

TABLE OF CONTENTS

<i>Preface</i>	v
<i>Acknowledgments</i>	vii
<i>Table of Abbreviations</i>	xxiii
<i>Table of Cases</i>	xxv

PART A — PARTNERSHIP LAW

Chapter 1 — Partnership Law Principles	1
1. Varieties of Business Organization	1
(a) Sole Proprietorships	1
(b) Partnerships	2
(c) Business Corporations	2
2. The History of Partnership Law	4
3. Definition of Partnership	5
<i>A.E. LePage Ltd. v. Kamex Developments Ltd.</i>	5
<i>Volzke Construction Ltd. v. Westlock Foods Ltd.</i>	10
<i>Pooley v. Driver</i>	14
<i>Continental Bank of Canada v. R.</i>	22
4. Legal Personality of Partnership	30
<i>Thorne v. New Brunswick (Workmen's Compensation Board)</i>	30
5. Conduct of the Business of the Partnership	39
(a). Relationship of the Partners to One Another	39
(i) Equality	39
(ii) Consensualism	39
(iii) Fiduciary Character	40
(iv) Personal Character	40
(b) Relationship of the Partners to Third Parties	41
(i) Pre-partnership Liabilities	41
(ii) Liability as Partner	42
(iii) “Holding out” Liability	42
(iv) Liability of Apparent Partner	43
(v) Posthumous Liability	43
6. Special Forms of Partnership	43
(a) Limited Partnerships	43
(i) Introduction	43
(ii) Important Features of the <i>Ontario Limited Partnerships Act</i>	43
(iii) Limited Partnerships and Taxation	45
<i>Haughton Graphic Ltd. v. Zivot</i>	46
<i>Nordile Holdings Ltd. v. Breckenridge</i>	52
(b) Limited Liability Partnerships (LLPs)	54
(c) Joint Ventures	57

PART B — BUSINESS CORPORATIONS LAW

Chapter 2 — Evolution of Business Corporations Law and the Nature of Corporate Personality	61
1. Introduction	61
(a) History of Canadian Business Corporation Law	61

(i)	British Origins	61
(ii)	Early Canadian Corporations Law	62
(iii)	Modern Canadian Corporations Law	63
(iv)	Securities Regulation	65
(v)	Differences between Canada and the United States	66
(b)	Constitutional Basis for Business Corporation Law	68
(c)	Statutory Provisions	69
	<i>B.C. Business Corporations Act</i>	69
	<i>Canada Business Corporations Act</i>	72
	<i>Interpretation Act</i>	73
(d)	Salomon's Case	73
	<i>Salomon v. Salomon & Co.</i>	73
2.	Limited Liability and Creditor Protection	80
(a)	Statutory Provisions	80
	<i>B.C. Business Corporations Act</i>	80
	<i>Canada Business Corporations Act</i>	81
(b)	Policy Considerations	81
	<i>Halpern, Trebilcock and Turnbull, An Economic Analysis of Limited Liability in Corporation Law</i>	81
(b)	Alternative Sources of Creditor Protection	84
(i)	Cautionary Suffix	84
(ii)	Capital Maintenance Requirements	86
(iii)	Publicity	87
(iv)	Officers' and Directors' Liability	87
(v)	The Oppression Remedy	89
(vi)	Duties in the Vicinity of Insolvency	90
(vii)	Piercing the Corporate Veil	90
(viii)	Cases	90
	<i>Mesheau v. Campbell</i>	91
	<i>ADGA Systems International Ltd. v. Valcom</i>	93
3.	Piercing the Corporate Veil	102
(a)	What is Piercing the Corporate Veil?	102
(b)	What is the Basis for Piercing the Corporate Veil?	103
(c)	Cases	103
(i)	General	103
	<i>Clarkson Co. v. Zhelka</i>	103
	<i>Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.</i>	109
(ii)	Involuntary Creditors	118
	<i>Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.</i>	118
	<i>Walkovsky v. Carlton</i>	123
	<i>Note Re Adams v. Cape Industries</i>	130
	<i>Note Re Prest v. Petrodel Resources Ltd.</i>	131
	<i>Note Re Shareholder Liability for Corporate Torts: The Hansmann- Kraakman Proposal</i>	131
(iii)	Statutory Construction Outside Commercial/Torts Context	131
	<i>Lee v. Lee's Air Farming Ltd.</i>	131
	<i>De Salaberry Realities Ltd. v. Minister of National Revenue</i>	134
	<i>Dole Food Co. et al. v. Patrickson et al.</i>	142
	<i>Lynch v. Segal</i>	147
(d)	Purpose of the Corporate Veil	150
4.	Theorizing Corporate Personality	151
5.	Corporate Criminal Responsibility	152
	<i>Canadian Dredge & Dock Co. Ltd. v. The Queen</i>	153

Chapter 3 — The Process of Incorporation..... 167

1. Introduction	167
2. Place of Incorporation	167
3. Extra-Provincial Licensing and Filing Requirements	171
4. Continuance under the Law of Another Jurisdiction	172
5. Classification of Corporations.....	173
(a) Publicly traded vs. Privately Held Corporations.....	173
(b) One-person Corporations.....	175
(c) Constrained Share Corporations	175
(d) Professional Corporations.....	175
(e) Unlimited Liability Companies.....	176
6. Corporate Names.....	177
7. Incorporation Techniques	179
8. The Nature of the Corporate Constitution	180
(a) Pre- <i>CBCA</i> Distinctions	180
(b) Current Position	182
(c) Note on the Scope of the Contract Created by the Memorandum and Articles of Association in Memorandum Jurisdictions	183
9. Alteration of the Corporate Constitution.....	185
10. Pre-Incorporation Contracts	186
(a) Common Law Position	187
<i>Kelner v. Baxter</i>	187
<i>Black v. Smallwood</i>	190
<i>Wickberg v. Shatsky & Shatsky</i>	193
(b) Statutory Reforms.....	196
<i>Landmark Inns of Canada Ltd. v. Horeak</i>	202

Chapter 4 — Management and Control of the Corporation 205

1. Corporate Governance: The Role of Legal and Market Instruments	205
(a) Introduction	205
(b) The Challenge of Berle and Means	205
(c) Enter the Contractarians	206
(i) Introduction to the Corporate Contract	206
(ii) Voting — Independent and Instrumental Value.....	210
(d) The Role of Corporate Law in the Contractarian Model of the Corporation	216
(e) Critique of the Contractarian Model of the Corporation.....	218
2. An Introduction to the Legal Model of the Corporation	220
(a) Introduction	220
(b) Mandatory versus Enabling Interpretations of Corporate Statutes.....	220
<i>Bushell v. Faith</i>	221
(c) Directorial Power and Interpreting the Corporate “Contract”	227
<i>Kelly v. Electrical Construction Co.</i>	227
<i>Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame</i>	229
<i>Hayes v. Canada-Atlantic & Plant S.S. Co.</i>	232
<i>Sherman & Ellis v. Indiana Mutual Casualty</i>	235
<i>Kennerson v. Burbank Amusement Co.</i>	237
<i>Realty Acceptance Corp. v. Montgomery</i>	238

	<i>Southern Foundries (1926) Ltd. v. Shirlaw</i>	241
3.	The Scope of the “Corporate Contract”	246
(a)	Note on the <i>Ultra Vires</i> Doctrine.....	246
(b)	Agency Doctrines and the Corporation	247
(c)	The Indoor Management Rule	248
	<i>Sherwood Design Services Inc. v. 872935 Ontario Ltd.</i>	249
(d)	Corporate Goals and Social Responsibilities.....	253
	<i>Dodge v. Ford Motor Company</i>	254
	<i>Miles v. Sydney Meatpreserving Co. (Ltd.)</i>	257
	<i>Parke v. Daily News Ltd.</i>	259
	<i>Peoples Department Stores Ltd. (1992) Inc., Re</i>	268
	<i>BCE Inc., Re</i>	274
	<i>Richard A. Posner, Economic Analysis of Law</i>	285
	<i>Henry Hansmann and Ranier Kraakman, “The End of History for Corporate Law”</i>	286
	<i>Kent Greenfield, “Reclaiming Corporate Law in a New Gilded Age”</i>	288

Chapter 5 — The Duty of Care Owed by Managers and Directors to the Corporation..... 291

1.	Introduction	291
2.	Common Law	291
	<i>City Equitable Fire Insurance Co. Ltd.</i>	291
	<i>Re Brazilian Rubber Plantations and Estates, Ltd.</i>	295
3.	Note on Statutory Reform and Judicial Interpretation of the Statutory Duties of Care	299
4.	Statutory Reform: Corporate Law.....	300
	<i>Peoples Department Stores Ltd. (1992) Inc., Re</i>	300
5.	The Securities Regulators’ Public Interest Duty of Care	307
	<i>Standard Trustco Ltd., Re</i>	310
	<i>Magna International Inc., Re</i>	317
6.	The Explosive Expansion of Statutory Duties for Directors.....	322
	<i>Ron Daniels and Ed Morgan, “Directors Face Grab-Bag of Liabilities”</i>	322
7.	Other Statutory Director Liabilities in Corporate Law.....	324
8.	The Business Judgment Rule	325
	<i>Smith v. Van Gorkom</i>	327
	<i>UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.</i>	341
	<i>Brant Investments Ltd. v. KeepRite Inc.</i>	344
(a)	Possible Alternative Transactions	347
(b)	Strategic Plan.....	348
(c)	Consultants’ Report	348
(d)	Valuation of the Inter-City Business on a Going-Concern Basis	349
	<i>Pente Investment Management Ltd. v. Schneider Corp.</i>	353
	<i>Unique Broadband Systems Inc., Re</i>	355
9.	Indemnification and Insurance	360
	<i>Ronald J. Daniels and Susan M. Hutton, “The Capricious Cushion: The Implications of the Directors’ and Officers’ Insurance Liability Crisis on Canadian Corporate Governance”</i>	360
	<i>Unique Broadband Systems Inc., Re</i>	365

Chapter 6 — Fiduciary Duties Owed by Directors and Managers to the Corporation.....	367
1. Introduction to Fiduciary Duties.....	367
(a) The Importance of Fiduciary Duties	367
(b) A Moving Target	370
(c) Common Law Cases Involving Conflict and Profit Rules	372
(d) The Hydra-Headed Fiduciary Duty	374
(e) Interaction between Fiduciary Duties and the Business Judgment Rule	376
(f) Overlap with the Oppression Remedy.....	377
2. Basic Self-Dealing Transactions	379
(a) Introduction to Basic Self-Dealing.....	379
(b) The Legislative Provisions.....	380
3. Corporate Opportunities.....	384
(a) Introduction to Corporate Opportunities	384
(b) The Common Law	385
<i>Regal (Hastings) Ltd. v. Gulliver</i>	385
<i>Peso Silver Mines Ltd. v. Cropper</i>	393
<i>Canadian Aero Services Ltd. v. O'Malley</i>	400
<i>Brudney and Clark, "A New Look at Corporate Opportunities"</i>	408
4. Competition	412
<i>London and Mashonaland Exploration Company, Limited v. New Mashonaland Exploration Company, Limited</i>	412
<i>Slate Ventures Inc. v. Hurley</i>	415
<i>Slate Ventures Inc. v. Hurley</i>	417
<i>Cranewood Financial Corp. v. Norisawa</i>	418
5. To Whom Is the Fiduciary Duty Owed?.....	421
<i>BCE Inc., Re</i>	423
6. Hostile Takeovers and Defensive Tactics by Target Management.....	429
(a) Introduction to Hostile Takeovers and Defensive Tactics	429
(b) Theoretical and Empirical Perspectives	432
<i>Jeffrey G. MacIntosh, "The Poison Pill: A Noxious Nostrum for Canadian Shareholders"</i>	432
(c) Defensive Tactics and the Theory of Takeovers.....	434
<i>Easterbrook and Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer"</i>	434
<i>Roberta Romano, "A Guide to Takeovers: Theory, Evidence and Regulation"</i>	440
(d) The Common Law	448
(i) An Introduction to Takeover Defences	448
(ii) <i>Teck v. Millar</i> , a Canadian Watershed.....	451
<i>Teck Corp. v. Millar</i>	453
(iii) American Jurisprudence on Defensive Tactics	460
<i>Unocal Corp. v. Mesa Petroleum Co.</i>	461
<i>Revlon Inc. v. MacAndrews & Forbes Holdings Inc.</i>	465
<i>Paramount Communications Inc. v. QVC Network Inc.</i>	472
(iv) Developments in Canadian Jurisprudence after Unocal and Revlon	476
<i>Pente Investment Management Ltd. v. Schneider Corp.</i>	476
(v) The Powers of Securities Regulators in Policing Defensive Tactics.....	490
<i>Chapters Inc., Re</i>	493
<i>Neo Material Technologies Inc., Re</i>	499
<i>Re Baffinland Iron Mines Corp.</i>	506

7. Sanction by Shareholders of Fiduciary Breach	509
(a) Introduction to Ratification.....	509
(b) The Common Law	510
<i>North-West Transportation Company, Limited v. Beatty</i>	511
(c) Ratification Provision in Corporate and Securities Law	517

Chapter 7 — Regulating the Exercise of Power by Controlling Shareholders..... 523

1. The Concept of “Control”	523
2. Why Should We Worry About the Exercise of Power by Controlling Shareholders?	524
<i>Jeffrey G. MacIntosh, “Corporations”</i>	524
3. The Strongly Majoritarian Temperament of Early Anglo-Canadian Common Law	526
4. Early English Judicial Attempts to Create a Fiduciary Duty.....	529
<i>Jeffrey G. MacIntosh, “Minority Shareholder Rights in Canada and England: 1860–1987”</i>	529
5. More Recent Canadian Judicial Attempts to Create a Fiduciary Duty	532
6. The Current Canadian Position with Respect to Fiduciary Duties of Shareholders at Common Law.....	533
<i>Brant Investments Ltd. v. KeepRite Inc.</i>	533
7. Duties Owed by Shareholders under the Oppression Remedy.....	536
<i>Ebrahimi v. Westbourne Galleries Ltd.</i>	537
<i>Ferguson v. Imax Systems Corp.</i>	543
<i>Scottish Co-operative Wholesale Society Ltd. v. Meyer</i>	554
8. The Duty of a Controlling Shareholder When Tendering a Takeover Bid	559
<i>Pente Investment Management Ltd. v. Schneider Corp.</i>	559
9. The Duty of the Board of Directors When There Is a Controlling Shareholder	563
<i>Pente Investment Management Ltd. v. Schneider Corp.</i>	563
10. “Majority of the Minority” Voting	565
11. The Role of the Securities Regulators.....	566
<i>Re Canadian Tire</i>	567
12. Are Controlling Shareholders Good for Canadian Capital Markets?	572

Chapter 8 — Shareholders’ Rights..... 579

1. Introduction	579
2. Pre-Emptive Rights.....	581
3. Shareholder Voting.....	585
(a) Introduction	585
(b) Note on Statutory and Judicial Voting Entitlements	588
(c) Note on Classification of Shares	590
(d) Permissible Limitations on the Right to Vote in the Corporation’s Constitution.....	592
<i>Jacobsen v. United Canso Oil & Gas Ltd.</i>	592
<i>Bowater Canadian Limited v. R.L. Crain and Craisec Ltd.</i>	600
(e) Protection of Non-Voting Shares in Takeover Bids.....	604
(f) Cumulative Voting for Directors.....	605

(g)	The Right to Appoint a Proxy	607
(i)	Background to Present Legislation	607
(ii)	The Proxy Legislation.....	608
	<i>Iacobucci, Pilkington, and Prichard, Canadian Business Corporations</i>	608
(iii)	The Concept of Solicitation.....	609
	<i>Brown v. Duby</i>	609
(iv)	Critique of the Proxy Provisions	616
(v)	Proxy Solicitation Expenses.....	618
(vi)	Remedies for Breach of Proxy Legislation.....	620
4.	Shareholder Meetings	624
(a)	Introduction	624
(b)	Unanimous Shareholders' Resolutions	625
	<i>Eisenberg v. Bank of Nova Scotia</i>	625
(c)	The Use of Directors' Powers in Relation to Meetings.....	629
	<i>Schnell v. Chris-Craft Industries Inc.</i>	629
(d)	The Conduct of Meetings and the Right of Discussion	632
	<i>Wall v. London and Northern Assets Corp.</i>	632
	<i>National Dwellings Society v. Sykes</i>	634
	<i>Blair v. Consolidated Enfield Corp.</i>	639
(e)	Shareholder Proposals	643
	<i>Varity Corp. v. Jesuit Fathers of Upper Canada</i>	648
(f)	Judicially Ordered Meetings	655
	<i>Canadian Javelin Ltd. v. Boon-Strachan Coal Co.</i>	657
	<i>Barsh v. Feldman</i>	661
	<i>Goodwood Inc. v. Cathay Forest Products Corp.</i>	663
(g)	Shareholder-Requisitioned Meetings.....	665
	<i>Airline Industry Revitalization Co. v. Air Canada</i>	665
5.	Right to Corporate Information: Access to Corporate Records	674
	<i>Iacobucci, Pilkington, and Prichard, Canadian Business Corporations</i>	674
6.	Right to Appoint an Auditor: Financial Disclosure, Auditor's Liability, and the Audit Committee	676
(a)	Introduction	676
(b)	Qualifications and Independence.....	677
(c)	Functions	678
(d)	Removal.....	679
(e)	Oversight	679
(f)	Liability of Auditors	679
	<i>Iacobucci, Pilkington, and Prichard, Canadian Business Corporations</i>	679
	<i>Livent Inc. (Receiver of) v. Deloitte & Touche</i>	688
(g)	Evaluation	695
(h)	The Audit Committee.....	697

Chapter 9 — Special Aspects of the Closely Held or Private Corporation

699

1.	Introduction	699
	<i>Nicholls, Corporate Law</i>	700
2.	Restrictions on the Transfer of Shares	707
(a)	Statutory and Contractual Provisions	707
	<i>Coates, "Share Transfer and Transmission Restrictions in the Close Corporation"</i>	707

(b)	Judicial Interpretation of Restrictions	712
	<i>Smith & Fawcett Ltd., Re.</i>	712
	<i>Case v. Edmonton Country Club Ltd.</i>	716
3.	Shareholders' Agreements	722
(a)	Introductory Note	722
(b)	Voting Agreements	723
	<i>Clark v. Dodge</i>	723
	<i>Ringuet v. Bergeron</i>	726
(c)	Voting Trusts	728
	<i>Pickering, "Shareholders' Voting Rights and Company Control"</i>	728
(d)	Unanimous Shareholder Agreements	730
	<i>Nicholls, Corporate Law</i>	730
	<i>Bury v. Bell Gouinlock Ltd.</i>	738

Chapter 10 — Shareholder Remedies 745

1.	Introduction	745
2.	The Derivative Action	747
(a)	Introduction	747
(b)	At Common Law: The Rule in <i>Foss v. Harbottle</i> and the Need for the Derivative Action	748
	<i>Beck, "The Shareholders' Derivative Action"</i>	748
(c)	The Statutory Derivative Action	749
(d)	Judicial Interpretation of the Derivative Action	751
	<i>Re Northwest Forest Products Ltd.</i>	751
	<i>Re Marc-Jay Investments Inc. and Levy</i>	754
	<i>Re Bellman and Western Approaches Ltd.</i>	756
(e)	Costs in Derivative Actions	763
	<i>Turner et al. v. Mailhot et al.</i>	764
(f)	The Relationship Between the Complainant and the Corporation	768
(g)	The Statutory Derivative Action after <i>BCE</i>	769
	<i>BCE Inc., Re</i>	769
	<i>Jeffrey G. MacIntosh, "BCE and the Peoples' Corporate Law: Learning to Live on Quicksand"</i>	771
	<i>Ed Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties"</i>	771
3.	The Personal Action	772
	<i>Beck, "The Shareholders' Derivative Action"</i>	772
	<i>Farnham v. Fingold</i>	780
	<i>Goldex Mines Ltd. v. Revill</i>	785
	<i>Hercules Management Ltd. v. Ernst & Young</i>	791
4.	Relief from Oppression	797
(a)	Introduction: The Mischief and Response	797
(b)	The Canadian Statutory Provisions	798
	<i>Iacobucci, Pilkington, and Prichard, Canadian Business Corporations</i>	798
(c)	Overlap Between Oppression Remedy and Fiduciary Duties	801
	<i>BCE Inc., Re</i>	803
	<i>Jeffrey G. MacIntosh, "BCE and the Peoples' Corporate Law: Learning to Live on Quicksand"</i>	807
(d)	Judicial Interpretation of the Action	809
(i)	Standing to Bring an Oppression Action	809
	<i>First Edmonton Place Ltd. v. 315888 Alberta Ltd.</i>	809

(ii)	The Substantive Scope of the Oppression Remedy.....	815
	<i>Ferguson v. Imax Systems Corp.</i>	816
	<i>Westfair Foods Ltd. v. Watt.</i>	821
(iii)	Does the Oppression Remedy Require a Showing of Bad Faith?	827
(iv)	Is the Oppression Remedy Personal or Derivative?	830
	<i>Sparling v. Javelin International Ltd.</i>	830
	<i>Malata Group (HK) Ltd. v. Jung</i>	833
	<i>Rea v. Wildeboer</i>	840
(v)	Can the Oppression Action be Applied to the Conduct of Shareholders of the Corporation?	851
(vi)	The Oppression Remedy and the Duties of Directors in the Context of Corporate Transactions.....	852
(vii)	Costs Orders Under the Oppression Remedy	853
(e)	Remedy.....	854
	<i>Nanef v. Con-Crete Holdings Ltd.</i>	854
5.	Appraisal Remedy.....	862
	<i>Iacobucci, Pilkington, and Prichard, Canadian Business Corporations</i>	862
6.	Other Remedies	867
(a)	Compliance and Restraining Orders.....	867
(b)	Rectification Orders	869
(c)	Investigations.....	869
(d)	Winding-Up	874
	<i>Huberman, "Winding-up of Business Corporations"</i>	874