**CORPORATIONS CANs**

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| Chapter 1: Types of Business Vehicles | |
| Sole Proprietorships |

* Advantages: simplest form, cheap (one man show), no document filing (may need licence), tax benefits
* Disadvantages: unlimited liability of proprietor 🡪 no legal personality separate from proprietor
* *Partnerships Act s.1(10)* 🡪 can practice under your name. Registration if under trade name (file declaration) that would include “and company”

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| Corporations |

* Advantages: Common, relatively cheap (cheaper than partnership), preferred if many owners
* Disadvantages: more complicated incorporation, extra administrations (ongoing reporting requirements)
* Certificate of incorporation issued by appropriate gov official = corporation in existence
* Has perpetual existence (doesn’t cease to exist if shareholder dies)
* Corporations are separate entities at law; shareholders have limited liability (behind veil)

2 ways to be incorporated in AB:

1. Provincially under the *Business Corporations Act,* RSA 2000, c B-9 [BCA]
2. Federally under the *Canada Business Corporations Act,* RSC 1985, c C-44 (interprov businesses)

Registration requirements:

* Articles of incorporation filed in prescribed form (1+ persons may incorporate a corporation)
  + Corp’s name, classes & max number of shares corp authorized to issue (and description of rights, privileges, restrictions, conditions in each class), number of corporate directors, restrictions on corp’s business, restrictions on share transfers 🡪 sent to registry WITH NUANS name search reserving corporate name, notice of directors, notice of address

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| Unlimited Liability Corporations (ULC) |

* Hybrid – same as incorporating reg corp but add “unlimited liability corporation” at end & articles must say ULC
* Smart for Americans conducting business in CA 🡪 tax purposes
* LLC continuing to AB as ULC 🡪 (1) continuance in AB as a LLC, (2) amend articles to convert to ULC

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| Partnerships\* |

* Relationship that subsists between persons carrying on a business in common with a view for profit
* NOT a separate legal entity 🡪 partners don’t “own” the partnership property, doesn’t have its own existence (tied to partners), property indivisible among partners *in specie*. Can assign profits but not partnership interest
  + Arises from contract, evidenced either by express declaration or by conduct
* “Trading, manufacturing, contracting, mining” 🡪 declaration at Corporate Registry filed within 6 month
* Liability
  + Jointly for the debts of the business (contractual obligations): shared liability each D liable to the full extent of the obligation in question
  + Jointly and severally liable for the wrongful act of a partner (negligence): P can collect 100% on its judgment from Ds but Ds can then apportion as between themselves according to fault or responsibility.
  + Note: newly admitted partner not liable for things having occurred prior to their admittance
* Have reciprocal duty of loyalty (no competing) and good faith (s.32 of *Partnerships Act*)

*Partnership Act s.4* 🡪 factors to be considered in determining whether partnership exists

1. Common ownership of property doesn’t by itself create a partnership (*Porter v Armstrong [1926]*) – arises out of contract, evidenced by express declaration or conduct signifying the same thing)
2. The sharing of gross returns doesn’t of itself create a partnership
3. Receipt by a person of a share of profits of a business is *prima facie* proof that person is a partner in the business

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| Limited Partnerships |

* Creatures of statute 🡪 governed by *Partnership Act ss.49-80*
* Consists of 1+ persons who are general partners and 1+ persons who are limited partners
  + General: unltd liability for obligations of partnership (on hook if something goes south)
  + Limited: only liable to the extent of the amount of money or property he/she contributed to the limited partnership (silent partner). Draw: tax benefits. Don’t have control over business (lose it once you do)
* Comes into existence when certificate listing essential terms is filed at Corporate Registry (*PA s.52(2))*

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| Limited Liability Partnerships |

* Applies to members of certain professions (aka lawyers, accountants). If you’re small you can incorp yourself
* If negligent, you’re on the hook with all your assets
* Partners shielded from liability in excess of their shares (that’s the limit of their liability)
  + Exception: negligent lawyer and other partners weren’t in on it, max anyone can go after them is their shares
* Governed by Part III (ss.81-104) of the *Partnership Act*
* \*Partners in an AB LLP aren’t shielded from liability of partnership’s ordinary contractual obligations. If LLP incurred debt or defaulted on contractual obligation, all partners on the hook.
  + Differentiate contractual obligation from tortious liability
  + Breach has to do w/ practice of law 🡪 negligence. Only give up what they brought in, that’s it.

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| Choosing a Form of Business Organization |

1. The need for limited liability (nature of business)
2. Tax implications (benefits w/ sole proprietor) – incentives as small business to incorporate
3. Formalities and cost and set-up – cheaper to incorporate than partnership but more expensive than sole, ongoing costs of the corporation
4. Degree of control – the bigger you are, the less control you have. If you’re in control 🡪 on the hook
5. Who participates in profits – more shareholders, more profits divided but more capital (they’re investors)
6. Dissolution – general partners surviving you

\*\*PAGE 8 FOR TABLE OF PROS AND CONS W/ COMPARISONS

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| Chapter 1: Business Arrangements (ways to carry on a business) | |
| The Franchise |

* Contractual arrangement between manufacturer, wholesaler, or service org (franchisor) and independent business (franchisee) who buys the rights to own and operate one or more units of the franchise system. Governed by franchise leg
* Motels, fast-food chains, restaurants, hair salons, fitness centres – way for franchisor to branch out

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| Joint Ventures |

* Definition: association of business entities that unite for the purpose of carrying on a business venture
* Contractual arrangement, jointly control and manage, share in profits and losses
* Key feature: usually limited to specific project or period of time
* Can be partnership, equity joint venture, contractual arrangement
  + Equity JV: parties incorporate separate corporation for the project. Each hold shares in the corp. Can be held to owe fiduciary duties to one another in relation to the activities of the JV

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| Strategic Alliance |

* Cooperative arrangement among businesses that may involve joint research, tech sharing, joint use of production, etc.
* No precise legal meaning and the relationship between parties normally contractual (contract describes rights & obligaitons of the parties)

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| Distributorship or Dealership |

* Manufacturer agrees (contract) to provide producers & distributor/dealer agrees to carry producers or perform services prescribed by manufacturer (e.g. car dealerships) 🡪 similar to franchise
* No fiduciary obligations and doesn’t normally involve any agency relationship

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| Sales Agency |

* Arrangement where manufacturer/distributor contract with agent to sell goods/services supplied on principal/agent basis
* Agent acts on behalf of principal (owner of goods), fiduciary obligations owed
* E.g. travel real estate, insurance industries, real estate agent out there on your behalf

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| Chapter 1: Agency and Partnership |

Agency: fiduciary relationship existing between two persons, one of whom (principal) expressly or impliedly consented that the other (agent) should act on his behalf so as to affect his relations with third parties

Principal: the one whose behalf the act(s) are to be done

Agent: the one who acts on behalf of the principal

\*Scope must be determined after agency relationship created 🡪 nature & extent of the power possessed by the agent to affect the legal position of his principal. Dealing w/ legal relationship of principal and his agent AND relations that could emerge between principal and 3rd party or agent and 3rd party.

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| Types of Authority | |
| Actual/Real Authority | |

Definition: where the agent’s authority results form a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent (must be proved by party alleging that agent acted under it)

1. Actual express authority
   * Authority which the principal has expressly given the agent (oral or written agreement)
2. Actual implied authority
   * If unclear or value. Can look at what’s customary in the business to make it out
   * If there’s ambiguity, as long as the agent acted in good faith and reasonably within what could reasonable be construed as his/her authority, the principal will be bound (look at circumstances)
   * When vague, court will fill in gaps and imply authority 🡪 every agent has implied authority

\*Only way out for principal 🡪 if principal gave notice to 3rd party that the agent isn’t acting on their behalf, principal not bound

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| Apparent Authority |

Definition: authority resulting from a manifestation of consent made by the principal to a 3rd party (agency by estoppel)

* Estoppel requires reliance by 3rd party to their detriment
* Rule: if principal gives impression to 3rd party that this was their agent (don’t have to expressly or impliedly grant authority), they will be bound by it if 3rd party relied on it to their detriment.
* If no detriment 🡪 no harm, no foul
* To prove:

1. The party relied on the relevant representation
2. Such reliance led to an alteration of the 3rd party’s position to his/her detriment

STEPS: (1) Is this a partnership? (2) What is the scope 🡪 express or implied??

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| *Volzke Construction Ltd v Westlock Foods Ltd* | |
| Facts | Westlock Shopping Centre 🡪 Bonel Properties (80%) & Westlock foods (20%; Shefsky is main shareholder). Bonel failed to pay P. Sued Westlock Foods alleging that it was in partnership with Bonel and liable for the debt.  Has to show that it’s a partnership |
| Analysis | Partnership found 🡪 parties agreed to share costs, spoke to each other as partners |
| Ratio | Control is not an indicator of a partnership (it’s irrelevant) |

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| *McDonic Estate v Hetherington (Litigation Guardian Of)* 🡪 case to determine scope | |
| Facts | McDonic and Cooper (P), Hetherington (D – law firm), Mr. Watt (negligent partner)  Mr. Watt took the client’s money, misinvested it and was sued (everyone else in firm sued along with them).  Liability of partners of a law firm for misconduct of one of their partners |
| Analysis | No express authority but there is actual implied authority, thus binding the partners.   * Money put in firm’s trust account, books of the firm, wasn’t practicing law 🡪 on the hook. |
| Ratio | Look to *s.12 of PA 🡪 wording!! S.13* is liability of firm for wrongs (actual authority) and s.14 is misapplication of money (apparent authority)   * “The nature of the activity, and not the manner in which that activity is performed will determine whether the activity falls within the scope of the firm’s ordinary business” * If their ordinary course of business goes beyond the courts of law, their LLP ends where the practice of law ends and they’re on the hook for anything further. * You’re only protected if you’re practicing law (s.12 of *PA*) |

Note: loss prevention bulletins 🡪 you are your partner’s keeper! Firms should have detailed policies re personal dealings w/ clients so that partners are in the know of what the other partners are doing.

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| Chapter 2: General Structure of a Corporation |

* Shareholders: equity claimants, invest for a return, claims or rights (voting, dividend and rights on liquidation), liability turned to amount of investment
* Corporation: separate personality with perpetual existence
* Directors: appoint officers to manage corp, make major decisions on corp policy, could consist of just one director
* Officers: e.g. prez, VP, secretary, treasurer. Manage corporation – hire others to assist in management and carry on corp’s business

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| *Salomon v Salomon*  (HL judgment)*– foundational case* | |
| Facts | Aaron Salomon (individual) wanted to incorp sole proprietorship, went belly up and had creditors he needed to pay. There was nothing left when he got to the unsecured creditors.  Liquidator: sale of business to the corporation should be rescinded and Aaron should be liable for his debts (on the hook) |
| Analysis | Conditions for incorp unde statute satisfied, can’t claim fraud if you knew what the true state of facts are, unsecured creditors had full notice they were now dealing w/ corp vs individual, one man = predominant partner, that’s it. |
| Ratio | Corporations are a separate entity from the individual behind them (corporate veil). You can’t go after the shareholders personally, you can go after them only to the extent of their liability (codified in *ABCA* section 16(1) and 46(1) |

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| Chapter 2: Corporate Constitution |

The core is comprised of “basic charter documents that constitute the fundamental terms of the corp concerned”

1. Articles of incorporation: contain basic provisions re corporation: name, structure of share capital, place of its registered office, size of board of directors, restrictions on any business in which it may engage
2. Bylaws: rules “adopted by a company for the regulation of its own actions and concerns, and of rights and duties of members among themselves
3. Oher sources of corporate conduct/power: legislation, directors’ resolutions, shareholders’ resolutions (unanimous agreement restricts directors’ power), CL

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| *Canadian Jorex Ltd v 477749 Alberta Ltd* | |
| Facts | Directors called a special meeting of shareholders but cancelled 1 month prior. Shareholders saying that cancellation is of no force and effect because they have the right to review auditor’s statements. Directors argued s.102 of *CBCA* applies (power to manage business and affairs (cancelling meetings falls into affairs) of the coproration |
| Analysis | * Pursuant to s.17 and s.101 of *ABCA* 🡪 general power unless restricted, and 101 says that unless restricted by shareholders, the directors is able to do it unless prohibited by *ABCA*  *CBCA* |
| Ratio | Directors have residual power, practically unlimited, to do whateer they see fit, unless prohibited by bylaws, the shareholders, etc.  Under the CBCA, the residual power to manage the corporation’s affairs lie with the Directors. |

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| Chapter 3: Incorporation Procedures – Corporate Names |

Procedures: (1) online (2) submit articles of incorporation (3) NUANS

ABCA re incorporation in AB: s.7 🡪 how to deliver, s.12 🡪 names, s.20 🡪 , s.106 🡪 Directors

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| Who may incorporate |

* *ABCA*: one or more “persons” can incorporate. (s.1(x)).
  + Persons 🡪 individual, partnership, association, body corporate, trustee, executor, administrator, legal rep
* *CBCA*: one or more bodies corporate or individual who are 18+, not of unsound mind and not bankrupt can incorp (s.5)

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| Kinds of corporations |

* *ABCA*
  1. Corporations with 15 or fewer shareholders (non-distributing corporations – shares not sold to public)
     + Most common in AB, least amount of regulation
  2. Corporations with 16 or more shareholders (non-distributing corporation
     + Must prepare shareholders list for meetings
  3. Corporations with 16 or more shareholders which distributes shares to the public (publicly traded)
     + Subject to the most restrictions, financial statements, subject o AB Securities Commission and AB Securities Act, must have at least 2 directors
  4. Unlimited Liability Corporation
     + Seinfeld example of American conducting business in CA, each shareholder on the hook personally, very rare, usually only used for tax purposes
  5. Not-for-profit corporations (*Companies Act* or *Societies Act*)
  6. Special corporations (professional corporations i.e. lawyer)
* *CBCA* (for companies conducting business in more than one province)
  + - Same classes of corporations, but doesn’t provide for special treatment of non-distributing corporations having 15 or fewer shareholders
    - Federal not-for-profit corporations governed by the *Canada Not-for-Profit Corporations Act*

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| Post-incorporation issues |

1. Directors’ organizational resolutions (s.104(1)) can adopt in lieu of a meeting (s.117). Kinds of resolutions they can issue (but don’t have to):
   1. Adoption of bylaws or of form of share certificate
   2. adoption of a corporate seal
   3. appointment of officers (directors can be officers in small corporations) but their powers and authority must be set out (they’re agents and their actions will bind the corporation)
   4. Issuance of shares (not to public but to shareholders) – shares must be fully paid to be issued
   5. Banking issues (borrowing partners)
   6. Auditors and accountants 🡪 if consent given by shareholders to not have auditor, directors can appoint accountant. Shareholders must confirm auditor, if appointed
2. Shareholders’ organizational resolutions (usually in first AGM)
   1. Confirmation of bylaws
   2. Election of directors (must consent in writing to be directors as it comes w/ fiduciary duties). Directors that appear are the initial directors who hold office only until the first AGM
   3. Auditors – must pass resolution whether they consent to an auditor but also if they don’t

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| Unanimous Shareholder Agreements |

* (s.146 in *CBCA* and *ABCA* – but they differ)
* Expectations and need of shareholders = dominant interest
* As fundamental & constitutional as articles of incorp and bylaws re governing how corp is to be managed
* Company, officers & directors don’t have to be parties to the agreement, but they’re bound by it sans signing
* Shareholders are, to the extent that they have taken on directors’ duties and powers, liable as directors would be

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| *Cicca v 609940 Ontario Inc (Trustee Of)* | |
| Facts | Cicco and Bertucci each own 50% of shares but only B is a director. B passed Directors resolution that the company was making an assignment in bankruptcy, declared it. Cicco sued saying he can’t do that – he’s a 50% shareholder |
| Analysis | For courts to annul, they must conclude that it wasn’t lawfully made in the first place (flexible test). Director did the right thing and the trustee in bankruptcy (3rd party) can rely – it was a valid and good call |
| Ratio | A unanimous shareholder agreement (usa) binds the directors but may not bind a 3rd party dealing with the company who has no notice of the restrictive authority of its directors |

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| Corporate Names?? |

## General

* Point: for public not to be confused between your client’s corporation and another corporation
* Numerical name is designed by registrar, alphabetic/word name requires name reservation and NUANS search (Newly Upgraded Automated Name Search – reserved for 90 days if available)

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| Criteria in name approval (*BCA, s.10*) |

* 3 elements:

(1) distinguishing element

(2) descriptive element (not statutorial required),

(3) legal element (required under *ABCA*) 🡪 Corp., Corporation, Ltd., Limited, etc

* *ABCA* s.12 🡪 can’t be identical (or so similar that it’s confusing) to the name of another AB body corp or extra-provincial corp registered in AB or a federal corporation. *Business Corporations Regulation* (p.65 of CB)
* \*You need at least the distinctive and the legal element. Point is to prevent confusing w/ existing corporations

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| *Paws Pet Food and Accessories Ltd v Paws and Shop Inc – s.12 case* | |
| Facts | Paws Pet Foot incorped under BCA aggrieved as registrar allowed other Paws. P asked registrar to force name change, registrar refused |
| Analysis | Acquired good will and was well-established in the community. People asked and believed it was an affiliate |
| Ratio | Where the corporation has acquired good will in its name and is well-established, courts will force other companies to change their name if there is evidence that the public has been misled and confused by a name. |

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| *Stenner v ScotiaMcLeod* – tort of passing off | |
| Facts | Father and daughter work at same business – understood that she’d take over one day. Deal fell through and daughter went to competitor (Scotia). She kept her father’s last name and the father argued that they were passing themselves off as still working for his team and wanted an injunction that would prevent them from using his last name |
| Analysis | Damages awarded for P’s loss of good will – had acquired reputation and good will in connection w/ financial services. Note: this is different because it was trademarked – don’t need to prove anything, can sue in trademark infringement |
| Ratio | For the tort of passing off, P must prove: (representing somebody else’s good as your own)   * + 1. The existence of goodwill     2. Deception of the public due to a misrepresentation     3. Actual or potential damage to the P |

Take home: make sure you client’s corporate name is legit and not similar/similarly confusing with another name. You can’t rely on the Registrar 100% to do it for you.

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| Share Capital |

* For a corporation to get money, people need to buy into your corporation and they do so by buying shares
* Investors who are shareholders have to buy shares in a corporation

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| Corporate Share |

* A common, divided, participation interest in the corporation’s business
* Share ownership does *not* represent proportionate shares in the assets owned by the corporation
* You have a right, when the company is dissolving, to a proportionate share of the value of the assets form the same
* Presumption is that shares of a corporation are equal, but it’s possible to defeat this presumption by dividing shares into different classes/series
  + Series = subdivision in one class (within one class, the series can’t be different in terms of rights)
* All shares in a corporation must belong to one and only one class of shares in the corporation (class determines rights, obligations)
* Breakdown:

1. One class of shares: rights of holders are equal in all respects
2. More than one class: shares belonging to each class may, but need not, have rights, terms, conditions and restrictions attached to them to distinguish them from the shares belonging to other classes

* Common shares: no preference, right, condition, restriction, limitation or prohibition attached set out in the articles or incorp. More risky – last one to get whatever is left when the company goes belly up
* Preferred shares: special shares that have some preferential right which caused the share to rank ahead of the common shares. Could have more voting power, could be first in line for dividends
* 3 rights of shareholders:

1. Right to vote
2. Dividends
3. Remaining property upon dissolution

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| Pre-incorporation Contracts |

Definition: contract someone is trying to enter into on behalf of a corporation that doesn’t exist yet

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| PROMOTER  (wants quick deal w/o personal liability) |

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| CONTRACT  (purportedly on behalf of the corporation to be incorporated) |

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| 3RD Party |

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| Principal |

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| Agent |

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| Contract? |

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| English CL  (*Kelner)* 🡪 NO! |

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| CORPORATION  (to be created) |

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| ON courts (*Black*) 🡪 depends on the intention of the parties 🡪 uncertainty |

2 problems:

* + - 1. No corporation exists so that you can go after the corporation. You have to go after the promoter as an individual
      2. Corporation to deal with but it is its own entity. The corporation can refuse to adopt this contract, then what? Is there actually a contract between corp and 3rd party?

Use *Kelner* to argue that there’s NO CONTRACT. Strict liability approach:

1. Promoter signed the contract, they’re bound by it! Promoter personally responsible
2. Once incorporated, the corporation can’t ratify (adopt) the contract if it wasn’t alive when the agent tried to bind them
   1. If you contract as an agent of a non-existent principal, you’re liable
   2. You need two parties to contract (both alive)
   3. Corporation born on date of incorporation 🡪 can’t reach back into past and adopt contracts

Use *Black* (ON courts) to argue that there may be a contract 🡪 depends on intention of the parties 🡪 uncertainty

1. Promoter’s liability depends on intention of the parties (more relaxed than stated in *Kelner*)
2. Corporation can’t ratify the contract once incorporated

Legislative reform (AB different) 🡪 (1) *CBCA, s.14*; (2) *OBCA*, *s.21*; *ABCA, s.15*

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| Statutory Rules re Pre-Incorporation Contracts |

* **CBCA/ONCA:** promoter deemed part (therefore personally bound) by pre-incorp contract unless corp adopts the contract.
  + This overturns second rule of *Kelner*. Now on the hook if they don’t incorporate (harsher 🡪 holding promoter liable)
* **ABCA (s.15)**: promoter = warrantor that the corporation will come into existence and adopt the pre-inco contract – can only be held liable for breach of warranty. (can only ever be a warrantor)
* **\***Promoter can “contract out” of personal liability 🡪 expressly put in that he/she isn’t liable in the contract 3rd party signing

JUDICIAL TREATMENT:

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| *Westcom Radio Group Ltd. v MacIsaac* (1989) – Ont CA | |
| Facts | D entered into series of contracts w/ P on behalf of a corporation both mistakenly believed to have been incorporated (it wasn’t). Company breached contracts, P sued D for amount owing under contract |
| Analysis | Should be held personally liable under s.21(1) OBCA: person who enters into contract on behalf of corp liable. XXX  OBCA doesn’t apply here – went back to CL *Kelner* and *Black* re intention – no intention to hold D personally liable |
| Ratio | Intention doesn’t matter anymore 🡪 that’s the whole point of legislation! This is the Courts not following OBCA |
| *Sherwood Design Services Inc v 872935 Ontario Ltd* | |
| Facts | P contracted w/ individual D (buyers) who purported to buy assets on behalf of corp not yet incorporated. Completed purchase using shelf company. Organizational docs for future company and draft (signed) resolution of directors to adopt pre-incorporation contract. |
| Holding | Sufficient evidence of the intention of the corporation to adopt. Once you have something amounting to legal intention, promoter is off the hook. |
| Ratio | Once you have something amounting to legal intention, the promoter is off the hook. 2nd principal of *Kelner* and what counts as adoption. Majority: this letter amounts to intention to be bound. |

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| *Szecket v Huang* | |
| Facts | P entered into tech licencing agreement with D (pre-incorporation contract). P sued D for breach of contract |
| Holding | D personally liable. Forget about intentions, look to OBCA s.21 – enough to have two parties entering into some kind of deal. The corporation was never incorporated so the promoter is personally liable (nothing in contract to get promoter out of it and off the hook). |
| Ratio | Overturns *Westcom*!  Personal liability of promoter to be decided on the basis of OBCA s.21  Common law rules of *Kelner/Black* still apply where there is no statute |

Note: In ABCA, the promoter is a warrantor ONLY if the corporation doesn’t come into existence. The most you can hold them liable for is breach of warranty. Above cases dealing with OBCA. If in AB, you need to use ABCA.

* Differences between OBCA and ABCA – OBCA says oral and written, ABCA says only written. If in AB and it’s oral 🡪 *Kelner and Black*.
* If legislation doesn’t apply, harsh rules will kick in and they’ll be personally liable unless they can prove the intention was not to hold them liable.

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| *Wickberg v Shatsky et al* | |
| Facts | P hired by Rapid Data (didn’t exist) but were defendants (directors) of Rapid Addressing Systems which did exist. They purported to incorporate Rapid Data but continued to do business under the name (seemed as though it was a corporation).  P’s letter of employment was on letterhead of non-existent corporation signed by D. Told they were dropping the Ltd. because it wasn’t incorporated. P fired by Rapid Addressing and suing for wrongful termination |
| Analysis | CL rules 🡪 it wasn’t parties’ intention when contract was made that D (signed as director) should be personally liable  Used Ltd when they knew it wasn’t incorporated was “reprehensible.” No causal connection between damage suffered by P and breach of warranty – business was failing and he would have been fired regardless. P recovered against D only that which he had lost by reason of the breach of warranty |
| Ratio | Resembles the current legislative scheme in AB  Promoter liable for the contract under CBCA or OBCA. Then you go to damages |

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| Chapter 4: The Corporation as a Legal Person – Grounds for Liability |

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| Grounds for Liability of Those Behind the Corporation –Lifting the Corporate Veil | | |
| *Salomon v Salomon* | | |
| Ratio | Corporation is its own legal entity distinct from the people behind it | |

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| *Kosmopoulos* | |
| Ratio | The corporate veil can be pierced where otherwise it would be ‘too flagrantly opposed to justice’ 🡪 VAGUE! |

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| *Transamerica Life Insurance Co of Canada v Canada Life Insurance CO* (1996) | |
| Ratio | Seminal case that tweaked *Kosmopoulos* 🡪 corporate veil can be pierced where the ocmpnay is a ‘mere façade’ concealing the true facts.  To pierce the corporate veil:   1. Subsidiary corporation must be completely dominated and controlled by the parent company 2. Used as a shield for fraudulent or improper conduct (harder to prove) – high threshold |

**Starting point for exam**: courts don’t like lifting corporate veil. Need hard evidence to show sufficiently fraudulent or improper acts

Parent company must hold enough voting shares in the subsidiary to control it. Has to have enough control to say that the subsidiary is just a puppet and must be used as a shield for fraudulent or improper conduct.

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| *Yaiguaje v Chevron Corporation* | |
| Facts | Chevron US did bad things in Ecuador (sued and won in Ecuador). Tried to enforce judgment in US (failed) and then against Chevron Canada |
| Analysis | Fails both prongs of *Transamerica test:* (1) Chevron CA owned by CCCC, Chevron US has very little to do with it (2) Fraud not argued. |
| Ratio | Followed *Transamerica test* |

\*Need to prove it’s the actual asset OR you pierce the corporate veil where you need to satisfy the two requirements. The further away you are (i.e. 7th subsidiary), the harder it is to prove

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| *Big Bend Hotel Ltd v Security Mutual Casualty Co* | |
| Facts | Hotel contracted to get insurance with D signed by Kumar (prez and sole shareholder). Used to own another ompany that burned down but didn’t disclose that on the fire application (whole different hotel owned by different company). Hotel burned down and D denied benefits b/c Kumar didn’t disclose previous loss |
| Analysis | *Transamerica* test: LIABLE!   1. Kumar controlled both companies 2. Previous loss was material so had to be included – omission of disclosing was fraudulent |
| Ratio | Affirms *Transamerica test* |

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| *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club* | |
| Facts | Sylvan (P) where Bell is the sole shareholder. Goes into JV with Performance (D). They had a verbal agreement and Bell signed the written agreement. Bell later realized big discrepancy in the terms. Didn’t read it – under mistake of fact as he believed the written contract reflected the verbal one |
| Analysis | Bell entitled to rectification  Satisfied both test prongs: (1) was in total control of D (he was sole shareholder) (2) committed fraud |
| Ratio | Affirms *Transamerica* test.  The corporate veil can’t be used as a shield for misconduct or fraud, liability may be extended |

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| *Jin v Ren 2015* ABQB (leave to appeal to SCC refused) | |
| Facts | Ren was the director of Hart Fibre. Jin (P) invested money and got nothing in return. Asked for his money back but Ren wouldn’t give it to him unless he agreed that neither he nor his wife would work in any hemp-related industry in either CA or China. Jin refused the terms and is suing the company and Ren. |
| Holding | Ren used the corporation as a shield while he expressly directed a wrongful thing to be done – veil lifted |
| Analysis | 1. D is the company (director) and held money inappropriately in his capacity as Director 2. D used the company to defraud/trick when he got the money from Jin   TEST SATISFIED!  No evidence he initiated incorporation process for fraud, but he took Jin’s money improperly – directly instructed an improper thing to be done 🡪 pierce veil. |
| Ratio | Even if you don’t incorporate a company for an illegal, fraudulent or improper purpose, if you expressly direct a wrongful thing to be done (you’re someone in control), the corporate veil can be pierced. |

\*\*ON EXAM: if it’s not expressly stated you would argue both “If it is fraud then…” and “If it isn’t fraud then…”

Salomon v Salomon: a corporation is a legal entity distinct from its shareholders! (general rule)

Don’t need to come to a conclusion on an exam, just need to argue both

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| *Wildman v Wildman* (2006) 82 OR (3d) 401 (CA) | |
| Facts | Divorce – guy has corporation and refused to pay child support and spousal support payments (didn’t argue amount just that he didn’t want to pay). Hiding money in his company |
| Holding | Lift the corporate veil! |
| Analysis | 1. Sole owner and exercised complete control over his various business enterprises 2. Controlled business enterprises and structured corp assets so as to divert money from them to his personal use (wrongful purpose) 3. Losers have been respondent and children. |
| Ratio | Where it has been found that an individual is hiding money away for a wrongful purpose (anything fraudulent or wrongful) and where you exercise complete control, the corporate veil will be lifted. |

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| *Rockwell Developments Ltd v Newtonbrook Plaza Ltd* [1972] 3 OR 199 (CA) | |
| Facts | Rockwell (Kelner is one of the directors). Rockwell tried doing a sale of land contract w/ Newtonbrook. Kelner sued D for specific performance of the sale. Rockwell lost and Newtonbrook was awarded costs. Rockwell failed to pay, Newtonbrook wants to go after Kelner personally to pay the cost |
| Analysis | No allegation of any misconduct or fraud on the part of Kelner when he entered into the transaction – can’t pierce veil |
| Ratio | The corporate veil can’t be pierced where there is no allegation of fraud (need to prove fraud to make out claim)  If the contract is entered into by the corporation, you must show fraud to lift the corporate veil. |

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| Liability Based on Thin Capitalization | | |
| *Qalkovszky v Carlton* – tort case | | |
| Facts | Taxicab industry. P injured when rundown by D’s cab. Sued all of D’s companies and D himself, arguing he undercapitalized and assets are mixed”. Arguing that all of the enterprises actually operate as one | |
| Holding | Carlton (D) can’t be held personally liable | |
| Analysis | 2 ways to disregard the corporations’ separate legal personalities:   * + 1. They’re operating as one – one for all and all for one     2. Go after the individual   D wasn’t conducting business in his individual capacity, wasn’t doing anything illegal and had the minimum statutory insurance. | |
| Ratio | Courts are reluctant to disregard the separate corporate personality principle | |

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| Liability Based on Total Disregard of Formality | | |
| *Wolfe v Moir* (1969), 69 WWR 70 (Alta SC (TD)) | | |
| Facts | P injured while rollerskating at establishment. Suing Gordon Moir (D) who is the secretary of Chinook Sport Shot Ltd (owned the rink?). Moir put out Ads and tickets conducted under Moir Sportland and not Chinook Sport Shop Ltd. Aruging that the wrong person was being sued – another man was the manager. | |
| Analysis | *Companies Act s.82(1)(c):* “every company shall have its name set forth…in all notices, advertisements and other official publications of the company, endorsements, etc.” DIDN’T FOLLOW THIS | |
| Ratio | Must follow all formalities  If a person chooses to advertise and to hold himself out to the public without identifying the name of a company with which he is associated, he runs the risk of being held personally liable | |

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| *Vallis v Prairie Alternative Energy Solutions Ltd* | |
| Facts | Parties entered into contract for installation of system (dealt only w/ Karass) and he failed to represent the business as incorporated (Prairie Alternative…). In the correspondence, the correct incorporated name was not used (no Ltd.). Going after Karass personally |
| Holding | Karass personally liable |
| Analysis | *Saskatchewan Business Corporation Act* (following *Moir*): failed to comply w/ statute re proper identification of the corporation under which he was carrying on the business. Ltd. nowhere, name not on cards, letterhead, emails, etc. |
| Ratio | Failure to abide by the *BCA* re proper identification of the corporation under which one is carrying on business, will result in one being held personally liable. |

Give proper advice to client re conducting business when incorporated **in writing**

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| Liability in the Area of Trust Law |

Grounds for disregarding the separate corporate entities

When the corporate is the trustee and there’s a trust relation between beneficiary and trustee, there’s a stranger, you must show either:

Knowing receipt, or

Knowing assistance with regard to the breach of trust by the corporation

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| *Citadel General Assurance Co v Lloyds Bank Canada –* knowing receipt case | |
| Facts | Drive-On Ltd was the trustee for Citadel and held in trust the proceeds of insurance policy premium on behalf of P. Trusts were contained in a bank account at Lloyds Bank (D). Drive-On gave Bank instructions to transger money in that account to the parent account daily. The Bank, through its senior officers, knew that the trust money was held in the subsidiary’s account. Trustee failed to remit to P so P sued Bank |
| Holding | The bank is liable to Citadel as a constructive trustee |
| Analysis | Senior officers of the bank knew of the trust relationship, had constructive knowledge of Drive-On’s breach of trust. The bank was unjustly enriched by this breach, thereby rendering it liable to Citadel as a constructive trustee. |
| Ratio | Threshold of knowledge required of the stranger to the trust, who is necessarily enriched at the plaintiff’s expense, is low – “constructive knowledge” will suffice as the basis of liability (knowledge of facts sufficient to put a reasonable person on notice or inquiry). |

If a corporation is a trustee and you want to go after both assets and the individual personally and you want to do it under knowing receipt: a) the individual benefitted individually from the breach of trust and b) had constructive knowledge

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| *Air Canada v M & L Travel Ltd* – knowing assistance | |
| Facts | AC and M&L had agreement where M&L would sell tickets, keep the money in trust to give to AC (created one but never used it). They took the money they received from sales and put it in a general account to pay off personal debts. AC suing company and directors personally. |
| Holding | M&L directors personally liable to AC for the breach |
| Analysis | 1. Need to establish trust relationship (established here) – clear intention to create a trust in the arrangement between M&L and AC, set up accounts 2. Relationship was fraudulent (M&L taking the money) 3. D you’re going after assisted with this breach with actual knowledge or reckless or wilful blindness – personally liable.   “Knowing assistance”: persons who “assist with knowledge in dishonest and fraudulent design on the part of the trustees” will be liable for the breach of trust   * Knowing receipt not relevant here – Ds didn’t pocket money (i.e. benefit from the breach) * Higher knowledge threshold – constructive knowledge won’t cut it   Actual knowledge (both of trust’s existence (🡪 trust relationship) and what was being done is improperly in breach of that trust), “reckless or wilful blindness” is required from the stranger.  \*Bank had no knowledge receipt – no way for them to know there was a trust relationship – money in general account |
| Ratio |  |

\*ON EXAM: either tell you it’s a trust relationship, OR you argue “If this is a trust relationship then..” or “If it isn’t then…”

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| Chapter 5: Tortious, Criminal, Regulatory & Contractual Liability of the Corporation |

Talking about attributing the actual wrongdoing to the corporation, not only going after its assets for individual’s wrongdoing. How to attribute liability to the corporation (separate legal personality)

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| *The “Rhone” v The “Peter A.B. Widener” – tort* | |
| Facts | The Widener (owned by D) got into an accident with The “Rhone” (owned by P). The Widener was towed by Captain Kelch. P suing both D and the captain. Need to prove that the captain was acting on D’s behalf with fault and privity. |
| Holding | The captain was not the directing mind of D and thus you can’t go after the company |
| Ratio | Identification theory (doctrine under which you’d show directing mind)   1. The employee who physically committed the offence must be “the *ego*, the ‘centre’ of the corporate personality, the ‘vital organ’ of the body corporate, the *alter ego* of the employer corporation or its ‘directing mind’ 2. There may be more than one directing mind and there may be “delegation and subdelegation of authority from the corporate centre” and the “division and subdivision of the corporate brain” 3. The focus of inquiry is whether the individual has been delegated the “governing executive authority” of the company within the scope of his/her authority   Key factor between directing mind and employee: capacity to exercise decision making authority on matters of policy. |

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| Corporate Defence to Liability |

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| *Deloitte & Touche v Livent Inc (Receiver of)* SCC – legality defence | |
| Facts | Deloitte hired by Livent (directors cooked the books). Shareholders unaware that the books were false (otherwise would have taken steps to save company). Company belly up. Deloitte sued by Livent Inc for negligence audit.  Deloitte arguing they have the defence of illegality as P is barred from a remedy b/c they conducted themselves illegally. |
| Analysis |  |
| Ratio | Test for corporate attribution (criminal liability)  Two conditions must be met:   1. The wrongdoer must be the directing mind of the corporation; and 2. The wrongful actions of the directing mind must have been done within the scope of his/her authority   An individual will cease to be the directing mind if the action:   1. Was totally in fraud of the corporation; and 2. Was not by design or result partly for the benefit of the corporation   \*This doctrine should not be applied strictly in civil suits (wouldn’t make sense to apply in tort for public policy reasons)  Provides *sufficient* basis to find that the actions of a directing mind be attributed to a corporation, not a *necessary* one  Courts didn’t overturn the corporation identification theory, they just carved an exception to it in the tort context |

## Criminal Liability\*\*\*

* Historically based on identification doctrine (“directing mind”
* Bill C-45 🡪 *CC* amendments.
  + Conduct of a corporate “representative” and
  + A “senior officer’ failed to act
* To prove crim neg, Crown needs to show (*CC s.22*): wanton or reckless disregard for lives or safety of others through the conduct of a corporate “representative/s” of an organization, acting

## Regulatory Offences

Due diligence defence can be applied by statute and under CL

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| *R v Bata Industries* | |
| Facts | Bata charged under enviro protection legislation. Arguing hta they didn’t exercise reasonbal care and therefore defence of due diligence should fail |
| Holding | President found guilty – has more responsibility than the CEO, had personal knowledge of the problem and didn’t do enough about it. |
| Ratio | To prove defence of due diligence, Crown must:   1. Prove the *actus reus* beyond a reasonable doubt (and then presumptively relieved of having to prove *mens rea* 2. Onus shifts to D to establish reasonable care on a balance of probabilities (due diligence |

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| *R v Syncrude Canada* | |
| Ratio | * Due diligence defence available “if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent; or if it took all reasonable steps to avoid the particular event” * Availability of the defence to a corporation depends on “whether such due diligence was taken but those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself” |

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| Contractual Liability | |
| Doctrine of Ultra Vires |

* “*Ultra vires”*: a class of acts of a body that are beyond its powers or jurisdiction (*ABCA, s.17(3))*
  + This doctrine eliminated – contract can’t be invalidated merely b/c the corporation was acting ultra vires
* “Constructive notice”: knowledge of a fact that is presumed or imputed by law (*ABCA, s.18*)
  + A person isn’t expected to have constructive notice
* Both eliminated under the Act. They were originally under CL

### ABCA

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| *John Beauforte (London) Ltd Re – Common Law* | |
| Facts | Jon Beauforte in his memorandum of association said he was carrying on the business of costumiers, gown makers and related activities. He undertook the business of making veneered panels (ultra vires) and went into liquidation. Asking whether the debts under contracts for veneer factory, etc. are enforceable? |
| Holding | Contract not enforceable, *ultra vires* and void as he was found to have constructive knowledge of what was going on |
| Ratio | This is overridden by ABCA s.18!! |

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| *Communities Economic Development Fund v Canadian Pickles Corp – ultra vires* | |
| Facts | Communities Fund lent Pickles (D) money, taking a guarantee from the individual shareholders and directors of Pickles. Pickles defaults on the loan and Communities sues them and the guarantors for repayment.   * Pickles arguing that Communities could only get its powers from the statute and thus the loan was *ultra vires* as * Arguing that the loan is expunged b/c it was all *ultra vires* |
| Holding | Corporation released from liability for the debt as it was *ultra vires* |
| Ratio | The doctrine of ultra vires only applies to corporation created by special act for public purposes that have only those powers which are expressly or impliedly granted to them by statute, acts which exceed those powers will be *ultra vires*. Want to protect the creditors  Language of the guarantee must find the guarantors to be the second first debtors should the principal debtor (corporation) be let off the hook.  Very limited circumstances – only when dealing with statutory company with public purpose |

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| Contracting with an Agency |

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| Agency (A) |

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| Principal (P) |

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| 3rd Party |

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| Contract? |

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| **Agency:** fiduciary relationship which exists between two persons, one of whom (“principal”) expressly or impliedly consents that the other (“agent”) should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so as to act or so acts   * A purports to contract on behalf of P * P bound when A has actual/ostensible authority * Actual authority: where agent’s authority results from a manifestation of consent |

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| *Freeman and Lockyer v Buckhurst Park Properties (Mangal), Ltd* | |
| Facts | Kapoor (D; agent?) was acting as the managing director of Buckhurst Ltd (D; principal?) even though not formally appointed by the Board. He contracted with Freeman (3rd party)   * P did the work and asked to be paid. D said they didn’t know about it and Kapoor nowhere to be found * Only way to go after D is to prove that Kapoor (agent) has ostensible authority. BUT they must have been told that he has ostensible authority by someone who has actual authority to give him ostensible authority (i.e. Board of Directors) |
| Holding |  |
| Ratio | Three conditions to entitle a 3rd party to enforce against a company a contract entered into on its behalf by an agent who had no actual authority to do so: presuming he doesn’t have actual authority!!   1. A representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made by the 3rd party 2. Such representation was made by a person(s) who had “actual” authority to manage the business of the company either generally or in respect of those matters to which the contract relates 3. The 3rd party was induced by such representation to enter into the contract, i.e. that he in fact relied on it; and 4. Under its memorandum or articles of association, the company was not deprived of the capacity either to enter into a contract of this kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent (\*\*ultra vires concept)   First 3 conditions are the most important |

Two layers of authority w/ corporations:

1. Whomever making representation must have actual authority to do that (Board of Directors). If by the Board’s conduct by act or express representation to 3rd party that the guy has ostensible authority, they can be bound. Making a representation to 3rd party that creates the impression that the agent has ostensible authority to bind it
2. If it’s just an employee who has “yeah that guy has ostensible authority”, they don’t have authority to say that

Two levels of authority:

1. Actual authority: authority of the board making representation to 3rd party that there’s an agent w/ ostensible
2. Ostensible authority: depends on representations by conduct/words made by principal to 3rd party.

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| *Doiron v Manufacturers Life Insurance Co (Manulife Financial)* - ABCA | |
| Facts | Arguing that even if agent had ostensible authority, he never represented D as principal. Doesn’t matter – still went around representing himself as an agent of Manulife |
| Holding | Manulife bound and liable to plaintiffs |
| Ratio | * Ostensible authority doesn’t require an explicit representation of authority; it is found where the principal has created a situation such that it is reasonable to infer and rely upon the apparent authority of the person * “A mere belief on the part of a 3rd party that s/he is contracting with the principal, absent some representation to that effect, express or implied, can’t support a claim of ostensible authority so as to bind a principal” |

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| *Canadian Laboratory Supplies Ltd. v Engelhard Industries of Canada Ltd* | |
| Facts | Cook (D; agent) was an employee of CanLab (P; principal?) and defrauded Engelhard (D; 3rd party). Cook essentially screwed them both over and defrauded them. Action is for conversion.   * As far as P’s books show, P legitimately got platinum from D but they weren’t aware that Cook was pretending to be a fake client. * P claims the platinum is theirs and D is still holding on to the platinum – liable for conversion? |
| Holding | Purchasing agent high enough up to have actual authority to give Cook ostensible authority to act as an agent – was made aware at this point so any loss from that point on they can blame on anyone else. |
| Ratio | The principal, who must have actual authority, has to represent to the 3rd party that the agent has ostensible authority. Once the principal’s corporation is made aware of what is going on, they are liable for their own losses from that point on. |

### Indoor Management Rule

* 3rd party not expected to go behind and look into internal operation of the coproraiton to see if they’re dealing with someone who has the proper authority. DON’T RELY ON THIS RULE TO SAY THAT IT’S NOT THE 3RD PARTY’S FAULT.
* RULE: if the person they’re dealing with doesn’t have high enough title to give them actual authority, that’s it. You can’t hold the corporation liable

Chapter 6: Corporate Responsibility

* Help businesses navigate reputational, financial and political risk
* THIS WAS GUEST SPEAKER – INSERT NOTES

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| Chapter 7: Corporate Governance |

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| Introduction to Director’s Fiduciary Duty & DOC & Business Judgment Rule |

Pp 223-247

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| *Peoples Department Stores Inc (Trustee of) v Wise* (2004) SCC – s.122\*\*\*\* | |
| Facts | Wise (D) bought Peoples (P) who became wholly owned and controlled by Wise. Wise brothers adopted a joint procurement policy that resulted in greater debt to P. Both went bankrupt. P suing the Directors saying they breached their duties by this joint procurement b/c they favoured the interests of D over P to the detriment of the creditors |
| Holding | Wise brothers didn’t breach their fiduciary duties under s.122 – decision protected by business judgment rule. Policy decision that was reasonable under the circumstances |
| Ratio | **s.122 of the CBCA** “Every director and officer of a corporation in exercising their powers and discharging their duties shall:   1. Act honestly and in good faith with a view to the best interests of the corporation; (only to the corporation – aka duty of loyalty or statutory fiduciary duty) and 2. Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (DOC) (broader than (a))   \*establishes two distinct duties of directors and officers: (a) duty of loyalty; and (b) DOC. If there is a DOC claim against directors, the standard of care is there (objective)  Business judgment rule: defence! Will defer to a reasonable business decision made in a reasonable manner, even if it ultimately fails. |

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| Director’s Liability After *Peoples* |

1. Fiduciary Duties (s.122(1)(a)): best interests of corporation (subjective, protects corp’s interests and no one else’s)
2. Statutory Duty of Care (s.122(1)(b)): proper accountability mechanism of directors to creditors.
   1. Creditors must establish they suffered direct damage as a result of the breach of duty
   2. Objective standard open to everyone else
3. Business Judgment Rule: stringent. Refrain from finding directors liable for “bad” business decisions where:
   1. The directors acted prudently and on a reasonably informed basis; **and**
   2. The decision was in and of itself reasonable (enhanced scrutiny test)

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| *BCE Inc V Debentureholders – fiduciary duty under s.122(1)(a)* | |
| Facts | BCE’s shares being bought by 3rd party, BCE borrowed $30B. Bell Canada (wholly owned subsidiary of BCE) was to guarantee BCE’s debt which had a negative impact on the existing debentures. Debenture holders saying the whole deal stinks! Claimed directors were breaching their duties |
| Holding | This was a reasonable decision, directors did not breach fiduciary duty. |
| Ratio | * Fiduciary duty of directors to corporation is broad and contextual. Mandatory and not confined to a short-term profit or share value. At minimum, it requires directors to ensure that the corp meets its statutory obligations (could be other requirements depending on the circumstances) 🡪 look to LT sustainability of corporation * Although *not mandatory*, it may be appropriate to consider the impact of corp decisions on shareholders * Business judgment rule reaffirmed – corporation about everyone. |

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| *Smith v Van Gorkom* (1985) – US CASE | |
| Facts | Trans Union (D; target company to take over) merged with New T (acquiring company). Van Gorkom (CEO and chairman of Trans Union) made agreement with New T for $55/share. Other directors (Ds) approved the deal but the CEO didn’t disclose how he got the $55/share. Attorney said they’d be sued if they didn’t accept – induced to agreement |
| Holding | Ds breached duty of care and business judgment rule doesn’t apply (there was duty to make reasonable inquiries) – the Board had the duty (CEO, chairman, other directors) |
| Ratio | Determination of whether a business judgment is an informed one depends on: “Whether the directors have informed themselves “prior to making a business decision, of all material information reasonably available to them” |

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| Fiduciary Duties (pp 247-292) |

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| Duty of Loyalty and Good faith (*CBCA/ABCA s.122(1)(a))* |

* Obligation to act honestly and in good faith w/ view of best interests of the corporation #1
* Obligation to avoid situations where duty to corp might conflict w/ personal interests
* When a corporation struggles financially, directors must take special care “to attempt to act in [the corporation’s] best interests by creating a ‘better’ corporation, and not favour interests of any one group of stakeholders”

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| Taking Corporate Opportunities | | |
| *Cook v Deeks* (1916) AC 554 (PC) | | |
| Facts | TO construction company had 4 directors and shareholders (Cook and Deeks both being among them). ¾ resolution tried to approve their own contract they entered into behind Cook’s back and the company’s back.  Seeking declaration – the profit they made in the contract behind company’s back is the corporation’s profit and belongs to the corporation. Seen as holding it on behalf of the corporation | |
| Holding | Directors breached fiduciary duty in representing themselves and not the company – abuse of shareholder powers | |
| Ratio | 1. You can’t, as a solicitor, enter into a contract on your own and not on behalf of the corporation 2. You can’t approve your own contract as majority shareholders | |

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| *Canadian Aero Service Ltd v O’Malley –* seminal case for corporate director and officer liability | |
| Facts | Canadian Aero (P) had two people: O’Malley (D; prez) and Zarzycki (D; VP) who wrongfully took the benefit of the contract by incorporating Terra Survey’s (D) by taking the contract. |
| Holding | President and VP liable for breach of fiduciary duty |
| Ratio | Corporate Opportunity Doctrine – opportunity must belong to the company   * “A director or senior officer is precluded from obtaining for himself, either secretly or without the approval of the company…any property or business advantage either belonging to the company or for which it has been negotiating; and especially this is so where the director or officer is a participant in the negotiations on behalf of the company” * This “disqualifies them from unsurping for himself or diverting to another person or company with whom or with which he is associated, a maturing business opportunity which his company is actively pursuing. * Don’t have to prove that the corporation would have obtained the contract or to establish what the profit would have been (in recovery of damages) by failing to reality the corporate opportunity in question |

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| *Matic et al v Waldner et al* (2016) MBCA – applies principles from *Peoples* and *Canaero* re taking opportunities | |
| Facts |  |
| Holding |  |
| Ratio | A director or officer is a fiduciary to his/her corporation. CL duty has been codified in s.117(1)(a) of the *The Corporation Act* |

## 2.Self-Dealing Transactions

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| *Aberdeen Railway v Blaikie Bros* – CL (1843) | |
| Facts | Aberdeen (P) contracted with Blaikie (D; partnership). Blaikie was a partner of Blaikie Bros and the director of Aberdeen Railway. Two conflicting interests – wanted shares as low as possible but wants to sell for as high as possible |
| Holding |  |
| Ratio | Idea of self dealing transactions came out here  Doesn’t matter whether the company ultimately benefitted for the self-dealing transaction, nor whether he was the sole director or one of many. |

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| *North-West v Beatty (1887)* | |
| Facts | NW bought steamer from Beatty (D; director and majority shareholder). Beatty sued by Henry (P; shareholder) so that the sale would be set aside the sale. James transferred some of his shares to people he knew would support the sale of the ship – he knew he’d have a majority on the board of directors to approve the sale |
| Holding | Ratifying insulated the decision – didn’t ado anything wrong as the company’s bylaws allowed him to have a majority voting shares – had the right to exercise his voting power |
| Ratio | Although a director is precluded from dealing on behalf of a compeny, etc and from entering into engagements in which he has personal interest conflicting, but “any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it.” |

## Legislative Responses

**ABCA s.120 requires:**

Three things you must do to get away with a self dealing transaction if you’re a director or officer:

1. Disclosure in writing/minutes of the director’s meeting
2. Approval by the appropriate body
   1. If it’s the board, the interested director can’t vote
   2. If it’s the shareholders, the interested director can vote his shares
   3. If approval is required by neither (s.120(5)): disclose to corporation or enter in the minutes the nature of your interest. Depends on nature of transaction and bylaw of corporation re which body is appropriate
3. Proof that contract is fair and reasonable at the time it was approved (s.120(8))
   1. If a director disclosed an interest in accordance w/ previous section, contract approve and reasonable and fair at time of approval, you’re good
   2. S.120(8.1) = whoopsie section. Even if conditions aren’t met, if they acted in honest and good faith, they’re not accountable to the corporation for the profits and the contract is not voidable. It’s a cover your ass provision

If the s.120 requirement is satisfied, contract is insulated from attack on the basis of self dealing

If there is a failure to comply, court has jurisdiction to set aside the contract or require an accountant or both (s.120(9))

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| *Dimo Holdings v H Jager Developments Ltd –* what counts as material under s.120 | |
| Facts | Moeller is the director of H Jager and his wife the sole director/shareholder/officer of Dimo. Dimo lent Jager 50k with 30k still unpaid. D saying they don’t have to pay back because Moeller had material interest in P and was obligated to disclose and failed to do so. Court should set aside contract under s.120(9) |
| Holding | Moeller didn’t have to disclose interest under s.120 as there was no material interest in plaintiff company |
| Ratio | Material interest: financial interest, more be more than insignificant; would include “a material beneficial interest”, possibly even “an interest in which an individual could exercise discretion or control over sufficient shares so as to affect the financial outcome of a company.  S.120(9): could to consider whether contract was “reasonable and fair” to the corporation at the time it was approved; then consider whether it should order an accounting for profits or set aside contract. (remedy section) |

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| *Zysko v Thorarinson* (2003) ABQB 911 | |
| Ratio | What counts as “material transaction” under *ABCA*   * Material contract: “possibility that the Director was to benefit from the contract more then *de minimis* then the transaction should be disclosed to the corporation.” * Rule of thumb: “there should be disclosure whenever the director or officer’s involvement might be relevant to the corporation’s decision-making process” * “If the corporation would undertake additional due diligence to determine whether the contract or any of its terms is truly in the best interest or if it would assign another director or officer to handle the negotiations, the contract is material and must be disclosed” |

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| *Sports Villa Resort, Inc (Re)* 2000 NFCA – competing directors and taking business opportunities | |
| Facts | Two directors sat on another company’s board of directors. P applied for breach of fiduciary duties to disqualify the two directors from sitting on their board as they had material interest in the other company. |
| Holding | No breach – no agreement between directors that all future developments would be acquired by P. No competition between them. The business opportunity didn’t impact the financial or personnel situation of the second company (too far removed) |
| Ratio | Sitting on various board doesn’t necessarily make you a competing director (only if they’re direct competitors)   * P must show on the fact that they competed with each other   Need more than just an assertion of unique proprietary material – can’t prevent directors from using generic materials/programs because it’s used by another company |

## Takeover Bids and Defensive Tactics by Management

* Inherent problem with takeover: directors and officers like going to be replaced. Conflicted b/c they want to make the best deal for the company, but by the offer being accepted, their position in the company is likely over. Personal interest vs. company’s best interest.

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| *Maple Leaf Foods Inc et al v Schneider Corporation et al* (1998) Ont | |
| Facts | Maple Leaf Inc (competitor; P) wanted to do a hostile take-over attempt of Schneider Corp (Target; D; controlled by ‘The Family’). Schneider had a special committee of non-family directors to assess the situation, but the CEO was allowed to negotiate on Committee’s behalf. As part of their review, they did a market survey to see what best offer they could get (other company put in offer at that time) |
| Holding | Special Committee and members acted in good faith and reasonably   * Informed\*\* and reasonably decision and the directors aren’t agents of the shareholders |
| Ratio | Particular meaning of fiduciary duties for officers and directors in a hostile takeover situation. Special committees are meant to isolate directors potentially in conflict of interest from breaching fiduciary duties. As long as such a committee is independent, the decision will be upheld |

## Other Sources of Fiduciary Obligations

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| *Tongue v Vencap* | |
| Facts | Directors/shareholders and directors/non-shareholders are Ds. Negotiating w/ potential buyer Vencap (intermediary; D). Bought minority shares for 60 cents/share and then turned around and sold it to the buyers for $2.16. Minority shareholders screwed. P (minority shareholders) claimed breach of fiduciary duty, D denies having duty to Ps |
| Holding | The directors breached their fiduciary obligations to the shareholders |
| Ratio | Directors’ fiduciary duties to shareholders can arise where:   1. The directors act outside of ordinary duties 2. Directors purchase shares from shareholder (this case – they were indirectly buying shares) 3. Other grounds – look at relationship and whether, based on the facts, there should be a fiduciary obligation   To argue duty 🡪 s.122(1)(a) or this case   * Mere presence of director-shareholder relationship doesn’t prevent fiduciary relationship – look to circumstances * No general fiduciary duty between director and shareholders simply because of that relationship. Something more must be present before a fiduciary duty |

Note (p. 290): shareholders ratification re breach of fiduciary duty\*\*\*

*CBCA* & *ABCA* reduced scope of fiduciary duty except in self-dealing transactions (1 exception). No other way for shareholders to protect directors against duties. All requirements under s.120 must be satisfied

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| Directors’ and Officers’ Liability in Tort to Third Parties (page 132) |

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| Negligence |

2 lines of authority (ONCA): Directors will most likely be held liable for intentional torts (fraud, inducing breach of contract, etc.)

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| ***Scotia McLeod 🡪***  liability is rare absent fraud, dishonesty or want of authority  High threshold | ***ADGA 🡪***  Liability is common  Only exception: when tort alleged is inducing breach of contract and the defense of *Said v Butt* applies (only if D is party to contract) |
| * Broad shield of protection. * Followed in AB in *Blacklaws* and *Hogarth* | * Narrow shield of protection * Liable even if director acting *bona fide* in best interests of corporation |
| \*\*Fraud covered by both tests; negligence is generally only caught by the *ADGA* test | |

ABCA:

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| ***Blacklaws v Morrow* (2000) 🡪**  “the mere existence of such relationships as officer, director and manager don’t create personal liability, whether in tort or otherwise” | ***Hogarth v Rocky Mountain Slate Inc* (2013) 🡪**  If the conduct is not “tortious in itself” or doesn’t exhibit “a separate identity or interest form that of the corporation,” there is no duty of care |
| At minimum: P must show some “independent tort” that is separate and distinct form the corporation to give rise to personal liability of the director  \*Agrees with *ScotiaMcLeod* | Tortious conduct must rise to the level set out in *ScotiaMcLeod*  Note: Slatter concurs BUT – liability for ordinary negligence possible but there is no *prima facie* DOC. Must go through tort analysis to determine whether DOC exists |
| **\*\*ABCA still applies *ScotiaMcLeod*** | |

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| ***Said* Defence**: only applies if:   1. The corporation is a party to the contract (here it was breach of contract between technicians and ADGA) 2. It was an induced breach of contract | |
| *Montreal Trust Co of Canada v ScotiaMcLeod Inc* – one extreme of spectrum 🡪 directors always protected 🡪 ON EXAM!! | | |
| Facts | Montreal (P) purchased debentures from Peoples (D) underwritten by Scotia (D). P argued that the documents didn’t disclose all financial liabilities and claimed the Scotia as the underwriter, failed to disclose. Scotia third partied the Directors of Peoples (Ds) (essentially brought into the lawsuit any other D they could share blame with). | |
| Holding | Directors not liable – doesn’t meet criteria | |
| Ratio | “In the absence of findings of fraud, deceit, dishonestly or want of authority on the part of employees or officers’, personal liability for actions carried out under a corporate name are rare.”  So long as directors are acting within the directing mind of the corporation, they will be protected  If the tortious conduct was:   1. In the best interest of the corporation 2. Doesn’t rise to the level of fraud and deceit 3. Was not a separate tort   You’re protected! | |
| Note | Could encourage unduly risky behaviour – can’t be held liable so why not? *LondonDrugs* held employees liable but now we’re saying that directors aren’t | |

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| *ADGA Systems International Ltd v Valcom Ltd –* intentional tort | |
| Facts | ADGA (P) was Valcom’s (D) competitor. They submitted bids for tendor (needed 25 senior techs to satisfy requirement but didn’t have that). Two senior employees of Valcom went to ADGA and poached 25 technicians. Valcome secured the contract. ADGA sued Valcom for induced breach of contract |
| Holding |  |
| Ratio | Officers or employees can be liable for tortious conduct even when they’re acting in their line of duty (best interest of company or as a director of said company), subject to the *Said* defence  *Said* defence only applies if:   1. The corporation is a party to the contract (here it was breach of contract between technicians and ADGA) 2. It was an induced breach of contract |

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| *NBD Bank, Canada v Dofasco Inc –* allows for personal liability of directors | |
| Facts | NBD lent money to Dafosco (D) which had a subsidiary in financial difficulty (that’s why they were seeking the money). Melville is the VP finance of the subsidiary (D) made representation to NBD Bank that made them lend the money. NBD suffered a significant loss |
| Holding | Committed tort, found liable in their personal capacity as D owed duty of care to P |
| Ratio | Moving away from Scotia and towards ADGA.  Liability depends on whether or not a duty of care was owed and breached based on the circumstances |
| Notes | More towards *ADGA* but they lowered the threshold set out in *Scotia* |

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| *Hogarth v Rocky Mountain Slate Inc* (2013) – intentional tort | |
| Facts | Slate deposit. Hogarth’s director (D) and investors (P). Quarry was unsuccessful and ceased operations within a year. Ps commenced lawsuit seeking to recover their investment moneys and alleging that Rocky and its principals had made negligent misrepresentations in the written materials and at meetings, in order to induce investments in the slate quarry |
| Holding | No liability as the actions didn’t rise to the threshold |
| Ratio | If the conduct is not “tortious in itself” or doesn’t exhibit “a separate identity or interest form that of the corporation,” there is no duty of care.  Slatter had different way of getting to it liability for ordinary negligence possible but there is no *prima facie* DOC. Must go through tort analysis to determine whether DOC exists |
| *Deloitte & Touche v Livent Inc (Receiver of)* – neg misrep causing pure economic loss | |
| Facts | Deloitte (D) hired by Livent (P). Directors of P cooked the books and Deloitte didn’t catch it when they looked at the documents. Ds drafted comfort letter ensuring financial soundness to potential investors. Claimed they were negligent in preparing those documents, which caused them harm |
| Holding |  |
| Ratio | *Anns/Cooper Test Stage 1*   1. Proximity    1. Whether the parties are in such a “close and direct”” relationship that it would be “just and fair having regard for that relationship to impose a duty of care in law”    2. In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: D’s undertaking and P’s reliance.    3. Any reliance o the part of P which falls outside of the scope of D’s undertaking of responsibility falls outside the scope of the proximate relationship and, therefore, of D’s duty of care 2. Reasonable foreseeability    1. Whether an injury to P was a reasonably foreseeable consequence of D’s negligence    2. An injury to P will be reasonably foreseeable if (1) D should have reasonably foreseen that P would rely on his/her representation; and (2) such reliance would in the particular circumstances of the case, be reasonable    3. Whether reliance is reasonable and reasonably foreseeable will turn on whether P had a right to rely on D *for that purpose*   Anns/Cooper Stage 2   * Whether there are “Residual policy considerations” outside the relationship of the parties that may neglate the imposition of a duty of care * Considerations include whether the law already provides a remedy, whether recognition of the duty of care creates “the spectre of unlimited liability to an unlimited class”, and whether there are “other reasons of broad policy that suggest that the duty of care should not be recognized” * Only in rare cases should liability be denied when a D’s negligence causes reasonably foreseeable injury to a P with whom he/she shares a close and direct relationship * Rarely, if ever, will indeterminate liability persis after a proper proximity and foreseeability analysis under stage 1 |
| Notes | Three types of indeterminancy arguments:   1. Indeterminate liability of value (amount) 2. Temporal (time) 3. Claimant (relating to class of plaintiffs) |