



BUSINESS STRUCTURES & LIABILITY

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Doing Business

- Benefits and risks
- A bit of history
- Available legal structures & what they mean
 - In person
 - Partnership
 - Limited company
 - Joint venture





Risks of doing business

- Entering business contracts fundamental and necessary component of economic development
- Agreeing to participate in project creates possible gains, but also unavoidable, unforeseen risks (eg. project failure, failure of contractors or subcontractors, loss of financing...)
- Risks borne by legal entity making the contract: ie. person, group, company





Risks of doing business

- Anyone suffering losses as result of a project (eg. breach of contract) can sue other party to contract, project proponent
- Remedies include attaching all the assets of the defaulting party, including personal assets, up to and including forced bankruptcy
- Can be devastating to an individual





Individual

- Historically the ‘legal person’ is touchstone for liability: someone must be accountable
- Essentially same test as standing to commence, maintain or defend a law suit, but from other side
- Courts will bend over backwards to give a remedy to guiltless victim; general resistance to efforts to protect assets from liability
- Means business activity puts personal assets at risk
- Bottom line: structures to shelter from liability are critical, but must be adhered to closely to maintain the protection





Partnership

- Essentially a contract to do business among individuals
- “the relation that subsists between persons carrying on a business in common with a view of profit”
- Statutory – *Partnership Act* – similar in all provinces
- Tax benefits: revenue taxed in hands of partners, not p’ship; no dividend taxes; better marginal rates
- Downside: unlimited personal liability





Partnership

- each partner personally liable for
 - debts and obligations incurred by every other partner, and
 - wrongful acts or omissions of every other partner in ordinary course of partnership's business
- Contract: every partner is agent for the others; can bind all the other partners
- Partnership can sue or be sued in own name, but the partners are always personally liable
- Serious misconduct of just one minor partner can create so large a liability it drains assets of even richest partner





Partnership

- No need for express contract to act as partners: court can deem partnership based on circumstances, eg.
 - Engaged in business for profit
 - Profit sharing
- Issue likely to arise when a business incurs liability its assets can't meet – victim goes looking for another source of assets
- Good idea, therefore, to formalize business relationship





Limited company

- Concept has been around very long time (eg. HBC), but only privately available since beginning of 20th century
- Corporation is legal person in eyes of law, distinct from the legal persons (shareholders) composing it
- Statutory, must meet various structural and registration requirements – issue shares, appoint officers and directors...
- Key significance: limited liability
- Individual shareholders liable only to amount of price of shares they've purchased





Limited company

- Other distinctions from partnership:
 - Transferrable ownership
 - Management
 - Continuous existence
 - Loyalty
 - Separation of ownership and management





Limited company

- Limitation of liability means opposing party's remedy goes no further than company's own assets
- Eg. Salomon case, 1897
- Limitation can, however, be lost





Limited company

- “Piercing the corporate veil”
 - Fraud
 - Taxes
 - Company as agent for shareholders
 - Directors – good faith, fiduciary duty to company
- Courts will not lightly set aside company’s limited liability





Joint Venture / Consortium

- Arrangement whereby two or more parties (often corporations) enter into agreement to contribute a part of their respective resources to a specific project
- Spreads risk of large project among participants
- Status at law vague: sort of like a partnership, but usually not regarded by participants as separate operation
- Can also proceed under its own separate ad hoc corporate entity
- Really a creature of contract: customizable for the unique needs, contributions of parties
- Somewhat dangerous to use joint venture loosely; hard to know extent of liability being undertaken unless expressed in contract





What's an Indian Act Band?

- An Indian Band is not a legal person / corporation
- Unique non-corporate body, created by statute
- Courts have gone both ways as to whether a Band has capacity to enter into contract, take action in own name
- Creates risk of personal liability for those contracting on Band's behalf

- Solution: limited company or companies

