JOINT VENTURES

FINAL REPORT 99

MAY 2012

ISSN 0317-1604

ISBN 978-1-896078-51-9

Table of Contents

Alberta Law Reform Institute i

Acknowledgments iii

Summary v

Recommendations vii

CHAPTER 1 Introduction and History of the Joint Ventures Project ... 1
- A. Introduction 1
- B. History of Project 2

CHAPTER 2 Should the Law Recognize a Joint Venture as a Legal Relationship Among the Joint Venturers that is not a Partnership? . 5
- A. Uncertainty About Whether a Joint Venture is or is not a Partnership 5
  1. Whether joint venturers can contract out of partnership ... 5
  2. Whether a joint venture can be structured so as to avoid partnership 7
- B. The Extent of the Practical Problem 11
- C. Advice of the Advisory Group 11
- D. Proposed Changes in the Law 12
- E. What Joint Venturers Should be Allowed to Declare That They are not Partnerships? 14
  1. Should all unincorporated commercial ventures be allowed to declare that they are not partnerships? 14
  2. What joint venturers should be allowed to declare that they are not partnerships? 15
  3. Should ventures established for a limited time be allowed to declare themselves not to be a partnership? . 16
  4. Should joint ventures of professionals be able to declare themselves not a partnership? 17
- F. Questions Arising from the Proposed Changes in the Law 17
  1. Should an alternative legal regime or alternative rules be provided for non-partnership joint ventures? 17
  2. Should the proposed legislation deal with the property committed to a non-partnership joint venture? 18
  3. Should the legislation say whether or not non-partnership joint venturers stand in fiduciary relationships to each other? 18
  4. Should tax issues affect the decision of whether or not some joint venturers should be able to declare that they are not a partnership? 20
- G. Conclusion 21

CHAPTER 3 Relationship of Non-Partnership Joint Venturers to Third Parties 25
A. In General 25
1. Liability of non-partnership joint venturers to third parties for debts, obligations and wrongs 25
2. Liability of non-partnership joint venturers to persons employed in the activities of the joint venture 26
3. Enforcement of claims against non-partnership joint venturers 27
B. Name and Registration 29
1. Name 29
2. Registration 30
C. Conclusion 30

APPENDIX A Draft Legislation 33

APPENDIX B Consultation 35

Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on January 1, 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

ALRI has offices at the University of Alberta and the University of Calgary. ALRI's contact information is:

402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291
Fax: (780) 492-1790
E-mail: reform@alri.ualberta.ca

This and other Institute reports are available to view or download at the ALRI website: www.alri.ualberta.ca.

Acknowledgments

As the presenting problem addressed by this report is the inadequacy of existing business structures for the purpose of joint ventures, the advice of industry has been fundamental to the project. The Institute has secured that fundamental advice from an Advisory Group of senior lawyers with great experience with partnerships and joint ventures and has relied heavily upon it. The members of the Advisory Group are:

Tony Clark, Graham Group

Dave Guichon QC, Norton Rose LLP

William Kenny QC, Miller Thomson LLP

Graham Vanhegan, Conoco Phillips Canada

Gordon W Flynn QC, Felesky Flynn LLP

Two Board members served on the Advisory Group and were particularly helpful in providing industry contacts and in reviewing the consultation document. They also provided extensive comments on the various drafts. They are:

Professor Nigel Bankes, University of Calgary, Faculty of Law

Doug Stollery QC, PCL Constructors Inc

The Institute is also grateful for valuable advice given us during the consultation process by a number of individuals and organizations. See Appendix B, page 35.

Our Counsel, who has been responsible for advancing the discussion, is William Hurlburt QC. He has not only prepared this report, but has carefully woven the comments and suggestions of Board and Advisory Group members into the final policy position. Cheryl Hunter Loewen, Legal Counsel, provided research, advice, editorial and other support to the project. Maria Lavelle, Legal Counsel, prepared background papers at an early stage of the project. Jenny Koziar prepared the report for publication; student research assistance throughout the project was provided by Anna-May Choles, Jill Gamez and Lara Yeung.

As always, the views expressed in this document are those of the Board of the Institute.

Summary

Joint ventures by business entities have become increasingly common and increasingly important to the economic life of Canada and other countries. They are prevalent in the construction industry for large projects such as dams, road works and public buildings. They are often used in the energy industry to provide efficiencies in the development of oil and gas properties. They are also used for smaller undertakings such as the development of a small subdivision. However, while the joint venture has developed, the legal landscape in which it operates has not developed to accommodate it. In particular, a joint venture is at risk of being categorized for legal purposes as a partnership and thus subject to a *Partnership Act* first adopted in 1896 and to common law that has developed over the centuries. There is thus a lack of fit between the applicable law on the one hand and the exigencies of present-day joint ventures on the other hand. This lack of fit results in a degree of uncertainty which has not necessarily been removed even if joint ventures have attempted to assert their status clearly.

The purpose of this report is to recommend legislative reform to clarify the lack of certainty by allowing a joint venture to take itself out of the law relating to partnership. To do so it would have to meet two requirements – declare in writing that it is not a partnership and carry on business under a name that includes “Joint Venture” or “JV”. A joint venture that meets these conditions would effectively take itself out of the law applicable to partnerships. This aspect of our recommendations would clarify the law relating to the relationships among joint venturers. The second aspect of our recommendations would clarify the law relating to the relationship between a joint venture and third parties. We do this by simplifying and redefining the basis of liability between the joint venturers and third parties. Finally, we set out the timing and effects of how a new or existing joint venture might meet these requirements.

We have not attempted to make a statutory regime for joint ventures, leaving them to govern their relationships by contract. This is on the basis that joint ventures need the flexibility that a contractual agreement provides to them. Where the parties to such an agreement wish to make it clear that they are not a partnership, we have recommended a method by which such a declaration would be effective. In our view, this would bring about the necessary clarity without imposing unnecessary legislative regulation.

Recommendations

RECOMMENDATION 1 21

(1) For the purposes of this Recommendation:
  (a) "joint venture" means the relationship that subsists between persons who carry on, in common and with a view to profit, a business venture established by contract for a discrete project or undertaking or for a series of discrete business projects or undertakings,
  (b) "joint venturers" means the persons who carry on a joint venture described in paragraph 1(a),
  (c) "non-partnership joint venture" means a joint venture which the persons carrying on the joint venture declare by contract, in writing, is not a partnership and which is carried on under a name which includes the words "Joint Venture" or the abbreviation "JV", and "non-partnership joint venturers" means the persons who carry on a non-partnership joint venture.

(2) We recommend that legislation be enacted providing:
  (a) that a non-partnership joint venture is not a partnership within the meaning of the *Partnership Act* or any other law relating to partnerships, and that the non-partnership joint venturers are not partners, in relation to the non-partnership joint venture,
  (b) that the legislation applies to any joint venture which, after the date of coming into force of this Part, satisfies the requirements of paragraph 1(c),
  (c) that the absence of a declaration that a joint venture is not a partnership does not imply that the relationship between the joint venturers is or is not a partnership, and
  (d) that a non-partnership joint venture is not a legal entity

(3) We recommend that the legislation enacted under paragraph (2):
  (a) not apply to a joint venture established for a limited time unless the joint venture otherwise complies with the definition of "joint venture" in paragraph 1(a),
  (b) not provide an alternative statutory framework or special rules and regulations applicable to non-partnership joint ventures.

(4) We recommend that the legislation enacted under paragraph (3):
  (a) not take into account possible tax implications of the legislation,
  (b) not make any provision with respect to,
    (i) fiduciary duties among non-partnership joint venturers, or
    (ii) the ownership of property as among non-partnership joint venturers. 23

RECOMMENDATION 2 30

(1) We recommend that, if legislation is enacted in accordance with Recommendation 1, it should:
   (a) include provisions as follows:
      (i) joint venturers in a non-partnership joint venture are jointly and severally liable for,
         - all debts and obligations of the joint venturers to a third party unless a contract between the joint venturers and the third party otherwise provides, and
         - all wrongful acts or omissions of a joint venturer or a person acting under the authority of a joint venturer, acting in the ordinary course of the business of the joint venture, and
   (b) require a non-partnership joint venture to carry on the joint venture under a name that includes "Joint Venture" or "JV"

(2) We recommend that such legislation does not:
   (a) make special provision for enforcement of claims against non-partnership joint venturers, or
   (b) require non-partnership joint ventures to make any form of registration.

CHAPTER 1

Introduction and History of the Joint Ventures Project

A. Introduction

[1] "Joint ventures" by business entities have become increasingly common and have become increasingly important to the economic life of Canada, as well as other countries. A joint venture can bring together the strengths and resources of two or more business entities to create a team that is stronger and more competent than any of its individual members. The joint venture structure is flexible: joint venturers may participate with each other in joint ventures while competing head to head with each other in other ventures.

[2] In the construction industry, joint ventures for the construction of buildings, dams and roads can bring together the immense resources required. In the energy industry, joint ventures provide efficiencies in the development of oil and gas properties. There are many other industries and business sectors in which joint ventures are important. Many small businesses come together in what they consider to be "joint ventures", such as a small warehouse operation or the making and developing of a small land subdivision, frequently adopting a joint venture relationship for tax purposes.

[3] However, joint ventures of these and other kinds have emerged onto a legal landscape that was not prepared for them. In particular they run the risk of being categorized as a partnership. However, statutes governing partnerships in Canada are largely based on a *Partnership Act* adopted in England in 1890,[1] and the common law relating to partnerships has developed over centuries, so that neither the partnership statutes nor the common law have been developed with joint ventures of present-day kinds in mind. This report is about the difficulties caused by the lack of fit between the applicable law, on the one hand, and the exigencies of present-day joint ventures, on the other hand, and about possible solutions to those difficulties.

---

[1] *Partnership Act*, 1890 (UK), 53-54 Vict, c 39.

[4] There is an initial semantic difficulty in the use of the term "joint venture". Sometimes the term is used in a broad general sense to refer to any form of undertaking in which two or more parties take part, including joint ventures undertaken through corporations, joint ventures undertaken through partnerships and purely contractual joint ventures. For the purposes of this report, however, unless the context otherwise requires, we will use the term "joint venture" to refer only to a contractual joint venture, that is to say, a business venture carried on in common, for profit, which is established by a joint venture contract for a discrete project or undertaking. We will use the term "joint venturers" to refer to the parties who establish and carry on a joint venture.

[5] As the principal recommendation of this report is that an appropriate category of joint venturers be entitled to declare themselves not to be a partnership and thus avoid the application of partnership law if it would otherwise apply, we will use the terms "non-partnership joint venture" and "non-partnership joint venturers" to refer to joint ventures and joint venturers who make such a declaration.

B. History of Project

[6] Having received reports that participants in many joint ventures wish to avoid the status of partners but that there is much confusion and uncertainty as to whether a joint venture contract can successfully avoid that status, ALRI decided to investigate further and, in light of that investigation, to decide whether or not to undertake a law reform project in the area.

[7] Our first step, apart from legal research, was to invite five senior lawyers who have extensive experience with, and understanding of, the operation of joint ventures, to form an Advisory Group to give us the benefit of that experience and understanding. Two are counsel to corporations that engage respectively in joint ventures in the construction and energy industries. Two are senior private practitioners who act for joint venturers. The members of the Group are Tony Clark, David A Guichon QC, William Kenny QC and Graham Vanhegan. Gordon Flynn QC, FCA acted as a member of the Advisory Group in relation to tax matters and provided insight into tax considerations.

[8] The advice of the Advisory Group confirmed that the confusion between partnerships and joint ventures creates difficult problems for joint venturers. They also gave advice as to how the problems might be solved. We have found their advice highly influential, and we refer to it in detail in this report. Two of ALRI's Board members, Professor Nigel Bankes and Douglas Stollery QC, took extensive part in the debates at ALRI's meetings with the Advisory Group, but the advice of the Group we refer to in this report is the advice of the members of the Advisory Group.

[9] In May 2011, we published our Consultation Memorandum No. 14, *Joint Ventures*.[2] The principal issue raised by the Consultation Memorandum was whether or not the law should be changed so as to recognize a joint venture that is not a partnership if that is what the joint venturers wish, and, if so, what the specific changes in the law should be.

[10] We circulated the Consultation Memorandum for comment in accordance with our usual procedures. In addition to our usual consultation, we were fortunate in being able to obtain advice and comment from meetings of the Corporate Counsel Section North, the Corporate Counsel Section South and the Construction Law Section North, of the Canadian Bar Association of Alberta. We also received advice and comment from the Association of General Counsel of Alberta and the Edmonton Construction Association. We also received extensive supportive comments from the Law Society's Corporate and Commercial Advisory Committee and from Felesky Flynn. We also received extensive comments from Joe Yurkovich QC, specific comments from Joan Moffat, Corbin Devlin and others, and specific comments by way of answers to questionnaires.

[11] The majority of those who expressed opinions indicated that uncertainty about whether or not joint ventures necessarily fall within the legal definition of "partnership" causes difficult problems for joint venturers and that those problems interfere with business efficiency. A number had not experienced any such problems, but did not suggest that giving joint ventures a relatively certain way of distinguishing the relationship among joint venturers from the relationship among partners would, of itself, cause any legal problems.

---

[2] Alberta Law Reform Institute, *Joint Ventures*, Consultation Memorandum 14 (2011).

CHAPTER 2

Should the Law Recognize a Joint Venture as a Legal Relationship Among the Joint Venturers that is not a Partnership?

A. Uncertainty About Whether a Joint Venture is or is not a Partnership

1. WHETHER JOINT VENTURERS CAN CONTRACT OUT OF PARTNERSHIP

[12] This chapter is about the relationship among joint venturers and the legal consequences of that relationship. It does not address questions about the relationships between joint venturers and other persons, which will be addressed in Chapter 3.

[13] If two or more persons, whether individuals or corporations, are "carrying on a business in common with a view to profit," section 1(g) of the *Partnership Act* defines the legal relationship between them as that of partners. That is, the relationship is established by the statute.[3] It is established for the purposes of the statute but it is also used for purposes of the common law. As the status of partners is imposed by statute, the test for determining whether a partnership exists is objective and the weight of authority is to the effect that the parties cannot contract out of that status by a term in their contract.

[14] Reiter and Sishler express the view that "courts have characterized relationships as partnerships even in the face of an explicit intention to the contrary", and that "[e]ven in the face of explicit clauses, courts routinely find that a partnership exists".[4] These statements appear to be justified by the authorities.

---

[3] *Partnership Act*, RSA 2000, c P-3 [*Partnership Act*]. Sections 3 and 4 list relationships that do not constitute a partnership but these provisions do not detract from the principal statement.

[4] Barry J Reiter & Melanie A Shishler, *Joint Ventures: Legal and Business Perspectives* (Toronto: Irwin Law, 1999) at 78 [footnotes omitted] and 83 [Reiter & Shishler].

[15] Reiter and Shishler refer to *Adam v Newbigging.* In that case, Lord Halsbury made the following statements: [5]

> If a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit or loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership …
>
> And no 'phrasing of it' by dexterous draftsmen, to quote one of the letters, will avail to avert the legal consequences of the contract …

[16] And he said later:[6]

> [N]o one has ever doubted that if the adventure is carried on for a person so that it is his business, then he is a partner, whatever subtle contrivance he may resort to cloak and muffle the real nature of his interest in the concern.

[17] Then in *Weiner v Harris*, Lord Cozens-Hardy MR made the following statement, which is quoted by Reiter and Shishler:[7]

> Two parties enter into a transaction and say "It is hereby declared there is no partnership between us." The Court pays no regard to that. The Court looks at the transaction and says "Is this, in point of law, really a partnership? It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is."

[18] In *Industrial Airport International Park v Tanenbaum*, Judson J quoted the passages from *Adam v Newbigging* set forth above as authority, though he distinguished the case on the facts. [8]

[19] On the other hand, in the recent case of *Roorda v MacIntyre* the Alberta Court of Appeal held that a joint venture agreement did not impose a fiduciary duty on the joint venturers, and said in the course of the judgment:[9]

---

[5] *Adam v Newbigging*, (1888), 13 AC 308 HL (Eng) at 315.

[6] *Adam v Newbigging*, (1988), 13 AC 308 HL (Eng) at 316.

[7] *Weiner v Harris,* [1910] 1 KB 285 at 290.

[8] *Industrial Airport International Park v Tanenbaum,* [1977] 2 SCR 326 at 338.

[9] *Roorda v MacIntyre*, 2010 ABCA 156, at para 14.

> Moreover, the JVA specifically disclaims the creation of a partnership, thereby effectively excluding the operation of fiduciary duties that might arise from a partner relationship. All of these terms are circumscribed by an entire agreement clause.

[20] In another recent case, *WCI Waste Conversion Inc v ADI International Inc*, [10] in which there was also an issue as to whether a fiduciary obligation existed between two parties, the Prince Edward Island Court of Appeal found that the relationship between the parties satisfied the criteria for a joint venture listed in *Graham v Central Mortgage and Housing Corporation and Bras D'Or Construction Ltd* which are discussed below,[11] and that the parties had contracted that "joint venture principles would govern their relationship." However, the Court's view of the relationship between joint ventures is puzzling; speaking of the fiduciary obligation issue the Court said:[12]

> Delineation between partnership and joint venture does not resolve the issue, and that is not essential. Some caselaw delineates, while other decisions identify the joint venture itself as a "partnership".

[21] Neither the judgment in *Roorda* nor the judgment in *Waste Conversion* provides reasons for holding that a venture that falls within the definition of "partnership" in the *Partnership Act* can be taken out of the Act by agreement, and neither judgment refers to authorities on the effect of a disclaimer of partnership such as *Adam* and *Weiner*.[13] It would therefore not be safe to rely upon the statements made in the two cases or upon the ability of the parties to a venture that falls within the definition of "partnership" to contract out of partnership.

2. WHETHER A JOINT VENTURE CAN BE STRUCTURED SO AS TO AVOID PARTNERSHIP

[22] There remains a question as to whether it is possible for a "joint venture" to be devised that will fall outside the definition of

---

[10] *WCI Waste Conversion Inc v ADI International Inc,* 2011 PECA 14 at para 25.

[11] *Graham v Central Mortgage and Housing Corporation and Bras D'Or Construction*, (1973), 13 NSR (2d) 183 (SCTD) [*Graham*].

[12] *WCI Waste Conversion Inc v ADI International Inc,* 2011 PECA 14 at para 48.

[13] *Roorda v MacIntyre*, 2010 ABCA 156; *WCI Waste Conversion Inc v ADI International Inc,* 2011 PECA 14; *Adam v Newbigging*, (1888) 13 AC 308 HL (Eng); *Weiner v Harris,* [1910] 1 KB 285.

"partnership". In recent years, some judicial decisions have given some recognition to "joint ventures", under that rubric, as being distinct from partnerships.

[23] However, attempts to distinguish between a joint venture that is a partnership and a joint venture that is not a partnership encounter difficulties. These difficulties may be illustrated by juxtaposing two statements. The first is a statement of the requisites deemed essential for the existence of a joint venture in *Graham*, a decision which has frequently been referred to as authoritative. [14] The second is a list of criteria indicating the existence of a partnership made by Bastarache J in *Continental Bank Leasing Corp v Canada*.[15]

---

[14] The *Graham* indicia were originally stated in *Williston on Contracts*, 3d ed, vol 2 at 563, which the Court quoted in its judgment. See *Graham*, note 11 at 706. These requirements have also been used in more recent cases: see e.g., *Canlan Investment Corp v Gettling (1997)*, 37 BCLR (3d) 140 (CA); *Blue Line Hockey Acquisition Co Inc v Orca Bay Hockey Limited Partnership*, 2008 BCSC 27; *Buchan v Moss Management Inc*, 2008 BCSC 285. (Application to quash dismissed 2009 BCCA 25.)

[15] *Continental Bank Leasing Corp v Canada*, [1998] 2 SCR 298 at para 24.

Graham Indicia of Joint Venture	*Continental Bank* Indicia of Partnership
A contractual basis.	"Contractual basis" is not mentioned in Justice Bastarache's list, but every partnership is based on agreement.
A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking.	A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking.
A joint property interest in the subject matter of the venture.	A joint property interest in the subject matter of the venture.
A right of mutual control or management of the enterprise.	A mutual right of control or management of the enterprise.
Expectation of profit, or the presence of 'adventure', as it is sometimes called, and a right to participate in the profits.	The sharing of profits and losses.
	The filing of income tax returns as a partnership and joint bank account. (The filing of income tax returns is not an essential element: a partnership exists from its formation; income tax returns come later. A partnership could exist without a joint bank account. This criterion is not essential to a partnership.)
Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.	See below.

[24] "Limitation of the objective to a single undertaking or ad hoc enterprise" appears on the *Graham* list but does not appear in Justice Bastarache's list. That omission, however, does not mean that, in law, an undertaking for a single undertaking or ad hoc enterprise is not a partnership. Section 36 of the *Partnership Act* provides for the dissolution of a partnership entered into for a fixed term or a single adventure, thus recognizing that a partnership for a fixed term or a single adventure may exist under the Act. As well, the Supreme Court of Canada has stated succinctly that, "It is settled law that a partnership may be formed for a single transaction."[16]

---

[16] *Spire Freezers Ltd v Canada*, 2001 SCC 11, at para 25, per Iacobucci and Bastarache JJ, giving the judgment of the Court.

[25] It follows that, even if the essential requisites in the *Graham* list are all present, a business venture for a single or ad hoc enterprise, as well as having the requisites of a non-partnership "joint venture", may well meet all the criteria of a partnership.

[26] However, a number of Alberta decisions have referred to a "joint venture" that is not a partnership.[17] So have cases in other jurisdictions.[18] The difficulty is that the courts have not authoritatively created an identifiable form of business organization called a "joint venture" which is not a partnership. In the cases in which the courts have recognized the existence of something called a "joint venture" that is not a partnership, they have not provided reasons or tests for distinguishing a "joint venture" from a partnership and, indeed, would necessarily have difficulty in doing so, given that the stated characteristics of a joint venture overlap with the stated characteristics of a partnership to the extent shown by the comparison of *Graham* and Justice Bastarache's characterizations given above. In other cases, the courts have denied the recognition of a "joint venture" that is not a partnership.

[27] The courts may "appear to be stumbling towards recognition of discrete status", as Professor Robert Flannigan has recently put it, but there is no present or prospective recipe that joint venturers can follow with any confidence that a business venture that they carry out jointly will not be characterized as a partnership. Joint venturers can be confident that they will not be held to be partners only if it is clear that the relationship among the joint venturers is not that of "persons carrying on a business in common with a view to profit." [19]

---

[17] In *Gironella v Berndt* [1982] AJ No. 264 (CA), the Court of Appeal held that the venture in that case was not a partnership but was in the nature of a lone business venture with the hallmarks of a joint venture as discussed in *Williston* and *Graham* (though the Court did not list the hallmarks). Given the later statement of the Supreme Court of Canada in *Spire*, the distinction between a partnership and a "lone business venture" does not appear to be firmly established. See also, e.g., *Glenmac Corp v McGonigal* (1989), 103 AR 170 (QB); *Luscar Ltd v Pembina Resources Ltd* (1994), 162 AR 35 (CA); *Canada Southern Petroleum Ltd v Amoco Canada Petroleum Co,* 2001 ABQB 803; *Klewchuk v Switzer,* 2001 ABQB 316; *Milroy v Klapstein*, 2003 ABQB 871.

[18] See, e.g., *Builders Market Ltd v Century 21 Northeastern Realty Ltd* (1991), 109 NSR (2d) 297 (NSCA); *SG Levy and Sons Ltd v Dover Financial Corp* (1996), 147 NSR (2d) 186 (CA); *Wonsch Construction Co v Danzig Enterprises Ltd* (1990), 75 DLR (4th) 732 (OntCA).

[19] Robert Flannigan, "The Legal Status of the Joint Venture" (2009) 46 Alta L Rev 713 at 718 [footnotes omitted].

B. The Extent of the Practical Problem

[28] Apart from the corporation, the only legal category into which joint ventures, in the broad sense, fit easily is the partnership. Unfortunately, statutes governing partnerships in Canada are largely based on a *Partnership Act* adopted in England in 1890,[20] and the common law relating to partnerships has developed over centuries, so that neither the partnership statutes nor the common law have been developed with joint ventures of modern kinds in mind. The advice of the Advisory Group is that partnership law is often unsuitable for a joint venture, and that the lack of assurance that a joint venture can escape from the grip of partnership law causes uncertainty, confusion and inefficiencies for joint venturers. While section 22(1) of the *Partnership Act* provides that "[t]he mutual rights and duties of partners … may be varied by the consent of the partners," it does not provide sufficient relief.

C. Advice of the Advisory Group

[29] The Advisory Group have unanimously advised ALRI:

(a) that there are significant problems with the law relating to joint ventures;

(b) that the problems arise because it is unclear whether or not joint ventures are partnerships under the general law and the *Partnership Act*; and

(c) that the problems are great enough that the law should be changed.

[30] We find the Advisory Group's advice to be persuasive, reflecting as it does the experience of lawyers with great experience of joint ventures. The law should not put obstacles in the way of legitimate business enterprises, either by forcing them into a form of business structure that is inefficient for their purposes, or by leaving them uncertain as to whether they have successfully differentiated their undertaking from an unwanted form of business structure. We therefore think that the law should be

---

[20] *Partnership Act*, 1890 (UK), 53-54 Vict, c 39.

changed so that joint venturers may adopt a business structure of their choice without significant risk that they will be classified as a partnership.

[31] We will make recommendations for legislation that will have the effect of making it clear that an appropriate category of joint venturers are not partnerships.[21]

D. Proposed Changes in the Law

[32] If the law is to be changed in order to make it suitable for the relationships among joint venturers, the next question is: what specific changes should be made? We leave aside for the moment the determination of the class or classes of joint ventures to which any such change might apply.

[33] One change that might be made is to provide a statutory definition of "joint venture", and then to exclude "joint ventures", as defined, from the definition of "partnership". The consequence would be that the *Partnership Act* and the common law of partnership would not apply to a "joint venture" as defined. Joint venturers would then merely have to shape their joint venture so that it would fall within the category of their choice, whether their choice is a partnership or a joint venture that is not a partnership.

[34] However, the two categories, partnerships and joint ventures, would have to be defined by formulas sufficiently clear and precise to give reasonable certainty that a business organization can arrange its affairs to fit clearly within one category or the other. However, it would be extremely difficult, and it is likely to prove impossible, to work out a satisfactory definition of a "joint venture" by which the *Partnership Act*, either by itself or coupled with a new Joint Ventures Act, would automatically identify two separate and mutually exclusive categories of business organizations: partnerships and non-partnership joint ventures. The difficulty is illustrated by the overlap between the requisites of a joint venture as described in *Graham*[22] and the requisites of a partnership as described by Justice Bastarache in *Continental Bank Leasing* which we have

[21] See Recommendation 1, page 22.

[22] See *Graham*, note 11.

set forth above.[23] We do not believe that separation of a class of joint ventures from partnerships by statutory definition is a practical solution to the uncertainty caused by the present law.

[35] A better approach would be to provide in legislation that a "joint venture" that has the qualifications stated in the legislation is not a partnership if the parties to the joint venture declare, by a contract in writing, that the joint venture is not a partnership. (Though, for reasons given below we would add a second condition, namely, that the joint venture must carry on the venture under a name that includes the term "Joint Venture" or the abbreviation "JV"). We think that such a provision will enable joint venturers to avoid the uncertainty caused by the resemblance of joint ventures to partnerships and will enable them to choose the form of business organization that they find suitable.

[36] Again, we have advice of the Advisory Group to that effect. In the unanimous opinion of the Advisory Group:

(a) the law should recognize joint ventures as a different kind of business undertaking;

(b) joint venturers should be able to "opt out" of being a partnership, that is, to provide by a joint venture contract that the joint venture is not a partnership;

(c) a joint venture should be governed by the joint venture contract, subject to the usual rules of contractual interpretation, and subject to the general law other than the law of partnership;

(d) the law should not impose rules or restrictions on the relationship between joint venturers who have opted out of partnership.

[37] We will make a recommendation that the relationship between joint venturers who carry on a joint venture that has the qualifications stated in the legislation is not a partnership under the *Partnership Act* and any other law if the joint venturers declare by a contract in writing that the joint venture is not a partnership and if the joint venture is carried on

---

[23] *Continental Bank Leasing Corp v Canada*, [1998] 2 SCR 298 at para 24.

under a name that includes the term "Joint Venture" or the abbreviation "JV".

[38] The proposed recommendation is intended to deal only with relationships in which joint venturers have made an express declaration that their joint venture is not a partnership. In order to ensure that the recommendation and any consequent legislation will not affect relationships among parties who have not made such a declaration, we will make a recommendation that legislation provide that the absence of a declaration that a joint venture is not a partnership does not imply that the relationship between the joint venturers is or is not a partnership.

[39] Our recommendations are not intended to affect joint-venture relationships that are in existence when the proposed legislation comes into force. However, a joint venture that has the qualifications stated in the legislation should be able to qualify as a non-partnership joint venture if the joint venturers comply with the requirements of the legislation, that is, by making a declaration that the joint venture is not a partnership and by carrying on business under a name that includes "Joint Venture" or "JV" and we will so recommend.

E. What Joint Venturers Should be Allowed to Declare That They are not Partnerships?

1. SHOULD ALL UNINCORPORATED COMMERCIAL VENTURES BE ALLOWED TO DECLARE THAT THEY ARE NOT PARTNERSHIPS?

[40] The first question is whether or not all unincorporated commercial ventures, and not merely the parties to a specific category of non-partnership joint ventures, should be able to declare themselves not to be partners and thus avoid the legal relationship of partners. Some opinion, though not the majority opinion, in the Advisory Group was to the effect that all unincorporated commercial ventures should be included.

[41] Allowing all parties to all unincorporated commercial ventures to declare their ventures not to be partnerships would be a major derogation from traditional partnership law, for which we have not seen any need or demand. Before doing so, it would be necessary to conduct a major investigation of the reasons for, and the effect of, the partnership relationship in myriads of kinds of business ventures. We do not think

that such an investigation would be useful or even justifiable, given that the problems presented to us have been problems of discrete-project joint ventures. It is for that reason that our investigation has been restricted to circumstances in which joint venturers come together for a discrete undertaking. Accordingly, our recommendations are limited to dealing with a specific class of joint ventures.

2. WHAT JOINT VENTURERS SHOULD BE ALLOWED TO DECLARE THAT THEY ARE NOT PARTNERSHIPS?

[42] If the power to declare themselves not to be partners is to be available only to a class or classes of contractual joint ventures, while not interfering with the status quo with respect to other classes of joint ventures and partnerships, it will be necessary to provide a litmus test that will enable joint venturers to determine with reasonable assurance whether or not a specific joint venture belongs to the class of joint ventures that may declare that they are not partnerships.

[43] The basic notion of a "joint venture" should be included in the definition of the class of joint ventures that can declare that they are not partnerships, that is, that the parties propose to engage in a business venture that will be carried out jointly with a view to profit. Up to this point, the definition would parallel the definition of "partnership" in the *Partnership Act*.

[44] Then, the definition should include a test that will distinguish a "joint venture" that can make an effective declaration of non-partnership from a joint venture that cannot make an effective declaration. One commentator frames the test this way: "The distinguishing feature of a joint venture is that it is an arrangement set up for a limited time, for a limited purpose, or both," which is one common statement of the test. [24] The *Graham* case states the test in this way: "limitation of the objective to a single undertaking or ad hoc enterprise."[25] An Alberta decision found that the venture in the case before the court "was more akin to a joint venture,

---

[24] J Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3d ed (Toronto: Irwin Law, 2009) at 76. Note, however, that the author describes this as a functional definition and not a legal definition. In his view, "[J]oint ventures are neither a distinct form of business organization nor a relationship that has any precise legal meaning", at 76.

[25] See *Graham*, note 11 at 707.

as the efforts were directed to one discrete project rather than an ongoing business."[26]

[45] While "single" or "specific" or "ad hoc" might be a satisfactory qualifier, we think that the better wording is that the venture is a "discrete project" or "discrete undertaking". The primary definition of "discrete" in the Oxford English Dictionary is, "separate, detached from others, individually distinct.[27] Opposed to continuous" and in Merriam Webster it is "constituting a separate entity: individually distinct".[28] The term "discrete" will include the joint ventures in which the possibility of confusion with partnerships presently causes the difficulties we have mentioned.

[46] We think that a word-formula that is suitable for the purpose of determining which joint ventures can make an effective declaration of non-partnership is: "'joint venture' means the relationship that subsists between persons carrying on, in common and with a view to profit, a business venture established for a discrete project or undertaking or for a series of discrete projects or undertakings." We will recommend the adoption of this wording.[29]

3. SHOULD VENTURES ESTABLISHED FOR A LIMITED TIME BE ALLOWED TO DECLARE THEMSELVES NOT TO BE A PARTNERSHIP?

[47] We do not think that a business venture established for a limited time should, without more, be included in the class that can declare themselves not to be partnerships. For one thing, we have not seen a judicial decision that refers to a joint venture set up for a limited time but not for a discrete project or undertaking. For another, we are not aware that problems have arisen with respect to such joint ventures. But, more important is the vagueness of "limited time": a venture that is limited to, say, 50 years, should not be able to declare themselves not a partnership if the definition of "partnership" otherwise applies, as that would allow virtually all joint ventures to declare themselves not to be partnerships. We will recommend that joint ventures established for a limited time,

---

[26] *Milroy v Klapstein*, 2003 ABQB 871 at para 21.

[27] *The Oxford English Dictionary*, 3d ed, *sub verbo* "discrete."

[28] *Merriam Webster*, *sub verbo* "discrete."

[29] See Recommendation 1, page 22.

without more, not be included in the class of joint ventures that may declare that they are not partnerships.[30]

4. SHOULD JOINT VENTURES OF PROFESSIONALS BE ABLE TO DECLARE THEMSELVES NOT A PARTNERSHIP?

[48] Some opinion in the Advisory Group, though not a majority opinion, was to the effect that joint ventures of professionals should not be allowed to declare themselves not partnerships. However, we think that, if there is anything inappropriate about professionals disclaiming partnership in favour of being a joint venture, that is a matter for the regulators of the professions and that the general law should not make the distinction. We will recommend that professionals not be excluded from the legislation.[31]

F. Questions Arising from the Proposed Changes in the Law

1. SHOULD AN ALTERNATIVE LEGAL REGIME OR ALTERNATIVE RULES BE PROVIDED FOR NON-PARTNERSHIP JOINT VENTURES?

[49] If non-partnership joint venturers are allowed to declare that their relationship is not a partnership relationship, and if nothing further is done, their general legal situation will be governed by their joint venture contract and all of the general law that would apply where a contractual relationship is involved. This would give the joint venturers the maximum power to manage their own affairs. We think that this is as it should be, and we make no recommendation for provisions of the general law respecting the relationship between non-partnership joint venturers.

[50] Given that the internal legal framework of partnerships will not apply, it would be possible to devise alternative rules specially designed to meet the needs of non-partnership joint venturers. There being no public interest in regulating the internal affairs of non-partnership joint ventures, business efficiency is the governing consideration. We do not think that it would be practicable or useful to provide an alternative

---

[30] See Recommendation 1, page 22.

[31] See Recommendation 1, page 22.

statutory framework, and we will not make any recommendation in that respect. The advice of the Advisory Group is to that effect.

2. SHOULD THE PROPOSED LEGISLATION DEAL WITH THE PROPERTY COMMITTED TO A NON-PARTNERSHIP JOINT VENTURE?

[51] If joint ventures are allowed to declare themselves not to be partnerships, questions may arise as to ownership of property owned by the non-partnership joint venturers respectively and committed to the joint venture, and as to the ownership of property acquired in the course of the joint venture. If the joint venture contract provides for the ownership of the property, its provisions will prevail. If the joint venture contract is silent on the question, in the absence of any legislative provision, property committed by a joint venturer for the use of the joint venture will presumably remain the property of the joint venturer, while property acquired in the course of the joint venture will presumably be co-owned by the joint venturers. We do not think that the legislation should try to deal with the ownership of property as among joint venturers, and we will make a recommendation to that effect.[32]

3. SHOULD THE LEGISLATION SAY WHETHER OR NOT NON-PARTNERSHIP JOINT VENTURERS STAND IN FIDUCIARY RELATIONSHIPS TO EACH OTHER?

[52] The *Partnership Act* imposes some obligations on partners that are of a fiduciary nature. For example, section 32 provides for the rendering of true accounts and information; section 33(1) requires each partner to account to the firm for a benefit derived by the partner from any transaction concerning the partnership and any use by the partner of the partnership property, name or business; and section 34 provides that a partner who, without consent, carries on a similar business and competes with the firm must account for, and pay over to the firm, the profits made by the partner in that business. The *Partnership Act* does not itself impose a general fiduciary duty on partners, but the common law does impose such a duty on each partner to the other members of the partnership.[33] The

---

[32] See Recommendation 1, page 22.

[33] It has been said that the mutual fiduciary duty of partners stems from the statutory agency created by the *Partnership Act*, e.g., see Reiter & Shishler, note 4 at 120-122. However, the duty applies in some circumstances in which a partner is not acting as an agent of the partnership.

fiduciary obligations of partners can be qualified by a partnership agreement.[34]

[53] Reiter and Shishler, in discussing obligations among contractual joint venturers (which term, for the purposes of this discussion, means joint venturers who have declared themselves not to be a partnership), say this:[35]

> Canadian courts have followed one of three distinct approaches in determining whether contractual joint venturers will owe each other fiduciary duties: (1) joint venturers always owe fiduciary duties; (2) joint venturers may or may not owe fiduciary duties depending on the facts of the case; and (3) joint venturers are presumed not to owe fiduciary duties.

[54] The uncertainty and confusion surrounding the distinction, or lack of it, between "joint ventures" and "partnerships" thus surround the question of whether or not non-partner joint venturers, if such relationships exist, owe fiduciary duties to each other. For example, the recent decision of the Prince Edward Island Court of Appeal in *WCI Waste Conversion Inc v ADI International Inc* says this:[36]

> [W]hile partnership relationships are viewed as fiduciary per se so that fiduciary duties are automatically engaged, for joint ventures they are not automatically engaged, but they may be engaged, depending on the circumstances.

[55] If joint venturers are to be permitted to declare themselves not to be a partnership, a question arises as to whether the permissive legislation should say whether or not non-partnership joint venturers who do so will owe each other fiduciary duties. The legislation might:

- provide that non-partnership joint venturers are under fiduciary duties to each other;
- provide that non-partnership joint venturers are not under fiduciary duties to each other; or
- say nothing about fiduciary duties.

---

[34] Reiter & Shishler, note 4 at 122.

[35] Reiter & Shishler, note 4 at 122 [footnotes omitted].

[36] *WCI Waste Conversion Inc v ADI International Inc,* 2011 PECA 14 at para 47.

[56] The first option is an unlikely candidate, given that non-partnership joint venturers get together for one project and may be in vigorous competition with each other in all other respects, so that general fiduciary duties would be in conflict with the basic purposes of some, if not all, non-partnership joint ventures. The first option could be varied to provide that non-partnership joint venturers could waive or vary the duty by the joint venture contract, but there does not seem to be any reason why the law should give initial preference to a fiduciary duty. The second option would underscore the difference between non-partnership joint ventures and partnerships, but it would also rule out a fiduciary relationship even when, on the specific facts, a fiduciary relationship should be recognized.

[57] The third option would, in individual cases, leave the question of fiduciary duties to the terms of the joint venture contract and to the court's interpretation of the joint venture relationship, having regard to the joint venture contract and to circumstances which do or do not indicate a fiduciary relationship. This option leaves joint venturers to work out their relationships by joint venture contracts, which we think is the appropriate course of action, so that the legislation should not say anything about it. We will make a recommendation to that effect.[37]

4. SHOULD TAX ISSUES AFFECT THE DECISION OF WHETHER OR NOT SOME JOINT VENTURERS SHOULD BE ABLE TO DECLARE THAT THEY ARE NOT A PARTNERSHIP?

[58] The Canada Revenue Agency [CRA], in its administration of the *Income Tax Act,* recognizes "joint ventures" as a form of business organization that is different from partnerships, though it does not provide a definition of "joint venture".[38] "Joint ventures" are also recognized in the *Investment Canada Act* and for the purposes of the *Excise Tax Act*.[39] For the purpose of assessing taxes under the *Income Tax Act*, the general rule is that profits and losses of a partnership (which is treated as having some aspects of a separate entity) are determined at the partnership level and allocated to partners accordingly, while profits and

[37] See Recommendation 1, page 22.

[38] *Income Tax Act*, RSC 1985, c 1 (5th Supp).

[39] *Investment Canada Act*, RSC 1985, c 28 (1st Supp); *Excise Tax Act*, RSC 1985, c E-15.

losses of joint venturers (who are treated as individual parties) are determined at the joint venturer level.

[59] If the facts do not clearly indicate that a partnership exists and if there are significant facts supporting the view that a relationship is not one of partnership, the CRA may accept a declaration in a joint venture contract that the joint venturers are not partners. Joint venture contracts are usually drafted to include provisions that are likely to be accepted by the CRA as supporting the latter view. Prudence may suggest that an advance tax ruling be obtained. In the event of uncertainty, the CRA may look to the provincial law as an important determinant in arriving at a decision as to the proper classification of the relationship.

[60] Tax issues are often important factors in the choice of business organization made by joint venturers. Sometimes a partnership may be the more tax-effective choice for the partners, while in other cases a joint venture recognized as such by the CRA may be more tax-effective. Making a choice, if a choice is available, is likely to be a complex process requiring expert advice.

[61] If tax law attaches one set of tax consequences to a partnership relationship and a different set of tax consequences to a joint-venture relationship, the general law should not leave taxpayers in a state of legal uncertainty as to which relationship they fall into. The legislation we propose may help to alleviate that uncertainty, but it cannot address tax considerations directly and should not attempt to do so.[40]

G. Conclusion

[62] We will now make our recommendations with respect to the relationship of joint venturers among themselves.

RECOMMENDATION 1

(1) For the purposes of this Recommendation:

(a) "joint venture" means the relationship that subsists between persons who carry on, in common and with a view to profit, a business

[40] See Recommendation 1, page 22.

venture established by contract for a discrete project or undertaking or for a series of discrete business projects or undertakings,

(b) "joint venturers" means the persons who carry on a joint venture described in paragraph 1(a),

(c) "non-partnership joint venture" means a joint venture which the persons carrying on the joint venture declare by contract, in writing, is not a partnership and which is carried on under a name which includes the words "Joint Venture" or the abbreviation "JV", and "non-partnership joint venturers" means the persons who carry on a non-partnership joint venture.

(2) We recommend that legislation be enacted providing:

(a) that a non-partnership joint venture is not a partnership within the meaning of the *Partnership Act* or any other law relating to partnerships, and that the non-partnership joint venturers are not partners, in relation to the non-partnership joint venture,

(b) that the legislation applies to any joint venture which, after the date of coming into force of this Part, satisfies the requirements of paragraph 1(c),

(c) that the absence of a declaration that a joint venture is not a partnership does not imply that the relationship between the joint venturers is or is not a partnership, and

(d) that a non-partnership joint venture is not a legal entity.

(3) We recommend that the legislation enacted under paragraph (2):

(a) not apply to a joint venture established for a limited time unless the joint venture otherwise complies with the definition of "joint venture" in paragraph 1(a),

(b) not provide an alternative statutory framework or special rules and regulations applicable to non-partnership joint ventures.

(4) We recommend that the legislation enacted under paragraph (3):

(a) not take into account possible tax implications of the legislation,

(b) not make any provision with respect to,

(i) fiduciary duties among non-partnership joint venturers, or

(ii) the ownership of property as among non-partnership joint venturers.

CHAPTER 3

Relationship of Non-Partnership Joint Venturers to Third Parties

A. In General

1. LIABILITY OF NON-PARTNERSHIP JOINT VENTURERS TO THIRD PARTIES FOR DEBTS, OBLIGATIONS AND WRONGS

[63] Chapter 2 of this report has considered the legal relationships among joint venturers and recommended changes in the law relating to those relationships. So long as any proposed changes in the law affect only internal relationships among joint venturers and do not affect third parties, the only interests that need to be taken into consideration are the interests of the joint venturers. However, under our recommendations in Chapter 2, partnership law, including the partnership law relating to the relationships between partners and third parties, would no longer apply to joint ventures as defined in that chapter. It is therefore necessary to consider the interests of third parties, that is, parties who enter into contractual or other relationships with joint venturers or who suffer damage from wrongful acts done by joint venturers or agents or employees of joint venturers.

[64] Under section 11(2) and (3) of the *Partnership Act*, each partner in a "firm" (that is, persons who have entered into partnership with one another) is liable jointly with the other partners for debts and obligations of the firm incurred while that partner is a partner, and the estate of a deceased partner is severally liable for debts and obligations of the firm incurred while the deceased partner was a partner. Under sections 13 to 15, each partner is liable jointly and severally for wrongful acts or omissions of a partner acting in the ordinary course of the business of the partnership, or a person acting under the authority of a partner.

[65] If our proposals are adopted, the provisions of the *Partnership Act* will not apply to non-partnership joint ventures. However, our proposals will apply only if the non-partnership joint venturers are carrying on a business venture in common with a view to profit, that is, if the venture will be carried on by all of the joint venturers. It is our view that parties

who are carrying on a business venture in common will be jointly and severally liable under the common law for debts and obligations incurred and wrongs committed, in the ordinary course of the business of the joint venture as described in the joint venture contract, unless there is something in the relationship of the joint venturers to the outside persons affected that negatives that liability, such as a contract between the joint venturers and the third party. The courts have so held in some cases. [41]

[66] Reiter and Shishler take issue with this approach. [42] They cite *Canadian Imperial Bank of Commerce v Charbonnages de France International SA*,[43] as recognizing "that not all joint venturers should be liable for actions undertaken independently by their fellow venturers."[44] However, the CIBC case involved litigation among members of the syndicate in question in the action, and the circumstances were against joint liability, and we do not think that the CIBC case is applicable to claims by third parties against joint venturers who carry on a business venture in common. However, given that views such as those of Reiter and Shishler can be held, it appears that the proposed legislation should provide that joint venturers in a non-partnership joint venture should be jointly and severally liable for debts and obligations incurred to third parties, unless a contract with the persons outside the joint venture otherwise provides, and also for wrongs done to third parties, by or under the authority of joint venturers. We will make a recommendation accordingly.[45]

2. LIABILITY OF NON-PARTNERSHIP JOINT VENTURERS TO PERSONS EMPLOYED IN THE ACTIVITIES OF THE JOINT VENTURE

[67] Liability of non-partnership joint venturers to persons employed in the activities of the joint venture is a special case of liability to third parties. Such an employee may be an employee of one joint venturer who is transferred to the books of the joint venture; they may be an employee who remains on the books of the original employer; or they may be an employee retained on behalf of the joint venturers.

---

[41] See *Graham*, note 11.

[42] See Reiter & Shishler, note 4, at 148-152.

[43] *Canadian Imperial Bank of Commerce v Charbonnages de France International SA* (1994), 117 DLR (4th) 262 (BCCA).

[44] See Reiter & Shishler, note 4, at 151.

[45] See Recommendation 2, page 30.

[68] In theory, a non-partnership joint venture will not be a separate entity and therefore will not be able to have employees. However, the Alberta Labour Relations Board has held that "two legal entities – here two corporations – can bind themselves together, and so act, as to constitute one employer of employees"[46] and "that a joint venture is a separate employer in its own right versus two separate employing entities."[47] It appears to follow from the separate-employer designation that, even though there is no agreement by the employee, an employee who is seconded to a joint venture from one joint venturer has a new employer. This appears to be so even if the employee was included in a collective agreement with the joint venturer by whom they were previously employed. We understand that other provinces have not treated a joint venture as an employer, with the consequence that the employment relationship of employees with the individual joint venturer continues.

[69] We do not think that the question of whether or not the characterization of joint venturers as "person[s] who customarily or actually [employ] an employee" under the *Labour Relations Code* will prevail in the event of a challenge is a matter that requires special reference in our recommendations.[48] Obligations to employees will be obligations to third parties and will thus be included in Recommendation 2 without special reference.

3. ENFORCEMENT OF CLAIMS AGAINST NON-PARTNERSHIP JOINT VENTURERS

[70] Partnership property and the property of individual partners are subject to specific provisions about enforcement of claims and about bankruptcy that will not apply to a non-partnership venture or to non-partnership joint venturers. For example, section 26 of the *Partnership Act* provides that a writ of enforcement cannot be issued against partnership property except on a judgment against the firm; section 28 provides that the Court may make an order charging a partner's interest in partnership

---

[46] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada: Local 488 v Loram-Techman A Joint Venture* [1983] Alta LRB 83-041 at 10.

[47] *Peter Kiewit Sons Co Ltd v United Brotherhood of Carpenters and Joiners of America* [1988] Alta LRBR 399 at 404.

[48] *Labour Relations Code*, RSA 2000, c L-1, s 1(m).

property and deals with points of detail; and section 43 deals with partners' rights to property on dissolution of their partnership. These provisions would not apply to a non-partnership joint venture. However, they would not be appropriate because the property will be the property of the joint venturers, individually or in common, and there is no separate joint venture property to which the provisions could apply.

[71] Then, section 142 of the *Bankruptcy and Insolvency Act* provides that, where partners become bankrupt, their joint property is to be applied in the first instance against their joint debts and their separate property is to be applied in the first instance against their separate debts. [49] If a bankrupt partner was a member of one or more bankrupt partnerships, claims against the estate in respect of which debts were incurred will have priority against that estate. Section 142 would not apply to the bankruptcy of a non-partnership joint venturer, and also would not be appropriate, because the property is the property of the joint venturers and there is no separate joint venture estate.

[72] If a creditor obtains a judgment against a non-partnership joint venturer, or if a joint venturer in a non-partnership joint venture becomes bankrupt, the ordinary law of enforcement or bankruptcy will determine what recourse the judgment creditor has against the bankrupt, including the bankrupt's specifically owned or co-owned property. However, what the ordinary laws of enforcement and bankruptcy say about the property of joint venturers has not been made clear by judicial decisions.

[73] Some creditors will have better recourse for recovery of their claims if a venture is carried on as a partnership. Some creditors will have better recourse if the venture is carried on as a non-partnership joint venture. The difference in treatment of partnership creditors from the treatment of the creditors of non-partnership joint venturers does not militate either for or against allowing joint ventures to declare that they are not partnerships, and we do not suggest that the proposed legislation should make any reference to the issue. We will make a recommendation accordingly. [50]

---

[49] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

[50] See Recommendation 2, page 30.

B. Name and Registration

1. NAME

[74] To the outside world, a non-partnership joint venture will look much like a partnership unless something is done to give it a different appearance.

[75] We have said above that we will recommend that joint venturers carrying on a non-partnership joint venture should be jointly and severally liable for debts and obligations incurred to third parties unless a contract with the persons outside the joint venture otherwise provides, and that they should also be under similar liabilities for wrongs done to third parties by or under the authority of joint venturers. The enactment of legislation to that effect would give substantial protection to third parties whether or not they are aware that they are dealing with a non-partnership joint venture.

[76] However, as we have pointed out, special remedies apply to the enforcement of partnership obligations, and special provisions in the *Bankruptcy Act* apply to the bankruptcy of partners. There are also complex provisions in the *Partnership Act* about many things, including agency, whether certain relationships amount to partnership, the nature of partnership property, the effect of representations and other things. Given these differences between the legal consequences of dealing with a partnership and the legal consequences of dealing with a non-partnership joint venture, we think it important that third parties should receive notice that they may be dealing with a non-partnership joint venture rather than a partnership.

[77] For these reasons, we will recommend that a joint venture not be allowed to claim the benefits of being a non-partnership joint venture unless they carry on the business under a name that includes the term "Joint Venture" or the abbreviation "JV". The use of "Joint Venture" or "JV" in the business name will put third parties on notice that they may be dealing with a non-partnership joint venture.

[78] We do not think that the requirement of using such a name will impose an undue burden on a non-partnership joint venture. Corporations do not have difficulty with including "Limited", "Ltd",

"Incorporated" or "Inc" in their names. Limited liability partnerships do not have difficulty including "LLP" in their names.

2. REGISTRATION

[79] Section 106 of the *Partnership Act* requires persons associated in partnership for trading, manufacturing, contracting or mining purposes in Alberta to file a declaration with the Registrar of Corporations. This gives the public access to the composition of the membership of such partnerships and is also an assurance that there is a partnership.

[80] An argument may be made for making a similar registration requirement for non-partnership joint ventures: the registration would at once make public the fact that the organization is a non-partnership joint venture and give the identities of its members.

[81] The contrary argument is that the usefulness of the existing register of partnerships is not very great and that it is likely that the usefulness of a register of non-partnership joint ventures will not justify imposing such a bureaucratic requirement, particularly given the dynamic nature of some joint ventures. We will recommend that no registration requirement be imposed upon non-partnership joint ventures.[51]

C. Conclusion

[82] We will now make our recommendations with respect to the relationship of joint venturers to persons outside the joint venture.

RECOMMENDATION 2

(1) We recommend that, if legislation is enacted in accordance with Recommendation 1, it should:

(a) include provisions as follows:

(i) joint venturers in a non-partnership joint venture are jointly and severally liable for,

- all debts and obligations of the joint venturers to a third party unless a

[51] See Recommendation 2.

contract between the joint venturers and the third party otherwise provides, and

- all wrongful acts or omissions of a joint venturer or a person acting under the authority of a joint venturer, acting in the ordinary course of the business of the joint venture, and

(b) require a non-partnership joint venture to carry on the joint venture under a name that includes "Joint Venture" or "JV".

(2) We recommend that such legislation does not:

(a) make special provision for enforcement of claims against non-partnership joint venturers, or

(b) require non-partnership joint ventures to make any form of registration.

JS PEACOCK QC (Chair)

ND BANKES

PL BRYDEN

AS de VILLARS QC

JT EAMON QC

HON CD GARDNER

WH HURLBURT QC

R KHULLAR

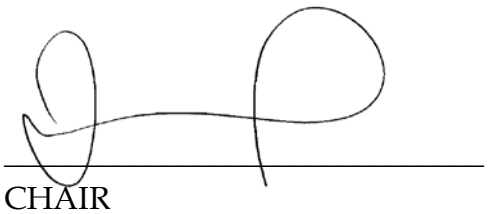
AL KIRKER QC

PJM LOWN QC (Director)

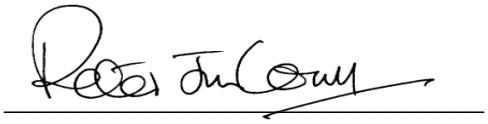
HON AD MACLEOD

ND STEED QC

DR STOLLERY QC



CHAIR



DIRECTOR

APPENDIX A

Draft Legislation

We think that legislation along the following lines would give effect to our recommendations.

PART X
Non-Partnership Joint Ventures

1 This Part applies to any joint venture which, after the date of coming into force of this Part, satisfies the requirements of section 2(c).

2 For the purposes of this Part:

(a) "joint venture" means the relationship that subsists between persons who carry on, in common and with a view to profit, a business venture established by contract of those persons for a discrete project or undertaking or for a series of discrete business projects or undertakings;

(b) "joint venturers" means the persons who carry on a joint venture described in section 1(a);

(c) "non-partnership joint venture" means a joint venture in which the persons carrying on the joint venture declare by contract in writing, is not a partnership and which is carried on under a name which includes the words "Joint Venture" or the abbreviation "JV";

(d) "non-partnership joint venturers" means the persons who carry on a non-partnership joint venture.

3 A non-partnership joint venture is not a partnership within the meaning of this Act or any other law relating to partnerships and the non-partnership joint venturers are not partners, in relation to the non-partnership joint venture.

4 The absence of a declaration that a joint venture is not a partnership does not imply that the relationship between the joint venturers is or is not a partnership.

5 A non-partnership joint venture is not a legal entity.

6(1) The non-partnership joint venturers who carry on a non-partnership joint venture are jointly and severally liable for,

(a) all debts and obligations to other persons incurred on behalf of the joint venturers, and

(b) loss or injury caused by a wrongful act or omission committed in the ordinary course of the joint venture or with the authority of a non-partnership joint venturer under a contract relating to the non-partnership joint venturers.

(2) Subsection (1) does not apply if a contract between the non-partnership joint venturers and persons who might otherwise have claims under subsection (1) negatives or limits liability, in which event the contract governs the relationship in accordance with its terms.

APPENDIX B

Consultation

Presentations were made to the following organizations and resulted in helpful discussion:

- Corporate Counsel Section North, Canadian Bar Association
- Corporate Counsel Section South, Canadian Bar Association
- Construction Law Section North, Canadian Bar Association
- Association of General Counsel of Alberta
- Edmonton Construction Association

The following individuals and organizations responded to our Consultation Memorandum:

- Law Society of Alberta, Corporate and Commercial Advisory Committee
- Tiro Clarke, Tiro Clarke Professional Corporation
- John Courtright, Shell Canada Limited, Law Department
- Corbin Devlin, McLennan Ross LLP
- Lawna Hurl, Niska Gas Storage
- Joan Moffat, Harvest Operations Corporation
- Ken Skingle QC, Michael Wong and Anthony Strawson, Felesky Flynn LLP
- Joseph Yurkovich QC, Miller Thomson