ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

Joint Ventures

Consultation Memorandum No. 14

May 2011

Deadline for Comments: October 31, 2011

INVITATION TO COMMENT

Deadline for comments on the issues raised in this document is October 31, 2011.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum on our website, by fax, mail or e-mail to:

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CHAPTER 3. RELATIONSHIPS BETWEEN JOINT VENTURERS AND OUTSIDERS

ALBERTA LAW REFORM INSTITUTE

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Our legal staff consists of P.J.M. Lown, Q.C. (Director); S. Petersson (Research Manager); D.W. Hathaway; C. Hunter Loewen; M.E. Lavelle; E.C. Robertson and G. Tremblay-McCaig. W.H. Hurlburt, Q.C. is a consultant to the Institute.

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ACKNOWLEDGMENTS

The Institute is grateful to a number of people who have greatly assisted in helping prepare this consultation document. Our Counsel, who has been responsible for the background research and advancing the discussion, is William Hurlburt, Q.C. He has not only prepared the document, but responded ably to the comments and suggestions of the Board and Advisory Group members. We specifically sought industry advice on the scope of the joint venture issues, and the comments of our Advisory Group were most helpful in helping frame the issues. The members of the that group are:

Tony Clark, Graham Group
Dave Guichon, Macleod Dixon LLP
William Kenny, Q.C., Miller Thomson LLP
Graham Vanhegan, Conoco Phillips Canada
Gordon W. Flynn, Q.C., 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 are:

Professor Nigel Bankes, University of Calgary, Faculty of Law
Doug Stollery, Q.C., PCL Constructors Inc.

William Hurlburt was also assisted by Cheryl Hunter Loewen, Legal Counsel, who provided research, 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 Consultation Memorandum for printing. Student research assistance was provided by Anna-May Choles and Jill Gamez.

As always, the views expressed in this document are those of the Board of the Institute. We look forward to the response to the document so that further proposals can be brought forward.

EXECUTIVE SUMMARY

An important form of business organization nowadays is the "joint venture", a form of business organization in which two or more parties agree to carry out a discrete project with a view to profit; in which each party will share in control; and to which each party will provide services, property or capital for the joint venture project. In a broad sense, a "joint venture" may be carried on through a corporation (which is outside the scope of this Consultation Memorandum) or a partnership. In many cases, joint venturers find partnership law inefficient and inappropriate to their joint affairs, and want to be able to arrange their joint affairs by contract. However, the relationship among joint venturers looks very much like "the relationship of persons carrying on a business in common with a view to profit", which is the definition of a partnership and which brings into play the *Partnership Act*, the prototype of which was adopted in England in the 19th century, and much common law of partnerships which has been developed over the centuries.

Sometimes courts in Canada have recognized that joint venturers are engaged in a form of business organization called a "joint venture", which is not a partnership. However, the legal characteristics of a "joint venture" that is not a partnership have not been well developed and there is no way for joint venturers to be sure that a specific joint venture will not be held to be a partnership. The resulting uncertainty and confusion are undesirable. Chapter 2 of the Consultation Memorandum considers the problem and, in particular, a solution under which joint venturers engaged in a single undertaking should be able to opt out of the *Partnership Act* and the common law of partnership and be left to the general law and the law of contract.

Under the present law, all partners are generally liable for all obligations incurred on behalf of the partnership and for all wrongs committed in the course of the partnership's business. Chapter 3 considers the ramifications for third parties if joint ventures are allowed to opt out of partnership law.

LIST OF ISSUES

(i) it is established for a limited time;
(ii) it is established for a discrete undertaking or venture, or some such language, or
(iii) it meets a different test and, if so, what test?

(c) exclude organizations of professionals?. 16

ISSUE No. 5

If joint venturers are permitted to opt out of partnership law, what should the law do about liabilities to third parties which are imposed on partnerships by partnership law:

- provide that opted-out joint venturers are under liabilities to third parties similar to those applicable to partnerships?
- make some other provision about the liabilities of opted-out joint venturers to third parties?
- say nothing and leave the common law to apply to determine the liabilities of opted-out joint venturers to third parties?. 19

ISSUE No. 6

If qualified joint ventures are to be permitted to opt out of partnership law, should an opted-out joint venture:

(a) be required to include in its name a term such as "Joint Venture" or "JV" so that third parties will be aware of its legal nature?

(b) be required to register in an appropriate office a declaration that it is an opted-out joint venture, including a list of the joint venturers who are its members?.. 25

CHAPTER 1. INTRODUCTION

A. Purpose and Description of this Consultation Memorandum

[1] It is very common nowadays for two or more parties to enter into a "joint venture" the basic characteristics of which are:

- two or more parties enter into a contract to carry out a discrete[1] project;
- each party agrees to provide services, property or capital to the project;
- each party participates in the control of the project;
- each party intends to profit from the carrying out of the project.[2]

[2] The parties to such a "joint venture" look very much like "persons carrying on a business in common with a view to profit." If they come within that description, in law they are partners and the law of partnerships applies to their joint venture.[3]

[3] Joint ventures of this kind have become more common and increasingly important to the economy. However, many joint venturers find a nineteenth-century *Partnership Act* and a centuries-old accretion of common law to be an inappropriate framework for their joint ventures and want to be able to govern their joint ventures by contract, untrammelled by the law of partnership. Some courts have given effect to this desire by recognizing a form of business organization called a "joint venture" which is different from a partnership joint venture. However, the courts have not defined the concept or the effect of adopting a "joint venture", and there is confusion and uncertainty about how to create a joint venture that is not a partnership.

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[1] *The Oxford English Dictionary*, 3d rev ed, *s v* "discrete": "separate, detached from others, individually distinct. Opposed to continuous." *Merriam Webster Thesaurus*, *s v* "discrete - synonyms", "detached, disconnected, separate, free, freestanding, single, unattached, unconnected." The term "discrete venture" thus designates a venture with clear starting point, a clear ending point and with firm boundaries in between. We think that it is a more precise term than those frequently encountered, such as "established for a limited purpose (or a single undertaking for a specific purpose)," or a "single undertaking or ad hoc enterprise," or "a distinct undertaking." We therefore propose to use the terms "discrete venture" or "discrete project" throughout this Consultation Memorandum.

[2] This Consultation Memorandum does not discuss a "joint venture" that is carried out through a corporation or a traditional partnership.

[3] See the definition of "partnership" in the *Partnership Act*, RSA 2000, c P-3, s 1(g) [*Partnership Act*].

[4] The Alberta Law Reform Institute's [ALRI] purpose in publishing this Consultation Memorandum is to elicit comment and discussion as to whether the law should permit joint venturers to have a relationship that is governed, not by partnership law, but, rather, by the general law and the law of contract, excluding the law relating specifically to partnerships. Insofar as internal relationships among joint venturers are concerned, the principal public interest is in providing a legal mechanism that is responsive to the needs of joint venturers. Chapter 2 is devoted to a discussion of those internal relationships. Different considerations apply to the external relationships between joint venturers and others who deal with their joint venture or are affected by its activities. Chapter 3 discusses external relationships.

[5] We invite comment and discussion of the issues raised by this Consultation Memorandum.

B. Advisory Group

[6] As noted above, the principal purpose of ALRI's project and of this Consultation Memorandum is to determine whether changes should be made in the law governing the relationship of joint venturers among themselves and, if so, what the changes should be. The relevant facts and considerations are therefore peculiarly within the knowledge of those who engage in joint ventures.

[7] We therefore invited 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 in joint ventures in the construction and energy industries. Two are private practitioners who act for joint venturers. They are Tony Clark, David A. Guichon, William Kenny Q.C. and Graham Vanhegan. Gordon Flynn Q.C., F.C.A. acted as a member of the Advisory Group in relation to tax matters and provided insight into tax considerations.

[8] We have had two meetings with the Advisory Group in which the matters dealt with in Chapter 2 were freely discussed and the knowledge and experience of the members have been brought to bear on the problems. It will be seen that the discussion in Chapter 2 is largely based on their advice. Two of ALRI's Board members, Professor Nigel Bankes and Douglas Stollery Q.C., took extensive part in

the debates at the two meetings, but the advice we refer to in Chapter 2 is the advice of the members of the Advisory Group.

CHAPTER 2. SHOULD THE LAW RECOGNIZE A JOINT VENTURE AS A FORM OF BUSINESS ORGANIZATION THAT IS NOT A PARTNERSHIP?

ISSUE No. 1
Should the present law relating to joint ventures be changed so as to recognize a joint venture that is not a partnership?

A. When is a Joint Venture Not a Partnership?

[9] If two or more persons, whether individuals or corporations, are "carrying on a business in common with a view to profit,"[4] the *Partnership Act* defines the relationship between them as that of partners. That is, for the purposes of the statute the relationship is established by the statute.[5] As the status of partners is imposed by statute, the test for determining whether a partnership exists is objective, and the parties cannot contract out of that status by a term in their contract.[6]

[10] In recent years, some, though not all, judicial decisions have given some recognition to "joint ventures", under that rubric, as being distinct from partnerships. The Courts have not, however, developed any intellectual or legal justification for such recognition, nor have they developed any test that will, with a reasonable degree of certainty, distinguish a non-partnership "joint venture" from a partnership.

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[4] *Partnership Act*, s 1(g).

[5] Sections 3 and 4 of the *Partnership Act* list relationships that do not constitute a partnership but these provisions do not detract from the principal statement.

[6] In the recent case of *Roorda v MacIntyre*, 2010 ABCA 156, the Court of Appeal held that a joint venture agreement for the establishment and operation of a closed-end mutual trust fund did not impose a fiduciary duty on the joint venturers to allow one of their number to participate in an additional series of closed-end mutual trust funds established by the other joint venturers. The decision does not discuss the other indicia and effects of a joint venture. One sentence in the judgment might be interpreted as holding that a disclaimer of partnership in a joint venture agreement negates a partnership, but it seems unlikely that the Court meant to ignore, without discussing them, authorities that say that a statement that parties do not intend to be a partnership will not negate a partnership: See Barry J Reiter & Melanie A Shishler, *Joint Ventures: Legal and Business Perspectives* (Toronto: Irwin Law, 1999) at 78, nn 41 and 83, nn 53-55 and authorities referred to, particularly *Weiner v Harris* (1910) KB 290 (CA) and *Adam v Newbigging* (1888) 13 AC 308 (HL).

[11] The difficulties of distinguishing between a joint venture that is a partnership and a joint venture that is not a partnership may be illustrated by juxtaposing two statements. The first is a statement of the requisites deemed essential for the existence of a joint venture, *Graham v. Central Mortgage and Housing Corporation and Bras D'or Construction Ltd.,*[7] a decision which has frequently been referred to as authoritative. The second is a statement of criteria indicating the existence of a partnership made by Bastarache J. in *Continental Bank Leasing Corp. v. Canada*, paragraph 24.[8]

***Graham* Indicia of Joint Venture**	***Continental* 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.

[7] [1973] 13 NSR (2d) 183 (SCTD) at 208 [*Graham*]. The *Graham* indicia were originally stated in *Williston on Contracts*, 3d ed, vol 2, at 563, which the Court quoted in its judgment in *Graham*. These requirements have also been used in more recent cases: see e.g. *Canlan Investment Corp v Gettling*, [1998] 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 5.)

[8] [1998] 2 SCR 298 at para 24.

[12] Section 36 of the *Partnership Act* provides for the dissolution of a partnership entered into for a fixed term or a single adventure and the Supreme Court of Canada stated succinctly that, "It is settled law that a partnership may be formed for a single transaction."[9]

[13] It appears to follow that, if the essential requisites in the *Graham* list are all present, a venture will meet all the criteria of a partnership as well as having the requisites of a non-partnership "joint venture".

[14] However, a number of Alberta decisions have referred to a "joint venture" that is not a partnership.[10] The difficulty is that the common law has 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 something called a "joint venture" they have not provided reasons or tests for distinguishing any "joint venture" from a partnership, and, indeed, would necessarily have difficulty in doing so, given that the stated characteristics of a joint venture are the same as the stated characteristics of a partnership. In other cases, the courts have denied recognition to a "joint venture" that is not a partnership.

[15] The courts may "appear to be stumbling towards recognition of discrete status", as Professor Robert Flannigan has recently put it,[11] but there is no present or prospective recipe that joint venturers can follow with any confidence that a 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

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[9] *Spire Freezers Ltd v Canada*, 2001 SCC 11, [2001] 1 SCR 391, per Iacobucci and Bastarache JJ, giving the judgment of the Court.

[10] In *Gironella v Berndt* [1982] AJ No. 264 (CA), the Court of Appeal without detailing them, 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 tenable. 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.

[11] Robert Flannigan, "The Legal Status of the Joint Venture" (2009) 46 Alta L Rev 713 at 738.

relationship among the joint venturers is not that of "persons carrying on a business in common with a view to profit."

B. The Extent of the Problem

[16] "Joint ventures" 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.

[17] 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. We understand also that many small businesses come together in what they consider to be "joint ventures", such as a small warehouse operation or a small subdivision, frequently adopting a joint venture relationship for tax purposes.

[18] However, joint ventures of these and other kinds have emerged onto a legal landscape that was not prepared for them. Apart from the corporation, the only legal category into which joint ventures fit easily is the partnership. Unfortunately, statutes governing partnerships in Canada are largely based on a *Partnership Act* adopted in England in 1896, 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 s. 22(1) of the *Partnership Act* provides that "the 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

[19] 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.

[20] The Advisory Group's advice seems to us to be persuasive. The law should not put obstacles in the way of legitimate business enterprises by forcing them into a form of business structure that is inefficient for their purposes. However, we invite comment on the issue and will take that comment into consideration when making our recommendations.

D. Possible Changes in the Law

ISSUE No. 2

(1) If the present law relating to joint ventures should be changed, what changes should be made, and in particular:

(a) should the law declare that a joint venture which falls within a statutory definition of a "joint venture" is not a partnership and is not subject to the *Partnership Act* or to the common law relating to partnerships?

(b) alternatively, should the parties to a class of joint ventures which fall within a subset of partnerships, as that subset is defined by legislation, be able to opt out of the *Partnership Act* and the common law relating to partnerships by a declaration in the applicable joint venture agreement?, or

(c) should some other device be adopted to take joint ventures out of the law relating to partnerships?

(2) If joint venturers are allowed to opt out of the law relating to partnerships, should the law

(a) prescribe default or binding rules governing opted-out joint ventures?
(b) provide that a joint venture relationship is governed by the joint venture agreement establishing the relationship and the general law, excluding the statute and common law of partnership, and that a joint venture is not a separate legal entity?
(c) provide for opting out and leave opted-out joint ventures to the common law?

1. Choices

[21] If the answer to Issue No. 1 is that the present law should be changed, it will be necessary to decide what changes should be made in the law in order to make it suitable for joint ventures. This chapter is restricted to the suitability of the law to relationships among joint venturers, leaving the question of legal rights and duties between joint venturers and other persons for discussion in Chapter 3.

[22] Two choices that are available are:

1. Provide a statutory definition of "joint venture", and exclude "joint ventures", as so defined, from the definition of partnership, so that the *Partnership Act* and the common law of partnership will not apply to a "joint venture" as defined. The question with respect to a specific venture would then be: into which statutory definition does the venture fall?
2. Provide that "joint venturers" under a "joint venture", as defined, may opt out of being a partnership.

2. A statutory definition excluding a "joint venture" from the definition of "partnership"

[23] It would be extremely difficult, and it might 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 two categories would have to be defined by formulas sufficiently clear and precise to give reasonable certainty to enable a business organization to arrange its affairs to fit clearly within one category or the

other. Despite the difficulties of devising the formulas, this option remains open for discussion under Issue No. 2.

3. Opting out

[24] Another approach would be to provide in legislation that a "joint venture" which falls within a defined subset of partnerships is not a partnership if the parties to the joint venture declare, by a joint venture agreement, that the joint venture is not a partnership.

[25] If the opting-out choice is made, it will be necessary to consider whether the law should provide an alternative framework specially designed to meet the needs of joint venturers. Insofar as relationships among joint venturers are concerned, there does not seem to be any special public interest at stake, so that the advancement of business efficiency appears to be the governing consideration. Given the diversity of joint ventures, an alternative statutory framework that would be useful across the board would be difficult to devise, so that there is an argument that a statutory solution should provide for opting out but should not go on to provide a statutory framework for opted-out joint ventures. The result would be that the general law, including the law of contracts, agency and tort responsibility, would apply to joint venture agreements and joint ventures.

4. Legal consequences of opting out

a. Applicability of the general law relating to contractual relationships

[26] The first consequence of joint venturers opting out of the partnership relationship would be that the joint venture would not be subject to laws that relate to the partnership relationship. Unless it is decided that the law should make specific provision for the joint-venture relationship, it would follow that there would be only a contractual relationship among the joint venturers, to which the general law, principally the law of contracts, would apply. This would leave the joint venturers the maximum freedom to determine their respective rights, obligations and relationships by their joint venture agreement. This consequence could be supported by a specific legislative statement that the relationship is governed solely by the general law that relates to contractual relationships and that no legal entity is created.

b. Ownership of property used for a joint venture

[27] Questions might then arise about property owned by the joint venturers and committed to the joint venture and about property acquired in the course of the joint venture. If the joint venture agreement provides for the ownership of the property, its provisions would prevail. If not, 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.

c. Whether joint venturers should stand in a fiduciary relationship with each other

ISSUE No. 3
Should legislation permitting qualified joint ventures to opt out of partnership law say anything about the existence or non-existence of fiduciary duties among the joint venturers, and, if so, what should it say?

[28] The *Partnership Act* imposes some obligations on partners that are of a fiduciary nature. For example, s. 32 provides for the rendering of true accounts and information; s. 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 s. 34 provides that a partner who, without consent, carries on a similar business and competing with the firm must account for and pay over to the firm the profits made by the partner in that business. The Act does not itself impose a general fiduciary duty on partners, but the common law does impose on each partner a general fiduciary duty to the other members of the partnership.[12] The fiduciary obligations of partners can be qualified by a partnership agreement.[13]

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[12] It has been said that the mutual fiduciary duty of partners stems from the statutory agency created by the *Partnership Act*, e.g., Barry J Reiter & Melanie A Shishler, *Joint Ventures: Legal and Business Perspectives*, (Toronto: Irwin Law, 1999) at 120-122. However, the duty applies in some circumstances in which a partner is not acting as an agent of the partnership.

[13] Barry J Reiter & Melanie A Shishler, *Joint Ventures: Legal and Business Perspectives*, (Toronto: Irwin Law, 1999) at 122.

[29] Reiter and Shishler, in discussing obligations among contractual joint venturers (which term, for the purposes of this discussion, means opted-out joint venturers), say this:[14]

> Canadian courts have followed one of three distinct approaches to 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.

[30] 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.

[31] If qualified joint venturers are to be permitted to opt out of partnership relationships, a question arises as to whether the permissive legislation should say whether or not opted-out joint venturers will owe each other fiduciary duties. The legislation might:

- provide that opted-out joint venturers are under fiduciary duties to each other which are of general application or may be varied by the joint venture agreement;
- provide that opted-out joint venturers are not under fiduciary duties to each other; or
- say nothing about fiduciary duties.

[32] The first option is an unlikely candidate, given that opted-out 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, opted-out joint ventures. The second option would underscore the difference between opted-out joint ventures and partnerships, but rule out a fiduciary relationship even when, on the specific facts, a fiduciary relationship should be established.

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[14] Barry J Reiter & Melanie A Shishler, *Joint Ventures: Legal and Business Perspectives*, (Toronto: Irwin Law, 1999) at 122.

[33] The third option would, in individual cases, leave the question of fiduciary duties to the terms of the joint venture agreement and to the court's interpretation of the joint venture relationship, having regard to the joint venture agreement and to circumstances which do or do not indicate a fiduciary relationship.

[34] The third option would be consistent with the Advisory Group's view that joint venturers should be left to work out their relationships by joint venture agreements.

d. Whether tax issues should affect the decision of whether or not some joint venturers should be able to opt out of partnership?

[35] 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".[15] "Joint ventures" are also recognized in the *Investment Canada Act* and for the purposes of the *Excise Tax Act*.[16] 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 losses of joint venturers (who are treated as individual parties) are determined at the joint venturer level.

[36] If the facts do not clearly indicate a partnership 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 agreement that the joint venturers are not partners. Joint venture agreements are usually drafted to include provisions that are likely to be accepted by CRA as supporting the latter view. Prudence may suggest that an advance tax ruling be obtained. In the event of uncertainty, CRA may look to the provincial law as an important determinant in arriving at a decision as to the proper classification of the relationship.

[37] 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 may be the better tax-

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[15] *Income Tax Act*, RSC 1985, c 1.

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

effective choice for the joint venturers. Making a choice, if a choice is available, is likely to be a complex process requiring expert advice.

[38] When tax law provides for different tax treatment of taxpayers depending on the nature of their relationship, the law should not put taxpayers into a position of having to make a tax-related choice when in a situation in which there is inevitable confusion and uncertainty as to which relationship they fall into. Allowing some joint venturers to opt out of partnership would alleviate that confusion and uncertainty.

5. Advice of the Advisory Group

[39] 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 agreement that the joint venture is not a partnership;

(c) a joint venture should be governed by the joint venture agreement, 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.

[40] Again, however, we invite comment on the issues and will take that comment into consideration when making our recommendations.

E. If Opting out of the Partnership Relationship Is Permitted, What Joint Ventures Should Be Allowed to Opt Out?

ISSUE No. 4
If an opting-out provision is adopted, should "joint venture" be defined for the purposes of the opting-out provision, and, if so, should the definition
(a) include all unincorporated commercial ventures?
(b) include a business venture carried on jointly by one or more persons with a view to profit that meets at least one of the following criteria:
(i) it is established for a limited time;
(ii) it is established for a discrete undertaking or venture, or some such language, or
(iii) it meets a different test and, if so, what test?
(c) exclude organizations of professionals?

1. Whether all unincorporated commercial undertakings should be able to opt out of partnership

[41] Some opinion in the Advisory Group is to the effect that the parties to any unincorporated commercial venture, and not merely the parties to a specific category of non-partnership joint ventures, should be able to opt out of partnership law. ALRI has so far considered only a more limited opting-out or definitional provision.

[42] Allowing all parties carrying on business ventures with a view to profit to opt out of partnership would be a major derogation from traditional partnership law. Before doing so, it would be necessary to conduct a major investigation of the reasons for, and the effect of, the partnership relationship. 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 or a limited time. However, we have included in Issue 4 a sub-issue as to whether all unincorporated ventures should be allowed to opt out of partnership.

2. Whether joint ventures of professionals should be able to opt out of partnership

[43] Some opinion was also expressed in the Advisory Group to the effect that joint ventures of professionals should not be allowed to opt out of the partnership relationship, apparently for reasons related to the joint and several liability of partners. We do not see any reason to treat professional ventures differently, but comment is invited.[17]

3. What venturers should be able to opt out of partnership

[44] If the opting-out option is to be available only to a class 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 determine with reasonable assurance whether or not a specific joint venture belongs to the class that may opt out. This could be done by providing a definition of "joint venture" for the purpose of the opting-out provision.

[45] The basic notions of a "joint venture" should be included in the definition, that is, that there is 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*, but it should be made clear that the "profit" is not confined to profits realized at the joint venture level and divided among all of the joint venturers, but might include profit at the individual joint venturer level.

[46] Then, the definition should include a test that will distinguish a "joint venture" that can opt out from a partnership that cannot opt out. 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,"[18] which is one common statement of the test. The *Graham* case states it this way: "limitation of the objective

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[17] The Alberta Limited Liability Partnership already allows qualified professional partnerships to limit the liability of individual partners to matters in which they are personally involved.

[18] J Anthony VanDuzer, *The Law of Partnerships and 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 "Joint ventures are not a distinct form of business organization, nor a relationship that has any precise legal meaning".

to a single undertaking or ad hoc enterprise."[19] An Alberta decision found that the venture in the case before the court "was more akin to a joint venture, as the efforts were directed to one discrete project rather than an ongoing business."[20] For reasons we have given above,[21] we think that the better wording is that the venture is a "discrete project" or "discrete undertaking".

[47] By way of illustration, a word-formula that might be suitable 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." Any definition is likely to leave some difficulties at the border: for example, it might be difficult to determine whether a joint venture established for making two successive bids on two separate construction contracts is established for "a single undertaking" or "a specific purpose". However, it seems that such difficulties could be worked around, and it may not be possible to craft a definition that will give perfect satisfaction.

[48] The common problems have to do with joint ventures that are established for a specific purpose or project. We have not seen a decision that refers to a joint venture set up for a limited time. However, we have included a time-limited joint venture among the alternatives in Issue 4.

[49] We invite comment and discussion about all of the questions raised in Issue 4.

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[19] See note 7.

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

[21] See note 1, above.

CHAPTER 3. RELATIONSHIPS BETWEEN JOINT VENTURERS AND OUTSIDERS

A. Liabilities of Joint Venturers to Third Parties

ISSUE No. 5

If joint venturers are permitted to opt out of partnership law, what should the law do about liabilities to third parties which are imposed on partnerships by partnership law:

- **provide that opted-out joint venturers are under liabilities to third parties similar to those applicable to partnerships?**
- **make some other provision about the liabilities of opted-out joint venturers to third parties?**
- **say nothing and leave the common law to apply to determine the liabilities of opted-out joint venturers to third parties?**

1. In general

[50] Chapter 2 is about the legal relationships among joint venturers. So long as any proposed changes in the law affect only those internal relationships and do not affect third parties, the only interests that need to be taken into consideration are the interests of the joint venturers. However, partners and partnerships are presently subject to stringent liabilities to third parties. If the only change in the law is to allow joint ventures, which would otherwise be held to be partnerships, to opt out of partnership law, liabilities of the joint venturers and rights of third parties may be affected. 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.

[51] Among the statutory provisions that apply to partners and partnerships and affect third-party interests are the following provisions of the *Partnership Act*:

> **6** Each partner is an agent of the firm and of the partner's other partners for the purpose of the business of the partnership.
>
> **7** The acts of each partner in carrying on in the usual way business of the kind carried on by the firm of which the partner is a member, bind the firm and the partner's partners, unless
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> (a) the partner so acting has in fact no authority to act for the firm in the particular matter, and
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> (b) the person with whom the partner is dealing knows that the partner has no authority, or does not know or believe the partner to be a partner.
>
> **8(1)** An act or instrument relating to the business of the firm and done or executed in the firm name, or in another manner showing an intention to bind the firm, by a person authorized in that behalf, whether a partner or not, binds the firm and the partners.
>
> **(2)** Subsection (1) does not affect any general rule of law relating to the execution of deeds, instruments or documents affecting land or negotiable instruments.
>
> **11(1)** This section is to be applied subject to section 12.[22]
>
> **(2)** Each partner in a firm is liable jointly with the other partners for debts and obligations of the firm incurred while that partner is a partner.
>
> **(3)** When a partner dies, the partner's estate is severally liable, in the due course of administration, for any debts and obligations of the firm incurred while the deceased partner was a partner that remain unsatisfied.
>
> **(4)** The payment of debts and obligations under subsection (2) is subject to the prior payment of the separate debts of the deceased partner.
>
> **13** When, by a wrongful act or omission of a partner acting in the ordinary course of the business of the firm or with the authority of the partner's co-partners, loss or injury is caused to a person not being a partner in the firm, or a penalty is incurred, the firm is liable for it to the same extent as the partner so acting or omitting to act.
>
> **15** Except as provided in section 12, each partner is liable jointly with the partner's co-partners and also severally for everything for which the firm while the partner is a partner in it becomes liable under section 13 or 14.

[52] If a contract is made on behalf of a partnership and the names of the partners are not disclosed, it appears that the usual rules relating to undisclosed principals apply. The general rule is that an undisclosed principal has "the same rights and liabilities

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[22] Section 12 deals with limited liability partnerships.

under the contract whether he or she was disclosed to the third party and despite the fact that his or her name did not appear on the face of the contract."[23] However, the general rule does not apply to a contract made under seal, so the principal cannot be sued on such a contract. Presumably, the same rules about undisclosed principals would apply to an opted-out joint venture, so long as there is an agency relationship.

[53] The first question is what liabilities should an opted-out joint venture be under to third parties?

[54] Arguments can be advanced in favour of opted-out joint venturers being subject to the same liabilities as partners to third parties. That result could be achieved either by providing that opted-out joint venturers are subject to the provisions of the *Partnership Act* and the common law relating to third-party liability or by putting similar provisions in a new statute.

[55] The arguments in favour of that result are:

1. The presenting problems of joint ventures relate to the nature and consequences of the organization of joint ventures, not to the extent of their liabilities to third parties, so that the reasons for changes in the law to enable joint venturers to opt out of partnership law do not provide any reason to make changes in the liabilities of joint venturers to third parties.

2. A joint venture is carried on by and on behalf of the joint venturers, so that all of the joint venturers should be liable for obligations incurred and wrongs done by authorized persons on behalf of the joint venturers.

3. No additional barriers or hurdles should be imposed on third parties, and no additional uncertainties introduced, by changes made in the law to solve the problems that the present law creates for joint venturers.

[56] An argument that can be made against imposing on opted-out joint ventures the liability provisions of the *Partnership Act* is that some of those provisions are complex and archaic, as demonstrated by the provisions quoted in paragraph 54. In particular,

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[23] *Friedman Equity Developments Inc v Final Note Ltd*, 2000 SCC 34 at para 15, [2001] 1 SCR 842.

the different rules about the joint liability of partners and the several liability of the estates of deceased partners in s. 11 are confusing. It may be better either to restate the liability in one straightforward proposition or leave the liability to the common law.

[57] A more general argument against imposing the liability provisions of the *Partnership Act* can also be made: the common law principles of agency and vicarious liability would apply to opted-out joint ventures if the rigid liability provisions of the *Partnership Act* and the common law of partnership do not apply. These common law principles can be applied on a case-by-case basis with results that are appropriate for the individual circumstances of each case.

[58] The second question is whether the law should make some other provision about the liability of opted-out joint venturers, e.g., whether it should provide that opted-out joint venturers are under different forms of liability, or no liability except for their own acts, to third parties.

[59] The third question for consideration is whether the law should simply say nothing about the liabilities of opted-out joint venturers to third parties.

[60] It is by no means clear just what the courts will do about third party liability if the law should permit a joint venture to opt out of partnership without making specific reference to liabilities of the joint venturers to third parties. In *Graham*,[24] the court held that CMHC and Bras D'Or were engaged in a joint venture and appeared to hold that that finding meant that "to the extent that Bras D'Or in carrying on the venture incurred liabilities then both parties were bound," the "liability" in question in *Graham* being liability for the negligent construction of a house by Bras D'Or. Other decisions have held also held joint venturers liable to third parties.[25] On the other hand, Reiter and Shishler,[26] take issue with this approach. They cite *Canadian*

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[24] See note 7 at 212.

[25] E.g., *Builders Market Ltd v Century 21 Northeastern Realty Ltd* (1991) 109 NSR (2d) 297 (NSCA); *Dover Financial Corp v W K Sharpe and Son Contractors Ltd* (1996) 147 NSR (2d) 186 (CA).

[26] Barry J Reiter & Melanie A Shishler, *Joint Ventures: Legal and Business Perspectives* (Toronto: Irwin Law, 1999) at 148-152.

Imperial Bank of Commerce v. Charbonnages de France International S.A.,[27] as recognizing "that not all joint venturers should be liable for actions undertaken independently by their fellow venturers."[28]

[61]We invite comment and discussion.

2. Persons employed in a joint venture

[61] Liability of opted-out joint venturers to employees is a special case of liabilities to third parties. Such employees may be employees of one joint venturer who are transferred to the books of the joint venture; they may be employees who remain on the books of the original employer; or they may be employees retained on behalf of the joint venture.

[62] In theory, a non-partnership joint venture is not a separate entity and therefore cannot 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"[29] and "a joint venture is a separate employer in its own right versus two separate employing entities."[30] 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. We understand that other provinces have not treated a joint venture as an employer, with the consequence that their employment relationship with the individual joint venture continues.

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[27] (1994), 117 DLR (4th) 262.

[28] Barry J Reiter & Melanie A Shishler, *Joint Ventures: Legal and Business Perspectives* (Toronto: Irwin Law, 1999) at 151.

[29] *United Association of Journeymen and Apprentices of 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.

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

[63] Whether the characterization of a joint venture as "a person who customarily or actually employs an employee" under the *Labour Relations Code*[31] will prevail in the event of a challenge, and whether the rules of vicarious liability will render all members of the joint venture liable for the wrongful conduct of an employee, are questions that have not been authoritatively answered. We think that these questions have to be left to employment law: they fall outside ALRI's project and are not part of this Consultation Memorandum.

B. Enforcement of Claims Against Joint Venturers

[64] Partnership property and the property of partners are subject to specific provisions about enforcement of claims and about bankruptcy that will not apply to an opted-out joint venture or joint venturers. For example, s. 26 of the *Partnership Act* provides that a writ of enforcement cannot be issued against partnership property except on a judgment against the firm; s. 28 provides that the Court may make an order charging a partner's interest in partnership property and deals with points of detail; and s. 43 deals with partners' rights to property on dissolution of the partnership. These provisions would not apply to an opted-out joint venture because the property is the property of the joint venturers and there is no separate joint venture property to which the provisions could apply.

[65] Then, s. 142 of the *Bankruptcy and Insolvency Act*,[32] 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. 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 an opted-out joint venture or joint venturer because the property is the property of the joint venturers and there is no separate joint venture estate.

[66] If a creditor obtains a judgment against an opted-out joint venturer, or if an opted-out joint venturer becomes bankrupt, the ordinary law of enforcement or

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[31] RSA 2000, c L-1.

[32] RSC 1985, c B-3.

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.

[67] 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 an opted-out joint venture. The difference in treatment of partnership creditors from the treatment of the creditors of opted-out joint venturers does not seem to militate either for or against allowing joint ventures to opt out of partnership.

C. Notice to Third Parties

ISSUE No. 6
If qualified joint ventures are to be permitted to opt out of partnership law, should an opted-out joint venture:
(a) be required to include in its name a term such as "Joint Venture" or "JV" so that third parties will be aware of its legal nature?
(b) be required to register in an appropriate office a declaration that it is an opted-out joint venture, including a list of the joint venturers who are its members?

1. Name

[68] An opted-out joint venture may look much like a partnership to the outside world. Third parties may rely on that appearance. A question arises as to whether something should be done to avoid the appearance of partnership. An obvious way of avoiding such an appearance would be to require opted-out joint ventures to have an indication in their names that they are legally joint ventures that are not partnerships. This could be done by requiring an opted-out joint venture to include in its name the term "Joint Venture" or its abbreviation "JV".

[69] The arguments in favour of such a requirement are that this would in general be a relatively simple way of making it clear to everyone who has dealings with an opted-

out joint venture that it is not a partnership, and that requiring such an element in a joint venture's name would not be a significant burden on the joint venture: business corporations do not have difficulty with including "limited", "ltd.", "incorporated" or "inc." in their names; professional corporations do not have difficulty with including "professional corporation" in their names; and limited liability partnerships do not have difficulty including "llp." in their names.

[70] The argument for requiring the inclusion of "Joint Venture" or "JV" will have much less strength if third parties will not be significantly prejudiced by finding that what appears to be a partnership is actually an opted-out joint venture. If the answers to previous questions will leave joint venturers under liabilities to third parties that are in general similar or equal to the liabilities of partners, there will be little prejudice in that regard. There will be some differences in priorities of enforcement of third party claims against the property of joint venturers as differentiated from partnerships, but these differences do not appear to prejudice third parties as a whole class, although in a given case they will prefer one set of creditors over another.

[71] The argument against such a requirement is that it would be an additional bureaucratic requirement that adds complexity to the operation of a joint venture. As well, there may be cases in which, due to the dynamic nature of joint ventures such as oil and gas joint ventures, a new joint venture may be carved out of the old with minimal time for doing anything but render the new joint venture operative.

[72] We invite comment and discussion.

2. Registration

[73] 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.

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

[75] The contrary argument is that the existing register of partnerships is little used and is a pointless requirement, and that it is likely that a register of opted-out joint ventures will also be little used and a pointless bureaucratic requirement, particularly given the dynamic nature of some joint ventures as mentioned above.

[76] We invite comment and discussion.