business Practice*, vol. 4 (Toronto: Carswell, 1986) 1.

The **CBCA** now allows for a “due diligence” defence in certain instances (rather than a “good faith reliance” defence). The scope of the “due diligence” defence is that it allows a court to determine that a director is not liable if the director exercised the care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances, and also includes a good faith reliance on reliable sources of information.

Compare Table A, [ss. 204](#) and [205](#) with [s. 124](#) of the **CBCA**. Would a **NSCA** company be permitted to replace ss. 204 and [205](#) with a provision like s. 124?

Blair v. Consolidated Enfield Corp., [\[1995\] 4 S.C.R. 5](#) sets out the requirements for indemnification of directors or officers and makes it clear that “mere *de facto* reliance on legal advice will not guarantee indemnification”. The reliance must be reasonable and in good faith: the director and officer must fulfill his or her fiduciary duty. Indemnification is geared to encourage responsible behavior by while fostering entrepreneurship.

Expert reports

It is common for the board of directors of a corporation facing major corporate matters, such as a takeover bid, to obtain an independent valuation and/or fairness opinion to assist in its evaluation of the offer. Not only does such a practice make good business sense, but it will help shield the directors from allegations that they breached their duty of care in either accepting or rejecting the offer. See [paragraph 123\(4\)\(b\)](#) of the **CBCA**. However, it should be noted that the Court in **Westfair Foods Ltd. v. Watt** (1990), [73 Alta. L.R. \(2d\) 326](#) at 349-50 (Q.B.) held that directors may not rely on [paragraph 123\(4\)\(b\)](#) where the author of the relevant report is not informed of all relevant facts. Furthermore, “[w]hen “outsider advice” ... is obtained, the directors of a company are entitled to rely on that advice if it is given by a person appearing to be qualified but on receipt of such advice, *the directors must themselves exercise their judgment.*”: **Northern & Central Gas Corp. v. Hillcrest Collieries Ltd.** (1975), [59 D.L.R. \(3d\) 533](#) at 597-98 (Alta. S.C.). What reliance may directors of a **NSCA** company place on expert reports?

Dissenting directors

A director who does not agree with a particular decision of the full board may dissent. Procedures for doing so are codified in the **CBCA** at [s. 123](#). Note that certain sections that impose directorial liability do so only where the director has voted for or consented to a resolution authorizing the prohibited conduct (*e.g.*, **CBCA**, [ss. 118\(1\), \(2\)](#)).

Good faith: The best interests of the corporation

Directors and officers are given substantial powers under both the governing corporation statutes and particular corporate constitutions. Recall, for example, [ss. 102\(1\)](#) of the **CBCA**, which vests the power to manage the business and affairs of the corporation in the directors, subject to any unanimous shareholders agreement. Consider also [ss. 25\(1\)](#), power to issue shares, and [ss. 34\(1\)](#), power to repurchase shares. The directors and officers must act within the authority conferred upon them and they must act with due care. In addition the powers have to be exercised in good faith in the best interests of the corporation. The later requirement is the subject matter of this section of materials.

To date most of the UK and Canadian cases have arisen in the context of directors either issuing or repurchasing shares in order to avoid a change in control through a takeover bid. However, it is important to remember that the basic equitable obligations apply to every exercise of particular powers.

The leading Canadian decision is *Teck Corporation Limited v. Miller*, [\[1973\] 2 W.W.R. 385](#) (B.C. Sup. Ct). In *Teck*, Berger J. said the directors must act in the honest belief that they are acting in the best interests of the corporation and there must be reasonable grounds for their belief. *Cf. Hogg v. Cramphorn Ltd.*, [1967] Ch. 254; *Exco Corporation v. Nova Scotia Savings & Loan Company* [\(1987\), 35 B.L.R. 149 \(N.S.S.C.\(T.D.\)\)](#).

In *BCE Inc. v. 1976 Debentureholders*, [2008 SCC 69](#), the Supreme Court of Canada reaffirmed its decision in *Peoples Department Stores Inc.* (see above) that the directors' fiduciary duty is owed to the corporation and not to any particular constituency. The Court stated that directors may, but are not required to, consider a range of stakeholders affected by corporate actions, commensurate with the corporation's duties as responsible corporate citizen.

Contracts of interested directors and officers and other self-dealing transactions:

In general terms, self-dealing transactions involve transactions or contracts carried out between officers or directors of a corporation, either directly or through their interest in another person, and the corporation itself. Over time the law has moved from a reliance on outright prohibition of self-dealing transactions to a position of permitting such transactions, subject to a review of the procedural and substantive fairness of these transactions.

The common law was very harsh in its treatment of a director having an interest in a contract with the corporation of which he or she was a director. The classic decision is *Aberdeen Railway v. Blaikie*, [1843-60] All E.R. Rep. 249 (H.L.). In *Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Company*, [1914] 2 Ch. 488 (C.A.). Swinfen Eady L.J. said *Aberdeen* decided that:

... directors of a company have duties to discharge of a fiduciary nature towards their principal, and that it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect: and that so strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It was accordingly held that a director of a railway company was precluded from dealing on behalf of the company with himself, or with a firm of which he is a partner, and that it makes no difference whether the contract relates to real estate, or personalty, or mercantile transactions, the disability arising, not from the subject matter of the contract, but from the fiduciary character of the contracting party.

The rationale for this harsh rule was that the fiduciary obligations of directors were such that no personal interest could be allowed to conflict with their carrying out those obligations. However, there was no limit upon what the members could agree to in the articles of association, and counsel drafted articles that waived the fiduciary obligation of directors to disclose their interests, permitted them to vote in connection with contracts in which they had an interest, and relieved them from a duty to account for any profit made on the transaction. The legislators became alarmed by these widely drafted exclusion clauses and in 1929 the UK *Companies Act* was amended to include a provision similar to [s. 99](#) of the [NSCA](#).

Compare s. 99 of the [NSCA](#) and [s. 120](#) of the [CBCA](#). It should be noted that the modern corporation statutes apply their conflict of interests provisions to both officers and directors.

Disclosure in accordance with s. 99 of the [NSCA](#) does not oust the application of the principles set forth in *Aberdeen*. However, it is common to provide in the articles of association provisions that allow the interested director to enter into contracts with the corporation. *See* Table A, [ss. 115\(1\)](#).

[Subsection 120\(1\)](#) of the [CBCA](#) provides that a director or officer who is a party to a material contract or proposed material contract with the corporation or who is a director, officer or holds a material interest in a person who is such a party, must disclose in writing or request to have entered in the minutes of meetings of directors the nature and extent of his or her interest. In order to avoid having the contract declared void or voidable there must be compliance with the three requirements in [ss. 120\(7\)](#) of the [CBCA](#).

Corporate opportunities

As noted in *Aberdeen Railway*, directors and now officers as well must seek to avoid any possible conflict between their duties to the corporation and their own personal self interest. They must account to the corporation for any personal profit obtained from their positions other than reasonable remuneration.

This strict duty to account for profits may be waived upon full and complete disclosure being made to all beneficiaries and their informed assent being attained.

In *Regal (Hastings) Ltd. v. Gulliver*, [\[1942\] 1 All E.R. 378](#) (H.L.), directors who made a profit by taking advantage of an investment opportunity that came to them by virtue of their positions as directors were required to account to the corporation for that profit. Lord Russell remarked:

I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them.

In *Canadian Aero Services Limited v. O'Malley*, [\[1974\] S.C.R. 592](#), Laskin J. stressed the need for flexibility in reviewing the facts of each case. He said at paras. 47-48:

It is a mistake, in my opinion, to seek to encase the principle stated and applied in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [\[1966\] S.C.R. 673](#), by adoption from *Regal (Hastings) Ltd. v. Gulliver*, in the straight-jacket of special knowledge acquired while acting as directors or senior officers, let alone limiting it to benefits acquired by reason of and during the holding of those offices. As in other cases in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it. So it is in the present case. Accepting the facts found by the trial Judge, I find no obstructing considerations to the conclusion that O'Malley and Zarzycki continued, after their resignations, to be under a fiduciary duty to respect Canaero's priority, as against them and their instrument Terra, in seeking to capture the contract for the Guyana project. They entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of Terra.

In holding that on the facts found by the trial Judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

9. Shareholders' (and other complainants') remedies

Derivative suit

At common law when a wrong was done to the corporation, the corporation was considered to be the only proper plaintiff. Therefore if those in control refused to bring the action, a likely possibility if they were the wrongdoers, the action did not proceed.

Both the [NSCA](#) and the [CBCA](#) provide that in respect of any wrong to the corporation a complainant (which includes current shareholders) may seek leave to bring an action in the name of and on behalf of the corporation or any of its subsidiaries ([CBCA](#) s. 239(1); [NSCA](#) s. 135A, Third Schedule s. 4). This type of proceedings is called a "derivative action" because the complainant derives the right to sue from some wrong done to the corporation. Normally the recovery, if any, is paid to the corporation although the court may direct that it be paid directly to present or former security holders ([CBCA](#) s. 240(c); [NSCA](#) s. 135A, Third Schedule ss. 4(3)(c)).

Amendments to paragraph 7(5)(b)(iia) of the Third Schedule to the NSC added creditor to the definition of a "complainant".

Certain conditions must be satisfied before a complainant can bring a derivative action. These are set forth in the legislation and are as follows:

- reasonable notice must be given to the directors of the corporation (*see, Re Northwest Forest Products Ltd.*, [\[1975\] 4 W.W.R. 724](#) (B.C.S.C.);
- the complainant must be acting in good faith; and
- the action appears to be in the interests of the corporation or its subsidiary.

If the shareholders ratify or otherwise approve of the wrong done to the corporation this ratification or approval is only a factor to be considered by the court in deciding whether to make any order relating to the derivative action ([CBCA](#) ss. 242(1); [NSCA](#) s. 135A, Third Schedule ss. 7(1)).

Shareholders of both a [CBCA](#) and a [NSCA](#) corporation may also commence actions, individually or as a class, to recover for wrongs done to them in their individual, personal capacities. Here, any recovery

goes to the individual shareholder or class of shareholders. For example, such an action could be commenced if the corporation refuses to record the vote of an individual shareholder (*See, for example, Goldex Mines Ltd. v. Revill* (1974), [7 O.R. \(2d\) 216](#) (C.A.) and *Fraser v. Westminner Canada Ltd.* (2001), [199 N.S.R. \(2d\) 1 \(S.C.\)](#)).

Appraisal remedies

Both the [CBCA](#) and the [NSCA](#) afford shareholders who dissent from certain major corporate changes a right to claim the fair value of their shares from the corporation. The drafters of the [CBCA](#) observed:

Instead of relying on common law standards to restrict the conduct of majority shareholders who propose to make a fundamental change, the provisions in this Part confer upon a shareholder who dissents from the fundamental change the privilege of opting out of the corporation and demanding fair compensation for his shares.

See Dickerson et al., “Proposals For a New Business Corporation Law For Canada”, (1971), Vol. 1, at 115.

(*See, CBCA s. 190; NSCA s. 135A*, Third Schedule, [ss. 2](#), 3).

When one of the triggering events occurs and the shareholders have adopted a resolution approving that transaction and it becomes effective, the shareholders may dissent ([CBCA ss. 190\(3\); NSCA, s. 135A](#), Third Schedule, [ss. 2\(4\)](#)). The dissent procedure is very elaborate and is set forth in the legislation ([CBCA ss. 190\(6\)-\(26\); NSCA s. 135A](#); Third Schedule, [ss. 2\(6\)-\(26\)](#)).

Oppression remedy

The oppression remedy provided under the [CBCA](#) and [NSCA](#) is probably the most effective and important remedy available to shareholders. It gives a court wide discretion to remedy almost any corporate conduct that is seen as unfair to complainants. In *First Edmonton Place v. 315888 Alberta Ltd.* (1989), [40 B.L.R. 28 \(Alta. Q.B.\)](#), stayed (1990), [45 B.L.R. 110 \(Alta. C.A.\)](#), McDonald J. of the Queen’s Bench gave a comprehensive review of the development of the remedy in the U.K. and Canada.

Both the [CBCA](#) and [NSCA](#) contain certain grounds for relief ([CBCA ss. 241\(2\); NSCA 135A](#), Third Schedule, [ss. 5\(2\)](#)). Subsection 241(2) of the [CBCA](#) states:

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

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

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

Canadian courts have held that “oppressive”, “unfairly prejudicial” and “unfairly disregards the interests of” each constitutes a separate and progressively wider basis for finding liability.

Some additional guidance of what will be seen as unfairly prejudicial or as an unfair disregard of a complainant’s interests is found in *Re Abraham and Inter Wide Investments Ltd. et al.* (1985), [51 O.R. \(2d\) 460](#) (H. Ct.), (1988), [66 O.R. \(2d\) 684](#). Application to amend judgment dismissed. The applicant, a minority shareholder in Inter Wide, alleged that the corporation’s directors had been guilty of financial improprieties concerning certain payments made to the directors or corporations controlled by them and consultant and directors’ fees paid. Griffiths J. remarked at paras. 28-30:

I accept the authority as cited to me by counsel for the respondents of *Re Jermyn Street Turkish Baths Ltd.*, [1971] 3 All E.R. 184 (C.A.), that to amount to “oppression” the conduct must have been “burdensome, harsh and wrongful” under which the shareholder is in effect coerced to submit to something unfair. I find no oppressive conduct here in that sense. I am satisfied however that the evidence supports a finding that Inter Wide and the directors acted in a manner unfairly prejudicial to the applicant or at the very least unfairly disregarded the applicant’s interest as a shareholder.

The report of the inspector and the opinion of the accountant Ernest A. Purkis supports that finding. The payments to directors characterized as directors’ fees were not authorized at law and according to the inspector those fees did not have the character of directors’ fees and did not appear to be associated with the duties and responsibilities of directors. Some fees were paid to corporations as directors’ fees although a corporation clearly cannot qualify as a director.

The findings of the inspector in my view raise a *prima facie* question as to the validity of some of the automobile expenses paid to directors. Further, there is evidence that the financial statements of Inter Wide are inadequate, inaccurate and not prepared in accordance with generally accepted accounting principles and that there have been breaches of the *Income Tax Act*. In my opinion these serious departures by the directors from legal and normal business-like practices are sufficient to establish a case of conduct that is both unfairly prejudicial and has the effect of unfairly disregarding the interests of Mr. Abraham. ...

His Lordship went on to order the repurchase by Inter Wide of the applicant’s shares determined on the basis of the net worth of the corporation without a minority discount being deducted.

It appears that evidence of bad faith or lack of probity is unnecessary under [ss. 241\(2\)](#) or its NSCA equivalent. *See, Brant Investments Ltd. v. Keeprite Inc.* (1991), [1 B.L.R. \(2d\) 225 \(Ont. C.A.\)](#). The important element is one of fairness and protection for the reasonable expectations of complainants.

In the case of *Re Argo Protective Coatings Inc.*, [2006 NSSC 283](#), a minority shareholder made an interim application for the appointment of an inspector to investigate several areas of alleged oppressive or unfair conduct. The application was allowed. Before making such an interim order, the court must be satisfied that the evidence supports a reasonable inference that the conduct complained of is likely true.

The NSCA s. 135A, Third Schedule [s. 9](#) oppression remedy was enacted in 1990. It does not apply to conduct occurring before the proclamation of the section. *See, Mathers v. Mathers* ([1993](#)), [123 N.S.R. \(2d\) 14 \(C.A.\)](#).

The case of *L&B Electric Ltd. v. Oickle*, [2006 NSCA 41](#) dismissed an appeal and held that the terms that the trial judge imposed in the circumstances were within the broad discretion conferred by the Third Schedule of the NSCA. See also *Chisholm v. Antigonish Construction Ltd et al.*, [2008 NSSC 12](#) for an oppression remedy granted to a shareholder in a family shareholder dispute.

There is considerable overlap between the derivative action and oppressive action provisions, and the courts have yet to sort out the question of the relationship between the two of them. *See* Beck, “Minority Shareholders’ Rights in the 1980’s” in *Law Society of Upper Canada Special Lectures on Corporate Law in the 1980’s* (Toronto: De Boo Ltd., 1982) at p. 318; *Sparling v. Javelin International Ltd.*, [1986] R.J.Q. 1073 (Que. Sup. Ct.).

It should be noted that under ss. 241(3) of the [CBCA](#) and ss. 5(3) of the Third Schedule to the NSCA the court is given very broad specific and general powers. Do these powers extend, for example, to ordering cancellation of a certificate of amalgamation? *See, Ruskin v. Canada All News Radio Ltd. et al.* (1979), 7 B.L.R. 142 (Ont. Sup. Ct.).

An example of the very wide powers being exercised by the courts under [ss. 234\(3\)](#) is *Inversiones Montforte S.A. v. Javelin International Ltd.* (1982), 17 B.L.R. 230 (Que. Sup. Ct.).

Although Canadian courts are given wide remedial powers under the oppression remedy provisions, in a majority of the decided cases to date they have ordered that a majority or controlling shareholder, or the corporation itself, purchase the shares of the complainant minority shareholder, as Justice Moir of the Supreme Court of Nova Scotia recently did in *Giffin v. Soontiens*, [2011 NSSC 404](#).

At the Supreme Court of Nova Scotia in *Belliveau v. Belliveau*, [2011 NSSC 397](#), Justice Duncan discusses oppression remedy at paragraphs 82 to 88 and writes:

[82] There remains to be considered whether the oppression remedy under the [Companies Act](#) offers relief to either plaintiff or defendant. In granting the oppression remedy a court has the ability to allow remedies to shareholders, among others, against acts or omissions that are:

1. oppressive; or
2. unfairly prejudicial; or
3. unfairly disregard the interests of others.

[83] For a helpful discussion of oppression claims, reference may be had to *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC*, [2005 NSSC 211](#), a decision of Associate Chief Justice Smith of the Nova Scotia Supreme Court, beginning at para. 105.

[84] The remedy is designed to protect reasonable expectations including the reasonable expectation that officers and directors will manage their company in accordance with their legal obligations, to act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person. *See, SCI Systems, Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 DLR (4th) 300 (Ont. S.C.), (affirmed at [110 O.A.C. 160](#)) where Epstein J writes at para. 36:

I agree that the oppression remedy is designed to protect reasonable expectations. However, one of the most reasonable of all expectations of those dealing with corporations must be that the directors will manage the company in accordance with their legal obligations. Some of these obligations are specifically prescribed by statute. Others are more generally derived from the common law. However, they essentially add up to the same thing: namely, to act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person.

[85] The decision of *Budd v. Gentra Inc.* 1998 [111 O.A.C. 288](#) considered analogous provisions in the [Canada Business Corporations Act](#) to those set out in the **Third Schedule** of the Nova Scotia **Companies Act**. In discussing personal liability of an officer or director in fashioning an oppression remedy Doherty J.A., wrote, at para. 46, that:

... A director or officer may be personally liable for a monetary order under that section if that director or officer is implicated in the conduct said to constitute the oppression and if in all of the circumstances, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties.

And further, at para. 52, the court commented that:

... the remedial reach of [s. 241](#) is long, but it is not unlimited. Any order made must "rectify the matter complained of" by the parties seeking the remedy. To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefitted from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another example of a situation in which a director or officer may be held personally liable to rectify corporate oppression.

[86] In *Danylchuk et al. v. Wolinsky et al. and Feierstein and Fishman Medical Corporation v. Wolinsky et al.*, [2007 MBQB 65](#) Keyser J. explained that self dealing was a form of oppressive conduct. At paragraph 36 the court wrote:

The author of **Oppression and Related Remedies** describes self-dealing, at p. 124, as one of the most common forms of oppressive conduct yet one of the easiest to establish. It involves the actions of directors who treat corporations as if they were their own property. This is the essence of what the applicants allege in this case. They argue that the reasonable expectations of the shareholders and creditors can be determined by looking at whether the provisions of the **CBCA** were followed, general commercial practice, the nature and structure of Protos, as well as representations made by the respondents to the applicants.

[87] In my view, both parties engaged in egregious self dealing and hence oppressive conduct. In light of my findings of fact, it should be clear that I find that neither the plaintiff, nor the defendant acted in their capacity as officers "honestly and in good faith in the interests of the corporation and exercise the diligence expected of a reasonably prudent person".

[88] In other circumstances, they could be held to account to each other and to the companies for their actions. I say "in other circumstances" because in my view it should be clear that the oppression remedy was created to remedy an injustice to innocent or otherwise vulnerable parties. It is not a device to be utilized by somewhat sophisticated business people holding positions of equal bargaining power caught in the web of their own intrigue and mutual deceit. I decline to order any remedy to either party under the oppression provisions of the [Companies Act](#).

10. Corporation law in an Aboriginal context

Nova Scotia courts have found that an Indian band is not a separate legal person (See: *Chapel Island First Nation Band Council v. Busch* (1997), 159 N.S.R. (2d) 319 (C.A.)). As such, there is some question about whether they can directly hold shares in a corporation. It is therefore common for the Chief or band council to hold the shares in trust for the members of the band, which is often evidenced by a trust agreement or trust certificate, which should make provision for the shares to be transferred upon the Chief or councillors deceased or ceasing to hold office (See: *Gitga'at Development Corp. v. Hill*, 2007 BCCA 158, 66 B.C.L.R. (4th) 349 (B.C. C.A.)).

Indian bands can also be the beneficiaries of a trust, where a trustee is designated to hold legal title and a band or bands are designated as beneficiaries of trust property (See *Keewatin Tribal Council v Thompson (City)*, 61 Man R (2d) 241, [1989] M.J. No. 295).

APPENDIX I

MEMORANDUM REGARDING INCORPORATION IN NOVA SCOTIA

- (1) Name: _____ Limited, Limitée, Incorporated, Incorporée, Ltd., Ltée or Inc.
(or Number: _____)
- (2) Restrictions, if any, on the objects and powers: _____

- (3) Capital: \$ _____ divided into\ _____
(can be unlimited) Common Shares having a par value of \$ _____; and
_____ Preference Shares having a par value of \$ _____ shares.
- (4) Preference Share provisions _____

- (5) Restrictions on share transfer (consider NI 45-106) _____

- (6) Recognized agent: _____

of _____
- (7) Registered office: _____
- (8) Bank: _____
- (9) Signing officers: _____
- (10) Directors: _____ of _____
_____ of _____
_____ of _____
- (11) Officers: _____ of _____
_____ of _____
_____ of _____
- (12) Number of shares to each Director: _____

- (13) Shareholders: _____, no. shares: _____
_____, no. shares: _____
_____, no. shares: _____
- (14) Auditors: _____ Fiscal year: _____
- (15) Assets being acquired: _____
- (16) From whom: _____
- (17) Consideration: _____
- (18) Further information: _____

MEMORANDUM OF INCORPORATION CHECK LIST - FEDERAL

- See www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs02194.html for more information.