



JOINT VENTURE AND UNDIVIDED CO-OWNERSHIP ARRANGEMENTS : A QUEBEC PERSPECTIVE

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1. Introduction

Joint venture and undivided co-ownership arrangements have become, during the latter part of the 20th century, accepted modes of carrying on business or holding property. Yet such arrangements are either unknown under statute law applicable in the Province of Quebec governing business relations (the main corpus of which being found, until December 31, 1993, in the *Civil Code of Lower Canada* (“CCLC”) and thereafter in the *Civil Code of Quebec* (“CCQ”)) or have only recently gained a measure of statutory recognition. Thus, joint ventures, as such, still remain an unknown vehicle under the CCQ and it is only under the CCQ, for the very first time, that undivided co-ownership of property is recognized as an accepted mode of holding property¹. Yet although the institution of joint venture still remains unknown under the CCQ and undivided co-ownership as a mode of holding property is now formally acknowledged under the CCQ for the first time, contractual arrangements among persons characterized as “joint venture” or as “co-ownership” (or “indivision”) agreements have been, for so long as such arrangements have existed, the object of case law in the Province of Quebec.

The purpose of this paper is to discuss the types of arrangement typically described as “joint venture” and “undivided co-ownership” both under the law as it stood prior to January 1, 1994 and to consider such modifications, if any, that have been brought to such institutions under the CCQ. As will be noted, the process has historically been, and under the CCQ will probably continue to be one of legal characterization, given that under the CCQ, there is no formal recognition, as such, of “joint venture”, and undivided co-ownership arrangements, although now statutorily acknowledged as a mode of holding property, have yet to be subject to any extensive case law. Courts, when faced with agreements which are identified on their face as “joint ventures”, have been called upon, in the absence of any statutory guide on the subject, to characterize the relationship that they feel to have been created by the parties, and the result of such characterization and the decision that follows may not have been what the parties have intended or have understood as resulting from their agreement.

It is not the purpose of this paper to discuss corporations as vehicles for carrying on business, except to the extent that it is available for parties structuring a joint venture to provide that the business resulting therefrom will be carried out by a separate company, typically a corporation jointly controlled by the joint venturers². To that extent, the use of the corporation as a joint venture vehicle and some interesting case law assimilating certain rules of partnership to corporations will be touched upon.

¹ The CCLC has envisioned undivided co-ownership as an accidental situation forced upon persons, principally heirs or legatees to whom property had devolved in indivision through succession and the thrust of the law, at least in its formal sense, was to bring an end to such state of indivision. Thus, art. 689 CCLC provided: “No one can be compelled to remain in undivided ownership; a partition may always be demanded notwithstanding any prohibition or agreement to the contrary. It may however be agreed or ordered that the partition shall be deferred during a limited time, if there be any reason of utility which justifies the delay”.

² See Pierre A. Cossette, « Les groupements momentanés d’entreprises (joint ventures) : nature juridique en droit civil et en common law » (1984) 44 R. du B. 463 at 467.

2. Joint Venture Arrangements

2.1. Introduction: What is a Joint Venture?

As joint venture arrangements (unlike partnerships) are not nominate contracts under the CCQ, there is no definition of “joint venture” flowing from legislative text or any interpretation thereof. Rather, joint venture describes a *de facto*, particular type of business relationship that has evolved over the years. A precise definition of the term may, therefore, be difficult to come by, but the elements which typically describe such a relationship can be provided. Where such elements are present, a “joint venture” can then be said to exist.

Indeed, an analysis of these elements can even give rise to a definition of the term, although it should be stressed that any such definition represents a generalized description of a factual situation and is in no way to be considered as a definition sanctioned by statute law. The definition provided by Pierre A. Cossette in his article mentioned above may provide a useful basis for considering the relationship understood by the term “joint venture”. Mr. Cossette defines joint ventures as follows³

Nous entendons par groupement momentané d'entreprises, un accord de collaboration entre deux ou plusieurs entreprises en vue de la réalisation d'un projet spécifique. Ce projet peut n'être que de courte durée ou s'échelonner sur plusieurs années. Il est conclu entre deux entreprises c'est-à-dire entre deux entités qui mènent, parallèlement au projet commun, des activités qui leur sont propres et qui, pour cette raison, n'entendent pas consacrer au projet commun la plus grande partie de leurs ressources.

In a business sense, a joint venture may be said to have been created between parties when the following circumstances or arrangements are present⁴:

(a) typically, a joint venture is created for the purpose of realizing a particular business or project and is not intended to describe an ongoing relationship between the parties beyond such venture. Thus, for example, persons who are otherwise engaged in the real estate business for their own account may form a joint venture for the purposes of assembling a particular piece of land and building improvements thereon with a view to eventual lease or sale. A joint venture is typically limited, therefore, to a defined and specific business undertaking. The duration of the joint venture will generally be determined by its purpose;

(b) given that parties to a joint venture typically are otherwise engaged in the same business, many joint venture agreements provide that each party thereto specifically reserves the right to carry on similar businesses without being obliged to account to the other party therefore. There is absent, therefore, the degree of fiduciary relationship between the co-venturers (other than the obligation to act in good faith with respect to the subject of their joint venture) that is present in a partnership or

³ *Ibid.* at 465, 467. Mr. Cossette's view is that the expression « groupement momentané d'entreprises » is the correct rendering, in French, of the expression “joint venture” as that term expresses who the parties to the arrangements are and the nature of the business for which such arrangements have been concluded.

⁴ It is not necessary, of course, for all of these elements to be present. It would be sufficient for a significant number to be present in order for the arrangement to qualify as a joint venture as the term is used in this paper.

corporation⁵. Joint venturers do not generally owe to each other an obligation not to compete outside the joint venture. To avoid the difficulties inherent in the characterization by the court of a “joint venture” relationship as one of partnership and the importation, as a result, of the fiduciary obligations which form part of the law of partnership, it is advisable for the parties to a joint venture to expressly limit the scope of their activities and the obligations of loyalty present between them.

thus, Cossette writes as follows⁶:

Ces devoirs, imposés aux associés dans un partnership peuvent s'avérer onéreux dans le cas d'un special partnership entre deux entreprises qui poursuivent parallèlement des activités qui leur sont propres. De plus, comme ces entreprises vont continuer leurs activités normales suite à la réalisation de l'entreprise commune, elles pourront décrocher par la suite des contrats pour leur propre compte, découlant de leur participation dans le special partnership ou encore acquérir, lors de la réalisation de l'entreprise commune, des informations qui leur serviront par la suite à décrocher des contrats pour leur propre compte.

and concludes thusly⁷:

Ces exemples illustrent les difficultés soulevées par l'application au joint venture des règles gouvernant le partnership. Bien sûr, il est toujours possible, lors de la rédaction du contrat de société, de délimiter clairement l'entreprise commune ainsi que les droits et obligations des parties et ainsi, de minimiser, en conséquence, les inconvénients évoqués ci-dessus. Toutefois, très souvent, les parties à un joint venture ne prennent pas cette peine car elles considèrent avoir conclu un contrat innommé. Comme la dénomination accolée à un contrat n'est pas déterminante dans sa qualification, il peut très bien arriver qu'un tribunal qualifie de contrat de partnership un contrat que les parties croyaient *sui generis* et leur imposent les droits et obligations afférents au partnership.

(c) it is common that parties to a joint venture set forth their understandings in writing. It should be noted, however, that the mere characterization by the parties of their arrangement as a “joint venture” and their specific disclaimer of an intention to create a partnership are of no effect if, in substance, the true relationship created is that of partnership. In such circumstances, the courts will not be bound by the disclaimer of the parties and will apply the rules of partnership⁸;

(d) there continues to be a debate as to the distinct legal status of partnership under the laws of the Province of Quebec. Although it is generally accepted that a partnership, unlike a natural person

⁵ Thus art. 2204 CCQ states: “A partner may not compete with the partnership on his own account or on behalf of a third person or take part in an activity which deprives the partnership of the property, knowledge or activity he is bound to contribute to it; any profits arising from such competition belong to the partnership, without prejudice to any remedy it may pursue”.

⁶ *Supra* note 2 at 470-1.

⁷ *Ibid.* at 471.

⁸ See *Impregilo Canada v. Québec (Sous-ministre du Revenu)*, [1992] R.D.F.Q. 264, 48 Q.A.C. 199, 5 T.C.T., 4187 (Que. C.A.) [hereinafter *Impregilo* cited to R.D.F.Q.]; *Sunshine Exploration Ltd. v. Dolly Varden Mines Ltd. (N.P.L.)*, [1970] S.C.R. 2, 8 D.L.R. (3d) 441, 70 W.W.R. 418.

or corporation, does not possess a distinct legal personality as such, there is authority and some codal justification to the conclusion that insofar as its patrimony is concerned, a partnership possesses a legal identity which is separate and distinct from the patrimony of its partners; the property of a partnership is viewed as a separate patrimony, separate and distinct from that of its partners⁹. It is common, in a joint venture, on the other hand, that the role of each participant is strictly defined and that in performing his role each participant retains title to such of his property as he may use for the purpose of carrying on his activity¹⁰. The property that the joint venture may acquire is usually held in indivision or undivided co-ownership; the property so acquired is not held by the joint venture as a separate patrimony, separate and distinct from that of the parties. It is typical in joint venture arrangements that where “common” property, acquired as a result of the operation of the joint venture, is concerned, the same is held by the parties in strict co-ownership, much like the characterization adopted by Brossard, J. in the *Ville de Québec* case with respect to partnership property;

(e) a joint venture, like a partnership, is created with a view to securing a financial benefit. In partnership, this benefit is expressed as an entitlement to share in profits¹¹. This is in keeping with the notion that partnership property, as such, is held by the partnership and that the partners are entitled to share in the profits which may be allocated to them. Under a joint venture arrangement, however, as title to “joint” assets is typically held in undivided co-ownership, each of the co-venturers enjoys his respective aliquot undivided interest in all of the assets and liabilities comprising the joint venture and, for financial statement purposes, each will often report his holdings in such way¹²;

⁹ The Court of Appeal of Quebec has recently reconsidered the *matter in Québec (Ville de) v. La Cie d'Immeubles Allard*, [1996] R.J.Q. 1566 (C.A. [hereinafter *Québec (Ville de)*]). A majority of the Court held that the assets of a partnership do not constitute a separate and distinct patrimony but that each of the partners holds an undivided interest therein. Although the decision of the Court was unanimous on the issue before it, only two of the judges (Brossard and Beaugard J.J.) concluded as to the foregoing; the third judge, Biron, J.C.A. (ad hoc) held that the assets of a partnership remain a separate patrimony. Professor Yves Lauzon, “Du contrat de société et d’association” in Barreau du Québec et Chambre des notaires du Québec, *La Réforme du Code civil*, vol. 2 (Québec: Presses de l’Université Laval, 1993) 955 at 961 concludes that the CCQ has not modified the old rules and that a general partnership, at least, possesses a form of juridical personality:

La doctrine et les tribunaux ont toujours reconnu la personnalité civile à la société commerciale, c’est-à-dire une existence propre, indépendante de ses membres. Nous ne croyons pas que le C.c.Q. déroge à cette tradition, d’autant plus commerciale. Toutefois, il nous apparaît, qu’en raison de l’article 2252 C.c.Q., la société en participation ne peut jouir de la personnalité civile, puisque chaque associé demeure propriétaire des biens constituant son apport social (et qu’elle n’a pas, non plus, un nom distinct).

Notwithstanding the decision of the Court of Appeal, therefore, the issue, in the view of this writer, is not entirely settled and is not free of controversy.

¹⁰ Although it is interesting to note that art. 2199 C.c.Q. provides that the contribution of a partner may be made “by transferring [to the partnership] rights of ownership or of enjoyment”; to the extent, therefore, that a right of use alone has been transferred to the partnership, the distinction between partnership and joint venture, at least on this point, may be less significant.

¹¹ Thus, art. 2186 C.c.Q. states that a contract of partnership is a contract by which the parties agree, *inter alia*, “to share any resulting pecuniary profits”.

¹² The economic benefit of a joint venture may be realized at the level of the joint venturers and not by the joint venture itself. For example, where the benefit or gain consists in achieving economies of scale or rationalization of costs among joint venturers who may be otherwise competitors (for example, hotel or airline companies settling up a joint venture for

(f) in partnership, each partner “is a mandatory of the partnership in respect of third parties in good faith and binds the partnership for every act performed in its name in the ordinary course of its business”¹³. Typically, in joint venture arrangements, each party performs the specialized activity which he has brought to the joint venture and although there is an on-going obligation to consult and to account, no party has the authority, ostensible or actual, to make any key or major decisions on behalf of the joint venture.

The foregoing is intended to summarize the principal elements of joint venture and how, in certain circumstances, joint venture differs from partnership. Where a joint venture arrangement is said to exist, the results that flow therefrom may be summarized as follows:

- (a) to the extent that a joint venture is evidenced by contract alone (and not through the vehicle of a separate company under the control of the joint venturers), the parties are free to stipulate, subject to the rules of public order, any provisions that they determine best govern their relations, free of the particular rules of partnership which it may not be their intention to create; and
- (b) significant fiscal differences exist between joint venture and partnership.

But for joint venture to exist, a court of law must be satisfied that the parties have indeed created such an innominate or *sui generis* relationship and not one of partnership. If, on an analysis of all relevant facts, a court concludes that what the parties have created is in fact a partnership, the rules of partnership will govern, even if the parties have expressly disclaimed such an intention. And it is to the issue of structure and characterization that we now turn.

2.2. Structure of Joint Venture

As noted above, a joint venture may simply be the result of an agreement arrived at by the participating parties, or it may take on the more formalized structure of a corporation.

Where the parties have agreed that the joint venture be structured by a separate corporation, it is clear, subject to the laws of the incorporating jurisdiction of such corporation, that the joint venture will be separate and distinct entity existing under law, all of the assets of which will be held by it. It is very common, even in such instances, for the parties to govern their relations in such corporations through a shareholders’ agreement. It is not within the purview of this paper to discuss the corporate structure or the types of shareholders’ agreements that the parties may contract. Corporations and shareholders’ agreements have their own set of well-defined rules and internal logic, and once the parties have decided to opt for such a structure, the particular rules of “joint venture” as innominate or *sui generis* contract would appear less significant in that the parties have chosen a well-regulated vehicle (the corporation) to govern their business dealings.

Quebec law does not have a concept analogous to that of the “close corporation” under American law¹⁴. However, Quebec courts will, under certain circumstances, apply the rules of partnership in determining whether a petition to wind up under the *Winding Up Act* (Quebec) should be granted. Usage by the court of analogous principles of partnership law is typically considered where the shares of a corporation are equally held by two (2) separate groups or “partners” and one

the purposes of handling reservations and the like), the benefits achieved are enjoyed directly by the participants to the joint venture and are not measured by any benefits to the joint venture itself, property speaking.

¹³ Art. 2219 CCQ

¹⁴ See Cossette, *supra* note 2 at 517.

shareholder (or group of shareholders) does not enjoy the confidence of the other shareholders. Thus:

- (a) a determination will be made that it is “just and equitable” to wind up a corporation under Section 24 of the *Winding Up Act* (Quebec) if the facts in proof would sustain a petition to dissolve a partnership¹⁵;
- (b) juridical sequestration of the assets of a corporation will be granted in circumstances of a breach of a shareholders’ agreement governing such corporation¹⁶;
- (c) where parties have used a corporate vehicle to operate a joint venture, a petition to dissolve such affiliate will lie where a lack of trust has arisen between the shareholders and the main asset, the operation of which was the economic reason for the creation of the joint venture, has been lost, on the basis that such facts would entitle the termination of the joint venture arrangement and the accessory of such joint venture arrangement, namely the corporation that was set up for the purpose of carrying on its business¹⁷

The “partnership analogy” appears to be limited, however, to those instances where dissolution is demanded. In those instances where the parties have chosen to conduct their affairs through an incorporated company, the courts will apply the rules of corporate law and will not derogate from such rules merely on the basis of the allegation by a party that the “true” business arrangement was intended to be one of joint venture or partnership¹⁸.

Where, however, the parties have decided to evidence their joint venture relations under the contractual regime alone, it is the law of contract which governs their relations *inter se* and their relations with third parties.

¹⁵ *Loi sur la liquidation des compagnies*, R.S.Q. c. L-4. See *Bannerman v. Concrete Column Clamps Ltd.*, [1953] C.S. 107, 33 C.B.R. 125, [1953] 4 D.L.R. 60; *Shimelman v. Ste-Marie Snack Bar of Quebec*, [1968] C.S. 149; *Re Prussin* (1964), 6 C.B.R. (N.S.) 31 (Que. Sup. Ct.); *Joseph Ain v. Centre d’achats Centreville (Longueuil)* (31 July 1995) Montreal 500-05-007556-945, J.E. 95-1677(Sup. Ct.), Lagacé J., where the doctrine of “partnership analogy” is considered in determining whether or not the “just and equitable” remedy will lie to obtain the liquidation of a corporation.

¹⁶ See *Timrod Mining Co v. Société Minière Louvem*, [1972] C.S. 361 at 363; the court characterized the contract between the parties as a « véritable contrat d’association entre les deux parties et peut être considéré comme un contrat de société, passé sous certaines conditions ».

¹⁷ *Cie de Rebutis de Papiers B.D.B. v. Comest Group Ltd.* (26 April 1985), Montreal 500-05-000314-805, J.E. 85-573 (Sup. Ct.), Macerola, J. This case concluded, on the facts, that the parties intended to create a joint venture arrangement and to operate such joint venture through the aegis of a common affiliate. Yet the Court was not altogether satisfied that certain of the elements of the agreement did not partake, at least in some respects, with those of partnership and this finding may have given rise to the conclusions reached by the Court. Thus at page 10 of the judgment, the Court states as follows:

Mais avant de me prononcer sur le sort de la filiale, je me prononcerai sur celui de l’entente. Certaines clauses dans ce type d’entente, qu’il s’agisse d’une société ou d’un contrat sui generis, ont comme effet de créer entre les parties, des rapports du type de ceux existants dans un contrat de société. Ce type de relations personnelles implique l’existence d’une confiance mutuelle entre les associés, confiance qui n’existe plus dans le « joint venture ».

It was this lack of confidence, *inter alia*, which led the Court to conclude that the dissolution of the corporation was the appropriate remedy.

¹⁸ See *Rosenstein v. Agence de Vente MC 75* (21 February 1985), Montreal, 500-05-015389-826, J.E. 85-362 (Sup. Ct.), Halperin J.

Given their unrecognized status under the CCQ, “true” joint venture arrangements must be characterized as innominate or *sui generis* contracts. An innominate or *sui generis* contract, of its nature, will be governed by and interpreted in accordance with the intention of the parties as expressly stated in their agreement or, to the extent not expressly stated, will be given effect in accordance with the necessary intendment of the agreement. Given that “joint venture” has evolved as a recognized means of doing business, to the extent that the written agreement of the parties to a joint venture may be silent on the matter to be settled by a court of law, it is submitted that there is no basis for a court, *a priori*, to fill the void by application of the law of partnership either directly or by analogy where such application is not consistent with the structure (joint venture) that the parties have elected to employ.

2.3. Characterization

This raises the entire issue of characterization. Given the admitted similarities between joint venture and partnership, there is a natural tendency for a court which has the benefit of having before it a series of established rules (*i.e.* the law of partnership) to apply such rules where a joint venture is present. This could arise in any one of the following situations:

- (a) where an agreement characterized by the parties as “joint venture” is silent regarding the rules to apply in a particular situation. If the court characterizes the relationship as one of partnership, the resulting void would be filled by those rules;
- (b) where the rights of third parties may be involved and such rights may be determined in a different manner should the joint venture relationship be characterized as partnership¹⁹;
- (c) where a provision in a joint venture agreement runs contrary to a partnership rule of public order or is at variance with that which is considered essential to a contract of partnership, such provision will be declared illegal or inoperative where the court has characterized the contract as one of the partnership. As noted above, the disclaimer by the parties of any intention to create a partnership will be of no effect where a court concludes, on a reading of the document and a consideration of the true relations of the parties, that a partnership was intended.

The result of all of the foregoing is that parties to an agreement who may have believed that they were not entering into a partnership but rather something else, may find that their juridical relations are indeed governed by the law of partnership, with all of its attending results. By way of example, and as indicated above, art. 2204 CCQ establishes a fiduciary relationship between partners. Given the limited nature or duration of a joint venture business, it may be the expectation of the parties not to be bound by such fiduciary relationship with respect to anything which goes beyond the scope of the joint venture. Should their agreement be silent on the point and a court conclude that a partnership exists, the parties may find that they are precluded from doing that which art. 2204 CCQ proscribes (and, to the extent that art. 2204 is of public order, any attempt by the parties in a joint venture agreement, styled by a court as “partnership”, to waive such clause would be without effect). On the other hand, if no partnership is held to exist, then it would be licit for the parties to permit such activity, as art. 2204 CCQ would not apply²⁰.

¹⁹ For example, would liability to third parties be s

²⁰ There are other examples: Arts. 2209 and 2210 CCQ deal with entitlement of a partner to associate a third party and provide certain rights of redemption. Although such provisions are probably not of public order, the failure of the parties to a joint venture to deal with the subject matter thereof may render such articles applicable where a court of law

Quebec case law on joint venture is not abundant. Unlike the American experience, no series of judicial guidelines has evolved establishing what, in law, constitutes a true joint venture. A reading of most of Quebec case law on joint venture leads one to conclude that for civil law purposes at least, joint venture is considered to be a various of subspecies of partnership. Given the great similarities between the two institutions are in many respects different, such a generalized conclusion is rather regrettable.

On the other hand, there is an established body of case law in the Province of Quebec determining when partnership will not be found to exist. In such circumstances, the courts have determined the relationship of the parties to either partake of another nominate contract or to constitute a contract *sui generis*²¹:

Thus:

- an arrangement in virtue of which a party agrees to permit another to have the use of the courtyard of his residence for the purpose of conducting a business therefrom in consideration, in part, of a sharing of profits does not give rise to a partnership, the common intention of the parties to *affection societatis* being lacking²²;
- an agreement in virtue of which two mechanics undertake to pay certain common expenses, each being entitled to use the tools of the other but each party retaining the financial fruits of his endeavours to the exclusion of the other does not give rise to a partnership²³;
- an agreement in writing to carry on a lumber business where there is no obligation on the parties to provide common funding and to share the profits resulting from such arrangements, such provisions being stated in the agreement to constitute only the possible basis of a future arrangement, does not give rise to a partnership²⁴;
- an agreement in virtue of which a person advances a sum of \$2,000.00 to another for which the lender is to receive interest and one half of the net profits of the business of the borrower does not constitute a partnership, given that the intention to create such a partnership is not otherwise expressed and that participation in the profits in and of itself is not sufficient to create partnership²⁵;
- a stipulation in a charter party for participation in profits does not in and by itself give rise to a partnership²⁶;

characterizes the relationship as one of “partnership”. Art. 2216 CCQ provides that a partnership agreement may not prevent a partner from participating in collective decisions. This rule appears to be one of public order; therefore, to the extent that a joint venture agreement which precludes such participation is characterized as one of partnership which would be null. There are many other provisions in the CCQ dealing with partnership which parties to a joint venture may find they are bound by once their relationship is characterized as one of partnership.

²¹ Generally, the focus of these cases is on whether or not a partnership can be said to exist. Typically, from the plaintiff’s perspective, the focus is not to disclaim or disavow a partnership, but rather to claim its benefits.

²² *Bourboin v. Savard* [1926], 40 B.R. 68.

²³ *Perron v. Laporte* [1945] C.S. 375.

²⁴ *Martineau v. Stewart* [1916], 25 B.R. 289

²⁵ *Reid v. McFarlane* [1893], 2 B.R. 130.

²⁶ *Jones v. Inverness Railway & Coal* [1906], 16 B.R. 16.

- an agreement in virtue of which one party is granted the right to operate a cheese and butter factory belonging to the other in consideration of the payment of certain expenses and an amount based upon the production at such facility does not constitute a partnership rendering the owner of the asset jointly and severally liable in favour of third parties, such a contract being characterized as *sui generis*²⁷;
- it is generally accepted that a leasing arrangement in virtue of which the landlord obtains percentage rent based on gross sales achieved from the leased premises as part of the consideration for the rental of the premises does not constitute a partnership under civil law.

On the other hand, where a party has placed at the disposal of another party premises adjoining those being occupied by the former in consideration of the latter organizing live entertainment in the premises so provided and an arrangement is made as to the division of “the gross take” from the bar operated by the former person, it has been held that such an arrangement does not constitute a lease but rather a “loose form of partnership or joint adventure”²⁸.

As noted above, there is a paucity of judgments rendered by Quebec courts involving the interpretation of a contract or arrangement styled “joint venture”. The judicial tendency, as noted above, is to consider such joint venture agreements as types or sub-sets of partnership.

The following cases may be illustrative:

(a) In *Miller v. Blouin*²⁹, the Superior Court was required to characterize a “pooling agreement” between the parties relating to the sale of mining shares. The contract was evidenced by a short letter agreement which did not provide any term and the Court was obliged to determine the law that governed the relations between the parties, which law would indicate the basis upon which such arrangement could be terminated. The Court held as follows:

The contract may not be labelled with one of those convenient code tags and neatly dealt with as would the case in, say, partnership, agency or deposit. It is a contract *sui generis* which partakes of the elements of several contracts, perhaps, most closely, resembling partnership and mandate. This pactional arrangement or joint venture upon which the parties embarked needs no further definition ... The purpose stated, to ensure equal division between the members upon sale, is sufficient to carry the agreement. No repugnancy arises upon applying to such agreement the principles of law applicable to those contracts which most nearly resemble it³⁰.

Although the Court applied the rules of mandate and partnership by analogy, both of which are types of arrangement terminable at the will of the parties, the court stressed:

²⁷ *Crèmerie de Sorel v. Mondou* [1957] B.R. 850; nor did the Court hold that the arrangement was one of lease and hire of service. This case is of particular interest because although the expression “joint venture” does not appear anywhere in the judgment, the arrangements between the parties seem to have partaken of at least some of the elements of joint venture.

²⁸ *Horn v. Langurand*, [1959] C.S. 110, [1958] R.L. 313 at 315 (Sup. Ct.)

²⁹ [1940], 78 C.S. 197.

³⁰ *Ibid.* at 200-201.

These instances are supplied merely by way of illustration, but there is no reason to believe that the agreement now under consideration should be so different as to require the adoption of other principles³¹.

(b) In *Tilly Manufacturing (1973) Ltd. v. Philip Horne et al.*³² an arrangement had been made (which, although committed to writing, was never signed) with respect to the sale of certain products of the plaintiff. The Court characterized the agreement as a *société en participation* (joint venture), although it is not clear from the report whether the parties themselves or the Court characterized the relationship as one of “joint venture”. On the facts, the Court held that a partnership existed between the parties notwithstanding the failure to execute the agreement. There does not appear to be any issue before the Court, however, as to whether the agreement of the parties, to the extent that one could be found to exist, would be anything other than a partnership;

(c) In *Consortium Interfor Inc. v. Groupe – Conseil G.B.G.M. Ltée*³³, the contractual arrangements between the parties are described in a most summary fashion and the reader is unable, on his own, to identify the juridical relationships intended to be created. The holding of the Court of Appeal suggests, however, that a joint venture was created between the parties which the Court characterized as a *société en participation*, to which art. 1862 of the CCLC applied. In the words of Mr. Justice Baudoin³⁴:

Le pourvoi propose à nouveau les deux mêmes moyens. La société en participation ou le groupement momentané des entreprises de l'appelante et de l'intimée (art. 1862 C.C.B.-C.) semble bien avoir été créé dans le but précis et spécifique : l'obtention du contrat pour le projet de l'A.C.D.I. au Sénégal. Dès le moment donc où l'accomplissement de la finalité pour laquelle la société avait été créée devenait impossible parce que le contrat en question était accordé à d'autres, la société se trouvait dissoute (art. 1892(8) C.C.B.-C.). Il ne m'est pas possible, sur ce point de remettre en question la constatation de fait que tire le juge de première instance de la preuve présentée devant lui, à l'effet que cette dissolution s'est effectivement produite dès la fin de décembre 1984.

Art. 1862 of the CCLC reads as follows:

Particular partnerships are those which apply only to certain determinate objects. A partnership contracted for a single enterprise or for the exercise of any act or profession is also a particular partnership.

The Court simply assumed the existence of a particular partnership. There is nothing in the report to suggest that either party alleged the non-existence of a partnership at the particular time. It may well be that given the text of art. 1862 CCLC, which specifically acknowledges the possibility of a partnership for a “single enterprise”, that the parties automatically assumed their relationship to be one of partnership.

³¹ *Ibid.* at 201.

³² [1978] C.S. 655.

³³ [1993] R.L. 574 (C.A.) (hereinafter *Consortium Interfor*)

³⁴ *Ibid.* at 576.

(d) In *Cam Meyers v. The Royal Bank of Canada*³⁵, a joint venture was concluded for the purpose of fulfilling the terms of an agreement for the construction of a storage dome and conveyor cover to be installed at Iles de la Madeleine, Quebec. The joint venture was evidenced by a brief letter agreement simply confirming the existence of the joint venture and the single purpose for which it was set up. The Court made certain findings of fact with respect to the terms that governed the relationship of the parties. Although many of the elements of joint venture summarized in Section 2.1 of this paper appear to have been present, the Court characterized the relationship between the parties as one of partnership.

As to the characterization process itself, the Court states as follows³⁶:

Plaintiffs and A.C. characterized the relationship as a Joint Venture and it is necessary to define the nature of this relationship and the meaning of the expression “Joint Venture”. The term is not defined in civil law. In common parlance, it covers a spectrum of relationships ranging from a loose amorphous relationship to partnership.

In finding that the relationship before it was one of partnership, the Court concludes as follows:

There are situations where parties choose to use the expression “Joint Venture” to characterize their relationship when in fact they are engaged in a simple sharing of expenses, parallel activity, grouping or other association for mutual convenience. Such a relationship should not be characterized as a Joint Venture, but rather as a co-ownership, association or otherwise. However, so long as Quebec law does not provide a specific definition for the expression “Joint Venture”, parties are free to use that expression and the Court in each such circumstance must delve into the affairs of the parties to explore and determine the nature of the relationship.

However, when a Joint Venture exists for the common profit of the partners, each of whom must contribute to it, property, credit, skill or industry, the expression is simply a synonym for partnership.

Since the objective or goal of the Joint Venture is usually limited to the accomplishment of one object, project or enterprise, most Joint Ventures constitute particular partnerships and fall within the definition of art. 1862 C.C. which provides the following:...

Although the Court was prepared to consider the arrangement between the parties in light of what they appeared to have intended to create, once the element of profit was identified, the Court characterized the relationship as being one of partnership. Given that most joint ventures, being in the nature of business relationships, are set up in anticipation of profit or gain (whether or not such is the ultimate result) *a priori*, most, if not all joint venture agreements would, on the reasoning of the Court, be considered to be partnerships. A different result could be achieved if the contract were to be considered as *sui generis* and the relationship determined on the basis of what the parties intended

³⁵ [1986] R.J.Q. 15 (Sup. Ct.) [hereinafter *Royal Bank*]

³⁶ *Ibid.* at 22.

(which may, in certain instances, in fact be a relationship of partnership) without the expectation of gain being determinative of the issue.

It is interesting to note that the Court acknowledges that for fiscal purposes the characterization of a relationship as a joint venture may have fiscal consequences. The Court concludes, however, that:³⁷

A consideration of these consequences is not necessary for the disposition of the present case. The above remarks made with respect to the Joint Venture are made and are intended to apply only within the context of the Civil Law of Quebec.

Without being required to draw any conclusions in this regard, the Court seems to be prepared to conclude that a relationship may be one of partnership for certain purposes but not for others. This conclusion, it is suggested, can only give rise to inconsistency given that for fiscal purposes (including federal fiscal purposes) courts will apply the terms “joint venture” and “partnership” as they are interpreted by the laws of the particular province in which the issue arises.

The *Royal Bank* decision was reversed by the Court of Appeal³⁸, although on the issue of the legal characterization of the arrangements between the parties, the Court of Appeal expresses its entire agreement with the lower Court. The Court of Appeal concludes with the following general statement³⁹:

Le *joint venture* constituait une société commerciale aux termes de l'article 1863 CC.

(e) In *Montreal (Ville de) v. 100979 Canada Inc.*⁴⁰, the facts are the following. The City of Montreal, as owner of Ile Notre Dame, entered into an agreement awarding the management of the Island to the *Société des gestion des activités communautaires d'Ile Notre Dame* (“Société”). The Société in turn entered into an agreement with a promoter entitling the latter to use the site for the purpose of organizing and realizing “une exposition de dinosauriens animés”. A general construction contract was entered into for the purpose of building the facility. A subcontractor not having been paid, the latter registered the usual legal hypothec. The City of Montreal moved to obtain radiation of the hypothec. The Court was called upon to analyse and characterize the agreement between the Société and the promoter. The city urged, among other grounds, that the relationship was one of lease⁴¹. The subcontractor urged, on the other hand, the existence of a joint venture between the City and the Société. The Court concluded that a joint venture *qua* partnership did not exist, as the usual attributes of partnership, including the intention to create such a relationship, was not present. The court also held that a joint venture *sui generis* had not been created⁴²:

De même, on ne retrouve pas les éléments requis pour conclure à la formation d'un contrat « sui generis ». Il y manque les mentions d'éléments précis indiquant une telle intention : création momentanée et limitée dans le temps d'une entreprise commune, avec dissolution prévue. Le fait de faire

³⁷ *Ibid.* at 23.

³⁸ [1989] R.J.Q. 514, 33 Q.A.C. 317 (C.A.)

³⁹ *Supra* note 35 at 23.

⁴⁰ (27 August 1996), Longueuil 505-05-00313-954, J.E. 96-2078 (Sup. Ct.), Durocher J.; this case is presently in appeal

⁴¹ Such that, in the result, the hypothec would fall based on *Industries Prodair v. Kolomeir*, [1988] 1 S.R.C. 1132, 50 R.P.R. 135, 29 C.L.R. 177, 86 N.R. 123, 16 Q.A.C. 169.

⁴² *Supra* note 40 at 10.

varier la rétribution de la Société en fonction du nombre de visiteurs n'est pas ici déterminant.

It would appear, therefore, that had the elements of a joint venture been found to exist, the Court would have been prepared to consider the rights of the parties in the light of a joint venture relationship without necessarily applying the rules of partnership. On a reading of the document, however, the Court concluded that the elements of a lease were present.

(f) In *Développements de la Haute Gatineau Inc. v. 2687461 Canada Inc. et al.*⁴³, the Court was called upon to consider an agreement which the Court characterized as a *groupement momentané d'entreprises* (Joint venture) set up for the purpose of acquiring Crown lands and developing the same as part of a real estate project. Various disputes had arisen between the parties which gave rise to suits at law.

In characterizing the relationship between the parties as one of joint venture, the court defines the arrangement in the following terms⁴⁴:

Le groupement momentané d'entreprises, (ou projet en coparticipation), (joint venture) a été défini comme « un accord de collaboration entre deux ou plusieurs entreprises en vue de la réalisation d'un projet spécifique ».

Le Code civil du Québec n'élabore pas de contrat nommé à ce sujet mais en pratique des coutumes américaines et de la Common Law, des contrats qualifiés de joint venture ou contrats *sui generis*, sont fréquemment conclus au Québec.

The Court cites, with approval, the finding of the Court of Appeal in the *Royal Bank* case that a joint venture constitutes a partnership under the terms of art. 1863 of the CCLC. Given the nature of the issues that were present before the Court, it is unlikely that the decision would have been rendered differently had the Court characterized the joint venture in terms other than partnership. Other than acknowledging that a joint venture is an innominate contract recognized by civil law, and other than citing the decision of the Court of Appeal that such innominate contracts partake of partnership, the Court does not further analyze the relations of the parties.

(g) in *Howard Edded Inc. v. McCubbin Consultants*⁴⁵, the court considered an agreement (self-styled as a joint venture) entered into for the purpose of preparing and drafting a report “on the best attainable technology to stop pollution of the atmosphere and streams of Ontario by pulp and paper mills”⁴⁶. Although the arrangement between the parties was of relatively short duration and for a specific project – and should have qualified as a *sui generis* joint venture arrangement and not as a partnership – the Court concludes for partnership in the following terms⁴⁷

This case is one where the partnership contract is *sui generis* and entails all the conditions set forth in two separate studies filed as authorities.

⁴³ (6 October 1994), Hull 550-05-002278-912, 550-18-001532-916, J.E. 94-1692 (Sup. Ct.), Frenette J. [hereinafter *Développements de la Haute Gatineau*]

⁴⁴ *Ibid.* at 21.

⁴⁵ (28 February 1994), Bedford (Granby) 460-05-000011-929, J.E. 94-835 (Sup. Ct.), Savoie J.

⁴⁶ *Ibid.* at 2.

⁴⁷ *Ibid.* at 6.

Having concluded as to the existence of partnership, the Court speaks of the consequences of “mutual confidence, trust and loyalty in the pursuit of a common goal” flowing therefrom⁴⁸. Although the Court makes the following statement⁴⁹:

As said, a joint venture is a *sui generis* contract is governed by special rules,

the Court describes the parties as “partners” throughout;

(h) In *Impregilo*⁵⁰, the issue before the Court of Appeal was the exigibility of sales tax arising out of the “transfer” of certain assets owned by parties to an enterprise characterized by them as a “joint venture”. The lower court had held that the joint venture was nothing other than a partnership under civil law. As a partnership enjoyed a separate and distinct patrimony, the lower court had held that the transfer by the “partners” of the assets to the “partnership” was a transaction giving rise to the payment of sales tax⁵¹. The taxpayers had urged that a joint venture is not a partnership, does not therefore possess the limited legal personality of a partnership under Quebec law, and consequently should not have been forced to pay any sales tax on the transfer of the assets. The agreement between the parties expressly disclaimed the intention to create a partnership.

On appeal, the Court of Appeal concluded that notwithstanding that the purpose of the relationship between the parties was limited to the submission of bids for, and obtaining construction contracts on, particular projects (each party otherwise carrying on its respective business for its own account), such relationship was one of partnership.. The Court held⁵²:

Il me semble donc, qu'à part le texte des documents signés entre les parties, rien n'appuie la prétention qu'il ne s'agisse pas d'une société commerciale particulière. Tous les gestes posés indiquent le contraire. Je souligne, en particulier, que lorsque deux ans après la signature d'une convention on sent le besoin d'en clarifier les ambiguïtés, en tentant de le faire de façon rétroactive, c'est qu'on a peut-être vu soi-même que les intentions n'étaient certainement pas exprimées aussi clairement qu'on le plaide aujourd'hui.

Au surplus, si l'on tenait pour acquis qu'il s'agit d'un *joint venture*, cela ne disposerait pas de la question d'une façon nécessairement favorable aux appelantes. Le plus souvent, le *joint venture* n'est rien d'autre, en droit québécois, qu'une société commerciale. Dans une affaire de *Royal Bank of Canada c. Meyers*, notre Cour, sous la plume du juge Beaugard, en venait à la conclusion que le *joint venture* « constituait une société aux termes des dispositions du *Code civil* ».

In summary, it would appear that the following conclusions may be reached :

- (a) Quebec courts acknowledge the existence, as such, of joint ventures;

⁴⁸ Again, it is highly unlikely that had the Court found the relationship to be one of *sui generis* joint venture and not of partnership the results would have been any different. In joint venture arrangements, each party is entitled to expect the loyalty and good faith of the other, and on the facts of this case, the defendant had not comported himself in the appropriate manner.

⁴⁹ *Supra* 45 at 10.

⁵⁰ *Impregilo*, *supra* note. 8.

⁵¹ The decision of the lower court is reported at [1984] R.D.F.Q. 206.

⁵² *Supra* note 8 at 268.

- (b) given that joint ventures are unknown entities under statute law, such contracts are characterized as either innominate or *sui generis* contracts;
- (c) although characterized as innominate or *sui generis* contracts, judicial tendency in Quebec is to view joint venture arrangements as variants of partnership and absent the specific agreement of the parties on the issue to be settled or in determining the relationship of the entity with third parties, judicial recourse will be had to, and the dispute determined following the application of, the provisions of the law of partnership.

All of this may, depending on circumstances, give rise to far-reaching consequences. The example of third party liability may be illustrative of the point.

Under the CCQ, members of a partnership are solidarily liable to third parties for the debts contracted on behalf of the partnership, where such debts are incurred in the carrying on of an enterprise⁵³. This responsibility flows from the entitlement of each partner to bind the partnership.

On the other hand, where a joint venture has been set up for the purpose of conducting a particular business, each joint venturer bringing to the business his own particular skills and talent, each party generally preserves his autonomy with respect to his own acts, and there is an absence of delegation of power to the other members⁵⁴. Given that there is a greater measure of autonomy amongst joint venturers, the act of one of them should not, *a priori*, give rise to the solidary liability of all the joint venturers. Cossette observes that the solidary responsibility arising from partnership is difficult to reconcile where the co-venturers exercise a high degree of autonomy. He says as follows⁵⁵:

Cette responsabilité, conçue dans le cadre de la relation traditionnelle entretenue entre les associés à l'intérieur d'une société, s'applique mal à un groupement momentané d'entreprises dans lequel les parties jouissent d'un haut degré d'autonomie.

In those instances where the courts have determined that a partnership does not exist (without determining thereby the existence of a joint venture) it has been held that given the relative freedom of action of the parties, joint and several liability would not attach. Cossette writes⁵⁶:

Afin d'éviter l'applicabilité de la solidarité qui, en matière commerciale, on le sait, se présume, l'on doit assigner à chaque partie une part de l'entreprise à réaliser dont elle assumera l'entière responsabilité. En effet, pour que la solidarité joue, encore faut-il que les débiteurs soient obligés à une même chose. Ainsi, dans l'affaire *Cargill Grain Co. Ltd. c. Foundation Co. Ltd. of Canada* il fut jugé que des entreprises groupées pour la construction d'installations portuaires, mais responsables chacune d'une partie de l'ouvrage, N'étaient pas solidaires entre elles.

The writer could find no reported decision where a Quebec court has concluded that members of a joint venture (and so styled by such court) engaged for profit or gain were not jointly and severally

⁵³ Art. 2221 CCQ.

⁵⁴ Cossette, *supra* note 2 at 475.

⁵⁵ *Ibid.* at 503. Cossette notes, however (*ibid.* at 477-8), that the majority of American case law would hold that each of the joint adventurers has the power to bind the others and to subject them to their party liability with respect to matters which are within the scope of the joint enterprise.

⁵⁶ *Ibid.* at 509, see also *Crèmerie de Sorel v. Mondou*, *supra* note 27.

(or solidarily) liable to third parties for the acts of one of the members independently carried out by him.

The issue arises as to whether any changes brought to the civil law by the CCQ may impact upon any of the foregoing, and it is to this issue that we now turn.

2.4. *Joint Venture Under the CCQ*

As stated above, the CCQ, like the CCLC before it, does not recognize joint venture as a nominate contract. Certain provisions of the law of partnership, on the other hand, have been modified, and although it is not the purpose of this article to discuss these modifications, certain of the changes may impact upon the status of joint venture under the law of Quebec. They are the following:

(a) in several of the cases mentioned above, the courts have characterized joint venture as types of particular partnerships⁵⁷. Particular partnerships no longer exist as a separate category of partnership under the CCQ. To the extent, therefore, that joint venture was characterized as a particular partnership under the former law, and given that such institution no longer exists, it may be arguable that one of the underpinnings of joint venture to the law of partnership is no longer available. In the opinion of this writer, this conclusion is not particularly strong. Since, in all likelihood, the term “particular partnership” was abolished in order to rationalize the terminology, and whether or not the term “particular partnership” existed to describe a type of partnership (*inter alia*, one contracted for a particular purpose) does not change the fact that a general partnership under the CCQ may be set up for the purposes described in art. 1862 of the CCLC without the necessity of describing it as such, as there is nothing in the CCQ which prohibits a partnership from being set up for a limited or particular purpose;

(b) the CCQ has introduced the regime of “undeclared partnerships” (*sociétés en participation*)⁵⁸. This regime resembles that of the anonymous partnership which was formerly governed by one article, art. 1870 CCLC. Whereas anonymous partnerships were assimilable in all respects to ordinary partnerships, the rules of undeclared partnerships under the CCQ are different:

(i) under art. 2252 CCQ, in respect of third persons, each partner retains title to the property constituting his contribution to the undeclared partnership;

(ii) under art. 2253 CCQ, each partner contracts in his own name and is alone liable towards third persons, saving where third parties have become aware of the existence of the partnership, in which case all the partners become liable;

(iii) although each partner is entitled to enjoy the benefits of a contract entered into by any other partner, art. 2250 CCQ provides that the third person is bound only towards the partner with whom he has contracted unless the partner has declared his capacity as such;

(iv) the rules of the dissolution of the contract of undeclared partnership differ, in certain aspects, from the rules relating to dissolution of an ordinary partnership. Certain events (for example, death or bankruptcy) which in the case of a general partnership entail the loss of partner status but do not bring the partnership itself to

⁵⁷ See the *Royal Bank* case, *supra* note 35, and the *Consortium Interfor* case, *supra* note 33.

⁵⁸ See arts. 2250ff CCQ.

an end (see art. 226 CCQ) give rise, in the case of undeclared partnership, to the termination of the partnership (see art. 2258, para. 2 CCQ). The Minister of Justice, in his commentary on this point, states as its reason for the distinction, that the *intuitu personae* aspect is more significant for undeclared partnerships than for general partnerships.

It can be argued that certain of the elements of undeclared partnership are analogous to those of joint ventures:

- (i) A joint venture which disclaims any intention of being a partnership will be “undeclared” by its very nature;
- (ii) As noted above, it is not uncommon in joint venture arrangements for each party to remain owner of that which he brings to the joint venture so that there is no intent to create a separate patrimony of assets. Art. 2252 states, at least where the partners are concerned, that each partner retains the ownership of the property that he contributes to the partnership;
- (iii) As noted earlier, in joint venture arrangements, because of the particular talent or activity brought by each party to the joint venture (which may be highly specialized in nature) and the relative autonomy of action that may be enjoyed by such persons, third party liability should not automatically attach to a co-venturer because of the acts of another co-venturer. As noted above, art. 2253 CCQ states that each partner contracts in his own name and is alone liable towards third persons, save for the exception created by the second paragraph of the article.

Given these similarities, it may be available to a court of law to assimilate a joint venture arrangement to an undeclared partnership. This would be regrettable where the parties have no intention that their relationship be governed by the law of partnership, declared or otherwise. The institution of joint venture as a commercial vehicle has sufficiently matured so as to be governed by its own set of rules and logic. Parties capable of contracting are free to establish their own rules of conduct and the contract between them will constitute the law between them. Absent the intent of the parties to create a partnership, there is no basis for considering a joint venture as nothing more than a subspecies of partnership. The provisions of the CCQ dealing with the interpretation of contracts should provide a basis from which a court of law could give effect to the intention of the parties in structuring a joint venture based upon what that institution has come to mean in commercial practice, rather than by following the law of partnership. Thus, art. 1426 CCQ states as follows:

In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, *and usage* are all taken into account [emphasis added].

As shall be further discussed below, the CCQ acknowledges, textually for the first time, the possibility for parties to conclude agreements governing their relations as undivided co-owners. To the extent that the operation of a business consists in the acquisition, ownership and administration of property (for example, a real estate business), the option available to undivided co-owners to govern their relations through agreements, now expressly recognized by law, may permit the

evolution of real estate joint ventures characterized strictly as co-ownership agreements, free of any influence from partnership law⁵⁹.

2.5. Fiscal Considerations

As noted above, there are significant fiscal differences between partnership and joint venture. It is not within the purview of this article to consider, in any great detail, wherein these differences lie. In this connection, the reader is recommended to an excellent article written by Blair P. Dwyer entitled "A Comparison of the Income Tax Implications of Using a Partnership or a Joint Venture"⁶⁰

(a) A partnership computes capital cost allowance at the partnership level rather than at the individual partner level. Each partner is allocated his share of net profits which would include, in such calculation, the capital cost allowance that has been taken. As capital cost allowance is taken at the partnership level, this amount must be agreed to by all the partners. In a joint venture, on the other hand, since the assets are held in indivision, each member of the joint venture may take, in any fiscal period, such portion of capital cost allowance as relates to his aliquot share of the property as he shall determine to be in his best interest.

(b) A corporation whose principal business is the leasing, rental, development or sale of real estate owned by it may claim capital cost allowance from such a property that exceeds its share of net rental income from such property. This rule would apply to a partnership of corporations except that if one partner does not qualify for the exception at any time in the partnership's fiscal year, the exception will not be available for any other partner. Such a disallowance would not apply, however, where the property is held under a joint venture arrangement; thus members of the joint venture need not concern themselves with the status of the other joint venturers.

(c) As a general rule, a taxpayer only deducts interest and property taxes in respect of vacant land to the extent of the net income derived therefrom; any deficiency must be capitalized and added to the cost of the land. Certain exemptions are applied to corporations whose principal business is the leasing, rental or sale of real estate, but such exemption is not available to partnerships (even those composed exclusively of real estate development corporations). They would, however, be available if the land is held by the corporation as a participant in a joint venture.

(d) the first \$200,000 of active business income earned by a Canadian-controlled private corporation is subject to the small business rate. Where several corporations constitute a partnership, the partnership is entitled to a notional small business deduction of \$200,000 which must be shared by all of the partners. This rule does not apply to a Canadian-controlled private corporation that is a member of a joint venture. Each joint venturer has a separate full entitlement to the \$200,000 small business limit⁶¹.

⁵⁹ Real estate joint ventures have over the past several years been characterized as co-ownership agreements, as parties to such arrangements typically consider themselves not to be partners but undivided co-owners, governed only by the terms of their agreement. Now, the possibility of using such an agreement is specifically acknowledged by law.

⁶⁰ In *Corporate Tax Planning in a Changing Business Environment*, Corporate Management Tax Conference, 1994 (Toronto: Canadian tax Foundation, 1995) 10:1.

⁶¹ See *Woodlin Developments Ltd. v. M.N.R.* [1986] D.T.C. 1116, [1986] C.T.C. 2188 (T.C.C.).

(e) Statutory “at risk” rules which restrict the amount of losses that may be deducted by certain members of certain partnerships do not apply to joint ventures, since each participant in a joint venture computes his income independently of other joint venturers.

(f) Income or losses allocated to a partnership avail to persons who are partners at the end of the fiscal year in question. Consequently, as pointed out by Dwyer, a person who becomes a partner on the last day of the partnership’s fiscal year may participate in income or loss of the partnership for the entire fiscal period. This technique does not apply to joint ventures. Generally, participants in a joint venture obtain no deduction for costs incurred before their participation.

(g) In certain circumstances, elections may be filed that affect the computation of partnership income. Such election, to be valid, must be filed on behalf of all partners and is binding upon each of them. On the other hand, each participant in a joint venture can choose to make these elections on his own, whether or not the same election is being made by any other joint venture participant.

(h) As the assets of a partnership are considered to constitute a separate patrimony⁶², partners can transfer partnership interests among themselves, and to the extent that such partnership interests constitute capital property, the same would generate capital gains or losses. However, the selling partner will not realize any recapture on depreciable property assets since the object of the transfer does not consist of assets but rather of the partnership interest. In a joint venture, on the other hand, the asset is not held by any entity separate and distinct from the members of the joint venture. Accordingly, the transfer by a joint venturer of his interest in a property is equivalent to the sale of that property and will be governed by the usual rules of recapture, if applicable. Similarly, if joint venture participants decide to readjust their respective interests, such readjustment will, of necessity, give rise to the purchase and sale of an interest in the property, which again would be governed by the usual rules⁶³.

Given the significant differences between the fiscal treatment of partnerships and joint ventures, it is hardly surprising that tax courts have been called upon to consider the differences between the two structures. The result has been that in the area of fiscal law, at least, courts more readily admit the distinction between joint venture and partnership⁶⁴. The differences in the treatment of joint venture under civil law and under tax law would appear to the practitioner to be somewhat surprising, given that joint venture, as such, is not a recognized entity under the *Income tax Act* (Canada) acknowledges the existence of partnership for the purposes of calculating net income therefrom (which is then attributed to the partners, each to the extent of his interest in the partnership), the Act does not, as such, define the term “partnership” and “joint venture”. The result should be the same whether the issue of joint venture arises in a civil law or fiscal context. Yet it is not⁶⁵.

⁶² Subject, however to the decision of the Court of Appeal in *Québec (Ville de)*, *supra* note 9

⁶³ For a consideration of the consequences of a partition of assets held in undivided co-ownership, see L. Samoisette, “La Propriété indivise du Code Civil du Québec: quelques considérations fiscaux” (1993) 24 R.D.U.S. 185.

⁶⁴ See *General Construction Co. v. M.N.R.* [1959] S.C.R. 729, [1959] C.T.C. 300, 59 D.T.C. 1169, 19 D.L.R. (2d) 373; *Woodlin Developments Ltd. v. M.N.R.*, *supra* note 61

⁶⁵ As noted in the *Royal Bank* case (*supra* note 35), Mr. Justice Steinberg readily admitted that his assimilation of joint venture to partnership availed only for civil law purposes and that the distinction might be otherwise under tax law.

3. Indivision or Undivided Co-Ownership Arrangements

3.1 Introduction: The Law Before January 1, 1994

The CCLC did not acknowledge undivided co-ownership as a contractual means by which parties holding property in common could govern their relations. Rather, the CCLC considered indivision as a situation forced upon the parties principally as a result of succession, but resulting from other situations as well, such as the dissolution of community of property between spouses or the dissolution of a partnership. The CCLC considered indivision to be an unnatural state of affairs and the economy of the law was to facilitate bringing an end to such a situation⁶⁶.

But even under the law as it stood prior to January 1, 1994, undivided co-ownership, as a means of holding property, was an accepted vehicle acknowledged by Quebec courts⁶⁷. As Deschamps indicates, a distinction must be drawn between indivision imposed upon the parties (such as indivision resulting from succession) and indivision chosen by the parties as a means of holding property in common⁶⁸.

Thus, notwithstanding that the CCLC may have eschewed indivision and provided detailed mechanisms to bring it to an end, it was settled law under the CCLC that it was possible for parties in indivision to provide otherwise. By agreement, they could postpone partition and create the rules under which their joint ownership of property would be conducted. Under art. 689 CCLC, partition could be deferred “during a limited time”, provided that such delay be justified for “any reason of utility”⁶⁹.

Indivision or undivided co-ownership agreements under the CCLC would have constituted innominate contracts and, depending upon what the parties intended to achieve by their arrangement, could probably have been characterized as one of the following:

- (a) As a simple *sui generis* co-ownership agreement, the purpose of which was limited to regulating the relations of the parties as co-owners, in their capacity as such, with respect to the property held in common. This type of agreement would have been most typical between co-owners of a dwelling⁷⁰.
- (b) As a partnership agreement, properly speaking. A partnership would arise where the relationship had been so qualified by the parties or where the elements of partnership otherwise existed.

⁶⁶ For an excellent analysis of the law of undivided co-ownership under the CCLC, see M. Deschamps, “Vers une approche renouvelée de l’indivision” (1984) 29 McGill L.J. 215.

⁶⁷ Indeed, such arrangements are even anticipated in art. 689, para. 2 CCLC.

⁶⁸ Deschamps, *supra* note 66 at 235-236.

⁶⁹ See e.g. *Robitaille v. Poulin*, [1988] R.J.Q. 1293 (Sup. Ct.); *Dubarle v. Valla*, [1992] R.D.I. 227 (Que. Sup. Ct. (settled in appeal)). In *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900, 133 D.L.R. (4th) 643, 39 C.B.R. (3d) 253 (*sub nom* *Dubois v. Raymond, Chabot, Fafard, Gagnon Inc.*) 196 N.R. 81, the Supreme Court of Canada unanimously held that an indivision agreement which provided for a postponement of partition for a period of thirty-five years was valid.

⁷⁰ See e.g. *Yarasbefsky Alice v. Shirley Miller Potashner*, [1988] R.J.Q. 149 at 152 (Sup. Ct.), where the superior Court characterizes the relationship of the parties in the following terms:

Il s’agit d’une situation *sui generis* où, tout en demeurant dans l’indivision, les copropriétaires se sont reconnu la liberté d’administration d’une quote-part physiquement décrite et déterminée. Rien ne s’oppose à un semblable arrangement qui présentait d’ailleurs des avantages pratiques considérables et qui a résisté à 30 ans de relations permanentes.

See also *Richer v. Lamothe*, [1994] R.D.I. 102 (Que. Sup. Ct.), *Dubarie v. Valla*, *supra* note 69.

(c) as a joint venture agreement. Although real estate joint ventures may have been treated as true joint ventures for income tax purposes (where the elements of joint venture described in Section 2.1 above are present), for civil law purposes, such arrangements have been characterized as partnerships by Quebec courts. Thus, in *Développements de la Haute Gatineau*⁷¹, although the Court characterized the relationship as *un groupement momentané d'entreprises* (Joint venture) and although many of the elements of a typical real estate joint venture may have been present, the Court cited and followed the decision of the Court of Appeal in the *Royal Bank* case by characterizing the joint venture as a commercial partnership under art. 1863 of the CCLC.

Where the parties to an indivision did not provide for the management of the property held in common, it was generally admitted that any decision would require the unanimous consent of all of the co-proprietors.⁷²

3.2. Undivided Co-Ownership Under the CCQ

One of the more important innovations under the CCQ is the recognition of undivided co-ownership as a legitimate means of holding property. Whereas under the CCLC indivision was viewed as a state of affairs imposed upon parties, the CCQ recognizes that such state may arise out of the will of the parties, and that the parties are free to contract as to the rules that will govern them as co-owners.

Again, it is not within the purview of this paper to analyze in depth the law of undivided co-ownership. Some of the more noteworthy changes are, however, the following:

- (a) although the contract of undivided co-ownership need not be committed to writing, and may be verbal, any provision postponing or deferring partition must be in writing (art. 1013 CCQ). Unlike the former art. 689 CCLC, it is not necessary for the parties to justify such deferral on grounds of utility;
- (b) an agreement to postpone partition may not exceed 30 years (any term beyond 30 years will be reduced to such period of time), but is renewable;
- (c) it is possible for the parties to publish (register) an indivision agreement relating to immovable property. Art. 1014 C.C.Q. sets out the minimum information which must be contained in such registration. Publication will not transform the personal rights contained in an indivision agreement into real rights; it will simply make the agreement opposable to third parties;
- (d) the CCQ provides a mechanism whereby a co-owner may disinterest a third party purchaser of another co-owner's interest by paying to the former the purchase price and expenses paid, provided that such right of redemption is exercised within 60 days of knowledge of the transfer (subject to a peremptory one year delay) (art. 1022 CCQ). Apparently, there had been some recommendation that the right be one of first refusal and not a right of redemption, but the legislator opted for the second mechanism;
- (e) an undivided co-owner may disinterest a creditor who is about to sell the share of an undivided co-owner or take it in payment of an obligation by paying the amount involved

⁷¹ *Supra* note 43

⁷² See e.g. *Stem Corporation v. Koutsogiannopoulos*, [1959] B.R. 421; *Compagnie de Téléphone du Lac St-Jean v. Compagnie de Téléphone du Saguenay* (1933) 54 B.R. 314

and becoming subrogated in the rights of the creditor (art. 1023 CCQ). The right of subrogation will avail, however, only to an undivided co-owner who has registered his address at the registry office. The second paragraph of art. 1023 states that an undivided co-owner who has not so registered “has no right of redemption against the creditor or the successors of the creditor”. Presumably, therefore, if a co-owner has not exercised his right of subrogation under the first paragraph of art. 1023 CCQ, he may exercise his right of redemption under the second paragraph after the creditor has taken title;

(f) The Code sets out rules relating to decision-making. Under art. 1026 CCQ, administrative decisions require a double majority of number and shares. Decisions as to alienation, partitioning, changing the destination of the property or making substantial alterations, etc., require unanimous approval. Finally, the parties are free to entrust the administration of the property to a manager, and where the parties cannot agree upon the appointment of a manager or his replacement, the second paragraph of art. 1027 C.C.Q. allows a Court to intervene;

(g) Art. 1030 CCQ maintains the principle stated in art. 689 CCLC that no party is obliged to remain in indivision. Exceptions exist where the parties have agreed to postpone partition by agreement (which, as noted above, must be in writing and may not exceed 30 years, but is subject to renewal) or such postponement has been caused by a testamentary disposition, a judgment, or by operation of law. Where the property has been “appropriated to a durable purpose”, partition cannot be demanded at any time⁷³. Art. 1033 CCQ provides that partition requested by a co-owner may be avoided by the other co-owners satisfying the demanding party in kind or in cash.

Most of the rules in the CCQ dealing with indivision are suppletive in nature and may be modified or added to by the parties. Indeed, most indivision agreements relating to commercial property are far more detailed and extensive in nature than the somewhat limited provisions of the CCQ. The provisions of the CCQ are relevant, however, to the extent that they are of public order (for example, partition cannot be deferred beyond 30 years) and will apply in those circumstances where the agreement of the parties is silent. Under the transitional rules, the Articles of the CCQ dealing with indivision will apply to indivision arrangements existing prior to January 1st, 1994⁷⁴.

Given that undivided co-ownership or indivision agreements now exist as nominate contracts under the civil law of Quebec, the question arises as to whether a real estate joint venture under the CCQ will continue to be characterized as a “partnership”, or rather as a state of indivision governed by the will of the parties, either as expressed in their agreement or as may necessarily flow from their decision to create a joint venture, and the applicable rules of the CCQ dealing with indivision.

The following example may be illustrative. Assume that under the terms of a joint venture (so styled) the parties have omitted to provide for the management of the asset. If the juridical arrangement is characterized as one of partnership, art. 2215 CCQ would apply and any partner would have the right of management and his acts would be binding upon all of the partners. If, on the other hand, the relationship is characterized as one of indivision alone, art. 1026 CCQ would apply and administrative decisions would require the double majority of number and shares.

The possibility for a Court to apply the rules of indivision contained in the CCQ (where such rules did not exist under the CCLC) may serve as a counterweight to the judicial tendency to characterize

⁷³ This would include streets, roads, aqueducts and the like which are held in indivision.

⁷⁴ *An act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57, s. 51 [hereinafter “*Transitional Law*”]

joint venture as a partnership. Undivided co-ownership is ultimately but a statement as to the manner in which property may be held; unlike partnership, it is not a contract⁷⁵. As a textual innovation, the Code now specifically recognizes that the parties to a co-ownership are free to contract *inter se* as to the rules which will govern them. And with respect to the arrangements which govern such state of indivision, the parties are virtually free to contract as they will. Very few of the articles in the CCQ dealing with indivision are of public order but rather are suppletive in nature in that they will only apply in the face of the silence of the parties⁷⁶. It is the freedom of the parties to contract in order to give effect to their unique business relationship characterized as “joint venture”, free from the constraints imposed by the application of partnership rules, that will permit joint venture to evolve in the Province of Quebec as a special legal entity subject to its own rules and logic. The availability of co-ownership agreements as distinct legal vehicles may permit joint venture, at least in respect of those business relations dealing with the acquisition, ownership and management of real estate, to come of age under the CCQ.

In this respect, a well developed body of case law dealing with undivided co-ownership has yet to emerge under the CCQ. Certain decisions have been rendered, however, which are worthy of note. They are the following:

- (a) In 2855-7346 *Québec Inc. v. 2847-3254 Québec Inc.*⁷⁷, the Superior Court was called upon to interpret the effects of a co-ownership agreement entered into prior to January 1, 1994 but which, pursuant to s. 51 of the *Transitional Law*, would be governed by the provisions of the CCQ. The arrangement between the parties was clearly commercial in nature and the co-ownership agreement expressly disavowed any intention on their part to create a partnership. One of the issues before the Court dealt with the manner in which certain decisions would be made. The Court analyzed the co-ownership agreement in light of applicable provisions of the CCQ on indivision. Absolutely no reference is made in the judgment to the applicability of the law of partnership to settle the issue. One can only speculate about how this case would have been pleaded and adjudicated upon under the CCLC⁷⁸;
- (b) the case of 2855-7346 *Québec Inc. v. 2847-3254 Québec Inc.*⁷⁹ was another instance between the same parties described in the preceding case. Again, the Court applied the rules of indivision to govern the relations between the parties⁸⁰.

⁷⁵ Under art. 1009 C.C.Q., co-ownership is described as a special *mode* of ownership; contract is but only one of the means through which co-ownership may arise; it may arise *ex contractu* (e.g. through a succession).

⁷⁶ On the other hand, other articles of the CCQ, which are of public order, may apply to an regulate indivision relations. For example, given the text of art. 1801 CCQ, it may no longer be available for parties to provide for an automatic “dilution” of a co-owner’s interest in the circumstances of the latter’s default. (See *Société d’Hypothèques CIBC v. Prévost* [1996] R.D.I. 198 (Que. Sup. Ct.) and *Investissement Limtor Inc. v. Jedco Sporting Goods* (1994), R.D.J. 539 (Que. Sup. Ct.); both cases hold that a clause in a lease providing for automatic forfeiture by a tenant of its property garnishing leased premises in the event of its default be deemed unwritten). It would be possible, however, for the co-owners to hypothecate their respective interests in the property in favour of each other to secure their obligations under the indivision agreement.

⁷⁷ [1994] R.D.I. 601 (Que. Sup. Ct.)

⁷⁸ The Court also holds that a clause in the co-ownership agreement stipulating a penalty in the event that a co-owner would seek partition is not, on its face, against public order.

⁷⁹ [1996] R.J.Q. 1669 (Sup. Ct.).

⁸⁰ The Court confirming, as well, that the penal clause mentioned above was a valid one. This case is presently under appeal.

The attention of the reader is drawn, once again, to the new provisions of the CCQ dealing with undeclared partnerships.

The second paragraph of art. 2250 CCQ states as follows:

Mere indivision of property existing between several persons does not create a presumption of their intention to form an undeclared partnership.

Accordingly, indivision in and of itself does not give rise to a presumption of undeclared partnership. Presumably, if a state of indivision exists where the other elements of undeclared partnership are present, it would be possible for a court of law to declare the existence of such an undeclared partnership. Furthermore, the second paragraph of art. 2252 CCQ states that undivided property acquired or held by the undeclared partnership “is undivided property in respect to the partners”. This would suggest that with respect to such property, the rules of undivided co-ownership would apply. There appears to be, therefore, a merging of certain concepts between undivided co-ownership and undeclared partnership. As noted earlier in this paper, undeclared partnerships partake, in certain respects, of certain of the elements of joint venture. The provisions of the second paragraph of art. 2252 CCQ may serve such a result insofar as real estate joint ventures are concerned. It may be urged, given the text of the art., that such arrangements are nothing more than a subspecies of undeclared partnership. For the reasons suggested above, such a development would be regrettable, as it would continue to tether joint venture unnecessarily to the law of partnership.

4. Conclusion

Although joint venture and undivided co-ownership agreements are not of recent vintage, each developed in the Province of Quebec in the absence of any specific legislative enactment. Joint venture still remains unrecognized as a nominate contract under civil law. It is only under the CCQ that undivided co-ownership agreements are acknowledged for the first time as a means of regulating the holding of property held in undivided co-ownership. Given the absence of legislative enactments, it is likely that joint venture will, at least for civil law purposes, continue to be regarded as a variant of partnership⁸¹. It is possible, however, that with the emergence of indivision agreements as nominate contracts, “true” real estate joint ventures may henceforth be recognized as such without any influence from, or reference to, the law of partnership.

⁸¹ Perhaps as a variant of undeclared partnership.