

# CANADIAN CORPORATE LAW

Cases, Notes & Materials

4th Edition

Bruce Welling

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# Canadian Corporate Law

## Cases, Notes & Materials

Fourth Edition

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## Canadian Corporate Law: Cases, Notes & Materials, Fourth Edition

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# PREFACE

As with its predecessor volumes, the fourth edition of *Canadian Corporate Law: Cases, Notes & Materials* maintains its primary purpose of providing an accessible and authoritative casebook for the teaching of general or survey courses in business associations/organizations or corporate law in any jurisdiction in Canada. Its editors draw on their collective experience in teaching corporate law at a number of law schools in Canada, Australia, England, New Zealand and the United States in putting together a volume that is manageable in terms of its length and provides the essential components of partnerships and corporations law within an appropriate context for appreciating the issues they raise.

A continuing feature of this fourth edition is the editors' collective desire to revisit and rationalize the inclusion of the previous edition's materials. All too often, casebooks that proceed into multiple editions experience a tremendous growth in size by adding new materials without critically rethinking the continued inclusion of pre-existing materials. Such a process often adds only to the physical rather than intellectual heft of a casebook. We have always endeavoured to have subsequent editions of this casebook expand in length only where necessary and only to the extent needed to maintain the appropriate coverage of the subject matter. To that end, we have often had to make difficult decisions to eliminate or reduce certain favourite items from time to time. If we have removed one of your favourites, we apologize for its exclusion. We nonetheless hope that you view these changes to the casebook as part of its evolution and mirroring the simultaneous evolution in Canadian partnerships and corporations law.

So, how would we characterize the notable additions or changes to this fourth edition and how they represent the evolution of Canadian partnerships and corporations law since the third edition of the book was published? Certainly, the Supreme Court of Canada's judgment in *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560 is the most obvious and notable addition. The *BCE Inc.* case is noteworthy for a variety of reasons, not the least of which is that it affirms the revolutionary discussion of corporate purpose in *Peoples Department Stores Inc. v. Wise*, [2004] S.C.J. No. 64, [2004] 3 S.C.R. 461 and engages in significant discussion of managerial fiduciary duties and the oppression remedy that sets the standard for corporate law in Canada. The *BCE Inc.* case is excerpted in Chapters 4 and 9.

*BCE Inc.* provided the Supreme Court of Canada with a prime opportunity to discuss the amorphous oppression remedy that has been a subject of consternation and debate for many years in Canada. The frequency and manner in which the oppression remedy has been argued and applied in the jurisprudence of different provinces brought about the need for a consolidation of the various judicial opinions that have been offered. *BCE Inc.* provided the opportunity for this to occur, but in the process of addressing the oppression remedy, it opened up potential new controversies, such as the extent to which principles of fiduciary

obligation in the discharge of corporate management's obligations may or may not be relevant in assessing the application of the oppression remedy.

What is also notable about *BCE Inc.*, and is illustrated particularly in Chapter 4, is that the judgment confirms the suggestions from the Supreme Court of Canada's judgment in *Peoples Department Stores Inc.* that Canadian corporate law regards the fundamental issue of corporate purpose and the duties and obligations of corporate management rather differently from what may be observed in the preponderance of corporate law scholarship in the United States. In particular, the notable emphasis in U.S. corporate law scholarship on the shareholder primacy theory has been thoroughly rejected as a legitimate basis of understanding the purpose and function of Canadian corporations or the obligations of corporate management. The Supreme Court of Canada has quite clearly indicated its support of the entity theory of the corporation through its judgments in *Peoples Department Stores Inc.* and *BCE Inc.*, which is far more consistent with the long-term interests and viability of corporations than with maximizing short-term shareholder value. The Supreme Court has also confirmed the need to consider the interests of a wide spectrum of stakeholders, including communities, government and the environment, rather than focusing solely upon shareholders when corporate management makes its decisions in the best interests of the corporation. Perhaps this fundamental difference in approach explains, at least in part, the greater acceptance of governmental regulation in Canadian corporate law than in the United States and the not entirely unrelated and far less severe effects of the recent financial crisis on financial institutions and corporate bodies in Canada than in the United States.

Last, but certainly not least, the *BCE Inc.* judgment tantalizingly raised the issue of good corporate citizenship and what it might mean though its repeated reference to the corporation acting "as a good corporate citizen". Is the Supreme Court making a reference here to corporate social responsibility and the need for Canadian corporations and management to pay greater attention to this duty? Alternatively, is this a phrase to be treated like the emphasis in *Peoples Department Stores Inc.* on the "better" corporation or making the corporation "better" that is never defined in that case and has largely ceased to be referenced beyond the initial case comments that appeared following *Peoples'* release?

In addition to the major inclusion of the *BCE Inc.* judgment, different chapters of the book have been reworked or reorganized, either to facilitate the inclusion of new materials or to provide for the better and more logical presentation of information. Some chapters have undergone minor tweaking, while parts of others have been more extensively reworked. For example, the section on corporate criminal liability has been rewritten and greater references have been made to aspects of Quebec civil law, particularly where it sheds light on Supreme Court of Canada jurisprudence in the fields of management obligations (*Peoples Department Stores Inc.*) and corporate personality (*Houle v. Canadian National Bank*, [1990] S.C.J. No. 120, [1990] 3 S.C.R. 122). Fiduciary law issues, such as corporate opportunity, have been updated, as has oppression jurisprudence by reference to *BCE Inc.* Attempts have also been made to provide more linkages between sections or towards possible analogies or comparisons between chapters.

Finally, the “Notes and Questions” components of each chapter have been reviewed and modified where appropriate.

The work involved in the production of a book such as this goes far beyond the three names on the cover (although we did, of course, do all the hard work!). Bruce thanks Patrick Copeland for his research work. Lionel thanks Benjamin Sormonte and Yury Smagorinsky for research assistance. Len thanks Jordan Green (J.D./LL.B. '09) and Laura Levine (J.D./LL.B. '10) for their research assistance and the financial assistance of the Law Foundation of Ontario.

Finally, the editors wish to thank Fran Cudlipp for her encouragement and support in the preparation of this edition, as well as LexisNexis Canada and the members of its staff who have contributed to the production of this volume.

Len Rotman  
Windsor, Ontario  
April 2010

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A casebook on such a wide subject necessarily contains a great deal of reference to the work of others in the field, in the cases, the notes, the text, and especially in the selected readings. The authors and publishers of the following articles and textbooks have been most generous in giving permission for the reproduction in this text of work already in print. References, of course, appear where necessary and possible in the text. It is convenient for us to list below, for the assistance of the reader, the publishers and authors for whose courtesy we are most grateful. The following list is organized by publisher in alphabetical order:

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Cambridge Law Journal and L.S. Sealy

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Rotman, Leonard I., *Fiduciary Law* (Toronto: Carswell, 2005). Reprinted by permission of Carswell, a division of Thomson Reuters Canada Limited.

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*Corporate Law in Canada: The Governing Principles*, 3rd edition (Scribblers Publishing, 2006). Reproduced with permission.

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# TABLE OF ABBREVIATIONS

Abbreviations for the federal and provincial company legislation are frequent and are listed as follows:

A.B.C.A.	Alberta Business Corporations Act, R.S.A. 2000, c. B-9
B.C.B.C.A.	British Columbia Business Corporations Act, S.B.C. 2002, c. 57
C.B.C.A.	Canada Business Corporations Act, R.S.C. 1985, c. C-44
M.C.A.	Manitoba Corporations Act, C.C.S.M. c. C225
N.L.C.A.	Newfoundland and Labrador Corporations Act, R.S.N.L. 1990, c. C-36
N.B.B.C.A.	New Brunswick Business Corporations Act, S.N.B. 1981, c. B-9.1
N.S.C.A.	Nova Scotia Companies Act, R.S.N.S. 1989, c. 81
O.B.C.A.	Ontario Business Corporations Act, R.S.O. 1990, c. B.16
P.E.I.C.A.	Prince Edward Island Companies Act, R.S.P.E.I. 1988, c. C-14
Q.B.C.A.	Quebec Business Corporations Act, S.Q. 2009, c. 52 (assented to December 4, 2009; not yet in force)
Q.C.A.	Quebec Companies Act, R.S.Q. c. C-38
S.B.C.A.	Saskatchewan Business Corporations Act, R.S.S. 1978, c. B-10
Y.B.C.A.	Yukon Business Corporations Act, R.S.Y. 2002, c. 20

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