

Structuring Joint Ventures

Blakes

OVERVIEW OF PRIMARY CANADIAN LEGAL FORMS OF JOINT VENTURES

Form and Principal Characteristics	Advantages	Disadvantages
Corporation with Limited Liability		
<ul style="list-style-type: none">• Legal entity separate and apart from its shareholders• Can contract, sue and be sued in its own name• Rights, powers and privileges of a natural person• Separate taxpayer; must file separate corporate tax return (even if no taxable income)	<ul style="list-style-type: none">• Higher market acceptance and certainty• Limited liability• Perpetual existence• Separation of ownership from management• Relatively easy to create and issue various classes of equity• Intercorporate dividends generally flow tax free between Canadian corporations• Tax-deferred rollovers possible	<ul style="list-style-type: none">• Less flexible than other options• Unclear whether many statutory provisions can be waived• Canadian residency requirements for directors in certain jurisdictions• Incorporation requires public filing of articles
Unlimited Liability Corporation (ULC)		
<ul style="list-style-type: none">• Separate legal entity• Only available in Alberta, British Columbia and Nova Scotia• Shareholders/members jointly and severally liable• No distinction from corporation with limited liability for Canadian income tax purposes	<ul style="list-style-type: none">• Perpetual existence• No Canadian directorship requirements under Nova Scotia and British Columbia legislation• Able to elect flow-through treatment for U.S. tax purposes that may result in U.S. tax advantages	<ul style="list-style-type: none">• Unlimited liability for current and former shareholders/members• Filing and renewal fees can be higher than for limited liability corporations• Recent changes to Canada–U.S. Tax Treaty have undermined some tax benefits from a U.S. tax perspective
General Partnership		
<ul style="list-style-type: none">• Not a separate legal entity• Relationship between persons carrying on business in common with a view to profit• Agency relationship: every partner is an agent of both the general partnership and the other partners• Partnership calculates its profit or loss for Canadian income tax purposes for the fiscal period and allocates it among the partners• Partners are taxed directly; partnership is not a taxpayer	<ul style="list-style-type: none">• Few formalities to establish• No Canadian director residency requirements• Dissolution is simple and inexpensive• Not subject to mandatory rules imposed on corporations	<ul style="list-style-type: none">• Significant commercial risk for partners: (a) unlimited liability for all partnership debts, (b) each partner is an agent of the other partners, and (c) corporate governance protections may not be available• Subject to agreement to the contrary, partnership automatically terminates on the death or bankruptcy of any partner• Where no agreed fixed term for duration of partnership, any partner may terminate the partnership upon written notice to the other partners• Withdrawal or retirement of a partner may create a new partnership and dissolve the existing partnership• Subject to agreement to the contrary, transfers of partnership interests require approval of all the other partners• Partners must decide collectively which discretionary deductions (e.g., CCA) to claim for Canadian income tax purposes in a fiscal period• No tax-deferred rollover unless all partners are Canadian residents

The logo for Blakes, featuring the word "Blakes" in a stylized, cursive script font.

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Form and Principal Characteristics	Advantages	Disadvantages
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Limited Partnership

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| <ul style="list-style-type: none">• Not a separate legal entity• Formed by complying with provisions of governing legislation• Consists of one or more general partners and one or more limited partners• Limited partners cannot take part in “control of the business” without losing limited liability status• Partnership calculates its profit or loss for Canadian income tax purposes for the fiscal period and allocates it among the partners• Partners are taxed directly; partnership is not a taxpayer | <ul style="list-style-type: none">• Liability of each limited partner is limited to the value of its investment (provided the limited partner does not take part in the “control of the business”)• Admission of limited partners and transfer of partnership interests more permissive than for corporate and general partnership entities• No Canadian director residency requirements | <ul style="list-style-type: none">• Most jurisdictions require the filing of a public declaration that typically requires renewal• Greater expense and formality in dissolving a limited partnership than a general partnership• Unlimited liability for limited partner if taking part in “control of the business”• General partner must bear full residual liability• Dissolved by retirement, death or mental incapacity of the general partner or the dissolution of a corporate general partner, unless replaced• Partners must decide collectively which discretionary deductions (e.g., CCA) to claim for Canadian income tax purposes in a fiscal period• Corporate governance protections may not be available• Potentially restrictive application of the “at-risk” rules• No tax-deferred rollover unless all partners are Canadian residents |
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Contractual Joint Venture

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| <ul style="list-style-type: none">• No separate legal entity• Venturers hold title to relevant assets• Parties agree by contract to provide one or more services, operations or assets, usually on a long-term basis• Examples: outsourcing, strategic alliances, licensing and distribution arrangements and franchising systems• Special GST/HST rules apply | <ul style="list-style-type: none">• Flexibility in formation and operation• Not a separate taxable entity• Income or loss calculated at owner’s level – joint venture does not file separate tax return• Flexible for profit-loss offsets• At-risk rules not applicable | <ul style="list-style-type: none">• Uncertain legal status• May be recharacterized as a general partnership• Venturers can have joint liability• All issues must be addressed in contractual documentation |
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Co-Ownership

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| <ul style="list-style-type: none">• Parties co-own assets (i.e., hold undivided interests)• Vehicle of choice in the areas of mining and oil and gas exploration and production• Special GST/HST rules apply | <ul style="list-style-type: none">• Flexibility• Not a separate taxable entity• Income or loss calculated at owner’s level – joint venture does not file separate tax return• Flexible for profit-loss offsets• At-risk rules not applicable | <ul style="list-style-type: none">• Uncertain legal status• May be recharacterized as a general partnership• Venturers can have joint liability• All issues must be addressed in contractual documentation |
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HIGH-LEVEL JOINT VENTURE CHECKLIST

1. Initial General Planning Issues

- Role of each venturer (consider strategic objectives and risk tolerance)
- General description of business or project (internally assess goals and objectives)
- Consider the cultural, geographic and legal environment
- Duration of joint venture
- Jurisdictions in which the joint venture will operate (which law will govern?)
- Due diligence conditions or other conditions precedent that must be satisfied before entering into a joint venture agreement (e.g., financial, commercial, tax, technical, legal, etc.)
- Select joint venture vehicle to be used (giving due consideration to tax objectives):
 - limited liability corporation
 - unlimited liability corporation
 - general partnership
 - limited partnership
 - co-ownership
 - contractual
- Possible material agreements required (e.g., confidentiality agreement, letter of intent, joint venture agreement (shareholder, partnership, contribution, revenue sharing, operating), IP licence agreement)
- Clarify title to joint venture assets (e.g., title held by joint venture, venturers or bare trustee?)
- Employee arrangements for the joint venture (e.g., secondment vs. transfer)
- Financing (e.g., by debt, equity or both; to what extent from operations)

2. Drafting Considerations for Joint Venture Agreements

- Formation of joint venture
- Objectives
- Relationship between parties and/or between parties and joint venture
- Accounts of joint venture
- Auditors/accountants, bankers and solicitors
- Capital contributions and financing
- Other contributions and defining scope of joint venture property
- Capital structure and issuances in respect of initial contributions
- Insurance
- Indemnification and guarantees
- Intellectual property issues
- Confidentiality
- Business opportunity and competition
- Allocations and distributions
- Management and control
- Books, records, financial information and reporting
- Transfers of equity (if applicable)
- Permitted issuances of equity (if applicable)
- Default
- Termination
- Dispute resolution

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