Joint Ventures—The Limited Fiduciary Relationship Structure
JOINT VENTURES—THE LIMITED FIDUCIARY RELATIONSHIP STRUCTURE

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I. Introduction

Many larger business endeavours are carried on in some form of risk and capital sharing collaboration. For most of the last 200 years, these collaborations had primarily only two generally recognized legal forms: (i) partnerships and (ii) corporations. This paper will discuss the implications of an evolving legal structure, the joint venture (“JV”). In the US, JVs have only been recognized by courts and scholars as a separate form of business association since the mid-20th century and the JV has only been recognized as such since the 1970s in Canada.1

JVs represent subtle but important legal differences from the traditional partnership relating primarily to the challenges of “contracting out” of the law of fiduciaries. As such, some courts in the US do not recognize the JV as something unique and some British and other authorities have treated the JV as merely a subset of partnership law.2 In BC, however, the contractual JV is in frequent use and its legal attributes widely recognized by the courts with the most debateable issue in recent cases being the extent to which joint venturers assume fiduciary obligations to one another. [cite Blue Line]

JVs are intended to be a more flexible form of business association (than a partnership or corporation) and similar arrangements are sometimes referred to using names such as: consortium, strategic alliance, collaboration, joint development, quasi-partnership, corporate joint venture and unincorporated association. Use of any of these types of nomenclature should alert the lawyer to the fact that the parties intend to create an agreement that is different from one that strictly falls into the realm of conventional corporate or partnership law and which may involve a joint venture or some overlap of these two traditional legal forms.

This paper will outline the primary business and legal elements of what typically distinguishes a JV from a partnership. The focus of this paper will be on the “pure” JV which is strictly a creature of contract and hence often referred to as the “contractual JV.” The term “joint venture” is also used in circumstances which involve two parties collaborating through a special purpose corporation so the form or arrangement may be referred to as a “joint venture corporation.” Although this paper discusses the joint venture corporation (“JVC”), it does not deal extensively with this structure because the basic structure is a corporation, albeit augmented with a shareholders’ agreement and as such it is more governed by conventional corporate law although the shareholders agreement may superimpose many JV concepts onto the manner of managing the corporation.

In the JVC, venturing parties who are generally the shareholders (but need not be exclusively) superimpose on themselves and the corporation they have formed, an agreement to deal with capitalizing, managing and winding up the jointly-owned corporate vehicle. The JVC is usually established with different objectives from most other corporations in that the JVC corporate vehicle usually has a relatively limited business purpose or life and may be operated not with a view to maximizing its profits but rather to developing an asset for the benefit of the shareholders. Likewise, a partnership which only has corporations as its members may sometimes be referred to as a joint venture partnership, corporate partnership or similar mixed usage terminology.

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4 Barry J. Reiter & Melanie A. Shishler, Joint Ventures: Legal and Business Perspectives (Toronto: Irwin Law, 1999) at 6.
II. The Contractual JV

A. Legal Structure

Unlike corporations and partnerships, the JV (in this paper, “JV” refers to contractual joint venture) is expressly intended not to be a separate legal entity, but instead is intended to be a separate economic entity only. Although a “partnership” is under certain laws deemed to be a “person” for certain purposes, it is traditionally deemed not to be a separate legal entity.\(^5\) The JV is created by an agreement between its owners who are often referred to as the joint venturers and hence is a “legal relationship” and not a “legal entity” and perhaps not even a “person.”\(^6\) In Canada and the US, the JV is not registered in any governmental registry such as those which register and provide public information in respect of the legal existence of corporations and partnerships (both general and limited). Unlike corporations and partnerships, there is no statute which explicitly creates or recognizes and governs JVs.\(^7\)

B. Basic Elements of a JV

The “ingredients” of a JV have been summarised by the BC Court of Appeal in *Canlan Investment Corp. v. Gettling* (1997), 37 B.C.L.R. (3d) 140 and followed in *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Limited Partnership, et. al.*, [2008] BCSC 24, 40 BLR (4th):

1. the JV must have a contractual basis; and
2. there must be:
   1. a contribution of money, property, effort, knowledge or other asset to a common undertaking;
   2. a joint property interest in the subject matter of the venture, which is usually a single or ad hoc undertaking;
   3. a right of mutual control or management of the venture;
   4. an expectation of profit and the right to participate in the profits.

I. “Contractual basis”

As with a partnership, a joint venture is founded on a contract between the parties. In *Central Mortgage & Housing Corp. v. Graham* (1973), 43 D.L.R. (3d) 686, 13 N.S.R. (2d) 183 (N.S.T.D) [*Central Mortgage*], the Court cited *Williston on Contracts*, 3rd ed. (1959) at 706:

"... A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without, however, forming a partnership in the legal sense (of creating that status) or corporation ... (emphasis added)"

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6. The *Interpretation Act* (BC) states a person “includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law” (R.S.B.C. 1996, C.238, s. 29).

7. Although no statute explicitly creates or recognizes JVs, s. 32(b) of the *Ontario Partnership Act*, R.S.O. 1990, ch. P.5 states that subject to any agreement between the partners, a partnership is dissolved, (b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking. According to *Lorne Park Pharmacy Ltd. v. Arrow Pharmacy Ltd.*, [2000] O.J. 929 (Ont. S.C.J.), a court may order dissolution of a joint venture if the characteristics of the relationship favour its classification as a partnership.
Central Mortgage has been followed in BC. In Canlan, Tysoe J. (as he then was) accepted as a correct proposition of law that a joint venture must have a contractual basis.

The existence of a contractual underpinning was also the issue in the recent case of Zynik Capital Corp. v. Faris, 2007 BCSC 527. Zynik and Intergulf, an investment company, agreed to jointly pursue an opportunity to purchase the Versatile Shipyards in North Vancouver. The parties signed a memorandum of understanding describing the basic terms of the venture pending the execution of a formal agreement.

The MOU specified a date on which the joint venture would end if the acquisition did not occur. Negotiations ensued with the bank holding security over the property. Intergulf took responsibility for finalizing the negotiations. A few days before the closing date, a dispute arose between the parties and Intergulf decided to acquire the property for itself. However, Intergulf failed to close the transaction and the bank sold the property to a third party.

Zynik sued, claiming that Intergulf breached its obligations arising from the joint venture allegedly created by the memorandum. Tysoe J. held that the joint venture described in the memorandum was not a binding contract for two reasons: first, the parties had not agreed on the price they would pay for the asset, and had not even agreed on a maximum price they would be willing to bid for the asset; and second, even if the price had been agreed, Intergulf would not have been bound because it had reserved the right to conduct due diligence on the property. By implication, Intergulf would not have been bound to proceed with the transaction if it was dissatisfied with the results of its due diligence. Because the parties had failed to agree on essential terms, their arrangement amounted to an agreement to agree, which is not enforceable. To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.

C. Distinguishing a JV from a Partnership

I. Fiduciary Duties Uncertain

Partnerships are presumptively fiduciary relationships at common law. Section 22 of the Partnership Act (BC) imposes on partners the additional duties of utmost fairness and good faith in their conduct toward one another. By contrast, judicial opinion is divided on the issue of whether joint venture agreements presumptively create fiduciary relationships (Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577; Visagie v. TVX Gold Inc. (2000), 187 D.L.R. (4th) 193, 132 O.A.C. 231) which are further discussed below.

While courts have long been reluctant to impose fiduciary duties in the context of commercial agreements the quasi-partnership nature of the JV has cases going each way. The governing principle for no fiduciary obligations in the context of sophisticated commercial negotiations was stated by Wilson J. in her dissenting reasons in Frame v. Smith, [1987] 2 S.C.R. 99. However, some decisions have found fiduciary obligations presumptively exist (see First Madison Corp v. Shabinsky, [1992] O.J. No. 2117 (C.A.), Finlayson J.A., relying in part upon Wonsch, also concluded that a joint venturer owed fiduciary duties to co-venturers. Also: Reichmann v. Vered, [2003] O.J. No. 1029 (Sup.Ct.).)

a. The Taxman’s View

The Excise Tax Act Guidelines⁸ (the “Guidelines”) provide a useful discussion as to the Canadian federal government’s views of the common law principles that distinguish a JV from a partnership. Under the Guidelines it is noted that both partnerships and JVs must comprise of two or more parties. It is

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⁸ GST Law reporter, CGST 156c (2002-11-15).
noted that while the apparent or stated intention of the parties is an “important factor” in determining whether the business arrangement constitutes a JV or partnership, it is not determinative.9

It should be noted that for the purposes of making elections under the GST Rules, the JV agreement must be made in writing, although it is acknowledged that for other purposes, it is possible to have a JV without a written agreement.10

2. **JV is Usually a Single Undertaking for a Limited Duration**

The Guidelines note that JV participants do not normally intend to participate in a “business in common” with the other participants and that the JV is confined to a particular undertaking with a specific termination date. Typically the activities of the JV do not require the continuous attention of every participant, as normally one participant is more or less the operator or manager of the JV for all the participants. The other participants carry on business on their own outside of the JV and no participant is an agent of any other in connection with the JV or otherwise (except for the designated manager). Unlike a (Canadian) partnership, the death, expulsion or admission of a member of the JV will not necessarily terminate the JV and create a new one.

3. **Endeavouring to Circumscribe Fiduciary Obligations**

The concept of “contracting out” of a legal obligation is one fraught with contradiction and as any lawyer knows there are many things parties simply can not agree to do, such as divorcing parents agreeing there will be no child support. On the other hand the law recognizes that sophisticated parties have the right to try to manage the practical problems inherent in concepts like “conflict of interest” which are otherwise abhorrent to the law.

The Visagie case cited above concerned a joint venture in which the plaintiffs disclosed commercially valuable information to the defendants about a potential mine site in Greece. The information was protected by a written confidentiality agreement. Ultimately, the Greek government decided not to sell the mine privately. The joint venture agreement was terminated as a result. Thereafter, the defendants successfully bid on the mine in a public offering and developed a lucrative gold mine. The plaintiffs sued for breach of fiduciary duty a breach of confidence.

The trial judge, Feldman J. (as she then was), relied on the decision of Wonsch Construction Co. v. National Bank of Canada (1990), 75 D.L.R. (4th) 732, 42 O.A.C. 195 [Wonsch] to conclude that the parties owed one another fiduciary duties as a result of the joint venture. She also concluded, on the basis of Wonsch, that the fiduciary duties extended beyond the termination of the joint venture agreement and prohibited the defendants from competing for the mine site.

On appeal, the court unanimously concluded the trial judge erred in holding that the joint venture gave rise to fiduciary duties and that those duties survived the termination of the joint venture. Charron J.A. (as she then was) observed that any duties owed by parties to one another during the life of a joint venture agreement, and following its termination, arose from the terms of the agreement itself and not from any fiduciary obligation imposed by law. Charron J.A. in Visagie said the following at para. 25:

> The Supreme Court of Canada in Cadbury Schweppes, supra, makes it clear that fiduciary obligations are seldom present in a commercial context between parties acting at arm’s length. Binnie J., in writing for the Court, quoted at pp. 163-164 the following from Frame v. Smith, [1987] 2 S.C.R. 99:

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Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm’s length. ... The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any “vulnerability” could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

The Court in Blue Line concluded that since Visagie there has been increasing judicial reluctance to accept the proposition that fiduciary obligations presumptively arise from joint ventures. In Chitel v. Bank of Montreal (2002), 26 B.L.R. (3d) 83, 45 E.T.R. (2d) 167 (Ont. S.C.J.), Boyko J. comprehensively reviewed the case law and concluded as follows at para. 167:

Although some cases support the proposition that a joint venture agreement automatically creates fiduciary obligations, the more compelling line of cases require a case specific approach to determining fiduciary duty.

See also: Canadian Southern Petroleum v. Amoco Canada Petroleum, 2001 ABQB 803, 97 Alta. L.R. (3d) 123. The Court in Blue Line agreed with the approach taken by the Court in Chitel.


Unlike partners, joint venturers collaborate in a more prescribed and limited way and they generally agree that they may compete freely except where otherwise expressly provided by the JV agreement. JV agreements usually provide for express limitations on fiduciary obligations such as any obligation by a joint venturer to disclose awareness of a perceived new business opportunity which are obligations which a partner or corporate director would be subject to. The JV agreement in a resource context might provide that, with regards to a specific geographical area of interest, the JV parties will communicate and co-operate fully but outside of that area, they are free to compete as they please. Technology joint venturers would have similar freedom outside of the limited field in which the JV is concerned. In the normal course, JV parties do have an obligation to deal fairly and to communicate relevant JV information, such as exploration results or clinical trial data. However, the JV agreement may provide that a party in default of its financial obligations under the JV agreement will not be entitled to receive important results information until they are back in good standing.

Good advice for the draftsman is found in Hodgkinson v. Simms, [1994] 3 S.C.R. 377 where LaForest J., states “the question to ask [in respect of whether a fiduciary obligation may arise] is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former’s best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.” It is the job of the JV agreement draftsman to leave as little as possible in doubt about the parties’ intentions about these expectation matters.

4. Mutual Control Rights

Although usually one participant will act as operator or manager and may be responsible, more or less, for the day-to-day activities of the JV, the other participants generally all have a certain amount of say in management of the JV, usually proportionate to their interest in the “equity” of the JV. Typically, no single participant exercises unilateral control. To the extent one participant holds a larger interest in the JV, certain key JV decisions may require unanimity, failing which termination or other provisions can come into effect. In practical, if not always in legal terms (for example, qualifying as a “taxpayer” under the Tax Act or a “person” for litigation), a partnership is an entity separate from its
partners. In a partnership, management is typically delegated to a small group, each partner is the agent of the others and each partner owes a fiduciary duty to the others. This is not the case in a JV relationship where the parties are intending not to create a legal entity or person to which duties are owed (other than “good faith see Perfect Portions Holding Co. v. New Futures Ltd., [1995] O.J. No. 2113 at para. 14 (Ct. J. (Gen. Div.)) (QL”) and followed in Choi v. Paik, [2008] B.C.J. No. 1588 (48 B.L.R. (4th) 266).

5. Participant Contributions

Participants in a JV contribute resources (including cash, property and services) to enable the JV’s activities and in return are entitled to receive a specific allocation of a right to the JV’s production or product developments. The JV agreement normally includes a defined separation of interest in the JV versus ownership of the JV’s property, with each participant generally retaining title to unique property which it contributes the use of. By contrast, assets contributed to a partnership belong to the partnership and not to any individual partners.

6. Separate Rights to JV Output

The JV agreement normally provides that the JV’s production is conferred on each participant in proportion to that participant’s specified interest in the JV. One hallmark of a JV is that the JV’s production is taken up by the participants for separate processing or marketing and other financial transactions connected with it, such as hedging. In a mining JV, it is typical for the parties to separately take and deal with their share of ore or for one joint venturer to have an interest in one metal while another party has an interest in another metal in a polymetallic mine. A partnership, on the other hand, generally completes the business cycle itself, from cash to cash, to arrive at a net profit or loss which is then allocated to the partners in proportion to their interests in net income or loss of the partnership.

7. JV Property Interests

It is typical in a JV for each party to retain the primary interest in the unique assets it contributes or allows the use of to the JV. Other arrangements are possible for example where the underlying assets are held in joint tenancy or tenancy-in-common. In a technology JV, this could include, for instance, a licensing of certain key technologies to the JV. In a JV, the participants continue to have, more or less, a direct interest in the JV assets, not an indirect interest through a “partnership.” In a mining JV, it is common that the registered property title will be held by one of the participants, but in trust for all the parties, in proportion to their interest in the JV. Thus, unregistered, beneficial co-ownership is created in resource properties and a one-party registration of the property helps practically so that each time the participating interests of the joint-venturers change, there is no need to register the changes and affect the title. By contrast, partners generally have only an indirect interest in the partnership assets where title is in the name of the partnership. A partner may have the right to deal with its interest in the partnership but not with the underlying partnership asset, as such dealings require the consent of the other partners.

8. Expectation and Allocation of Profits

A partnership, generally speaking, is an association which carries on business with a view to profit. However, a JV is neither required to actually carry on a business nor look to profit which is a useful distinction because under some countries’ tax rules, an active corporation must generate sufficient revenues from its activities with its related parties to have a reasonable (and hence taxable) profit on its activities. A JV may be established for the purpose of developing a technology for ultimate use by the participants rather than for that technology to be exploited for profits by the JV. The JV may be expected to be an expenditure-based arrangement from start to finish, although ultimately one that will produce a benefit, cost reduction or an asset, but not an accounting or tax profit.
While the sharing of profits of a business is prima facie evidence that a partnership exists, it is possible for sharing of “net” profits in a JV as well. However, in a US mining JV, gross revenues (or the JV’s output/production) are more typically separately allocated to JV participants as are the expenses and costs. Each JV participant deals separately with the output allocated to it and calculates a separate net profit or loss. This separate access to production is key in US tax law to ensure non-partnership treatment of the JV.

9. Limitation of Liability

Partners in a partnership are generally legal agents of the others and all are normally jointly and severally liable for all the debts of the partnership (although such third party liability does not apply to limited partnerships which are specifically designed to permit investment without such liability to passive investors). JV agreements normally provide that JV participants are only liable for their respective proportions of the JV’s investments and agreed expenses. To the extent there are cost overruns incurred by the managing or operating participant (usually another participant but possibly a third party retained to be “operator” or “manager”), that managing party is liable to the other participants to discharge those overrun obligations. A JV should not normally contract in its own name because it is not a legal entity which is why the participants appoint either one of the participants or a third party contractor to act as “operator” or “manager” being the party who assumes responsibility for all agreements with third parties. Although responsible to third parties, the operator is usually indemnified by the JV participants for certain types of liabilities and risks. The operator is financially responsible and solely at risk for those agreed activities which, if badly carried out, are its “fault.”

10. Tax Treatment of Contributions and Distributions

A JV is often established with an intention by the participants that the capital assets contributed for the JV’s use are not being disposed of by the contributor but rather the participants are allowing such assets to be used by the JV and they expect to get them back upon wind-up of the JV. Assets “contributed” to a partnership are considered disposed of for tax purposes and create a taxable event unless a “rollover” is available. The dissolution of a partnership generally results in a final disposition of its property and distribution of the proceeds whereas the dissolution of a JV may result in a cessation of use of the contributed property (e.g., termination of a technology license). A partnership interest is normally regarded as capital property for income tax purposes so that a sale of a partnership interest usually results in a capital gain or loss. However, a JV interest is not recognized as capital property and the sale of the interest would be taxed as though the participant’s interest in each of the specific assets of the JV were sold (to the extent the JV assets are sold to a third party on termination or otherwise). Where a particular arrangement has been classified as a partnership or JV for income tax purposes, it should have the same status for GST purposes as well.

D. Civil Law

According to the Guidelines, a JV relationship is not recognized under Quebec civil law in the same way that it is under common law. Nevertheless, Quebec civil law does not prohibit the formation of a JV and where a JV has been established under the common law guidelines, it will generally be regarded as a JV at least for GST purposes. Quebec decisions have held that an arrangement that might satisfy the common law JV Guidelines will be regarded as a partnership under civil law, where:

(a) the agreement is oral;
(b) the written agreement does not contain a clause which indicates the contractual relationship is not to be governed by the rules concerning partnerships; and
5.1.9

(c) there is a delegation of ultimate authority or abandonment of final control over the JV by one participant to another so that unilateral control exists or:

(i) a separate “autonomous” entity is created whereby it has a separate name registered under the civil code;

(ii) the organization has its own funds, bank account, management committee or accounting system; or

(iii) the organization has an estate and can purchase or dispose of property or the participants do not individually or jointly carry out the transactions necessary to realize the JV’s objectives.

E. Other Case Law

As noted above, it matters little what the participants state to be their intentions in the governing agreement establishing a JV; the Court will decide what the relationship is after taking into account all the relevant facts, including the agreement. For example, in the case of *Amneet Holdings Ltd. v. 79548 Manitoba Ltd. et al.*,11 the plaintiff corporation acquired a shopping mall and its sole shareholder arranged for 10 investors to participate in ownership of the mall. Title to the mall was taken in the name of a numbered company acting as bare trustee (see separate discussion of bare trustee) for the beneficial owners. The 11 investors entered into an agreement setting out the details of their joint investment in the mall and the numbered company was also a party to the agreement. Ten years later, the investors decided that they needed to contribute additional cash to the joint investment. However, one of the investors failed to contribute the required cash and, as a consequence, his interest in the mall was forfeited. He sought relief from forfeiture and remedies, including remedies under the oppression remedy of the relevant corporations statute. The Court found the proper characterization given to the relationship was that of a “joint venture” and not as an investment in the title-holding corporation. Therefore, oppression remedies were not available.

In the case of *Aronovitch & Leipsic Ltd. v. Berney*,12 the plaintiffs sought fees for participation in a real estate development proposal. The plaintiffs were real estate brokers who had reached an agreement with the other parties to work together as a consortium to submit a development proposal. According to the oral agreement, there would be no compensation unless the proposal was successful. Although the construction part of the proposal was accepted, it had been submitted on the basis that the land was to be owned by them and leased back to the tenant. However, the final project was instead owned by the intended tenant, resulting in some $8 million less in lease income over the term. The other members of the consortium were paid their fees but the brokers were excluded because they had not obtained the lease contemplated by the original proposal. Therefore, the financing aspects of the development were different. The plaintiffs were eventually awarded some fees. The case is instructive in that it distinguishes a contractual JV from a partnership or agency relationship. The elements of a JV taken into account by the Court included the fact that the consortium was goal-specific, limited in duration, that the parties had other business interests and returned to these business interests on completion of the objectives and that each party contributed its own special skills and assets to the project. The parties retained ownership of their separate assets and did not become members of one legal entity.

While a JV is theoretically (according to BC decisions discussed above) virtually impossible to form without a written agreement, a partnership is not. In *Redfern Farm Services Ltd. v. Wright*,13 Master

Harrison in the Manitoba Queen’s Bench found that three farmers, who thought they were operating separate farms, were actually partners and thus, jointly and severally liable for a debt owed by one of them to Redfern for farm supplies. Master Harrison noted that the farming operation was run to a degree cooperatively with some of the parcels of land registered in the names of all of the defendants and that the animals were fed and pastured together. The arrangement had all the “characteristics of a partnership.” Master Harrison concluded that the partnership definition applied, namely that there was a “relationship which subsists between persons carrying on a business in common, with a view of profit.” Other decisions have found that a partnership will not exist where a firm name, joint bank account and a division of profits are absent and undeterminable. Although note that in the Reichmann case (footnote 10) the Court found the JV was formed by an oral contract.

III. Drafting the JV Agreement

The form of JV agreement is usually similar to a partnership agreement as both must address many of the same types of financing and management issues. JV agreements must document:

(a) the required financial contributions of each owner;
(b) the owner’s resulting interest in both the capital and earnings and expenses of the JV;
(c) the degree of control each owner will have over all or certain aspects of the JV’s activities;
(d) the consequences of the JV needing further capital and what happens if a party fails to contribute further capital when it is required under the terms of the JV to be contributed; and
(e) how and when the JV to be wound up.

The JV agreement should specifically state that it is not to be construed as a partnership agreement. However, it should be noted that in the US, JV participants may elect the JV to be treated as a tax partnership even though the agreement is a JV for other purposes. A statement of intention that the parties intend to form a JV and not a partnership, being merely inter partes, is not binding on third parties nor on the judiciary. Courts have, as noted above, “routinely” found the existence of a partnership where the parties did not intend one.14 Drafting a JV for a limited purpose and duration may not suffice, as partnerships can also be established for a limited scope and duration.

A practical solution to distinguishing JVs from partnerships can involve ensuring that the JV entity does not itself complete the entire business cycle from investment to net profits. For example, in the mining industry where JVs are very common, the JV agreement almost invariably provides that while the joint venturers will combine investment and share risk in developing the mine, each party to the JV will separately take its share of physical mine production and will deal with such production on its own. In other words, each joint venturer will make a separate decision as whether to inventory the ore, sell it, hedge it or otherwise deal with it. In the technology industry, similar treatment might be that the JV will provide that the end-product of the JV’s drug development program will be taken up separately by the JV participants, perhaps by license or right to semi-processed material, and each must then decide how to exploit the molecule, cell line or other technology or asset developed by the JV.

There are many places for the JV agreement draftsman to look for precedent JV agreements. Natural resource exploration and development are commonly conducted in the form of a JV. As such, the mineral and oil and gas industry have associations which have for years published “model” form JV agreements.

A. Other JV Tax and Accounting Issues

I. Earnings & Expenses

Because the JV agreement establishes an economic entity but does not create a legal entity, the JV, like the partnership, under Canadian tax rules, will not itself pay taxes. Instead, each of the joint venturers will be entitled to interests in the capital and operating accounts of the JV as the JV agreement dictates. Because JV owners have the flexibility to each treat their interests in the JV’s assets, liabilities, income and expenses uniquely, the owners may well show different book and tax effects for the same JV transactions.

For example, in a partnership, depreciation expense for tax purposes (referred to as capital cost allowance or “CCA”) is taken as a deduction from net income before the net income is distributed to the partners. This means each partner is effectively allocated, and must claim a proportional amount of, CCA whether it is useful to it or not. In a JV, each joint venturer can either take or leave the CCA in its particular interest in the JV assets. This may occur where a party is already in a loss position and taking CCA will only increase the losses. By comparison, the JV owner can elect not to take CCA in a year and postpone the deduction to a future year when it is more beneficial to use the deduction. An example helps illustrate the difference:

Compare a 50:50 JV versus a 50:50 Partnership, each with $100,000 in gross income, $80,000 in expenses before CCA and assets on which can be claimed up to $40,000 in CCA for a given year. Assume also that Party A has losses from its other business and Party B has profits from its other business. In other words, Party A has other losses to shelter income from the JV but Party B wants to recognize a loss in the JV to create shelter for its other income.

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<th>JV</th>
<th>A</th>
<th>B</th>
<th>Partnership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income</td>
<td>$50,000</td>
<td>$50,000</td>
<td>$100,000</td>
</tr>
<tr>
<td>Expenses</td>
<td>(40,000)</td>
<td>(40,000)</td>
<td>(80,000)</td>
</tr>
<tr>
<td>Net before CCA</td>
<td>10,000</td>
<td>10,000</td>
<td>20,000</td>
</tr>
<tr>
<td>CCA Expense</td>
<td>Nil</td>
<td>(20,000)</td>
<td>(40,000)</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>$10,000</td>
<td>$(10,000)</td>
<td>$(20,000)</td>
</tr>
<tr>
<td>Distributed to A &amp; B</td>
<td>$(10,000) to A and</td>
<td>$(10,000) to B</td>
<td></td>
</tr>
</tbody>
</table>

As can be seen above, the JV has the flexibility to allow Party A and Party B to take different deductions for CCA. The partnership model first takes the CCA and each partner must take its share whether that is ideal or not. In the JV, Party A can take the CCA at a future time. The JV is said to treat CCA, scientific research credits and similar deductions on a “gross” basis, allowing each joint venturer to make separate claims off of the gross transactions. On the other hand, the partnership operates on a “net” level, taking the deductions against expenses and distributing the net.

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15 See the Rocky Mountain Mineral Law Foundation’s Model Joint Venture Agreement, the Canadian Association of Petroleum Landmen Model Operating Agreement and the Continuing Legal Education Society of British Columbia’s Model Joint Venture (Minerals). For technology JV agreements, see the Canadian Institute Publication’s Art of Negotiating and Structuring JV Agreements and the Continuing Legal Education Society of British Columbia’s Business Ventures.
2. Avoiding Taxable Gains on Asset Contributions and Returns

Because the JV is not recognized as a separate entity for Canadian tax purposes, complexities can arise in connection with the JV agreement to contribute assets for use by the JV and the subsequent treatment of the assets during the JV term and upon its wind-up. By contrast, where there is a transfer by Canadians of assets to a Canadian corporation or a partnership, the Income Tax Act\(^{16}\) (Canada) (the “Income Tax Act”) has clear rules permitting the asset to be ‘rolled-over’ on a tax-deferred basis. That is, the asset may be contributed to the corporation or partnership on a basis where any gains in the asset which would have otherwise been taxable to the contributor on disposal to the corporation are deferred until the contributor disposes of its shares in the receiving corporation or partnership.\(^{17}\)

While it is typical of a JV that assets are contributed for the use of the JV and hence the benefit of all the participants, it is generally not intended that the properties are being “disposed of” (for tax or other purposes) to the other participants. However, it is possible that unless carefully drafted, the JV may inadvertently provide that an asset is effectively disposed of for tax purposes where, for instance, the contributing participant agrees to contribute it to the JV in a way where beneficial ownership of it is given up to the other participants. Where the JV agreement provides for what is demonstrably a transfer to others of an interest in a party’s assets, there may be no tax deferral roll-overs available to the contributor if there is a taxable gain inherent in the asset at the time of disposition.

This deemed disposal problem may arise where the JV agreement provides that the participants specifically share in the beneficial ownership of specific assets contributed by one participant, including, for example, in its title or control, or in an agreed gain or loss on the disposition of that asset in the context of the JV undertaking. The JV should avoid appearing to convey the trappings of ownership by putting another JV participant disproportionately “at risk” in connection with ownership of a specific asset. The joint venturers may be seen to have become co-owners of the asset and as a consequence, the original contributor may be deemed to have disposed, at least in part, of an interest in the asset to the other JV participants. Similar issues arise where the JV agreement provides that the direct interest of certain participants in certain assets will change from time to time where such changes are different than changes in their interests in the JV as a whole.

Existing tax rules avoid this problem for the resource extraction industry in Canada and the United States. North American tax rules in the resource industry generally allow co-operative exploration and development of a property owned by one party under JV arrangements where the JV participants are able to respectively combine mineral properties with exploration and development dollars into a JV without deeming the resource property owner to have disposed of any part of its interest in the property for tax purposes. That is, for tax purposes, participants are said to “earn-in” or “farm-in” to the resource property by spending exploration dollars on it. The reason for this treatment for tax purposes is the long-standing US “pool of capital doctrine,” whereby the contribution of the property rights by one party and the contribution of cash and services by the other party creates a larger pool of capital which both parties have rights in, rather than a disposition of property rights from one party (usually the owner of the mineral rights) to the other party (with the cash). There are no clear analogous tax rules in other fields, such as in the technology industry.

Upon the wind-up of a JV, each participant normally recovers to some degree, the assets which it “contributed” or allowed the JV to use. The recovery of these assets should also be a non-taxable event notwithstanding that, as a consequence of the operations of the JV, some amount may still be owing by one participant in the JV to one or more others in connection with the provisions of the JV agreement. As discussed above, the JV model becomes more complicated from a tax perspective where co-ownership rights or disproportionate risk in connection with a contributed JV asset were created in

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\(^{16}\) R.S.C. 1985 (5\(^{th}\) Supp.), c.1.

\(^{17}\) It is important to note that the rules require the recipient entities to be Canadian corporations or 100% Canadian partnerships.
favour of another participant. Where a JV participant has contributed to developing a new asset, for example, an improvement patent, the parties may share the benefits of that asset without treating it as a disposition by one of them.

Tax issues related to the asset (and even service) contributions of JV participants are complex, especially where cross-border participants are involved. The legal status of the participants (individuals, corporations, trusts, etc.), the physical location of JV assets, the jurisdiction of the legal title of JV assets and the extent to which the JV assets may become subject to co-ownership in some fashion are all factors in planning the tax aspects of the JV. Different treatment in different jurisdictions of essentially the same type of asset also can complicate matters. For instance, it is now settled law in BC that mineral claims (unlike mining leases) constitute personal property rather than interests in real property. On the other hand, mining claims in the US are generally seen as interests in real property. Thus, participation in mining ventures by aliens may be subject to different taxation rules from conventional JV treatment for resource property taxation when the US claims are involved (the foreign investment in real property or “FIRPTA” rules).

JV participants must also be aware that where cross-border JVs are established, there may be issues related to withholding taxes on distributions of revenue, royalties, interest, management fees or other benefits from the JV. This includes fees that may be charged by one participant to the JV or paid by a JV member to the others.

3. JV Operating & Capital Accounts

Sophisticated (i.e., large dollar) JV agreements typically have accounting procedures included as a schedule. This is to avoid the JV’s accountants having to guess the intentions of the parties as to treatment of items for capital or expense purposes and the manner of calculating and attributing costs and losses. The JV accounting figures which are delivered to the participants must be easily incorporated into the participants’ own accounting systems for consolidation and the JV’s internal controls be satisfactory to the participants’ auditors. Lawyers sometimes do not appreciate that the nature of accounting is such that a JV agreement which specifies the participating interests as a percentage of the JV may result in the actual capital accounts for those same participants to contain dollar balances which do not reflect those percentages. In other words, it is quite possible for the 40% JV participant to receive less than 40% of the ultimate proceeds of disposition of assets depending on what entries have been made into that participant’s capital accounts. It is also possible for a party with a 40% interest in the initial capital of the JV to have a different participating interest in certain revenues and certain expenses where the JV agreement provides for this. It is also possible that the different status for tax purposes of the participants will result in certain types of expenses being allocated under the JV agreement disproportionately to a participant’s participating interest where that participant can use such tax expenses where other participants cannot. These types of allocations may cause differences between a participant’s tax books for the JV and its accounting books for the same JV. For example, a participant may have a lower cost base for tax purposes in its capital account that the dollar balance of the account.

Capital accounts nominally reflect what each participant “has in the deal” and work similar to a bank account. They are credited (or increased) with the amount of the participant’s contributions to the JV at fair market value and with the amount of income or gains realized by the JV. They are debited or reduced by the amount of distributions the participant receives from the JV at fair market value in the amount of venture losses or deductions allocated to the participant. While beyond the scope of this paper, it is necessary to appreciate that capital account balances and tax bases in the JV interest can fall out of sync with the percentage interest of a participant in other aspects of the JV as a consequence of different rights and obligations in connection with revenue and expenses for book and tax purposes. Care is needed in drafting the relevant provisions and they should be accountant reviewed.
5.1.14

B. Participation and Management Roles of the Parties

The JV is typically governed by a management committee comprised of representatives of each participant in the JV. Establishing the degree of control that each participant has over the JV’s activities is a key element of negotiating the JV agreement. As each participant’s contribution to the JV is usually of a different kind, including cash, expertise, technology or resource prospects, it is important to weigh the degree of control in the JV which is required by a participant to offset the commercial risks that that particular participant is assuming in regards to its contributions by participating in the JV. For example, a participant which contributes a minority of the assets, or assets which are fungible, such as cash, may have less need to control the JV’s activities than one contributing proprietary technology which is at the root of its existing business. The degree of control necessary to a participant is also generally in line with the dollar magnitude of the participant’s contributions. For example, one would normally expect the party contributing 80% of the JV assets to have a great degree of freedom of action in operating the JV on behalf of itself and the 20% participant.

It is typical for a JV to establish that one participant or a third party under a contract will operate the JV under the direction of the management committee. The management committee makes its decisions typically by the representatives voting in proportion to the percentage interests that they represent. Thus, where one party has more than 50% participating interest, it is said to “drive the bus.” However, the minority interest holders will typically seek a unanimity requirement for certain kinds of decisions. Clearly, the greater the detail in a JV agreement which specifies what the JV is to do, the less scope exists for deal-changing decision making issues to arise.

A key point to recognize is that control of the management committee is usually linked to changes in the participating interests of the parties through funding and dilution provisions. The JV agreement will typically provide for one or more budgets annually for the JV which needs to be funded by the participants. Before the JV budget is adopted by the management committee, each participant is generally provided an opportunity to comment on it. After the budget is adopted (usually by a majority of votes on the management committee) each participant which is to maintain its participating interest in the JV, must fund its share of costs budgeted or else may elect to fund a smaller share or decline altogether. The consequences of failing to fund are usually that the declining party’s participating interest in the JV is diluted to a lesser percentage with the lost points of participating interest being distributed proportionately among those participants who elect to fund. There are many different types of dilution formulas from “straight line,” which is the reduction in participating interest equal to the proportion of missed funding divided by aggregate funding, or some multiple of straight line dilution especially at key risk points in the JV’s project life. For example, with straight line dilution, the decision on the part of Party A to not participate in the next $1 million approved budget in a 50:50 JV which has already spent $9 million to date, will result in a 5% dilution to Party A ($500k/$10M). Henceforth, that JV will be a 45:55 JV and the parties will fund accordingly. Some JV agreements provide that where a party declines to participate twice, it is no longer open to that party to elect to participate in further expenditures. The non-participating party will thereafter suffer dilution if the other parties continue to fund, although the non-participating party will generally retain some interest, such as a royalty, for the funds risked to the point where it ceases to participate in funding.

The dilution formula must relate to the degree of risk of the monies involved, which is dependent on the stage of the JV project that the funds are to be expended upon. Monies needed for a high-risk phase should result in much larger dilution than failure to fund a low-risk phase. The point to recognize is that because the budget is set by the holders of the majority participating interests (the bus drivers), they can determine the speed of the bus and if some of the passengers cannot afford the ticket, the bus will drop them off early. The participating interest to dilution linkage can become a vicious cycle where for example the minority voting partner is unable to control or influence an increasing level of JV expenditures, which it then cannot match, and suffers a continual erosion of its participation and voting rights in the JV, leading again to fewer votes in determining the level of JV
expenditures. There are some protections that can be negotiated for the financially weaker participant, such as requiring unanimity for budgets over a certain dollar limit within a certain period of time or allowing the weaker partner a longer period of time to secure funds for a budgeted program over and above a certain dollar limit.

C. **Unwinding the JV**

A JV can be terminated in a number of ways which typically include:

(a) by agreement of the parties at any time;
(b) in the event of a deadlock in decision making;
(c) by a unilateral decision to leave by one participant which allows the others to elect termination;
(d) after a specified duration of the JV; or
(e) after completion of specified goals of the JV (completion of a certain technology or extraction of the available resources).

On termination, all expenses incurred by the JV must be discharged and its assets disposed of, often by return to the contributing party but otherwise by general sale. The JV agreement will provide that the residual assets, if any, will be transferred at fair value to the JV participants in accordance with the dollar credits in their capital accounts and not with their participating interests.

JVs may be established with a view that they will not be wound up but rather will be sold by the participants as a going concern. In such cases, the JV agreement requires the provisions typical to a shareholders’ agreement where parties desiring to sell their JV interests can “drag-along” the other participants into the sale. Minority interest holders will want the protection of a “tag-along” provision where larger participants are selling out. The JV agreement typically provides restrictions on the assignment by a party of its interest (consent required) and often rights of first refusal in the event a participant desires to sell its JV interest.

The JV agreement must also deal with post-termination agreements. These typically involve ongoing non-competition covenants, confidentiality commitments in respect of matters learned about the other participants or certain JV technologies or mineralized areas interest to the JV. There will also usually need to be terms, allowing for continuing rights to the technology or other assets developed in the course of the JV where they are transferred to one participant subject to mutual licensing arrangements. Finally, on-going indemnification among the parties is typical in connection with JV activities, especially environmental matters in the context of the resource JV, as well as ongoing rights to data or information used in the JV where a participant wishes to pursue like activities on its own after termination.

D. **Dispute Resolution**

Most JVs are managed by a committee whose members have the authority to bind all the participants. Typically, the committee allocates votes on matters in proportion to the interests of the participants in the JV. Therefore, in most JVs the controlling interests are clear although in a 50:50 JV, the agreement will require some deadlock resolution mechanism. A deadlock provision might include a casting vote in a Chairman who is appointed in alternate years by the other 50% party. Often agreements will refer deadlocked matters back to the Chief Executive Officers of the participants for resolution, or alternatively, will require an objective third party arbitrator to make the decision. Deadlocks can also result in the triggering of a shotgun (i.e., mandatory buy/sell) arrangement or termination and liquidation of the JV.
Even though one party may have a controlling vote in the JV, the minority party is still entitled to legal protections. Due to the lesser fiduciary duties in a JV, the corporate law concepts of "oppression" do not exist. A JV will often state that the intentions of the parties are that, even if they disclaim fiduciary obligations, they must still govern themselves in the JV under a premise of "fair dealing." While a well drafted JV agreement should leave little room for disputes and misunderstandings, all possible JV operating issues can not be foreseen by the draftsperson. Some form of alternative (to litigation) dispute resolution should at least be considered. An arbitration clause is a typical fallback, however, the writer is aware of one major American conglomerate that will not, as a matter of corporate policy, subject itself to arbitration clauses. Their philosophy is that they would prefer to rely on their legal rights in a court of law knowing that pending litigation has the effect of forcing parties to mutually compromise. For this particular company, it seems the benefit that arbitration is a private process so details of the dispute are not available to the public does not overcome the concern about the looser evidentiary rules generally involved in an arbitration.

The JV agreement should allow all participants a grievance procedure for certain kinds of transactions of the JV, such as where service fees, royalties or other benefits are paid to a participant. All non-arm’s length arrangements should be capable of being justified to an objective arbiter both for the benefit of the parties themselves but also to ensure tax authorities do not raise concern over transfer pricing and similar issues. The JV books of account must be transparent to all the participants, and to the extent required, government.

E. Setting the JV Objectives

Given that the parties should have already established all the principal objectives and rationale for creating a JV, it is very helpful for the JV agreement draftsperson to see the JV’s business plan. The Plan should provide the particulars of the assets, technology and personnel to be contributed to or committed by the participants to the JV. The Plan should have some principal short term and long term budget information and relate this budget information to success-contingent milestones and decision points. The JV goals should be clear, measurable, achievable and verifiable.

The job of the lawyer is twofold. The lawyer should ensure that the JV agreement properly reflects the Plan and the lawyer should also ensure that the JV agreement will deal with the most likely outcomes of the JV operations. Additionally, the Plan needs to be reviewed to advert the parties of potential tax issues, such as those described above in connection with the possibility of inadvertently triggering taxable dispositions to participants contributing assets. The need for other expertise is also usually evident from a review of the Plan, such as foreign, intellectual property and title, legal, as well as accounting and tax advice.

The JV’s near-term milestones should be developed to coincide with natural decision points outlined in the Plan, such as the key tests of the feasibility of the technology development or resource exploration program where either party might conclude that the JV’s objectives are no longer feasible or entail too much risk or need for additional capital to warrant pursuing the program. It is also helpful if the Plan clarifies what activities are not intended by the parties to be part of the JV’s activities.

The Plan should be referenced in the JV agreement. Deviations from the Plan should require approval by certain majorities of interest in the JV and some should only be implemented by unanimous approval. The consequences of not achieving the Plan should be agreed upon, such as winding-up, mutual buy/sell (or "shotgun") of JV interests, etc.
IV. JV Corporations

According to one author, the larger a joint venture is to be, the more likely it is that the parties will wish to operate it through a corporate vehicle. There are clearly a number of advantages to operating a JV through a corporation including the formal legal recognition and the limited liability afforded its owners, as well as the fact that most business people are reasonably familiar with rules and laws that govern corporations.

Anglo-Canadian law has firmly established certain corporate statutory and common law principles (e.g., the fiduciary obligations of directors) and it is simply not possible to contract out of them. Thus, the JVC will impose on the participants (and certainly the directors of the JVC) a body of statutory corporate law which is immutable and may be inimical to their legitimate intentions, such as complete freedom to compete with the corporation outside of the JV. Where a corporation that is incorporated under the laws of a jurisdiction outside of Canada is concerned, there is no doubt need for counsel in that jurisdiction.

Shares typically carry the right to one vote each and directors are elected by a plurality of votes. Where the parties wish to have voting arrangements which more closely resemble equity participation in the JV, thought will need to be given to multiple voting shares and rotating directorships. Ultimately all that a shareholder of a corporation is able to do is to influence the make-up of the Board of Directors, but it cannot itself vote directly on corporate matters qua shareholder. In Canada, the long-standing Supreme Court of Canada case *Ringuet v. Bergeron* is cited for the proposition that directors of a company cannot enter into agreements to fetter their discretion as directors. Thus, it may be awkward for directors where the parties have agreed to limit access to certain confidential information from each other where such information comes to the attention of a director who has a common law and/or statute-imposed fiduciary duty to the corporation.

In Canada, rules respecting contributions to a corporate vehicle and distributions from a corporate vehicle are governed by rules in the *Income Tax Act* which at least, are relatively clear. Where taxable Canadian property is concerned, the rules generally allow for tax-deferred rollovers of assets into the corporation, although distributions out of corporations are generally taxable both to the corporation and to the recipient. The rules respecting the calculation of paid-up capital and related tax pools, both of which need to be analyzed for the JVC to see if a distribution can be made tax free, are beyond the scope of this paper. Corporations have the disadvantage that certain information about them must be made available to the public. There are many statutory rules concerning the nature of the records which corporations need to keep and the financial information they need to produce.

A. The Bare Trustee Corporation

A JVC may also use a corporation as a “bare trustee” only. This is said to occur where registered title to all or certain JV assets are placed in a corporation’s name, however, the JV participants retain beneficial interest and control over those assets by having the right to direct the bare trustee corporation to transact with the registered title. A bare trustee corporation must act only as trustee and agent for the beneficial JV owners of such assets and will transfer them at such party’s behest for nominal consideration. The position of Canadian tax authorities is that a corporation acting as a bare trustee must not carry on activities which are contradictory to its role as a bare trustee. Hence, consideration should be given to separate corporations for JV operating activities versus the bare trusteeship of assets in the corporate JV model.

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If the trust that is created by transferring assets to a corporation “in trust” permits discretion on the part of the trustee to deal with the property with independent powers and responsibilities, the trust will be considered a separate person for GST and tax purposes. If the trust is a “bare trust” in which the trustee does no more than hold the property and transfer on the direction of the beneficial owner, then for tax purposes one looks through the bare trust to treat the property as being dealt with by the beneficial owner. For tax purposes, a bare trustee is effectively the same as an agent for a nominee, although there are legal differences between these terms as far as Canadian tax authorities are concerned. A bare trustee is a conduit for income tax purposes and is not taxed personally on profits dealing with the trust property on behalf of the beneficiary even though the bare trustee holds title to the property.

Some relevant case law is as follows:

- In *Brookview Investments v. Canada (Minister of National Revenue – M.N.R.)*,[21] the Court held that a corporation held property as bare trustee for a group of shareholders. Therefore, the shareholders should be taxed as if they had dealt directly with the property.

- In *Trident Holdings Ltd. v. Danand Investments Ltd.*, [22] the Court ruled that an agency relationship can exist contemporaneously with a bare trust. As such, a beneficiary is made the principal of the trustee who is acting as agent.

- In *Fraser v. Canada*, [23] the Court ruled that a high degree of autonomy and independence of action enjoyed by the trustee was incompatible with the notion of a “bare trust.”

- In *Stewart v. Canada*, [24] a taxpayer took title to properties, rather than having them in his corporation’s name, in order to circumvent provincial rental housing legislation. The Court found no evidence of an intention to create a bare trust. Thus, the benefits from the properties were correctly included in the taxpayer’s income.

The JVC model requires a shareholders’ agreement to augment the company’s articles and by-laws. Under certain corporate law statutes such as the *Canada Business Corporations Act* [25] (but not the BC *Business Corporations Act*) a unanimous shareholders’ agreement effectively becomes part of the company’s constating documents. The shareholders’ agreement will need to deal with most of the matters that a conventional contractual JV will need to deal with in respect of the contribution of assets, the management and funding of the JV and the consequences of failing to advance additional funds when required to do so. Because the participating interests in the JV are reflected in shareholdings in the JVC, there are many complexities with regards to the issuance and redemption of shares. The JVC will need to be a party to the agreement and the parties will need to decide whether additional funds are contributed by way of loan or share capital and if the latter, whether by way of common equity or preferred equity. All the complexities inherent in corporate capitalization will be applicable to this model. In addition, the parties should be sensitive to the “thin capitalization” rules under certain legislation whereby consequences flow from the JVC having inadequate equity capital (vis-a-vis the business risks it assumes) in circumstances where the parties would otherwise prefer to advance all of their funding by way of loans (for example, public transportation companies and financial intermediaries may require large equity capitalization in the public interest).

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20 See CRA Bulletin B-068.
25 R.S. 1985, c. C-44.
V. Conclusion

The contractual JV is a flexible structure whereby parties can cooperate, share risk and combine unique technologies or resources with capital and expertise. If structured correctly, the JV should not trigger dispositions for tax purposes on the contribution of assets to it although complications arise, especially where foreign parties or assets are involved or where the JV purports to effectively convey the trappings ownership of the assets from one participant to other participants. A JV structure using a corporation adds a layer of liability protection but complicates the structure because of the body of statutory and common law principles applicable to corporations. If the corporation is used only as a bare trustee then that trustee function may be incompatible for tax purposes with the corporation being an active operator or participant in the JV. The use of the corporation in a JV requires either a shareholders’ agreement to flesh out the JV or a shareholders’ agreement in lieu of the JV agreement.

For a useful guideline for the contents of a JV agreement, the reader is invited to review the attached Schedule A, which is the index to a model JV operating agreement in the Canadian oil and gas industry (provided courtesy of the Canadian Association of Petroleum Landmen). Note that the CAPL JV index alone takes three pages; the actual JV agreement that the index represents is some 40 pages of fine print with an additional 40 pages of annotation in respect of the consequences of employing various alternative clauses. Note also that the Schedule A index deals only with JV operations and does not deal with contributions of the JV asset rights to the JV (that is, the usual earn-in or farm-in for a resource project). Negotiators in all situations should not rely on form documents, however they do help at least as a checklist to appreciate the extent of the issues involved in forming, financing, managing and eventually winding up a JV.
### VI. Schedule A—Index of Joint Operating Agreement

*(JV Operating Agreement, Canadian Association of Petroleum Landmen – Copyright – Used with permission)*

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