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UNIFORM LAW CONFERENCE OF CANADA
CIVIL SECTION

POLICY REPORT
ON THE REFORM OF JOINT VENTURES

PRESENTED BY

THE WORKING GROUP ON THE
REFORM OF JOINT VENTURES

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WORKING GROUP MEMBERSHIP AND MEETING REPORT

[1] The members of the working group are (in alphabetical order):

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- Peter Lown - Alberta Law Reform Institute/ULCC
- Paul Martel – Blake, Cassels & Graydon S.E.N.C.R.L.
- Rebecca Warner – Government of Alberta

[2] The members of the working group have met many times over the course of the work to make progress on a number of fronts, including

- identifying the main legal issues likely to arise from the use of joint ventures;
- identifying the leading possible legal framework solutions for joint ventures;
- analysing ALRI's proposals in light of the leading solutions and the findings from the exploratory consultation of experts.

[3] The Chair of the working group would like to thank all the other members for contributing to the research and analysis, and for their work on identifying the policy recommendations that we are proposing to the delegates.

BACKGROUND

[4] A joint venture (*coentreprise* in French) is an agreement between two or more companies to collaborate on a specific project. It enables companies to join forces to carry out a joint operation, while sharing the associated risk. The project is generally limited in time.

[5] In a joint venture, the partners agree to work together to achieve a common goal and they share both risks and rewards. A joint venture can be set up as a company, for example, as a general partnership, a limited partnership or a joint stock company (business corporation).[1] The type of company chosen will depend on the partners' needs and objectives.

[6] A joint venture can also be set up without creating a separate legal entity. For example, the joint venturers can enter into a contract that will govern their collaboration without creating a new company. This type of joint venture has no separate legal personality and the partners remain individually responsible for their actions. They operate on the basis of a simple contract (without a common legal instrument). However, in this case, if they agree to carry out a joint project in a spirit of collaboration, to contribute to it in the form of goods,

[1] Regarding joint stock companies, see Paul Martel, *La société par actions au Québec, les aspects juridiques,* (Montréal: Éditions Wilson & Lafleur, Martel Ltée, 2023–2024), paragraphs 27–124. Translator's note: since 2011 in Québec, "company" and "joint stock company" have been the preferred terms. Prior to 2011, "business corporation" was used.

knowledge or activities, and to share the resulting profits, they run the risk of a court concluding that their joint venture constitutes a partnership.

[7] There must be no visible intention to form a partnership in either the contract between the parties or the parties' conduct (otherwise, the partners could be held jointly and severally liable). Joint venturers cannot be certain that a judge will not consider their joint venture to be a partnership, and this generates legal uncertainty and confusion.

[8] Note we will be focussing on the "contractual joint venture". This is a topic that has been little explored in Quebec and the other Canadian provinces, partly because there is no specific legal framework governing the contractual relationship between the parties and partly because there is little legal doctrine or case law devoted entirely to it.

[9] A great deal of work was done on this subject a few years ago by the Uniform Law Conference of Canada (ULCC) and the Alberta Law Reform Institute (ALRI). For the purposes of this report, we have examined and analysed all the documents pertaining to the ALRI's work, as well as the consultation memorandums and the Final Report.

[10] As we will describe below, the working group considers that instituting a legal framework for joint ventures would provide greater legal predictability and would make it possible for joint venturers to avoid having the contract establishing their joint venture not recognized by the courts, which could have consequences with respect to their obligations and liability.

APPLICATION

[11] Research in comparative law and separate recommendations for common law provinces and territories and civil law jurisdictions will make it possible for the working group to propose a uniform bill addressing common law provinces and territories, and also to make suggestions for amending provisions compatible with the *Civil Code of Québec*.

CONSULTATIONS

[12] On general issues relating to this topic, the members of the working group found it useful to take inspiration from ALRI's work. However, they believe that due diligence needs to be done to ascertain whether there have been any developments between 2012 and 2023 and any changes in case law and practice in relation to joint ventures. (Are the issues still the same today?)

[13] Consultations were held with the sector and with a number of experts in practice and academia to find out whether the legal difficulties and the reasons behind the reform and harmonisation project proposed in 2005 were still relevant today.[2] We would like to give

[2] We would like to thank Me Shane Goldman of Blake, Cassels & Graydon S.E.N.C.R.L., who accompanied us during the consultation period, for his expertise, availability and generosity.

special thanks to Professor Charlaine Bouchard at the Université de Laval for her contribution to this process of reflection.

[14] The findings from the consultation are analysed in Part 2 of the section on options to be considered.

ANALYSIS AND ISSUES

[15] The purpose of this section is to identify the main legal issues with respect to joint ventures and to determine whether a legal framework could be required.

[16] This part is based on comparative research in Canadian and Québec law, in the light of American and English law. The research takes into account the most important relevant elements of the doctrine and jurisprudence of these four legal sources.

[17] Two students assisted us in this task and two documents were drafted (one on Canadian and Québec law,[3] and one on English and American law[4]). These two documents were used as the foundation for drafting this report.

1- HISTORICAL FOUNDATION AND LEGAL UNCERTAINTY

[18] One of the major risks associated with joint ventures is their uncertain status. A joint venture is created by a contract, but a contract cannot provide for everything, hence the risk that a joint venture will be characterized and classified in accordance with the various legal instruments recognized in different legal systems.

[19] These difficulties specific to joint ventures are more likely to arise when disputes are litigated. It is before the courts that the characterization of a joint venture raises certain problems. However, where the relationship between the joint venturers is purely contractual, the very structure of the contract concluded between them has several advantages,[5] including flexibility, confidentiality, a minimum of formalities, the preservation of autonomy and freedom with respect to activities.

[20] Yet, joint ventures are exposed to significant risks associated with legal uncertainty because their status is often unclear and there can be some lack of precision regarding the joint venturers' rights, duties and relationships with third parties. Consequently, in the event of a dispute, the courts must interpret the intentions of the contracting parties and try to

[3] We would like to thank Allison Morin, third year student in the Bachelor's of Law program, Faculté de droit, Université de Montréal, for her contribution.

[4] We would like to thank Firas Zghaib, third year student in the Bachelor's of Law program, Faculté de droit, Université de Montréal, for his contribution.

[5] Whatever their reasons for joining forces, one of the fundamental characteristics of such ventures is that the companies wish to retain their own identity and complete freedom in all respects not covered by the contract they are entering into.

characterize the contract in terms of existing models. It is usually at this stage that comparisons with a company or a partnership are made, which complicates matters.

[21] In this report, we will examine the status of contractual joint ventures in the two main legal systems: common law and civil law.

[22] To begin with, in common law, the concept of "joint venture" is treated in two different ways.

[23] In English common law, the distinction between the concept of "partnership" and "joint venture" is generally unclear, aside from in a few respects, such as the latter's limited duration. In English common law, the concept of "joint venture" does not stand alone, but is a subcategory of "partnership".

[24] In American common law, the notion of "joint venture" is recognized as a structure that is distinct from "partnership". The distinction is made when five specific criteria are met: a contract is entered into between two or more companies with respect to a shared project that is limited in time and anticipated to make a profit, and all the parties must contribute to the project and manage it collectively.

[25] The concept of "joint venture" is thus an American invention designed to avoid the situation where one party is bound by the actions of another party.

[26] Canada's provinces have gradually adopted a perspective similar to that of the United States. They differentiate between "partnership" and "joint venture", although the case law is still uncertain in this respect.[6] Canadian case law recognizes that there are such things as joint ventures and that they are entities distinct from partnerships.

[27] The key decision in this respect is *Central Mortgage & Housing Corp* v. *Graham* (*Mortgage*),[7] which used the same American criteria to determine whether there was a joint venture. In that decision, Jones J. recognized the concept of "contractual joint venture" as entailing that the following criteria must be met: (1) the parties must contribute, in the form of money, goods, effort, knowledge, skill or some other asset, to a common venture; (2) there must be joint property interest in the object of the collaboration; (3) there must be a right of mutual control of the venture; (4) there must be an expectation of profit; (5) there must be a right to participate in the profits; (6) the venture must be limited to a single project.

[28] *Mortgage* has played a fundamental role in the evolution of "joint venture" in the Canadian legal context because it recognized the concept. However, paradoxically, the criteria described in the decision seem in fact to be a different way of describing the notion of

[6] C. BOUCHARD "Les rapprochements entre la société de personnes et le *partnership*: une étude de droit comparé canadien" (2001), 42 *C. de D.* 155, p. 184.
[7] *Central Mortgage & Housing Corp* v. *Graham*, (1973) 13 N.S.R. (2d) 183 (TD)); (1973); 43 DLR (3d) 686 (NSSC).

"partnership". One author has noted that "the listed factors place the arrangement squarely within the borders of the conventional conception of partnership".[8]

[29] Moreover, the courts have not applied the recognition of "joint venture" in a uniform manner, so a clear distinction has not been made between it and "partnership".

[30] It should be noted that three of the criteria set out in *Mortgage* seem to apply more specifically to "joint venture" even though they can also occur in the context of "partnership": (1) joint property interest in the object of the collaboration; (2) a right of mutual control of the venture; (3) the limitation of the venture to a single project or a limited number of projects (what constitutes a single project may be interpreted in different ways).[9] The limitation criterion stands out particularly for the crucial role it plays in the doctrinal analysis that confirms that the purpose of a partnership lies in regular, long-term commercial activity (a real business), whereas a joint venture is formed for the purpose of engaging in a single activity. While this distinction is not universally accepted, its influence is clear in the principles established by American case law.

[31] In Québec, the situation of "joint venture" in civil law has been explained clearly in a decision[10] in which the court stated that the common law notion of "joint venture" is translated in civil law by several terms, such as *coentreprise*, "temporary grouping of companies" and "consortium of enterprises".[11] However, these terms do not necessarily refer to a specific legal form.[12] In the common law in the provinces of Canada, a joint venture is treated like a partnership (an entity similar to the civil law *société de personnes*), but with a lifespan limited to a single project,[13] as an undeclared partnership in Québec and as a *société de fait* in France.[14] The treatment in each case has significant consequences on the parties to the joint venture, who may find themselves bound mutually by the actions of a single member and by joint and several liability with respect to third parties.[15]

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[8] Robert FLANNIGAN, "Joint Venture Figmentation" (2021) *65 Can Bus LJ* 35, p. 35; R. FLANNIGAN, "The Legal Status of the Joint Venture" 2009 46-3 *Alta Law Rev* 713, 2009 CanLIIDocs 231, <https://canlii.ca/t/2d0x>, retrieved on 2024-07-01, p. 723.

[9] N. LACASSE, "La réalisation d'une coentreprise à l'étranger: le choix de la forme juridique", in N. LACASSE and L. PERRET, eds., *La coentreprise à l'étranger*, "Bleue" collection, (Montréal: Wilson & Lafleur, 1989), pp. 46 and 50.

[10] *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46.

[11] C. BOUCHARD, *Contrat de société et d'association* 3rd ed. (Montréal: Éditions Yvon Blais, 2012), p. 100. See also V. KARIM, *Le consortium d'entreprises, joint venture: nature et structure juridique, rapports contractuels, partage des responsabilités, modes alternatifs de règlement des différends: médiation et arbitrage* (Montréal: Wilson & Lafleur, Martel ltée, 2016), para. 23.

[12] Swan, Bala and Adamski define "joint venture" as a business relationship that may take different legal forms. See A. SWAN, N. C. BALA and J. ADAMSKI, *Contracts: Cases, Notes & Materials* , 9th ed. (2015), para. 7.243. See also C. BOUCHARD, "Les rapprochements entre la société de personnes et le *partnership*: une étude de droit comparé canadien" (2001), 42 *C. de D.* 155, p. 184.

[13] R. FLANNIGAN, "The Legal Status of the Joint venture" (2009), 46 *Alta. L. Rev.* 713, pp. 715 and 720.

[14] C. BOUCHARD, "Les rapprochements entre la société de personnes et le *partnership*: une étude de droit comparé canadien" (2001), 42 *C. de D.* 155, pp. 188–189; Marc Guénette, *Les différentes formes d'entreprises au Canada* (Montréal: Éditions Yvon Blais, 2015), p. 233.

[15] It should be noted that if a judge characterizes a joint venture as an undeclared partnership, then *Civil Code of Québec* article 2253 applies. In such a case, each party is solely liable to third parties for work carried out on its own behalf. However, if the third party is aware of the existence of the partnership, then all the partners will be bound

[32] Many other Québec decisions equate joint ventures with undeclared partnerships.[16] In fact, since there are no legislative provisions on the topic, judges try to draw parallels between joint ventures and other legal forms (in Quebec, the undeclared partnership seems to be the reference).[17] The contractual agreement between the parties remains governed by the fundamental principle of good faith, which is an implicit obligation inherent in any contract. This obligation is incumbent on all participants with regard to the other members of the consortium. Its purpose is to avoid an obligation of loyalty between the members, so that they can instead pursue their activities independently, even if those activities compete with those of the other members of the consortium.[18] Consequently, we can see that the principles of loyalty and non-competition cannot be applied in the context of a joint venture because they contradict the "[TRANSLATION] joint venture concept, since otherwise all forms of activities regularly carried out by the different partners would be prohibited".[19]

[33] The independence of the joint venturers is in fact the key component in a contractual joint venture, since neither party has control over how the other's operations are run.[20]

[34] Ideally, recognition in Canada of the joint venture as an independent structure with no implicit or explicit mandate between the venturers would free them from joint and several liability for obligations contracted by only some of them. This would allow each party to retain ownership and control of its assets. For now, this is not the case.

[35] In summary, the joint venture concept originated in American law. It has been exported, with some variations, to the majority of countries with civil law and common law legal systems. One aspect shared by all these legal systems is that a joint venture is neither a named contract (a contract explicitly referred to in the Civil Code) nor an autonomous legal entity. Consequently, to characterise the relationship in question in a joint venture, it is necessary to draw on the existing legal framework.

[36] The natural tendency is therefore for lawyers to look for a set of indicators that will enable them to determine with some degree of certainty whether a joint venture is involved, rather

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(reciprocal mandate). In practice, joint venturers state in the contract whether the mandate is reciprocal or not and set out the limits of each participant's responsibility. This limitation is not, however, enforceable against third parties. The responsibility of the joint venturers will therefore be, as in the case of a partnership, joint and several.

[16] Since a joint venture is an undeclared partnership (*Civil Code of Québec*, a. 2250*ff*), creditors may sue only the partner with whom they contracted. See *Forestier SL inc.* v. *Gestion Unibec inc.*, 2017 QCCA 998. In the decision being appealed, the judge had found that as the joint venture agreement in question was of the same nature as an undeclared partnership, reference needed to be made to articles 2250 and following of the *Civil Code of Québec*, which deal with partnerships of that type (*Gestion Unibec*, para 25). The Court of Appeal confirmed that the joint venture entered into by the two entities, Gestion Unibec inc. ("Unibec") and Corporation de développement Waswanipi, was an undeclared partnership (*Civil Code of Québec*, a. 2250*ff*), but that it was hidden, not apparent, which meant that only Unibec, who had entered into a contract with the appellant, was liable to the appellant (*Civil Code of Québec*, a. 2253).

[17] V. KARIM, *Le consortium d'entreprises, joint venture: nature et structure juridique: rapports contractuels, partage des responsabilités, règlement des différends*, 2nd ed. (Montréal: Wilson & Lafleur, 2016), p. 16.

[18] Id.

[19] D-C LAMONTAGNE, *Droit spécialisé des contrats: Les contrats relatifs à l'entreprise*, Vol. 2, (Éditions Yvon Blais, 1999), para. 65–68.

[20] B. CAVE, "Escaping the Shadow of Partnership: A New Framework for Distinguishing Contractual Joint Ventures from Joint Venture Partnerships", *University of Toronto, Faculty of Law Review*, 2022, Vol. 80. Issue. 1, p. 9.

than to attempt to define the concept in a precise and rigid manner. Since there is generally no requirement as to a specific form a joint venture must take, the focus is on the actions and documents of the associated parties.[21]

2- THE NEED FOR A LEGAL FRAMEWORK, AND A FEW OBSERVATIONS

[37] As will be discussed below, the fact that there is no defined framework leads to certain complications with respect to the legal classification of this structure. A simple discrepancy in the wording of the contract or in the conduct of the parties may lead the courts to characterize a joint venture as a partnership in common law Canada and as an undeclared partnership in Quebec, with all the disadvantages that this may entail.

[38] It should be remembered that contractual joint ventures offer the possibility of collaboration between competing companies while ensuring the protection of the economic interests of each without the automatic fiduciary duty that usually accompanies such collaboration.[22] An important aspect is therefore the desire of the joint venturers to retain their power to compete outside the joint venture, particularly in relation to confidential information and trade secrets. In a contractual joint venture, the parties have the opportunity to retain absolute control over their own interests, which can also result in tax advantages.[23] The absence of a predefined structure is another advantage of contractual joint ventures, as members can adjust the arrangements to suit their specific needs without being hampered by legal constraints.[24]

[39] As we have seen, the contract is the basis for the creation of joint ventures. It must therefore be well drafted to provide for all kinds of situations.

[40] In this regard, legal experts have provided some advice on the content of the contract. In their view, the contract for a joint venture should avoid the use of terms, such as “partners”, likely to create ambiguity as to legal status. It should set out the obligations, responsibilities and contributions of the parties, and provide for the separation of assets, joint control of the business and a system for calculating profits and losses. It should also specify that the parties do not form a company.[25]

[41] However, the parties must remain cautious, since contractual stipulations do not protect against the application of partnership rules by a judge.[26] It should also be noted that the fact of providing that the different parties will do different work is not conclusive proof of the existence of a joint venture contract.[27] As for the behaviour of contracting joint venturers,

[21] D-C LAMONTAGE, ed, *supra*, note 19.
[22] B. CAVE, *supra*, note 20.
[23] Id.
[24] Id.
[25] D-C LAMONTAGNE, *supra*, note 19, para. 120.
[26] V. KARIM, *supra*, note 17, p. 11.
[27] Id., p. 15.

Me Lamontagne advises against using a common name in dealings with third parties, and recommends invoicing work separately and keeping separate accounts.[28]

[42] In Quebec in particular, members of a joint venture must be even more specific when drafting their contract. They must clearly indicate whether or not they are forming an undeclared partnership. Since a joint venture is very similar to an undeclared partnership,[29] caution is the watchword.

[43] Many legal experts[30] have pointed out that care must be taken to make it explicit that the desire is for a temporary grouping rather than to form an association, as case law often fails to distinguish joint ventures from other companies, given their similarities (contribution, sharing of losses and profits, etc.).[31]

[44] As in other provinces of Canada, one of the key factors for establishing that there is a joint venture is whether or not the venturers intend to carry out a specific project that is limited in time. It is therefore important to clearly state in the contract that the purpose is to collaborate on a temporary basis.[32] In fact, one of the decisive criteria that case law has used to conclude that a consortium exists is the mention in the contract of the fact that the grouping is limited to a single project or to a few specific projects.[33]

[45] It should also be noted that one of the key characteristics of a joint venture is the fact that each of the venturers retains ownership of the property, equipment and tools that it brings to the joint venture and that are used solely for the performance of the work entrusted to it, unless otherwise agreed. Each joint venturer also retains its own customers and its own legal status. Similarly, each carries out its own individual commercial activities in addition to the joint activities that are the subject of the joint venture.[34]

[46] Some authors recommend that Canadian law adopt rules to govern joint ventures or, at least, give them a legal definition in order to dissociate them from civil law and common law partnerships. This would give Canadian courts a relevant legal basis that they could rely on to interpret joint venture contracts without resorting to the legal rules applicable to other types of partnerships. As long as there is no clearly defined, well circumscribed legal framework for the concept of "joint venture", drafters of contracts will have to compensate by taking extra care.[35]

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[28] D-C LAMONTAGNE, ed., *supra*, note 19, para. 121.
[29] C. BOUCHARD, *Droit et pratique de l'entreprise*, 4th ed., Vol. 1, (Centre d'études en droit économique, Éditions Yvon Blais, 2023), para. 623-624, para 627.
[30] V. KARIM, *supra*, note 17, p. 13.
[31] Id., p. 14.
[32] Id., p. 13.
[33] Id., p. 16.
[34] Id., p. 18.
[35] D-C LAMONTAGNE, ed., *supra*, note 19, para. 122-125.

OPTIONS FOR CONSIDERATION

[47] Analysis of the issues described in the first part sheds light on a number of solutions that seem relevant to take into account when drafting legal provisions in this matter.

1- POTENTIAL FRAMEWORKS FOR JOINT VENTURES

A- The English common law approach

[48] Some authors suggest that the concept of contractual joint venture should simply be abandoned in favour of partnership. In this regard, one author points out that the courts have not adequately distinguished between the two categories.[36] He adds that the fact that the participants in a partnership may contractually opt out of the fiduciary duty or that they do not trust each other are not sufficient distinguishing grounds to justify the recognition of two different legal instruments (partnership and joint venture).

[49] A research report by the University of Toronto rejects this solution. According to the authors, failure to accept the contractual joint venture as a distinct legal concept would remove an advantageous, simple, flexible legal instrument that allows members to avoid the imposition of a fiduciary relationship and also joint and several liability to third parties (both of which are legally imposed in the case of partnerships).

B- Registration

[50] In common law provinces in Canada, one of the advantages of a joint venture is the simplicity and speed afforded by not having to register.[37] Researchers at the University of Toronto indicate that speed and simplicity go hand in hand with not having to register. In their opinion, incorporating or registering a partnership (depending on the jurisdiction) requires time and money:

> Contractual joint ventures are well suited for undertakings where the parties are looking for a quick and simple arrangement to facilitate their independent efforts for a mutually beneficial project. As Shishler notes, these types of arrangements have become increasingly prevalent as global markets evolve and require more inter-company coordination and skill-sharing to develop projects. The characteristics "quick" and "simple" exclude corporations and partnerships from consideration because incorporation or the registration of a partnership (depending on the jurisdiction) require time and money. Corporate and partnership joint ventures are also more complex than their

[36] R. FLANNIGAN, "The Legal Status of the Joint venture" (2009), 46 *Alta. L. Rev.* 713, pp. 715, 720 and 722; R. FLANNIGAN, "Joint Venture Figmentation", (2021) *65 Can Bus LJ* 35.

[37] B. CAVE, *supra*, note 20.

> contractual counterparts because they require managing an entirely new entity and different tax filings. By contrast, contractual joint ventures allow the parties to immediately cooperate and coordinate as individuals and do not require the expenses and management that accompany partnerships and corporations.[38]

[51] If a bill is introduced to provide a framework for Canadian joint ventures, the registration requirement should therefore not be imposed on them under the common law:

> 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.[39]

[52] In Québec, the situation may be different. It is true that joint ventures are not subject to the *Act respecting the legal publicity of enterprises* (CQLR c P-44.1) and are not required to register. However, nothing prevents a joint venture from registering voluntarily and thereby becoming subject to that Act (s. 22),[40] which includes the presumption of knowledge and the possibility the information may be set up against third persons (s. 98). Many joint ventures already do this, and this may be the best solution in Québec.

C- Contractual clauses

[53] First, one possible solution would be to allow joint venturers to declare in the contract that their business is not a partnership, in other words, to be able to choose not to have their business considered a partnership.[41]

[54] This is a very good proposal, but it should be borne in mind that it does not completely eliminate the risk that a court might interpret such a clause differently after analyzing the

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[38] Id.

[39] Alberta Law Reform Institute, *Joint Venture*, Consultation Memorandum No. 14, 2011, https://www.alri.ualberta.ca/wp-content/uploads/2020/06/cm014.pdf.

[40] Paul MARTEL, "Entreprises et sociétés", Collection de droit 2022-2023, École du Barreau du Québec, Vol. 10, *Loi sur la publicité légale des entreprises*, (Cowansville: Éditions Yvon Blais, 2022), pp. 53–67.

[41] Alberta Law Reform Institute, *Joint Venture*, Consultation Memorandum No. 14, 2011, p. 16.

parties' conduct.[42] In Quebec, joint venturers are also exposed to this risk, given that article 1425 of the *Civil Code of Québec* sets out the obligation to seek the common intention of the parties rather than the literal meaning of the terms used in the contract.[43] A court might conclude that a partnership exists based on an analysis of the parties' conduct.[44]

[55] This is why great care must be taken in drafting the entire contract. The terms must stipulate in advance that the venturers do not intend to form a partnership, and the use of terms that might suggest this (such as "partners", "partnership", etc.) must be avoided. The contract should indicate the contribution of each, and provide for the separation of assets, unanimous decision-making (joint control), participation in profits and losses, etc.[45] The behaviour of the parties must also reflect the above (separate invoicing, separate bank accounts, etc.).

[56] Other clauses may also be included in the contract regarding liability to third parties, such as the clauses proposed in the ALRI report, which read as follows:

> 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 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, . . .

[57] In Québec, the situation is already similar to this because of the third paragraph of article 1525 of the Civil Code.[46] In fact, however liability under the contract is divided between the parties, they remain jointly and severally liable to the client for the completion of the

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[42] B. CAVE, *supra*, note 20.

[43] V. KARIM, *supra*, note 17, pp. 10 and 15.

[44] M. THÉRIAULT, "Entreprises et sociétés", Collection de droit 2022-2023, École du Barreau du Québec, Vol. 10, *L'entreprise contractuelle*, (Cowansville: Éditions Yvon Blais, 2022), pp. 21–52.

[45] P.A. COSSETTE, "Les groupements momentanés d'entreprises (*joint ventures*): nature juridique en droit civil et common law", (1984) 44 *R. du B.* 463 and 467.

[46] *Civil Code of Québec*, article 1525:

> **1525.** Solidarity between debtors is not presumed; it exists only where it is expressly stipulated by the parties or provided for by law.
>
> Solidarity between debtors is presumed, however, where an obligation is contracted for the service or operation of an enterprise.
>
> The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the operation of an enterprise.

project.[47] However, it is possible to ask the client to sign a waiver of joint and several liability in the contract:

> [TRANSLATION] The client, as the creditor of the obligation, may waive the joint and several liability of the members of the consortium by express stipulation. This article establishes a simple presumption of joint and several liability, which may be rebutted by evidence to the contrary, in this case a contractual clause under which the client expressly waives joint and several liability. Obtaining such a waiver will be rare, however, as it is very disadvantageous for the client as a creditor.[48]

[58] Third parties who suffer damage as a result of a fault committed in carrying out a project have a remedy in extracontractual liability if they prove that an extracontractual fault was committed.[49] However, [TRANSLATION] "unlike joint and several liability in contractual matters, perfect joint and several liability in extra-contractual matters allows each of the defendants to prove that he or she did not participate or was not involved in committing the fault that caused the loss. This proof will have no effect on the liability of the other members, who remain jointly and severally liable towards the third-party victim".[50]

D- The name of the entity

[59] One question that arises with respect to joint ventures is whether steps should be taken to avoid confusion with partnerships in terms of their relationship with third parties. A way to prevent confusion would be to require joint ventures to state in their names that they are legally joint ventures and not partnerships. A joint venture could be required to include the term "joint venture" or an abbreviation such as "JV" in its name.[51]

[60] In our view, this proposal would also be well received in Quebec. However, another major challenge would have to be addressed in cases where contracts are entered into with third parties by one or the other of the venturers and not by the joint venture.[52]

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[47] V. KARIM, *supra*, note 17, p. 10

[48] Id., pp. 105–106.

[49] Id., p. 110.

[50] Id., p. 112.

[51] Alberta Law Reform Institute, *Joint Venture*, Consultation Memorandum No. 14, 2011, https://www.alri.ualberta.ca/wp-content/uploads/2020/06/cm014.pdf.

[52] B. CAVE, *supra*, note 20.

E- A clear definition

[61] Despite the recognition of joint ventures in American law, there is no clear definition of the term. The courts have limited themselves to indicating the constituent elements of a joint venture,[53] without clearly defining it.

[62] In Canada, as in the United States, it is the courts, case-by-case and based on the facts, that have identified the criteria for a joint venture:[54] contract, contribution, independence of the parties, joint management, right to profits and limitation to a single undertaking (the parties continue their respective activities (see *Mortgage*[55])):

> The widely recognized legal relationship of joint adventure is of modern origin. Generally, courts have not laid down any very certain definition of what constitutes a joint adventure, nor have they established a very fixed or certain boundary thereof, contenting themselves in determining whether the facts of a particular case constitute the relationship of joint adventure.[56]

[63] Another possible definition can be found in *Black's Law Dictionary [5th edition]*:

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[53] *Woronuk v. Woronuk*, 2015 ABQB 116.

[54] In *Continental Bank Leasing Corp.* v. *Canada.*, [1998] 2 SCR 298, the Supreme Court proposes a guide for determining whether an enterprise is a partnership. There would be

> 22 . . . three essential ingredients: (1) a business, (2) carried on in common, (3) with a view to profit:
> 23 The existence of a partnership is dependent on the facts and circumstances of each particular case. It is also determined by what the parties actually intended. As stated in *Lindley & Banks on Partnership* (17th ed. 1995), at p. 73: "in determining the existence of a partnership... regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case".
> 24 The *Partnerships Act* does not set out the criteria for determining when a partnership exists. But since most of the case law dealing with partnerships results from disputes where one of the parties claims that a partnership does not exist, a number of criteria that indicate the existence of a partnership have been judicially recognized. The *indicia* of a partnership include the contribution by the parties of money, property, effort, knowledge, skill or other assets to a common undertaking, a joint property interest in the subject-matter of the adventure, the sharing of profits and losses, a mutual right of control or management of the enterprise, the filing of income tax returns as a partnership and joint bank accounts. (See A. R. MANZER, *A Practical Guide to Canadian Partnership Law* (1994 (loose-leaf)), at pp. 2-4 *et seq.* and the cases cited therein.) ».

[55] In *Central Mortgage & Housing Corp v Graham* (1973), 43 DLR (3d) 686 (NSSC), Jones J. indicates the factors essential for there to be a joint venture:

> Besides the requirement that a joint venture must have a contractual basis, the courts have laid down certain additional requisites deemed essential for the existence of a joint venture. Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
> (b) A joint property interest in the subject matter of the venture;
> (c) A right of mutual control or management of the enterprise;
> (d) Expectation of profit, or the presence of "adventure", as it is sometimes called;
> (e) A right to participate in the profits;
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.

[56] *Leo Johnson, Inc. v. Dana E. Cramer*, Supreme Court of Delaware 156 A.2d 499; 1959 Del.

> Joint Adventure**.** Any association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge.

[64] In contrast, according to Professor Shishler, establishing a specific status for joint ventures is the surest way to distinguish them from partnerships. She suggests giving a clear definition to the term "contractual joint venture" by explicitly stating that a contractual joint venture does not create an agency relationship. However, the University of Toronto research report considers this proposal for reform insufficient, since legislatures have been recommended to adopt the list of characteristics that were drawn up by Williston[57] and inspired *Mortgage*. In the view of the authors of this report, it would be a mistake to incorporate the *Mortgage* framework into the law, since it is this very framework that is at the root of the confusion surrounding contractual joint ventures and why the courts tend to attribute partnership characteristics to contractual joint ventures.[58]

[65] As we can see, defining a joint venture is no simple task. In fact, we can also ask: should we define the concept? Or should we simply list the most important constituent elements (a framework for identifying contractual joint ventures), such as the contractual relationship, the sharing of resources and risks, the limited duration, the independence of the venturers, joint management, etc.?

[66] Researchers at the University of Toronto have proposed a new framework based on principles that would guide courts in identifying a contractual joint venture and help joint venturers better structure their arrangements to prevent them from being classified as partnerships. The new framework would provide for the following:

1. A contractual joint venture will exist where
    a. There is an agreement between two or more parties regarding a collective undertaking;
    b. All parties contribute in some manner to the undertaking;
    c. All parties retain their independent and sole control over the execution of their contribution within the contractual parameters;
    d. All parties have a clearly defined interest in the outcome; and
    e. No new entity is formed of or by the parties for the purpose of executing the undertaking.

2. The presence of the following provisions in the joint venture agreement may indicate the fulfillment of the above requirements:

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[57] Samuel Williston defines "joint venture" as follows: "The joint venture is an association of two or more persons based on contract who combine their money, property, knowledge, skills, experience, time or other resources in the furtherance of a particular project or undertaking, usually agreeing to share the profits and the losses and each having some degree of control over the venture. Stated in somewhat greater detail." Samuel WILLISTON and W.H.E. JAEGER, *A treatise on the law of contracts*, (3d ed. 1957): https://lawcat.berkeley.edu/record/26022.

[58] L.O. BAPTISTA and P. DURAND-BARTHEZ, *Les joint ventures dans le commerce international*, 2012, https://www.stradalex.com/fr/sl_mono/toc/ASSENCOINT/doc/ASSENCOINT_005.

a. A declaration of no-partnership;

b. A well-defined separation of the interests and ownership in any property subject to the contractual joint venture;

c. An allocation of gross revenues and expenses to each of the parties;

d. Filing taxes as individual participants;

e. Dealing with third parties independently and as individuals;

f. An indemnification of parties for liabilities incurred by other parties; or

g. A limitation of the joint venture to a discrete undertaking[59]

[67] In Quebec, as in the United States and Canada, there is no statutory definition of the concept of joint venture. However, some authors have attempted to define it:

> [TRANSLATION] A temporary grouping of companies, an agreement between two or more companies to work together on a specific project. The project may be of short duration or extend over several years. It is concluded between two companies, i.e. between two entities which carry out their own activities in parallel with the joint project and which, for this reason, do not intend to devote the majority of their resources to the joint project.[60]

[68] Claude Reymond provides a more general definition:

> [TRANSLATION] A joint venture agreement is a contract by which two or more partners agree, while continuing their own business, to set up a joint venture for a specific activity, whether lasting or temporary, and to give this company the technical, financial or commercial support of their own companies.[61]

[69] Other authors suggest that one way to regulate joint ventures is to give them a legislative definition to distinguish them from partnerships. If a definition existed, the courts could more easily interpret the original contract without resorting to the rules applicable to a partnership. Until a definition is clearly set out, joint venturers will have to take additional precautions when drafting their contracts.[62]

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[59] In Québec, given the lack of a clear legal framework, the courts have often likened joint ventures to undeclared partnerships (a legal instrument in the *Civil Code of Québec* that is not available in the common law provinces). The rules that apply to undeclared partnerships are stated in Civil Code article 2253: "Each partner contracts in his own name and is alone liable to third persons. However, where the partners act in the quality of partners to the knowledge of third persons, each partner is liable to the latter for the obligations resulting from acts performed in that quality by any of the other partners."

[60] P.A. COSSETTE, *supra*, note 45.

[61] C. Reymond, "Le Contrat de « Joint Venture »", in *Innominatverträge*, mél. Schluep, (Zurich: Schultess, 1988).

[62] P.A. COSSETTE, *supra*, note 45, p. 467.

2- ON THE PATH TO DRAFTING A UNIFORM LAW

[70] It should be noted that a great deal of work was done on this subject a few years ago by the Uniform Law Conference of Canada (ULCC) and the Alberta Law Reform Institute (ALRI).

[71] The members of the working group found it relevant to draw on the work of ALRI for inspiration on the general issues discussed in relation to this topic. In order to ascertain whether any new developments or different issues had arisen since 2012, the members of the Working Committee consulted a number of experts.

[72] The following paragraphs present ALRI's recommendations, followed by the working group members' findings from the consultations.

A- ALRI's recommendations

[73] ALRI recommends the adoption of legislative provisions that, among other things, would allow joint venturers to declare in their contract that they are not establishing a partnership. This will allow the joint venture to avoid fiduciary responsibilities. However, ALRI also recommends that the joint venturers be jointly and severally liable for all their debts and obligations to third parties, unless otherwise provided in the contract between the joint venturers and the third party in question. In addition, ALRI recommends that the joint venture be operated under a name that includes the term "joint venture".

[74] Here are ALRI's recommendations:

> 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 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.

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 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.

B- The working group's findings from the consultations

[75] According to the experts consulted, the issues of legal uncertainty described in the section entitled "Analysis and Issues" remain the same.

[76] Based on the ALRI proposal, several different points of view were expressed on legislative solutions.

[77] The ALRI recommendations set out solutions that, according to experts consulted in Alberta, are well suited to the needs of joint ventures. Since the law is uniform in the common law provinces and territories, these solutions should also meet their needs.

[78] Therefore, and as will be described in detail below, the members of the working group recommend, for the common law provinces and territories, that the ALRI recommendations be adopted, with certain modifications, and, for Québec, that certain provisions be incorporated into the *Civil Code of Québec*.

[79] With respect to Recommendation 1 (definitions), it does not seem desirable to limit the definition of "joint venture" to commercial enterprises. In the definition of "joint venturers", it is not desirable to use the term "person", so as not to exclude trusts.

[80] Paragraph 3(a) of Recommendation 1 contains a rather incomprehensible clause; we recommend that it be clarified or deleted.

[81] Paragraph 1(a) of Recommendation 2, sets out a provision that would solve the problems in the common law Canadian provinces, but in Quebec, this provision would have no impact, given that, as mentioned above, joint and several liability is a consequence of the framework in which companies operate (common law system). We therefore doubt the relevance of legislating on this issue in Quebec. Where a joint venture is purely contractual in nature, the *Civil Code of Québec* regime governing undeclared partnerships protects third parties and the public, and limiting liability to third parties would benefit the contracting party but not third parties or the public (see, for example, *Civil Code of Québec* articles 2252*ff*). There are also legal instruments for limiting liability, for example, the formation of a joint-stock company. We also have doubts about the possibility of obtaining a waiver of joint and several liability from the client, since this would be very disadvantageous for any creditor. Similarly, in the context of infrastructures, the call for tenders usually requires that the members of the consortium to which the mandate is entrusted constitute an entity, often a limited partnership.

[82] Paragraph (1)(b) of Recommendation 2 (reference to the term "joint venture" or "JV") provides interesting advice for ostensible joint venturers.

[83] With respect to paragraph (2)(b) of Recommendation 2, registration is a solution rejected by the ALRI Report and the University of Toronto research report. However, in Québec it would be advisable because this solution would provide partners with an appreciable degree of protection against liability. Many ostensible joint ventures choose to register voluntarily. The next step will be for the working group to determine the consequences of registering or not registering.

[84] For Québec, the working group recommends that the *Civil Code of Québec* provide a definition of "joint venture" that includes the following elements:

- a joint venture is a distinct form of enterprise recognized in Québec;

- the status of joint venture must appear in the name of a joint venture; and
- joint venturers must meet the criteria for forming a joint venture, in particular in their relationships with third parties, otherwise their enterprise may be considered to be a general partnership or an undeclared partnership.

[85] Lastly, a provision could be added to the *Civil Code of Québec* to provide that a joint venture's registration declaration deposited in the Québec enterprise register (the Registre des entreprises du Québec (REQ)) raises the presumption of the joint venture's legal status if the joint venturers state the name of the joint venture in their dealings with third parties.

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3 - CONCLUSION

[86] As we can see, maintaining the status quo of a contractual joint venture would certainly expose it to the risk that a court might at any time characterize it as a partnership, which would deprive it of the legal certainty desirable for the purposes of delimiting the obligations and liabilities of the participants.

[87] The specific legislative reforms recommended by ALRI appear to be a very good starting point for a new legal regime that would recognize joint ventures as entities distinct from partnerships. Because of the differences between the laws of the other Canadian provinces and the laws of Quebec (for example, the category of undeclared partnership), certain adaptations would have to be considered. This is the challenge facing the members of the working group, but a major step forward has already been taken.

NEXT STEPS

[88] This fall, the working group will begin preparing its final report, drafting a uniform bill suitable for the common law provinces and territories, and drawing up draft provisions compatible with the *Civil Code of Québec*. Everything should be ready to present to the delegates at the annual meeting in August 2025.

DRAFT RESOLUTION

[89] In view of the above, it is proposed that the delegates

THAT the report of the working group on joint ventures be accepted;

THAT the working group continue working in accordance with the direction of the ULCC; and

THAT the working group present a final report as well as a draft Uniform Act and proposals for legislation adapted to the Civil Code of Québec at the 2025 annual meeting.

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