
Table of Contents

<i>Preface</i>	iii
<i>Frequently Cited Statutes and Regulations</i>	xvii

Chapter One Introduction to the Law and Legal Theory of Business Corporations

Corporate Law	1
What Is a Corporation?	2
Companies, Corporations, and Bodies Corporate	5
Business Corporations	7
A Brief History of the Business Corporation	8
Regulated Companies	9
Joint Stock Company	10
The South Sea Bubble	11
Deed of Settlement Companies	12
Companies and the Corporate Law Intersect	12
Incorporation in Canada: The Constitutional Question	15
Corporate Law Scholarship	16
Corporate Personality	17
“Realist,” “Fiction,” and “Concessionist” Theories of the Corporate Entity	17
Reification and Personalizing of the Corporation	24
Theory and Purpose of the “Firm”	26
Introduction	26
Transaction Cost Theory	26
Agency Theory	27
The Firm as a “Nexus of Contracts”	30
Function of Corporate Law	32
Charter Competition and the Delaware Phenomenon	32
Corporate Governance	35

Chapter Two The Mechanics of Incorporation

Choice of Incorporating Jurisdiction	39
Types of Canadian Business Corporation Statutes	39
Memorandum and Articles of Association	40
Letters Patent	40
Articles of Incorporation/“Division of Powers”	40
Some Purported Advantages of Particular Canadian Corporate Statutes	42
The Practicalities of Incorporation Under the CBCA	44
The Name of the Corporation	44
Legal Element	44
Business Name or Style	45
Rules Governing the Choice of Corporate Name	48
Name Search	48
Numbered Companies	49
The Jurisdiction Where the Registered Office Is Situated	50
Shares of the Corporation	51
Classes and Maximum Number of Shares	51
Share Conditions	52
Restrictions on Share Transfers or Ownership	53
Number of Directors	53
Business Restrictions	54
Other Provisions	55
Incorporators	55
Cost	56
Summary and Conclusion	57

Chapter Three Fundamental Characteristics of the Modern Canadian Business Corporation

Introduction	59
Operated for Profit	59
Separate Legal Entity	62
Doctrinal Evolution of the Separate Legal Entity Principle	63
Salomon’s Case	65
Separate Legal Entity and Limited Liability	74
Limited Liability	77
Economic Explanation for Limited Liability	78
Unlimited (Liability) Companies	83
Perpetual Existence	84
Transferability of Share Interests	86
Centralized Management	87
Conclusion	88

Chapter Four Private Corporations

Introduction	91
The Distinction Between Private and Public Companies	92
Private and Public Companies: Early English and Canadian Origins	93
Canadian Reforms	97
The Public Corporation	98
The “Public”	98
“Distributing Corporation”	100
The Significance of the CBCA’s “Distributing Corporation” Definition ...	101
Board of Directors’ Requirements	101
Public Filing of Financial Statements	101
Access to Corporate Records	102
Requirement to Appoint an Auditor	102
Audit Committee	103
Calling of Shareholder Meetings	104
Compulsory Acquisition Rules	104
Going-Private and Squeeze-Out Transactions	106
Proxy Solicitation	108
Trust Indentures	108
Stated Capital Rules for Open-End Mutual Funds	110
Closely Held Corporations and Shareholder Agreements	110
Shareholder Agreements at Common Law	111
Unanimous Shareholder Agreements	113
Statutory Recognition of Closely Held Corporations: The Delaware Example	119
Conclusion	121

Chapter Five Promoters’ Cases and Pre-incorporation Contracts

Introduction	123
Promoters’ Cases	124
Framing the Issue	124
Pre-incorporation Contracts	130
Framing the Issue	130
The Common Law Position	131
Kelner v. Baxter Postscript	137
Statutory Reform	139
Application to Non-incorporation Contracts	144
What Is a Pre-incorporation “Contract”?	147
An Alternative Statutory Approach	150
Adoption of the Contract	154
Disclaiming Promoter’s Liability	157
Conclusion	160

Chapter Six Contracting Authority, Corporate Seals, and Ultra Vires

Introduction 161

Actual and Ostensible Authority of Corporate Signing Officers 162

 Framing the Issue 162

 Constructive Notice and the Indoor Management Rule 164

 Actual and Ostensible Authority of Corporate Agents 167

 Statutory Codifications 171

Sealed Documents and the Corporate Seal 173

Ultra Vires 177

 Introduction 177

 Framing the Issue 177

 Trap for the Unwary? 178

 Protection to No One 178

 The CBCA: The End of Ultra Vires? 182

Conclusion 184

Chapter Seven Piercing or Lifting the Corporate Veil

Framing the Issue 185

Judicial Reluctance To Pierce the Corporate Veil 188

Classifying the “Veil” Cases 194

 Equity or the Interests of Justice 198

 Facade or Sham; Fraud or Improper Purpose 201

 Single Economic Entity and Other Veil-Piercing Considerations 209

Conclusion 213

Chapter Eight Criminal and Tortious Liability of Corporations

Introduction 215

Corporate Liability for Torts 217

 Framing the Issue 217

 Organic or Personal Liability of Corporations and the “Directing Mind and Will” 218

A Brief Digression: Personal Liability of Corporate Officers and Directors to Third Parties 219

Corporate Criminal Liability 220

 Introduction 220

 Identification Theory 222

 Who Is a Corporation’s Directing Mind and Will? 223

 Bill C-45 225

 Implications of Corporate Criminal Liability 226

 The Animating Logic of Corporate Criminal Liability and Punishment 227

Conclusion 229

Chapter Nine The Basic Structure of the Modern Business Corporation

Introduction	231
The Building Blocks of Corporate Governance	232
Shareholders Elect the Board of Directors	233
Removal of Directors	235
Statutory Requirements Concerning Directors	235
Number of Directors	235
Flexible Boards and Cumulative Voting	237
Can a Corporation Have No Directors?	238
Qualifications of Directors	240
Basic Qualifications	240
Qualifying Shares	241
Residency Requirements	241
Defect in Director's Appointment	243
Directors Manage or Supervise the Management of the Corporation	243
Directors' Authority To Manage	243
Directors' Meetings/ Directors' Resolutions	248
Place and Notice of Directors' Meetings	249
Telephone and Electronic Meetings	250
Quorum	251
Written Resolution in Lieu of Meetings	251
Dissenting Directors	252
Directors Appoint the Corporation's Officers	253
Conclusion	256

Chapter Ten "Best Interests of the Corporation": Shareholder Voice and Directors' Duties

Introduction	257
Shareholder Voice	259
Introduction	259
Access to Certain Corporate Records	261
Shareholders' Meetings: Requisitions and Proxies	262
Right of Discussion at Shareholders' Meetings	266
Shareholder Proposal Rules	267
Shareholders' Power To Make Bylaws or Amend Articles	270
Non-shareholder Constituents and the "Best Interests of the Corporation"	271
Corporation as Entity	274
Stakeholder Constituency	275
Shareholder Primacy	280

Directors' and Officers' Duties	285
Introduction	285
The Duty of Care, Diligence, and Skill	286
Introduction	286
The Subjective Standard at Common Law	287
Statutory Duty of Care Standard	289
Differing Standards of Duty of Care?	292
Profit and Non-profit/Large and Small Corporations	292
“Inside” and “Outside” Directors and Members of Board Committees ..	293
Outside (Non-executive) Directors	294
Relative Infrequency of “Duty of Care” Cases	297
Duty of Care: Owed to Whom?	298
Directors' Indemnification and Insurance	299
Due Diligence and Good Faith Reliance Defences	302
The Business Judgment Rule	303
Duty of Loyalty and Good Faith	307
Nominee Directors	309
Proper Purpose/Collateral Purpose Doctrine	310
Recent Corporate Governance Developments	311

Chapter Eleven Interested Directors' Contracts, Corporate Opportunities, and Directors' and Officers' Personal Liability

Introduction	313
Interested Directors' Contracts	313
Framing the Issue	313
Interested Directors' Contracts at Common Law	315
UK Statutory Reform	316
Canadian Statutory Reform	317
Overview	317
CBCA Section 120	318
Applies to Officers and Directors	318
Applies to “Material Contracts” or “Material Transactions” with the Corporation	318
Applies to Contracts with Officers and Directors and with Other “Entities” in Which the Officers or Directors Have an Interest	319
Obligation To Disclose	320
Method of Disclosure	321
Abstention from Voting	322
Contract or Transaction Must Be “Reasonable and Fair to the Corporation”	323
Contract Not Invalid; Director Under No Duty To Account	324
Other Canadian Jurisdictions	325

Corporate Opportunities	328
Framing the Issue	328
Personal Liability of Directors and Officers to Third Parties	337
Statutory Liabilities	337
Tort Liability	338

Chapter Twelve Financing the Corporation

Introduction	343
Debt and Equity	345
Debt Ranks Ahead of Equity	345
Debt Must Be Repaid	345
Interest Payment Deductibility	345
Taxation of Interest Payments and Dividend Payments	345
“Dilution” of Ownership	346
“Dilution” of Earnings	346
Financial Statement Implications	347
Effects of “Leverage”	348
Debt Financing	349
Basic Elements of Debt	349
Corporation’s Power To Borrow	349
Negotiated Loan or Debt Security	350
Debt Securities and Trust Indentures	350
Voting by Debtholders	353
Equity Financing	354
Introduction	354
Share Capital	362
Minimum Capital Requirements	362
Authorized Capital	363
Share Conditions	364
Issuance of Shares	365
Subscription	365
Allotment and Issuance	366
Directors’ Authority	366
Partly Paid and Fully Paid Shares	366
Par Value	367
Stated Capital Account	368
Class Rights	369
What Is a “Class” of Shares?	369
Series of Shares	372
Payment of Dividends	373
Meaning of “Dividend”	373
The Mechanics of Declaring a Dividend	373
Restrictions on the Payment of Dividends	375
CBCA Section 42	376
Repurchase or Redemption of Shares and Reduction of Capital	379

Financial Assistance	381
Statutory Approaches to Financial Assistance	381
Preference Shares	382
Conclusion	385

Chapter Thirteen Corporate Statutory Remedies: Derivative Actions and Oppression Remedies

Introduction	387
An Overview of Key Corporate Civil Remedies	388
Derivative Actions	389
Framing the Issue	389
The Common Law Derivative Action and the Rule in <i>Foss v. Harbottle</i>	391
Exceptions to the Rule in <i>Foss v. Harbottle</i>	396
The Rule in <i>Foss v. Harbottle</i> : Gone but Not Forgotten?	398
Statutory Derivative Action	399
Introduction	399
Key Legal Issues in Connection with a Statutory Derivative Action	399
Introduction	399
Who May Commence a Derivative Action?	400
“Complainant”	400
Registered Holder or Beneficial Owner of Securities	400
Securityholders Other Than Shareholders	403
“Of a Corporation or Any of Its Affiliates”	405
Corporate Directors and Officers and the CBCA Director	407
Any Other “Proper Person”	407
Procedural Steps	410
Leave of the Court	410
Notice to the Directors	412
“Acting in Good Faith”	415
Action “Appears To Be in the Interests of the Corporation”	415
Evidence of Shareholder Approval Not Conclusive	416
Costs	416
Scope of Available Remedies	418
Procedural Steps Mandatory When Action Is Derivative	418
The Oppression Remedy	419
Framing the Issue	419
Statutory Oppression Remedy	421
Who May Initiate an Application for an Oppression Remedy?	424
What Interests Does the Oppression Remedy Protect?	429
Legitimate/Reasonable Expectations	429
The Broadness of the Court’s Remedial Powers	433
Relationship Between Derivative Action and Oppression Remedy	434
Conclusion	435

Chapter Fourteen Corporate Statutory Remedies: Dissent and Appraisal Rights, Compliance Orders, “Winding-Up” Orders, and Investigation Orders

Dissent and Appraisal Rights	437
Framing the Issue	437
Rationale Underlying the Appraisal Remedy	439
Potential Impact of the Appraisal Remedy	441
CBCA Dissent and Appraisal Rules	441
Fundamental Changes That Trigger the Appraisal Remedy	442
Alterations to Share Ownership, Business Restrictions, or Rights of Holders of a Class of Shares	443
Amalgamations	446
Continuance	447
Background on Continuance	447
Sale of “All or Substantially All” of the Corporation’s Property	449
Going-Private Transactions and Squeeze-Out Transactions	453
Background	453
Statutory Arrangements	455
Procedure for Exercising Dissent Right	456
Registered Shareholders/Beneficial Owners of Shares	457
Determination and Payment of “Fair Value”	458
An Exception for Public Company Shares?	459
Compliance Orders	460
“Winding-Up” Orders	461
Winding Up “On Just and Equitable Grounds”	463
Section 214 Versus Voluntary Dissolution	464
Investigation Orders	464
Conclusion	467
Index	469