THE LEGAL STATUS OF THE JOINT VENTURE

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Commercial actors commonly describe their group undertakings as joint ventures. That practice has infiltrated the judicial lexicon and appears to be fostering a supposition on the part of some judges that a joint venture is a distinct legal form. The supposition is unwarranted. A review of the American, English, Australian, and Canadian case law and commentary discloses no substantive basis for the claim of distinct status.

Les acteurs commerciaux décrivent régulièrement leurs entreprises collectives comme des coentreprises. Cette pratique a infiltré le lexique juridique et semble favoriser une supposition de la part de certains juges qu'une coentreprise représente une forme juridique distincte. Cette supposition n'est pas justifiée. L'étude de la jurisprudence et des observations américaines, anglaises, australiennes et canadiennes ne révèle aucune base fondée justifiant un caractère distinct.

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I. INTRODUCTION

Beginning in 1973 with the judgment of Jones J. in *Graham v. Central Mortgage and Housing*,[1] there seemingly has been a progression in Canada towards judicial recognition of the claim that a "joint venture" is a distinct legal form. In most cases the support for the claim is barely implicit. Judges frequently appear to employ the label only because that is the label the parties used in their documents and pleadings. They apparently do not appreciate that the assertion of discrete status rests on an infirm foundation. Other judges do confront the issue directly. They take either the conventional view that an unincorporated business undertaking is a partnership, or the novel view that a joint venture is a distinct form of commercial association. The analysis in the latter decisions, however, is cursory and pleonastic, often involving little more than a reference to the deficient *Graham* analysis. Still, cases dealing with "joint ventures" continue to accumulate. It appears that Canadian courts are on the verge of accepting the joint venture claim notwithstanding their failure to offer any substantive justification. I propose to interrupt that march to false distinction.

II. THE JOINT VENTURE CLAIM

Business arrangements usually attract a default legal characterization of some kind. In the immediate context, four analytical approaches have been employed to avoid a partnership

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1 (1973), 13 N.S.R. (2d) 183 (S.C. (T.D.)) [*Graham*].

characterization of joint effort. The first is to deny partnership explicitly. That, however, is effective only as between the parties to the agreement. Status assertions do not affect third parties.[2] The second approach is to structure the arrangement to satisfy the definitional criteria of some other legal form. Agency or employment are possibilities. Co-tenancy is another.[3] Those characterizations are not applicable, however, if the parties exercise de jure or de facto joint control over active production (doing more, for example, than merely maintaining co-owned property), which typically is the case for arrangements that are labelled "joint ventures." The third approach is a variant of the second approach, but requires separate attention. The approach is to claim that there is no idiosyncratic default characterization — that instead the arrangement is exclusively or wholly defined by contract.[4] Relations between the parties are characterized as principal to principal, with the important consequence that liability exposure to third parties is a matter of separate or independent determination. Again, however, a principal/principal characterization is not appropriate where production is jointly controlled. Joint control is distinguishable from two or more parties simply having a community of interest in the sense that each is interested in the advancement of the overall undertaking. A supplier to a vehicle manufacturer, for example, has an interest in advancing the production of vehicles, but is not jointly engaged in assembling the vehicles.

The fourth approach, which is yet another special case of the second approach, is the joint venture claim. The objective is to displace the partnership characterization with, in this instance, a novel legal form. To do so in the absence of recognized doctrine, however, it is first necessary to establish that the "new" form is legally distinct from the partnership form. Legal advisors strive to produce that result by drafting contractual arrangements that are intended to differ both in substance and appearance from a conventional partnership. It is then claimed that the contract creation is a distinct new form of association that ought to be recognized by the courts (or the legislature).[5] The difficulties with that approach are our present concern. It will become apparent that advocates of the joint venture claim appear to misconceive the reach of partnership law. Partnership has always been a broad category of default legal regulation. Diverse joint arrangements fit within the category. Variation in individual arrangements is *expected*. Attempts by advisors to locate arrangements outside the borders of the category often fail because they focus on superficial or inconsequential aspects of the relations between the parties. Advisors usually are not able either to alter, or draft around, the joint control that typifies "joint venture" arrangements. The joint control of production, when essential to the parties, is a feature of an arrangement that cannot easily or

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2 See Robert Flannigan, "The Limits of Status Assertion" (1999) 21 Advocates' Q. 397 [Flannigan, "Status Assertion"].

3 On the distinction between partnership and co-tenancy, see *Robert Porter & Sons Ltd. v. Armstrong*, [1926] S.C.R. 328; *National Insurance Company of New Zealand, Limited v. Bray*, [1934] N.Z.L.R. Supp. 67; *Thrush v. Read*, [1950] 2 D.L.R. 392 (Ont. C.A.); *Lansing Building Supply (Ontario) Ltd. v. Ierullo* (1989), 71 O.R. (2d) 173 (Dist. Ct.); *Rice v. Rawluk* (1992), 8 O.R. (3d) 696 (Gen. Div.). See also Robert Flannigan, "The Control Test of Principal Status Applied to Business Trusts" (1986) 8 E. & T.Q. 37 at 46-47, nn. 33-34.

4 It will be appreciated that contract law is itself a form of default regulation.

5 There are a few statutory references to joint ventures. Consider the definition of joint venture in the *Investment Canada Act*, R.S.C. 1985 (1st Supp.), c. 28, s. 3 (joint venture "means an association of two or more persons or entities, where the relationship among those associated persons or entities does not, under the laws in force in Canada, constitute a corporation, a partnership or a trust"). It will be appreciated that this wording begs the question.

plausibly be re-characterized as a "several" obligation. Consequently, the parties cannot avoid the conclusion that they carry on business in common with a view to profit.

III. AMERICAN ORIGIN

The joint venture claim originated in the courts of the United States in the nineteenth century.[6] The earliest cases were concerned with the rule that the remedial procedure for partnership disputes was an action in equity for an accounting. An exception arose where the purpose of a partnership was to carry out a single transaction. The development of that exception had nothing whatever to do with a claim of distinct status. It was predicated instead on the supposed lesser complexity of the affairs of a partnership engaged in a single transaction. For such partnerships, a partner could pursue an action at law without having to incur the greater cost and delay of the equitable action of account. Thereafter, and despite arising as a pragmatic accommodation for a class of partners, the distinction the courts made between partnerships generally and partnerships for single transactions was misconstrued as a substantive difference between partnerships on the one hand, and joint ventures on the other.[7]

Twentieth century developments in the U.S. did not advance the conceptual argument for the joint venture claim. Most judges continued to regard joint ventures as partnerships, or as governed by partnership law.[8] Judges who insisted that joint ventures were not partnerships commonly identified the key difference as the pursuit of a single transaction or venture. Generally the analysis in those cases did not extend beyond assertion. The same bifurcation of authority is found in the American literature on the topic, with the proponents of the joint venture claim also failing to support assertion with principle or policy.[9]

The joint venture claim is not uniformly recognized across the U.S. Far from it. Courts taking the conventional position have always greatly outnumbered those taking the view that the joint venture is distinct. Moreover, it is not a case of nuanced variation across jurisdictions. Rather, it is a situation where the minority view cannot be reconciled with the majority view, and a choice must be made. The majority choice in the U.S. has been constant and clear for two centuries. In the minority jurisdictions, no credible conceptual foundation for the joint venture claim has been established. The lists of distinguishing criteria that American courts and commentators have proposed collapse quickly when subjected to close analysis. There is no distinction to be found, for example, in an ability to sue at law rather than in equity, an agreed absence of agency or loss-sharing, or the capacity of corporations to participate in the undertaking.[10] Accordingly, while the joint venture originated in the U.S., it did not generally achieve recognition or conceptual integrity there, and the American jurisprudence is an unsatisfactory foundation for recognizing the joint venture in Canada.

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6 See Robert Flannigan, "The Joint Venture Fable" Am. J. Legal Hist. [forthcoming] [Flannigan, "Fable"].

7 *Ibid.*

8 There is, of course, no difference between concluding that an arrangement is a partnership and that it is governed by partnership law. Yet historically the latter mode of expression was frequently adopted in American judgments.

9 Flannigan, "Fable," *supra* note 6.

10 *Ibid.*

IV. THE ENGLISH POSITION

It was common for American judges and commentators evaluating the joint venture claim to observe that the English courts did not accept the joint venture as a distinct legal form. That remained the conventional English view through the twentieth century.[11] There were seemingly inconsistent or otherwise curious decisions in the nineteenth century, but they were explicable as co-tenancies, agencies, or employments, or they were analytically undeveloped.[12] There were also a few problematic decisions near the close of the twentieth century.[13] In 1985, for example, in *Hampton & Sons v. Garrard Smith (Estate Agents) Ltd.*,[14] Dillon L.J. characterized a relationship as "not a partnership, but it is a joint venture raising obligations of good faith."[15] That statement was isolated and undeveloped, and the judgment was sharply discounted several years later in *Thames Cruises Limited v. George Wheeler Launches Limited*.[16] Another Court of Appeal decision, *Vekaria v. Dabasia*, is of concern because of ambiguity over joint venture status relative to partnership and co-ownership.[17] The Court, however, did appear elliptically to equate the joint venture with partnership: "The same considerations militate against there being such a joint venture as militate against there being a partnership."[18]

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11 *Saville v. Robertson* (1792), 4 T.R. 720, 100 E.R. 1264 (K.B.); *Gouthwaite v. Duckworth* (1810), 12 East. 421, 104 E.R. 164 (K.B.); *Davidson v. Robertson* (1815), 3 Dow. 218, 3 E.R. 1044; *Tupper v. Haythorne* (1815), Gow. 135, 171 E.R. 863; *Crawshay v. Maule* (1818), 1 Swans. 495, 36 E.R. 479; *Raba v. Ryland* (1819), Gow. 132, 171 E.R. 861 (C.P.); *Reid v. Hollinshead* (1825), 4 B. & C. 867, 107 E.R. 1281 (K.B.); *Russell v. Austwick* (1826), 1 Sim. 52, 57 E.R. 498 (Ch.); *Holderness v. Shackels* (1828), 8 B. & C. 612, 108 E.R. 1170 (K.B.); *McInroy v. Hargrove* (1867), 16 L.T. (N.S.) 509; *Lowe & Sons v. Dixon & Sons* (1885), 16 Q.B.D. 455; *Mann v. D'Arcy*, [1968] 2 All E.R. 172 (Ch.); *Walker West Developments Ltd. v. F J Emmett Ltd.* (1978), 252 EG 1171 (C.A.); *European Strategic Bureau Ltd. v. Technomark Consulting Services Ltd.* (20 June 1995, unreported) (Ch.). ("A joint venture is essentially a partnership for a single venture and the relationship will come to an end (save for the purpose of accounting and winding up) when the venture is accomplished.")

12 Consider *Meyer v. Sharpe* (1813), 5 Taunt. 74, 128 E.R. 614 (C.P.); *Gibson v. Lupton* (1832), 9 Bing. 297, 131 E.R. 626 (C.P.); *French v. Styring* (1857), 2 C.B. (N.S.) 357, 140 E.R. 455 (C.P.); *Heap v. Dobson* (1863), 15 C.B. (N.S.) 460, 143 E.R. 864 (C.P.); *Alfaro v. De La Torre* (1876), 34 L.T. (N.S.) 122 (Ch. D.); *Walker v. Hirsch* (1884), 27 Ch.D. 460. Query *Tyser v. Shipowners Syndicate (Reassured)*, [1896] 1 Q.B. 135.

13 The issue was raised, but left unaddressed, in *Shanshal v. Al-Kishtaini* (1999), 1999 WL 477436 (Q.B.), revd. [2001] EWCA Civ 264, [2001] 2 All E.R. (Comm.) 601. Consider also *Todd v. Adams*, [2001] 2 Lloyd's L.R. 443 (Q.B. (Admlty)).

14 [1985] 1 Estates Gazette Law Reports 23 (C.A.).

15 *Ibid.* at 24.

16 [2003] EWHC 3093 (Ch.) at para. 20 ("The Judgment is short and there is no analysis of any arguments. Further, it was a decision based on an application for a judgment in default. All the court appears to have decided is that as the facts deemed to be admitted in the Statement of Claim, there was some duty to account. It says nothing more.").

17 [1998] EWCA Civ 1880.

18 *Ibid.* at para. 31.

A more significant decision, if only because of its citation in a popular text,[19] is *Spree Engineering & Testing Limited v. O'Rourke Civil & Structural Engineering Limited*.[20] Two companies entered into a joint venture agreement to work on a gas pipeline project under a contract with a pipeline contractor. MF Kent Services Limited (Kent) was to do the mechanical and electrical work and RO Rawling & Son Limited (ROR) the civil construction work. Kent engaged the plaintiff to conduct weld testing. When the project failed, both the plaintiff and Kent became insolvent. The assignee of the plaintiff's claim for payment then sued ROR, claiming that ROR was liable as Kent's partner. Deputy Judge Stow, Q.C. concluded that there was no partnership between ROR and Kent. His main reason for that conclusion, however, was deficient. He stated that "although there were joint meetings from time to time to review progress, both companies carried out their own part of the work independently of each other."[21] It should be obvious that different specializations often are the very reason parties combine together, and that such arrangements clearly are partnerships. What matters to a partnership characterization is whether the parties jointly organize and control an undertaking, not whether they insert themselves into the actual specialized work of each other. The parties in fact had formed a joint executive committee "whose decisions would be binding on both parties."[22] That was evidence, essentially ignored by the judge, that the parties carried on business *in common*. The judge apparently thought that partnership status was negated by the complaint of an engineer for the pipeline contractor that "the contract was being run as if it were two separate contracts, with two separate contractors operating from two different offices."[23] If those dealings with the pipeline contractor went beyond the work details of the respective specialized areas of expertise (which would be of no significance), they only indicated that both Kent and ROR believed that they were jointly entitled to conduct the overall work effort.

The Judge also found comfort in the unsupported opinion of the authors of a commentary on joint ventures:

> [Counsel] also referred to passages on pages 29 and 30 of Linklaters and Payne's work on joint ventures, and submits that the case here is a classic illustration of a non-integrated joint venture which is not a partnership. In analyzing the situation here, I derive considerable assistance from passages on page 30 of this last work. It reads as follows:

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19 R.C. I'Anson Banks, *Lindley & Banks on Partnership*, 18th ed. (London: Sweet & Maxwell, 2002) at 11, 74. According to the author, at 74 [citations omitted, emphasis in original]:

> In the current editor's view, whilst it can properly be said that all partnerships involve a joint venture, the converse proposition manifestly does not hold good. This is demonstrated by the unreported decision in *Spree Engineering and Testing Ltd. v. O'Rourke Civil and Structural Engineering Ltd.*, in which a distinction was drawn between a so-called non-integrated joint venture, which would not involve a partnership, and an integrated joint venture, which *would*, in general, constitute the joint venturers as partners.

The "converse proposition" (that all joint ventures are partnerships) undoubtedly is not true in the sense that legal forms other than partnership (including principal/principal relations) often are described by participants as joint ventures. It is not the case, however, that a non-integrated joint venture cannot be a partnership. Integration of the assets of separate business operations in the performance of a joint undertaking is not a requirement for the existence of a partnership relation between those businesses.

20 [1999] EWHC QB 272.

21 *Ibid.* at para. 16.

22 *Ibid.* at para. 12.

23 *Ibid.* at para. 16.

> "The participants in a non-integrated joint venture would typically assume the same joint and several liability to the employer for the performance of their obligations under the construction contract, as would parties to an integrated joint venture.
>
> In a non-integrated join venture on the other hand, no profit is struck at the level of the joint venture. Instead, the work is divided up into discreet segments which the participants carry out severally, each bearing their own costs of performance, and dividing between them the flow of payments from the employer under the construction contract. Profit is thus taken, not at the level of the non-integrated joint venture, but severally by the participants, and it is possible for one participant to show a profit, and another a loss, on their respective parts of the work under a non-integrated joint venture.
>
> It will be seen that the status of the two types of venture is very different for the purposes of the Partnership Act. An integrated joint venture generally satisfied the test of 'the relation which subsists between persons carrying on business in common with a view to profit.'
>
> On the other hand, the non-integrated joint venture generally falls to be treated simply as an unincorporated association, since the participants generally share no more than the gross payments received from the employer under the construction of the contract — see the Partnership Act sub-section 2.2."
>
> I accept Mr. Davis's submission that this description of a non-integrated joint venture is close to the situation we have in this case. One must be cautious about accepting at face value the opinions of authors, unsupported directly by authorities of the courts, but I find the analysis compelling, and likely to represent the views of professionals used to dealing with joint ventures on a regular basis.[24]

It is enough to observe at this point that the analysis of the quoted authors is akin to the "product" argument that appeared in Australia a few decades earlier.[25] As will soon appear, the argument is an empty one. The assertion that it matters that parties take profit on a "several" basis (by dividing the "flow of payments") is problematic on its face where the facts otherwise indicate that the parties were carrying on business in common with a view to profit.

The conventional view of "joint ventures" appears to have been confirmed recently by the House of Lords in *Khan v. Miah*.[26] In the Court of Appeal, the majority had held that parties to a joint venture did not become partners until trading actually commenced. Speaking for a unanimous House of Lords, Lord Millett expressed a different view:

> I think that the majority of the Court of Appeal were guilty of nominalism. They thought that it was necessary, not merely to identify the joint venture into which the parties had agreed to enter, but to give it a particular description, and then to decide whether the parties had commenced to carry on a business of that description. They described the business which the parties agreed to carry on together as the business of a

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24 *Ibid.* at paras. 23-24.

25 Consider the similar argument that a participation in profits (as opposed to a view to profit) is an essential criterion for a partnership characterization. That proposition has been rejected in the English cases. See *Stekel v. Ellice*, [1973] 1 All.E.R. 465 (Ch.); *Darker v. Pimm* (23 November 1988, unreported) (C.A.); *M. Young Legal Associates Ltd. v. Zahid Solicitors*, [2006] EWCA Civ 613.

26 [2001] 1 All E.R. 20 (H.L.).

> restaurant, meaning the preparation and serving of meals to customers, and asked themselves whether the restaurant had commenced trading by the relevant date. But this was an impossibly narrow view of the enterprise on which the parties agreed to embark. They did not intend to become partners in an existing business. They did not agree merely to take over and run a restaurant. They agreed to find suitable premises, fit them out as a restaurant and run the restaurant once they had set it up. The acquisition, conversion and fitting out of the premises and the purchase of furniture and equipment were all part of the joint venture, were undertaken with a view of ultimate profit, and formed part of the business which the parties agreed to carry on in partnership together.
>
> There is no rule of law that the parties to a joint venture do not become partners until actual trading commences. The rule is that persons who agree to carry on a business activity as a joint venture do not become partners until they actually embark on the activity in question. It is necessary to identify the venture in order to decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it. Any commercial activity which is capable of being carried on by an individual is capable of being carried on in partnership.[27]

The implicit if not express message from the coupling of joint venture with partnership is that in England the joint venture is not recognized as a separate form of association.

Of the subsequent English cases that deal with "joint ventures," only a few possibly imply any inconsistency with that conventional position.[28] In *Button v. Phelps*, Englehart J. seemed to accept the submission of counsel that a "joint venture was not per se a relationship which gave rise to fiduciary obligations in equity."[29] That would be inconsistent with the conventional view, and the originating American jurisprudence, unless the statement was intended to accommodate other legal forms of "joint venture," such as a corporate joint venture where shareholders do not have status fiduciary obligations to each other. The submission advanced in *Button* was adopted one month later in *Beddow v. Cayzer*, where, although the joint venture was a partnership, the trial judge insisted that: "Of course, a partnership, or fiduciary duties may not arise from a joint venture, depending upon the terms of the agreement for the joint venture."[30] The statements in these two cases, in their blunt form, may produce confusion going forward. Apart from that consideration, the conventional English position remains that the joint venture is not a distinct legal form.

V. THE CANADIAN RECEPTION

The joint venture claim crossed into Canada from the United States in 1973. It arrived courtesy of Jones J. in *Graham*.[31] Prior to *Graham*, with rare anomaly,[32] the Canadian view

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27 *Ibid.* at 24.

28 Consider generally *Murad v. Al Saraj*, [2004] EWHC 1235 (Ch.); *Donnelly v. Weybridge Construction Limited*, [2006] EWHC 2678, 646 Estates Gazette 208 (T.C.C.); *Welford v. EDF Energy Networks (LPN) Ltd.*, [2007] EWCA Civ 293, 724 Estates Gazette 170 (C.A.); *Sintra Homes Ltd. v. Beard*, [2007] EWHC 3071 (Ch.).

29 [2006] EWHC 53 at para. 57 (Ch.) [*Button*].

30 [2006] EWHC 557 at para. 255 (Q.B.). The point was not clarified on appeal at [2007] EWCA Civ 644.

31 *Supra* note 1.

32 See *Sutton v. Forst* (1924), 55 O.L.R. 281 (S.C. (A.D.)). In *Olson v. Gullo* (1994), 17 O.R. (3d) 790 at 798 (C.A.) it is said (without citation) that *Sutton v. Forst* was "affirmed, apparently without reasons, by the Supreme Court of Canada on June 6, 1924."

was that a joint venture was a type of partnership.[33] In *Re Lunenburg Sea Products Ltd.*, Doull J. stated that: "In our law it has been and is still considered a species of partnership. The difference between the two kinds of partnership is that the joint adventure is limited in its scope and in its time. It usually is concerned with one particular transaction to be finished within a limited time."[34] In *Thrush v. Read*, Roach J. expressed the view of the Ontario Court of Appeal that the members of a syndicate were "partners in a joint venture."[35] In *Graham*, Jones J. conceded that conventional view, but was not constrained by it. He chose instead to act on the unsatisfactory analysis of American commentators.

It perhaps is understandable that Jones J. may have been receptive to the joint venture claim. The arrangement before him had seemingly complicated elements of separate and joint effort, and both profit and nonprofit motives.[36] The case involved a counter-claim in a foreclosure action for damages. The purchasers had refused to make mortgage payments because of deficiencies in construction. The argument of the purchasers was that their mortgagee, Canadian Mortgage and Housing Corporation (CMHC), was engaged in a partnership or joint venture with the builder of the houses and consequently was liable for the defective work of the builder. The outcome of the litigation therefore depended on the nature of the relationship between the builder and CMHC.

CMHC was interested in the construction of low income housing. In this instance, it took the initiative and sought proposals from local contractors. Bras D'Or Construction Ltd. (the builder) was enlisted to build a set number of houses according to plans, and with financing, provided by CMHC. The builder owned the houses it constructed, but agreed that it would sell the houses only to purchasers approved by CMHC. Once purchasers were approved, they would assume from the builder the CMHC mortgages on their respective homes. That overall arrangement led the purchasers to advance their argument that CMHC was liable along with the builder for the construction deficiencies. Justice Jones responded positively to that argument and concluded that CMHC and the builder were engaged in a joint venture. He did not, at least in the judgment, consider the partnership argument.

Justice Jones may have left the partnership argument unexamined because it was implausible on the facts. The arrangement was no more than a contract between two distinct bodies pursuing two distinct undertakings. Although the judge suggested otherwise in his joint venture discussion, the undertakings of the two parties were separate. They did not carry on a business in common. They remained principals relative to each other. The narrow undertaking of the builder was to build homes to specification for financial gain. The very different specific undertaking of CMHC was to foster the construction of low income housing stock to meet government social policy. It pursued that objective in part through its

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33 *Manitoba Mortgage v. Bank of Montreal* (1889), 17 S.C.R. 692; *Ross v. Canadian Bank of Commerce*, [1923] 3 D.L.R. 339 (P.C.); *Matthews v. Maurice* (1923), 54 O.L.R. 64 (S.C. (H. Ct. D.)); *Merriam v. Kenderdine Realty Co.* (No. 1) (1915), 25 D.L.R. 369 (Ont. C.A.); *Re Lunenburg Sea Products Ltd.*, [1947] 3 D.L.R. 195 (N.S.S.C.) [*Lunenburg*]; *Thrush v. Read*, [1950] O.R. 276 (C.A.) [*Thrush*]; *Coast Steel Fabricators Ltd. v. Minister of Finance*, [1973] 4 W.W.R. 701 (B.C.S.C.).

34 *Lunenburg*, *ibid.* at 204.

35 *Thrush*, *supra* note 33 at 279.

36 Consider whether the absence of an intent on the part of one party to achieve pecuniary gain negates an overall partnership characterization. Justice Jones did not address the question. Consider *Westcan Malting Ltd. v. Canada*, [1998] G.S.T.C. 34 (T.C.C.) [*Westcan*].

general undertaking as a financier of housing stock. The builder did not purport to engage in either one of those CMHC undertakings. Its sole objective was the construction of the houses. The contract between the two was exceptional in one main respect, but that difference did not suggest partnership status. Unlike standard arrangements between lenders and builders, CMHC had the exclusive right to approve purchasers. That was a term negotiated by CMHC to allow it to pursue its objective of providing housing for low income families. The term had no effect on the construction undertaking of the builder. It would be different only if both parties jointly approved purchasers, which could be taken to indicate that they were acting "in common" in the undertaking of supplying low income housing. Nor was it of consequence that the builder constructed the houses based on specifications provided by CMHC. Buyers do not become partners because they contract for specific or customized characteristics for the products they purchase. It also is of no consequence that CMHC employees regularly inspected the construction of the houses. CMHC had no discretion or ongoing control in relation to house construction. Its only power was to require compliance with the specifications defined at the outset in the contract. Accordingly, because the partnership argument was not promising, Jones J. may have thought it best to move directly to the joint venture argument.

Justice Jones did not misunderstand the significance of his analysis. He was aware that he was addressing a novel claim. Unfortunately, his attempt to justify that claim was based almost exclusively on the analysis that Walter Jaeger contributed to Samuel Williston's text on contract law.[37] As discussed elsewhere, Jaeger's analysis did not accurately reflect the American jurisprudence, or otherwise offer a credible basis for distinguishing joint ventures from partnerships.[38] Justice Jones did not appreciate that fact, however, because he neglected to conduct his own review of the American case law. Justice Jones first cited Barrett and Seago for the view that "this rather peculiar type of business organization has had increased use" for large scale tasks and where it was necessary to pool equipment and skills.[39] The significance of scale, however, is not obvious. Nor is the need to pool equipment and skills, as that propels the formation of many partnerships. It perhaps is unnecessary to add that a joint venture appears to be "peculiar" only because the claim of distinct identity is inconsistent with the fact that the arrangement has all the physical attributes of a partnership.

Justice Jones went on to quote extensively from Jaeger's discussion. Here we find all of the propositions that supposedly confirm the independent existence of the joint venture form. Jaeger stated that the courts, "responding to the urgent problems arising from the need of applying fundamental principles of the common law to new developments in the world of business and commerce, have gradually evolved what may become a distinctive legal relationship: The joint venture."[40] This train of analysis is both unsupported and incoherent. In particular, the very claim of distinct status is contradicted when Jaeger states that the

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37 Jaeger replaced Williston for the third edition of the text. See W. Jaeger, *A Treatise on the Law of Contracts*, 3d ed. (Mount Kisco, N.Y.: Baker, Voorhis & Co., 1959), vol. 2, ss. 318-319C [Jaeger, *Williston*]. Jaeger was a leading proponent of the joint venture claim, publishing a number of articles on the topic shortly after his addition to *Williston*. See Flannigan, "Fable," *supra* note 6.

38 See Flannigan, *ibid.*

39 J.M. Barrett & Erwin Seago, *Partners and Partnerships: Law and Taxation* (Charlottesville, Va.: Michie, 1956), cited in *Graham*, *supra* note 1 at para. 62.

40 *Graham*, *ibid.* at para. 64.

courts *evolved* "what *may become* a distinct legal relationship."[41] The next observations quoted from Jaeger are equally problematic:

> Unaided by established precedents of stare decisis and faced with the exigencies of rapidly developing and expanding business methods and requirements, the courts have, quite naturally, shown a wide divergence of views in their characterization of the joint venture, and an understandable reluctance to formulate a precise definition of "this case law hybrid of recent origin and undetermined connotation."
>
> The cases show that there has been a complete lack of terminological uniformity or exactitude in the judicial expressions attempting to formulate a definition of joint ventures; and many courts have declared that the particular circumstances and agreement as well as the object of the undertaking must determine the legal nature of the association.[42]

The difficulty with the joint venture claim is not lack of precedent, judicial reluctance, or the lack of uniform terminology. The problem, rather, is that nothing in the claim differentiates the joint venture from conventional partnership. The idle suggestion by Jaeger that the stunted progression of the claim was attributable to judicial intellectual dissonance is telling. Most judges quite properly require more than undeveloped assertion before conceding the existence of a new legal form.

Jaeger continues on, as cited by Jones J., to note that the joint venture is founded entirely on agreement between the parties: "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."[43] That is a striking proposition. How is it coherent to describe what clearly amounts to a standard partnership arrangement (a common undertaking for joint profit) and then add "without … forming a partnership in the legal sense."[44] Consider also Jaeger's statement that "[f]acts showing an intention to unite resources, such as money, property, labor, knowledge and skill in a joint endeavor to attain a result for the benefit of the parties will go far towards establishing the existence of a joint venture."[45] Do those stated facts not perfectly describe a model partnership?

Finally, consider the introductory comments to the list of requisites or factors that Jaeger believed characterized the joint venture:

> Besides the requirement that a joint venture must have a contractual basis, the courts have laid down certain additional requisites deemed essential for the existence of a joint venture. Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated

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41 *Ibid.* [emphasis added]. Jaeger subtly but fundamentally altered this wording in a paper published a year later. See Walter H.E. Jaeger, "Joint Ventures: Origin, Nature and Development" (1960) 9 Am. U.L. Rev. 1 [Jaeger, "Joint Ventures"]. He replicated the sentence but changed the ending ("gradually evolved what *appears to have become* a distinctive legal relationship described as the joint venture") (at 5) [emphasis added]. No authority was offered to justify that very different proposition.

42 *Graham*, *supra* note 1 at para. 64.

43 *Ibid.* at para. 65.

44 *Ibid.*

45 *Ibid.*

which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:

> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
> (b) A joint property interest in the subject matter of the venture;
> (c) A right of mutual control or management of the enterprise;
> (d) Expectation of profit, or the presence of "adventure," as it is sometimes called;
> (e) A right to participate in the profits;
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.[46]

The introductory remarks are incoherent. The various factors are said to be "additional requisites deemed essential." Yet immediately thereafter it is said that "no definite rules have been promulgated which will apply generally to all situations." Then, finally, the factors "must be present." Beyond that, the listed factors place the arrangement squarely within the borders of the conventional conception of partnership. The listed factors actually suggest that a joint venture is more partnership than most partnerships. The factors describe a close and engaged relationship for joint profit.

Given his essentially exclusive reliance on Jaeger's analysis, it is no surprise that Jones J. concluded that "[t]he concept of joint venture has been clearly recognized by the American courts."[47] As we have seen, however, that proposition was not true then, and it is not true now.[48] Only a few American courts have concluded that the joint venture can be distinguished from a partnership. The majority view in the U.S., by a very wide margin, is that the joint venture label (unless it is a reference to some other established form) invariably describes what in law is a partnership.

Having accepted that a joint venture was a distinct legal form, Jones J. then explained why he believed the arrangement between the builder and CMHC fit within that category.

> In my view there was a contribution by both parties of money, property, skill and knowledge to a common undertaking. There was a joint property interest in the subject matter even though evidenced only in the mortgages. The parties had a mutual control and management of the enterprise during the construction of the houses and in the sales. The arrangement was limited to this project. There is no doubt that Bras D'Or intended a profit from the project. While there was not a mutual sharing of the profits, Central Mortgage clearly had a financial interest at stake and was vitally concerned with the successful completion of the venture…. Based on the evidence, the arrangement between Central Mortgage and Bras D'Or can be characterized as a joint venture. To the extent that Bras D'Or in carrying on the venture incurred liabilities then both parties were bound.[49]

As discussed earlier in relation to the possibility of a partnership characterization, the parties were not contributing to a "common undertaking." The parties did not have "mutual control."

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46 *Ibid.*
47 *Ibid.* at para. 66.
48 Flannigan, "Fable," *supra* note 6.
49 *Graham*, *supra* note 1 at para. 74.

They each had separate control of their distinct undertakings. CMHC initially specified and subsequently inspected construction, but it had no discretion in the process of construction. The builder, for its part, had no control over the decisions CMHC made with respect to financing, or who would be selected as purchasers. Apart from that, it was of no significance that CMHC had a contingent property interest as a mortgagee or that the arrangement was limited to the one project of building a set number of houses. And despite the judge's words, there was no mutual sharing of profit.

The *Graham* decision is a profoundly flawed exercise in judicial innovation. The analysis of the distinction between partnerships and joint ventures did not extend beyond quotation from American secondary sources. In the end, nothing in the decision justifies acceptance of the joint venture claim. Nevertheless, it is the key judgment in Canada. A large part of the subsequent Canadian jurisprudence on the topic is derived from or dependent on the decision. Before examining that jurisprudence, however, it is necessary to look to Australia briefly to review the emergence of another supposed differentiating feature of joint ventures.

VI. THE PRODUCT ARGUMENT

Notwithstanding a few cases with ambiguous or undeveloped analysis,[50] the standard view in Australia in the twentieth century was that joint ventures or syndicates were partnerships.[51] In the 1980s, however, a new basis for distinguishing joint ventures was advanced in the Australian resource sector.[52] The argument was that joint ventures were distinct by reason of the receipt of "product" rather than profit. One version of the argument was that the extraction and division of product as such was not a "business." According to J.D. Merralls:

> If a participant were to conduct the whole operation alone from extraction to sale, he would be conducting a business at all phases. There would be no need to make an artificial distinction between extraction, treatment and sale and in common parlance he would not be said to conduct three businesses. If he were to join with another for the purpose of selling the product, the separation of that activity from production would make them different businesses, at law, for accounting, and for taxation. Combination for production which is not followed by a distinct transaction of sale of the product by the parties in combination to themselves individually is essentially different. Though the parties acquire individual interests in the product upon the division of a mass owned in common, the individual's business of selling is not separate from the activity of production. He does not acquire his stock by purchase and the phase of the total activity that is conducted in common is not a separate gainful activity.[53]

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50 *Re Buchanan and Co.* (1876), 1 Q.L.R. 67; *Collins v. Locke* (1879), 5 V.L.R. (L.) 13; *Lang v. James Morrison & Company Ltd.* (1911), 13 C.L.R. 1 (H.C.A.); *Re Orange* (1958), 18 A.B.C. 157 (S.C.N.S.W.); *Television Broadcasters Limited v. Ashton's Nominees Pty. Ltd.* (No. 1) (1979), 22 S.A.S.R. 552 (S.C.).

51 *Williams v. Robinson* (1890), 12 N.S.W.L.R. 34 (Eq.); *Blockey v. The Federal Commissioner of Taxation* (1923), 31 C.L.R. 503 (H.C.A.); *Folks v. Woolf*, [1933] V.L.R. 403 (S.C.); *Canny Gabriel Castle Jackson Advertising Pty. Limited v. Volume Sales (Finance) Pty. Limited* (1974), 131 C.L.R. 321 (H.C.A.). See also Michael Sharwood, "Panel Discussion on Deadlock Breaking Mechanisms in Mining and Petroleum Joint Ventures" (1980) 2:2 Australian Mining and Petroleum L.J. 342.

52 Consider the earlier judgment of Stephen C.J. in *Ex parte McInnes* (1870), 9 N.S.W.S.C.R. 28.

53 J.D. Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1981) 3 Australian Mining and Petroleum L.J. 1 at 3 [citations omitted]. The piece was reprinted years later at (1988) 62 Aust.L.J. 907.

Although the reasoning is cloudy, the idea seems to be that the contractual disconnection of the production of the product (extraction and treatment) from the marketing of the product prevents the production process being characterized as a "business." Accordingly, so the argument goes, if two or more parties produce product and divide it amongst themselves, they will not at that point have carried on a business, and cannot be characterized as partners. When they subsequently individually sell their respective portions of product, there is no partnership at that point either because they are not associated with each other in the selling of their portions. The obvious difficulty with that argument, however, is that the parties carried out the production process "with a view to profit," and quite clearly satisfied the definition of partnership.

The more popular version of the product argument addressed that particular difficulty. As Gerald Ryan described it in 1982, the second version was that there was no view to profit:

> Most of the Australian commentators who have sought to distinguish a typical mining or petroleum joint venture from a partnership have done so on the basis that, in order for there to be a partnership, the business must be carried on with a view of joint profit; and that because under a typical joint venture agreement each party takes its share of production and deals with it separately, there is no view of joint profit, and thus, no partnership.[54]

Ryan went on to quote several commentators for this version. According to one, "but that profit will be derived by the individual parties for their own account and strictly, how and where that profit is made by each party is of no concern or business of the other parties and it may vary from party to party."[55] Another stated that "a joint venture, whilst it may carry on business, will not lead to any mutual gain being derived."[56] A third argued that "[a]lthough each venturer may have the object of individual gain, there is no joint profit motive and no joint profit; thus the persons may be carrying out their business or undertaking in common but they are not carrying it out for joint profit."[57] It should again be evident that this reasoning does not alter the conclusion that the parties engaged in production with a view to profit. In fact it confirms it. Separate marketing indicates at most that the joint effort of the parties ends after the product is divided, and so the partnership ends. Nothing in that relates back to production so as to negative partnership status at that earlier point.

In 1984, Richard Ladbury offered a qualified view of the joint venture claim.[58] As he saw it, "the joint venture under U.S. law is not synonymous with the joint venture under Australian law."[59] Rejecting association with the American joint venture was a defensive assertion, presumably, because he stated that "it is difficult for an Australian lawyer to see

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54 Gerald L.J. Ryan, "Joint Venture Agreements" (1982) 4 Australian Mining and Petroleum L.J. 101 at 137.

55 *Ibid.* at 138, citing W.D. Leslie, "Joint Ventures and Farmouts" (Paper presented at *Law Institute of Victoria Seminar on Mining Law*, 1970) at 6.

56 *Ibid.*, citing C.M. Beeny, "Partnership Law and Legal Implications of Joint Ventures" (Paper presented at Commercial Law Problems – a Course for Accountants, 25 March 1980) at 8.

57 *Ibid.*, citing Richard A. Ladbury, "Lenders' Requirements in Joint Venture Financing" (Paper presented at *Energy Law 1981, International Bar Association*, Banff, Alberta, 1981) at para. 1.2.

58 R.A. Ladbury, "Mining Joint Ventures" (1984) 12 Austl. Bus. L. Rev. 312 [Ladbury, "Mining"].

59 *Ibid.* at 321.

a great deal of difference under U.S. law between the joint venture and the partnership."[60] He suggested, albeit without authority, that Australian joint venturers could not bind each other by their acts, and were not status fiduciaries.[61] Apart from that, he remained committed to the "product" argument, though he did consider that there may be "difficulties" with that view:

> "With a view of profit" — the reason most commonly expressed as to why a mining joint venture is not a partnership is that the business or undertaking is not carried on for joint profit but for individual gain. While there are some difficulties with this view it is likely that a major difference between the mining joint venture and partnership is that in the joint venture the profit or gain will be derived by the venturers individually and will not be derived for their common or joint benefit. The mining joint venture is an expense sharing and production sharing agreement. Although each venturer may have the object of individual gain, there is no joint profit motive and no joint profit; thus even if contrary to (b) above the persons may be carrying out their business or undertaking in common, they are not carrying it out for joint profit. Indeed some venturers may sell the product whilst others may process it further before sale.[62]

There is nothing fresh in his analysis, and Ladbury chose not to specify what "difficulties" were involved. His analysis on this point never progressed beyond assertion.

It is necessary to put the Australian commentary to one side briefly to mention the 1985 decision of the Australian High Court in *United Dominions Corporation Limited v. Brian Pty. Limited*.[63] The majority concluded that "joint venture" was not a term of art that specified a novel legal form.[64] Justice Dawson, however, in a separate judgment, offered the following remarks:

> Perhaps in this country, the important distinction between a partnership and a joint venture is, for practical purposes, the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants. Enterprises of the latter kind are common enough in the exploration for and exploitation of mineral resources

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60 *Ibid.*

61 Presumably that was a reference to the terms of the then typical mining joint venture where, by contract, the parties had restricted their mutual agency and fiduciary obligations *inter se*. Contractual modification of the default legal characterization does not wholly nullify ex ante the default characterization. That characterization remains applicable where it has not been altered by the appropriate parties.

62 Ladbury, "Mining," *supra* note 58 at 321.

63 (1985), 157 C.L.R. 1 (H.C.A.) [*Brian*].

64 *Ibid*. at 10-11 (per Mason, Brennan, and Deane JJ.):

> The term "joint venture" is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Such a joint venture (or, under Scots' law, "adventure") will often be a partnership. The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership. The borderline between what can properly be described as a "joint venture" and what should more properly be seen as no more than a simple contractual relationship may on occasion be blurred. Thus, where one party contributes only money or other property, it may sometimes be difficult to determine whether a relationship is a joint venture in which both parties are entitled to a share of profits or a simple contract of loan or a lease under which the interest or rent payable to the party providing the money or property is determined by reference to the profits made by the other.

> and the feature which is most likely to distinguish them from partnerships is the sharing of product rather than profit. It is, however, unnecessary to pursue that matter here.[65]

If this were intended to suggest a legal difference, rather than merely a factual one, it was without authority. Moreover, the remarks add nothing in terms of analytical justification. They nevertheless might be construed instrumentally by joint venture proponents as some sort of implicit concession or recognition of the independent status of joint ventures.

Returning to the literature, yet another version of the product argument was offered by Michael Crommelin in 1986.[66] Relying in part on the comments of Dawson J. in *Brian*, he argued that the preferred approach to assessing partnership status was to require a group or joint profit motive:

> Adopting this approach it seems clear that the mineral and petroleum joint venture is not a partnership. Each participant in the joint venture is undoubtedly engaged in business (that of discovery and exploitation of natural resources) with a view of profit. At the same time the participants are undertaking some common activities. But they are not carrying on a business in common with a view of profit. Rather they are carrying on several businesses each with a view to profit, some aspects of which are performed in common. Two factors underline this result: the separate contributions of participants to the cost of common activities, and the separate sale of individual shares of the common product.
>
> Two of the statutory rules for determining the existence of a partnership lend tacit support to this conclusion. First, tenancy in common does not itself create a partnership as to property so held. Secondly, and more significantly, the sharing of gross returns does not itself create a partnership. It would appear that the sharing of product is one step further removed from partnership than the sharing of gross returns.[67]

This attempt to elevate the product argument also fails. The reasoning seems to be that each participant's view to profit is associated exclusively with that participant's separate resource business. Crommelin takes that position notwithstanding his own concession that aspects of the businesses are "performed in common."[68] His attempt to diminish or marginalize the key "in common" attribute of the arrangement is plainly unsatisfactory. It is beyond question that in the usual case where separate business enterprises enter into arrangements in which each carries on "some aspect" of business in common with the other that the resulting arrangement is, to the extent of the joint purpose or control, a partnership. That consequence is not overcome by the bare assertion that the common performance is in fact part of the separate business of each party. To the extent they engage in a common undertaking, there is a joint business distinct to them that is separate from their individual businesses. That separation is defined by their distinct separate control (joint control) over the joint activity. They are each engaged both in their separate businesses and collectively in their shared business. Moreover, it is of no significance that they each make separate contributions to fund their joint activities. That can be a feature of a conventional partnership. Nor is there support for the product argument in the separate sale of product. As noted above, separate marketing only

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65 *Ibid.* at 15-16.

66 Michael Crommelin, "The Mining and Petroleum Joint Venture in Australia" (1986) 4 Journal of Energy & Natural Resources Law 65.

67 *Ibid.* at 68 [citations omitted].

68 *Ibid.*

indicates that the parties have reverted to separate businesses with respect to that aspect of realizing profit. Finally, the rules about tenancy in common and the sharing of gross returns have no special operation in this context. They figure into the analysis in precisely the same way they do for any claim of partnership. In that respect, it is quite meaningless to state that "the sharing of product is one step further removed from partnership than the sharing of gross returns." Where an arrangement involves the cost-paid production of product, the sharing of product is the sharing of *net returns* or, to play the game, *net product*. It is perhaps in anticipation of these kinds of responses that Crommelin ended his article with the caveat that his normative arguments had yet to be accepted: "It remains for the courts to place their stamp of approval upon this creature of commercial ingenuity."[69] Thus, as of 1986, Crommelin was not prepared to assert that the joint venture claim had come to fruition in Australian courts.

The incoherence of the Australian position at that point was noted, and then curiously adopted, by John Lehane.[70] His words reflect a certain intransigence on the part of the advocates of the joint venture claim:

> What is, perhaps, somewhat remarkable is that lawyers advising both venturers and financiers have been able to take the view, almost universally, that the typical joint venture — providing for separate ownership of product and stopping short of sale of product — is not a partnership. Gerald L. J. Ryan has demonstrated how questionable are the reasons usually given for this conclusion, but he joins the other commentators in concluding that Australian courts are likely to hold that the typical joint venture is indeed not a partnership. The present writer joins Ryan and the commentators in that view, despite the High Court's decision in *United Dominions Corpn Ltd. v. Brian Pty Ltd*.[71]

Lehane's advice is to structure arrangements with the characteristics that are best calculated to avoid a partnership characterization:

> Plainly it is important for the venturers and any financiers equally that the joint venture agreement go as far as it reasonably can to exclude the indicia of partnership: it should provide for separate ownership and disposal of assets or product resulting from the joint venture activity; it should provide that joint venture assets are to be owned by the venturers in specified shares, as tenants in common; it should exclude mutual agency; and, for what it is worth, it should include a declaration that partnership is not intended.[72]

None of these relational adjustments or assertions, however, will avoid a partnership designation. They are all (including the denial of partnership) wholly acceptable terms, *inter se*, within conventional partnership law. The definitive criteria of partnership have not been displaced. If parties produce product jointly, they carry on a business *in common*.

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69 *Ibid.* at 79.

70 J.R.F. Lehane, "Joint Venture Finance and Some Aspects of Security and Recourse" in R.P. Austin & Richard Vann, eds., *The Law of Public Company Finance* (Sydney: Law Book, 1986) 515.

71 *Ibid.* at 517 [citations omitted].

72 *Ibid.*

In a 1987 conference paper, McPherson J. took the position that the joint venture claim had not been made out.[73] Ladbury, who assumed the task of commenting on McPherson J.'s analysis, expanded on his earlier opposed views.[74] His clarification included the following:

> Mr Justice McPherson raises the issue as to whether joint ventures merit attention as a distinct concept or separate branch of the law. It is clear that the joint venture does not enjoy legal personality. Equally it is clear that there is no separate branch of the law known as "joint venture law". The legal principles to be applied to the joint venture are those to be applied to all contractual and proprietary relationships. However, this is not to say that the mining joint venture does not merit attention as a distinct concept so as to ascertain how those legal principles have been or should be applied to the mining joint venture.[75]

Ladbury's denial of a separate branch of joint venture law seems to conflict with his claim for attention to the mining joint venture as a "distinct concept." It appears, however, that he was making a niche claim for the resource sector joint venture. As he put it, "The mining joint venture as it has evolved in Australia is a vehicle based on Australian law and practice. It is not a slavish adoption of the United States joint venture."[76] He analogized the Australian mining joint venture to the American joint exploration or joint operating agreement, which he believed was neither a joint venture nor a partnership under American law.[77] He then asked what distinguished the Australian mining joint venture from partnership. His argument on this occasion was that a new justification had been forthcoming from commentators (Merralls, Ryan, Crommelin, and himself). He consolidated the earlier arguments as follows:

> More recently commentators take the view that there is a more compelling reason for distinguishing the mining joint venture from partnership. This argument proceeds on the basis of an absence of the second element. Under this thesis, the joint venturers are carrying on business severally and not in common. The more joint venture agreements that one drafts or comments on or examines in practice the more attractive this argument becomes. The only common aspects in the joint venture are the use of common assets and possibly the contribution to common expenses and "common" decision making through the operating committee, in each case related to one particular project. All other aspects of the joint venture are several. For example, that the parties make several and separate contributions, there is separate profit, separate accounting, separate tax treatment, that the joint venturers cannot bind each other, the fact that each of them has severally and

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73 The Hon. Mr. Justice B.H. McPherson, "Joint Ventures as a Separate Concept" in P.D. Finn, ed., *Equity and Commercial Relationships* (Sydney: Law Book, 1987) 19. See also The Hon. Mr. Justice J.A. Dowsett, "Operator of a Joint Venture — Principal or Agent?" [1987] AMPLA Yearbook 269.

74 R.A. Ladbury, "Commentary" in Finn, *ibid.* at 37 [Ladbury, "Commentary"].

75 *Ibid.* at 38.

76 *Ibid.* Consider Harry L. Mathison, Jr., "Mining Partnerships, a New Perspective On An Old Theory" (1987) 2 J. Min. L. & Pol'y 319.

77 Consider also the views of G.M. Lewis, "Comment: The Joint Operating Agreement: Partnership or Not?" (1986) 4 Journal of Energy and Natural Resources Law 80; Gerard M.D. Bean, *Fiduciary Obligations and Joint Ventures* (Oxford: Clarendon Press, 1995) at 4-20. The reason that non-operators are not partners for purposes *inter se* is that they disclaim that status in the joint operating agreement. Absent that status assertion, they invariably would be partners, and would in any event be partners relative to third parties once they satisfy the definition of partnership by carrying on business in common. Operators are agents of the venturers, unless they displace it with trustee or some other status. See H. Kevin McCann, "The Role of the Operator Under a Joint Venture Agreement" (1982) 4 Australian Mining and Petroleum L.J. 256; Gerard M.D. Bean, "The Operator as a Manager: A New Fiduciary Duty" [1993] J. Bus. L. 24; John Burritt McArthur, "Judging Made Too Easy: The Judicial Exaggeration of Exculpatory and Liability-Limiting Clauses in the Oilfield's Operator Fiduciary Cases" (2003) 56 SMUL Rev. 925.

> separately appointed the operator as its agent, the several extent of their liabilities to third parties and the separate taking of product all point to separate and several businesses.[78]

Ladbury essentially collapsed the different versions of the product argument into a singular denial that the "in common" criterion was met, bringing the product (or "several") argument to bear on the one remaining criterion of conventional partnership. Again, however, it was bare assertion, and failed for the reasons articulated above. Like others, Ladbury skirted over the common control of the parties in creating the product. Consider also the significance of Ladbury's concession of the changing character of the argument, its source in commentary (rather than precedent), and its description as a "thesis."

Ladbury went on to insist that the mining joint venture differed from a conventional partnership in other ways.[79] Not one of his seven listed differences, however, is a substantive difference. Each difference, if not defective or unclear in its description in some respect, may be accommodated within conventional partnership law in precisely the same way that Ladbury contemplates, taking into account that contractual modifications have effect through their operation on the parties *inter se*.

That is the genesis of the product (several) argument. Its development was neither homogenous nor coherent. Its first proponents, however, were tenacious. The stakes were high. The primary incentive for avoiding partnership status was the associated tax treatment. If partnership status could be avoided, there would be no need for a separate partnership tax filing, each party could make various elections (for example, as to depreciation) independently of the other parties, and each party could offset losses from one project against

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78 Ladbury, "Commentary," *supra* note 74 at 40-41 [citations omitted].

79 *Ibid*. at 43-44. According to Ladbury:

> Not only does the mining joint venture not contain at least one of the essential three elements, it also varies from conventional partnership in other ways. For example:
> (1) The joint venture agreement or joint operating agreement is expressed to create a joint venture and not a partnership.
> (2) The agreement will provide that joint venturers cannot bind one another or pledge the credit of one another. This contrasts with partnerships where every partner is the agent of the firm.
> (3) The agreement will provide that joint venturers are severally liable only in their proportionate interests for debts of the joint venture. Letters and documents from the operator will inform third parties of this. This contrasts with partnership where partners are jointly liable for debts of the partnership.
> (4) The agreement will provide that the joint venturers hold the assets of the joint venture as tenants in common in undivided shares. This contrasts with the interest of a partner in partnership assets.
> (5) The joint venturers severally appoint their operator to manage the project. In partnership the partners manage the business.
> (6) The joint venturers agree that the joint venture stops after production, each joint venturer takes its product in kind and each joint venturer disposes of its own product. A partnership would normally sell the product and share the proceeds.
> (7) The joint venture agreement will also vary numerous principles of partnership law, for example in relation to assignments (*Partnership Act* (Vic.), s. 35); in relation to non-competition (*Partnership Act* (Vic.), s. 34).

income from their other projects.[80] The value of such tax considerations could be considerable. Understand, however, that the joint venture claim was not strictly necessary to avoid partnership taxation. It would be enough to establish that the arrangement was not a partnership — that it was merely a contractual arrangement between principals or independent contractors. The simple "contract" argument, however, becomes implausible or untenable once an arrangement involves joint control.

The claim of a separate legal form as an alternative was perhaps thought to enhance the probability of avoiding partnership taxation. There was, moreover, an available foundation for that approach. First, there was the American jurisprudence, where some courts had accepted the joint venture claim. That made the claim credible on its face, rather than fanciful, notwithstanding that the American courts never actually collectively embraced the claim, or that some Australian commentators sought to distance their claim from the American joint venture. Second, with that lever in the door, the drafting of "several" obligations for the parties, along with denials of partnership, and contradictory appeals to commercial antiquity, innovation, and sophistication, may have been thought sufficient to convince judges of the validity of the claim, or to intellectually confuse or intimidate them.[81]

In 1994, Neil Thompson offered the tentative view that "courts in Australia may well be progressing towards a recognition of a distinct corpus of joint venture law."[82] As he understood it, the way to achieve joint venture status was to replace joint obligation with "several" obligation:

> Currently the most widely accepted basis [by the bar] for claiming that joint ventures are not covered by … [partnership law] … is the exclusion as far as possible from the operation of the venture of joint activity in the joint venture agreement. One instance of this approach is that the covenants in joint venture agreements are expressed in several rather than joint terms.[83]

Whether or not "expression," or drafting, has that kind of cosmetic power, however, remains to be seen.[84] Since that time, it cannot be said that the Australian courts have accepted the

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80 Ryan, *supra* note 54 at 127; Robert L. Pritchard, "Unincorporated Joint Ventures" in Austin & Vann, *supra* note 70, 494 at 513-14; Howard Alexander, "Tax Aspects of Joint Ventures" in W.D. Duncan, ed., *Joint Ventures Law in Australia* (Sydney: Federation Press, 1994) 192.

81 Consider, in that regard, the remarks of Howard J. Kellough, "The Business of Defining a Partnership Under the Income Tax Act" (1974) 22 Can. Tax J. 190 at 211:

> It would seem possible, however, by careful drafting, to characterize an arrangement as something other than a partnership. The several cases mentioned in this article point out a number of matters on which such a distinction could be made. The practical consequences of drawing this distinction, however, may be undesirable and, indeed, cause unnecessary hardships to the members of the arrangement because of a failure to incorporate certain fundamentally sound terms merely to avoid the partnership tag.

82 Neil Thompson, "The Nature of the Joint Venture" in Duncan, *supra* note 80, 15 at 15.

83 *Ibid.* at 37.

84 It should be obvious that expression and fact may diverge and that an intention to have "several" obligations cannot magically alter the reality or substance of joint effort. Consider that the parties themselves understand that the original "several" description is an instrumental characterization designed to cloak their joint effort, and they generally carry on jointly in the actual conduct of the activity without further attention to the characterization.

invitation of the bar to confirm that the joint venture, or the mining joint venture, is a distinct legal form.[85]

VII. CANADIAN DEVELOPMENTS POST-*GRAHAM*

Tax considerations also appeared to propel the joint venture claim in Canada. If the actors involved could avoid partnership taxation, it was not necessary for them to, for example, collectively agree on the level of discretionary deductions, or share the small business deduction.[86]

Prior to *Graham*, there were a number of tax cases in Canada that might be thought to imply a distinct legal character for joint ventures or "syndicates."[87] The analysis in those cases, however, was laconic, obiter, uninformed by authority, conceptually undeveloped, and ultimately legally inconclusive.[88] After the *Graham* decision, claims of joint venture status in the tax context did not fare well in the courts, and in some instances elicited general reservations from the judges.[89] The cases are still problematic, however, in that the judges appeared to accept the premise that joint ventures are distinct from partnerships in some sense. The judges apparently formed that impression on the empty authority of *Graham*. Tax commentators on the issue also relied on *Graham*, and cases which adopted *Graham* views, as base authority.[90] The government itself accepted the joint venture claim for tax purposes, along with the product argument.[91] That tax "recognition" of the joint venture, however, does

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85 Consider *Cummings v. Lewis* (1993), 113 A.L.R. 285 (F.C.A.); *Whywait Pty. Ltd. v. Davison*, [1997] 1 Q.R. 225 (C.A.); *Gibson Motor Sport Merchandise Pty. Ltd. v. Forbes*, [2006] FCAFC 44; *Dresna Pty. Ltd. v. Linknarf Management Services Pty. Ltd.* (2006), 156 F.C.R. 474 (F.C.A.); *Thompson v. White & Ors*, 2006 NSWCA 350.

86 For descriptions of the tax considerations, see D. Birnie, "Partnership, Syndicate and Joint Venture: What's the Difference?," in *1981 Conference Report: Report of Proceedings of the Thirty-Third Tax Conference* (Toronto: Canadian Tax Foundation, 1982) 182 at 183-84; James G. McKee, "The Distinction Between Joint Ventures and Partnerships" (1985) 1 Can. Curr. Tax C89 at C89-C90; Blair P. Dwyer, "A Comparison of the Income Tax Implications of Using a Partnership or a Joint Venture" in *Corporate Tax Planning in a Changing Business Environment* (Toronto: Canadian Tax Foundation, 1994) 10:1; James P. Thomas & Elizabeth J. Johnson, *Understanding the Taxation of Partnerships*, 5th ed. (Toronto: CCH Canadian, 2006) at 10-12. See also Merrill W. Shepard, "Partnership v. Joint Venture" (1986) 8 Can. Taxpayer 94; Mary-Ann Haney, "Blurring Even Further Any Distinction Between Partnership and Joint Venture" (1989) 37 Can. Tax J. 1499.

87 *Carson v. M.N.R.* (1959), 59 D.T.C. 219 (T.A.B.); *No. 701 v. M.N.R.* (1960), 60 D.T.C. 244 (T.A.B.); *Cole v. M.N.R.* (1964), 64 D.T.C. 5141 (Ex.); *Cada v. M.N.R.* (1965), 65 D.T.C. 575 (T.A.B.); *Romano v. M.N.R.* (1966), 66 D.T.C. 490 (T.A.B.). The Supreme Court offered no guidance in *General Construction Co. Ltd. v. M.N.R.* (1959), 59 D.T.C. 1169 (S.C.C.).

88 Contrast *Northern Sales (1963) Limited v. M.N.R.* (1973), 73 D.T.C. 5200 (F.C.T.D.).

89 *Woodlin Developments Ltd. v. M.N.R.* (1986), 86 D.T.C. 1116 (T.C.C.); *D & B Oilfield Contracting Ltd. v. M.N.R.* (1989), 89 D.T.C. 425 (T.C.C.); *Marion Estates Ltd. v. M.N.R.* (1990), 90 D.T.C. 1369 (T.C.C.); *Westcan*, *supra* note 36. Consider also *Schultz v. Canada*, [1996] 1 F.C. 423 (C.A.).

90 Birnie, *supra* note 86; McKee, *supra* note 86.

91 Canada Revenue Agency, Interpretation Bulletin IT-90, "What is a Partnership?" (9 February 1973). Paragraphs four and five of that bulletin were reproduced verbatim in Peter E. McQuillan & E. Cal Cochrane, *Understanding the Taxation of Partnerships* (Don Mills, Ont.: CCH Canadian Limited, 1982) at 3. Neither the bulletin nor the authors offer any authority or explanation for the "joint venture" aspects of the two paragraphs. Note also that in 1995 the government issued a GST policy statement that incorporated or reflected the analytical confusion in the American jurisprudence and adopted the Australian product argument. Canada Revenue Agency, Policy Statement P-171R, "Distinguishing Between a Joint Venture and a Partnership for the Purposes of the Section 273 Joint Venture Election"

not generally confer distinct legal status on the joint venture.[92] The fact that the state is prepared to vary the tax treatment it applies to a category of partnership cannot by itself produce a legal transformation, and more obviously so when the transformation lacks any substantive foundation. Lastly, in the tax context, commentators have crafted lists of the criteria that ostensibly are to be met to avoid partnership taxation.[93] However, as before, none of the criteria are inconsistent with or outside the range of conventional partnership parameters.

Beyond the cases that deal specifically with tax questions, there are numerous other Canadian decisions post-*Graham* that deal with "joint ventures."[94] A number of them adopt the conventional approach of treating joint ventures as partnerships, or as having equivalent attributes.[95] In *Cabot v. Hicks*, for example, a participant in a joint fishing venture was not simply a lender or "banker" to the venture.[96] Instead, because he had an "organizational and supervisory role"[97] in the arrangement, he was a partner. Judges in other decisions explicitly state that the joint venture is not a distinct legal form. In *Newfoundland Aggregates (1991) Ltd. v. Lodestone Ltd.*, Roberts J. concluded that: "A joint venture is no more than a particular form of partnership and is commonly used to describe two or more persons or corporations combining to use their resources and efforts to carry out a specific business

(24 February 1999) [CRA, "Policy Statement].

92 CRA, "Policy Statement," *ibid.* at 1, explicitly states that: "The *Excise Tax Act* does not define either 'partnership' or 'joint venture'. Therefore, the rules of statutory interpretation require that the common meaning of 'partnership' and 'joint venture' apply."

93 See Thomas & Johnson, *supra* note 86 at 9-10, citing Joseph W. Yurkovich, "Start-Up Businesses — Choosing a Business Vehicle" in Canadian Tax Foundation, *1999 Prairie Provinces Tax Conference: Deep in the Heart of Taxes* (Toronto: Canadian Tax Foundation, 1999):

> From the cases that have given consideration to the distinction between partnership and joint venture and a review of various authorities, the following points should be noted if the intention of the parties to a joint venture is to avoid partnership characterization:
> (i) the joint venture should be limited to a single undertaking or limited number of undertakings and/or should have a specific termination date;
> (ii) the arrangements should provide for a sharing of gross revenues and expenses as opposed to calculation of profit and sharing of such profit at the partnership level;
> (iii) the joint venturers should each have a right of mutual control and management of the enterprise;
> (iv) there should be minimal fettering of the ability of the joint venturers to dispose of their own property;
> (v) there should be no general ability of any joint venturer to bind the other joint venturers;
> (vi) the joint venture agreement should expressly remove the fiduciary obligations which would otherwise be imposed in the context of a partnership relationship; and
> (vii) there should be an express negation of the partnership relationship in the joint venture agreement.

94 Recent general commentary on the topic is sparse and thin. There are brief references in legal texts, but few extended treatments. Consider Melanie A. Shishler, "The Graham Decision Revisited: The Fading Promise of the Joint Venture as a Distinct Legal Concept" (1999) 31 Can. Bus. L.J. 118. See also Barry J. Reiter & Melanie A. Shishler, Joint Ventures: Legal and Business Perspectives (Toronto: Irwin Law, 1999).

95 *Gallo v. Silverberg*, [1976] O.J. No. 1251 (H. Ct. J.) (QL); *Moncton (City of) v. Aprile Contracting Ltd.* (1980), 29 N.B.R. (2d) 631 (C.A.); *Quality Construction Ltd. v. Custom Laminating and Furniture Co. Ltd.* (1981), 10 Sask. R. 342 (Q.B.); *Cabot v. Hicks* (1999), 176 Nfld. & P.E.I.R. 48 (Nfld. S.C. (T.D.)) [*Cabot*].

96 *Cabot, ibid.*

97 *Ibid.* at para. 36.

objective with a view to making a profit."[98] In *Red Burrito Ltd. v. Hussain*, Smith J. accepted the definition of one commentator that began with the observation that: "Joint ventures are not a distinct form of business organization, nor a relationship that has any precise legal meaning."[99]

There are, on the other hand, numerous cases post-*Graham* that seem, usually implicitly, to accept some sort of status for the joint venture.[100] Many of the decisions rely on the *Graham* judgment as the ostensibly definitive source and, consequently, are vicariously flawed. Some judges freely use joint venture terminology, but do not consider (or perhaps do not perceive) the question of partnership status. Few of these post-*Graham* decisions require specific attention, as the difficulties with their reasoning, or, frequently, their lack of reasoning, is evident. A few, however, are of individual interest. Before turning to those cases, however, it is worth reproducing the laconic assertion of Stevenson J. in 1980 in *390346 Ontario Limited v. Malidav Holdings Limited*: "A joint venture or joint adventure is a legal relationship created by the courts of the United States which has been recognized in

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98 (1997), 150 Nfld. & P.E.I.R. 25 at para. 50 (Nfld. S.C. (T.D.)).

99 2007 BCSC 1277, 33 B.L.R. (4th) 205 at 209. See J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 2d ed. (Toronto: Irwin Law, 2003) at 67. The full extract reads:

> Joint ventures are not a distinct form of business organization, nor a relationship that has any precise legal meaning. Functionally, the term "joint venture" is used to describe a relationship among persons who agree to combine their money, property, knowledge, skills, experience, time, or other resources for some common purpose. Usually the joint venturers agree to share the profits and losses from the venture, and each has some degree of control over it. The distinguishing feature of a joint venture is that it is an arrangement set up for a limited time, for a limited purpose, or both. "Joint venture" is used loosely to refer to all sorts of legal arrangements given effect in corporations and partnerships and in relationships based exclusively on contract.

100 There is an inexplicable, one might say injudicious, unilateral dependence on the *Graham* decision. Consider *Fraser-Brace Maritimes Ltd. v. Central Mortgage and Housing* (1980), 42 N.S.R. (2d) 1 (S.C. (A.D.)), leave to appeal to S.C.C. refused, [1981] 43 N.S.R. (2d) 540n.; *Central Mortgage and Housing v. Omega Investments Ltd.* (1981), 34 N.B.R. (2d) 291 (C.A.); *Nova Scotia Drydock Limited v. Rijn-Schelde-Verolme Madinfabrieken en Scheepswerven n.v.* (1982), 56 N.S.R. (2d) 1 (S.C. (T.D.)); *Canada Dry Limited v. Nova Recreation Development Company Limited* (1982), 56 N.S.R. (2d) 167 (S.C. (T.D.)); *Canadian Pacific Ltd. v. Telesat Canada* (1982), 36 O.R. (2d) 229 (C.A.), leave to appeal to S.C.C. refused, (1982), 43 N.R. 625; *Gironella v. Berndt*, [1982] A.J. No. 264 (C.A.) (QL); *Ross v. Acorn* (1984), 31 Sask. R. 87 (Q.B.), varied (1986), 46 Sask. R. 69 (C.A.); *Carleton Condominium Corp. No. 11 v. Shenkman Corp. Ltd.* (1985), 49 O.R. (2d) 194 (H. Ct. J.) 14 D.L.R. (4th) 571 (Ont. H.C.); *Harmony Co-ordination Services Ltd. v. Wickson* (1986), 22 C.L.R. 113 (B.C.S.C.); *Semenoff v. Saskatoon Drug & Stationery* (1988), 64 Sask. R. 75 (Q.B.); *Laxton v. Canada*, [1989] 2 C.T.C. 85 (F.C.A.); *Wonsch Construction v. Danzig Enterprises Ltd.* (1990), 1 O.R. (3d) 382; *Builders Market Ltd. v. Century 21 Northeastern Realty Ltd.* (1991), 109 N.S.R. (2d) 297 (S.C. (A.D.)); *Head v. Inter Tan Canada Ltd.* (1991), 5 O.R. (3d) 192 (Gen. Div.); *Bramalea Ltd. v. 620923 Ontario* (1992), 8 O.R. (3d) 151 (Gen. Div.); *Canadian National Railway v. Norsk Pacific Steamship*, [1992] 1 S.C.R. 1021; *Canadian Imperial Bank of Commerce v. Charbonnages de France International S.A.* (1994), 49 B.C.A.C. 161; *UAP v. Oak Tree Auto Centre* (1997), 149 Nfld. & P.E.I.R. 313 (S.C. (A.D.)); *Canlan Investment v. Gettling* (1997), 95 B.C.A.C. 16; *Smith's Field Manor Development Ltd. v. Campbell*, 2001 NSSC 44, 195 N.S.R. (2d) 220; *Levesque v. Magna Marine Inc.*, 2005 NBQB 49, 277 N.B.R. (2d) 63; *Tercon Contractors Ltd. v. British Columbia*, 2006 BCSC 499, [2006] 6 W.W.R. 275; *Aronovitch & Leipsic Ltd. v. Berney*, 2006 MBCA 131, [2007] 1 W.W.R. 195, leave to appeal to S.C.C. refused, (2007), 370 N.R. 393; *Pen-Bro Holdings Ltd. v. Demchuk*, 2007 ABQB 282, 419 A.R. 313; *Foreman v. Chambers*, 2007 BCCA 409, 245 B.C.A.C. 189; *Ouzounova v. Kiriakova*, [2007] O.J. No. 3106 (Sup. Ct. J.) (QL); *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27, 40 B.L.R. (4th) 83. See also *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, [2007] 3 S.C.R. 679.

Canada."[101] That is the sort of untutored and undeveloped assertion or assumption that afflicts this area of the law. Given that the claim is that an entirely novel legal form has been created by the courts, we might fairly expect a careful and thorough investigation of the claim. None of the post-*Graham* cases undertake that investigation.[102]

A decision of the British Columbia Court of Appeal is of particular interest because the majority judges uncritically accepted the "product" argument. *Hayes v. British Columbia Television Broadcasting System Ltd.*[103] involved an arrangement between Artray Limited (which controlled Britsh Columbia Television Broadcasting System Ltd. (BCTV)) and Ralph Andrews Presentations Inc. (RAP) to produce a television game show. BCTV was to provide the production facilities (studios, equipment, personnel) and RAP the production staff, sets and set designs, prizes, contestants, music, make-up, and on-camera talent. The show failed and two contestants who had not received their prizes from the insolvent RAP sued Artray on the ground that it was the partner of RAP. The majority of the court decided that the arrangement was not a partnership. On a conventional view, that conclusion was mistaken because the parties had joint control over the entire production.[104] Apart from that, the factor that appeared to convince the majority judges was that the parties had agreed to produce two original master tapes for separate geographic distribution by Artray and RAP:

> In this case, although each of Artray and RAP expected to obtain something of value from the joint enterprise it was not in the view of either that what would be obtained would be the profit of the business being carried on in common. There could not be a profit in the sense of the "amount of gain made by the business" because, as pointed out earlier, there was neither cost or revenue sharing and there were no accounts, and there were not contemplated to be any accounts, which could be turned to or relied upon to determine the "gain" made by the business over the period during which it was being carried on. Whether either party realized a profit turned upon that party's costs and that party's revenue from that party's market area. And that was what was in the contemplation of the parties throughout.[105]

McEachern C.J.B.C. took a different view:

> As already mentioned, judges have, from time to time, made pronouncements suggesting that only net profits will suffice to establish partnership. I have already mentioned the limited source of these pronouncements. I am not aware of any binding authority requiring us to construe this feature of partnership so strictly. When the purpose of the enterprise is to create a property which each partner will use for profit, there is no reason in principle that such an arrangement will defeat partnership when a pooling and sharing of cash would suffice for that purpose. It must be remembered that many of the cases relied upon by Mr. Hamilton were decided in a very different economic climate from that which prevails today. Even if business practices were

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101 (1980), 31 N.B.R. (2d) 72 (Q.B.) at para. 55.

102 Consider *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1995), 130 Nfld. & P.E.I.R. 92 (Nfld. C.A.) at para. 34 ("No one seems to have been prepared to attempt the quintessential definition of a joint venture").

103 (1992), [1993] 2 W.W.R. 749 (B.C.C.A.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. viii.

104 As McEachern C.J.B.C. noted, it was a term of the agreement that Artray would have "no less than an equal measure of decision making responsibility and the right of approval over all creative decisions in connection with the production of the Series" (*ibid.* at 757). Contrast cases where there was no joint control. See *Lyon v. Knowles* (1863), 3 B. & S. 556, 122 E.R. 209; *Bradd v. Whitney* (1907), 14 O.L.R. 415 (Div. Ct.)

105 *Ibid.* at 755-56.

> thought to be frozen in the last century, one would still be hard pressed to find clear authority for the proposition that only a sharing of cash profits will permit a finding of partnership. There is no reason in principle why a sharing of the production of the enterprise is not just as significant as a sharing of net cash profits. In this respect, see *Pooley v. Driver*, already mentioned, where it was stated at p. 467 that a contract establishing partnership must be one for the purpose of carrying on a commercial business, and "dividing the profit *in some shape or other between the partners*."[106]

The acceptance by the majority of the product argument cannot be justified. Up to the point of taking away their separate tapes for separate distribution, the parties were jointly engaged in carrying on a business with a view to profit. A partnership characterization is not displaced because parties employ and cost out separately owned assets (that in this case were "integrated") and maintain separate accounting regimes.

A second issue of interest in the cases is whether "joint venturers" are status fiduciaries to each other.[107] The trial judge in *Visagie v. TVX Gold* stated that it "is well accepted that joint venturers owe fiduciary duties to one another."[108] That was a fair statement in the context of the case, whether a joint venture is regarded as a partnership, or whether based on the authority cited by the judge, or on the originating American jurisprudence. It was therefore surprising that the Court of Appeal rejected that conclusion. According to Charron J.A.: "In my view, the trial judge erred in concluding that there was a fiduciary relationship between the parties. The duties owed by each party to the other during the currency of the agreement and after its termination, as described by the trial judge, arose from the terms of the agreement itself rather than from any fiduciary obligation imposed by law."[109] The decision clearly is unsatisfactory in that respect.[110] Nevertheless, the conclusion of the court was subsequently adopted by MacLeod J. in *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum*:

> The plaintiffs contend that the parties here were involved in a joint venture and "a joint venture is one of the legal relationships or categories that is recognized in law as creating fiduciary obligations." They cite *Wonsch Construction* … *Harris v. Lindeborg*, … *United Dominions Corp. v. Brian Pty Ltd.* … and *Graham v. Central Mortgage & Housing* … in support of this argument.

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106 *Ibid.* at 766 [emphasis in original].

107 As noted earlier, the same issue recently has been addressed in the English cases. See *supra* text accompanying notes 28-29. See also *Paper Reclaim Ltd. v. Aotearoa International Ltd.*, [2007] NZSC 1, [2007] 3 N.Z.L.R. 169.

108 (1998), 42 B.L.R. (2d) 53 at para. 274 (Ont. Ct. J. (Gen. Div.)).

109 *Visagie v. TVX Gold* (2000), 49 O.R. (3d) 198 at para. 25 (C.A.).

110 The Court of Appeal adopted the common mistaken premise that courts should be reluctant to impose fiduciary accountability on commercial parties. Once properly understood, it is clear that fiduciary accountability is *fundamental* to commercial relations that involve limited access, as is usually the case with unincorporated joint ventures. See Robert Flannigan, "Commercial Fiduciary Obligation" (1998) 36 Alta. L. Rev. 905. For some joint ventures, such as those between competitors, there often is a need to contract around certain aspects of fiduciary accountability (duty to not compete, not appropriate business opportunities). But other aspects of fiduciary accountability, such as the confidentiality of contributed, or jointly-produced information, usually remain appropriate. Competitors are free, as are others, to tailor their fiduciary accountability to suit their purposes. There is no obvious need to produce, if that is the objective, a default legal form that is novel only in the sense that it has status fiduciary accountability stripped away from it. Any ostensible additional flexibility from such a conceptual move would likely be overwhelmed by the further uncertainty and confusion it would bring to an already muddled jurisprudence.

> As already stated, the Ontario Court of Appeal overturned the finding of a fiduciary relationship in *Visagie*. To the extent the trial decision actually stood for the proposition that joint venturers automatically owe fiduciary duties to each other this has clearly been reversed.
>
> …
>
> At best, the cases relied on by the plaintiffs here suggest that joint venturers may owe fiduciary obligations to one another in certain circumstances. There is nothing automatic about it. Joint venturers are not status based or traditional fiduciaries for all purposes.[111]

There is no discernible logic to support this view in circumstances where "joint venture" arrangements are partnerships.[112] Because joint ventures may be structured as corporations, where there are no status fiduciary duties between shareholders, it is correct to say that "joint venture" status does not automatically attract fiduciary accountability. It is a mistake, however, to apply or extend that conclusion individually to every type of joint venture. If a joint venture is organized in a way that satisfies the criteria for partnership (or limited partnership), the default status fiduciary accountability of the parties necessarily is established.[113]

The last point of present interest is the effect of parties asserting in their contract that they are not partners. Recently, in *CSFY v. Creit Management Ltd*., the judge determined that a status assertion was effective against a third party.[114] That conclusion is contrary to a mass of established authority, and the judge offered no supporting authority.[115] Then, in *Ben 102 Enterprises Ltd. v. Ben 105 Enterprises Ltd*., the judge apparently did not appreciate the difference between the internal and external effect of a status assertion:

> What then is the intention of the parties in entering into the joint venture agreement? It is clear they intended to associate themselves as joint venturers. The association they created has all the indicia of a joint venture as outlined in *Williston*. There are four aspects of the arrangement that are telling in relation to whether they also intended to create a partnership. First they "expressly agreed and declared" that the joint venture agreement was not a partnership agreement, and they expressly agreed and declared that they did not, as participants in the joint venture, consider themselves partners of one another. Second, they chose to create a joint venture. While this does not mean they did not also intend to create a partnership, the fact that they elected to form a joint venture must have been an election they undertook for a reason. The only reason arising from the terms of the agreement is that they did not want to form a partnership. Third, they agreed that their liabilities would be several and not joint. Fourth, the association was formed to pursue an *ad hoc* single enterprise in which they chose to define the commencement of their relationship, how it would be

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111 2001 ABQB 803, 300 A.R. 201 at paras. 209-11 [citations omitted].

112 The judge also rejected status fiduciary accountability between the operator and the venturers, notwithstanding the agency character of that arrangement. See McCann, *supra* note 77; McArthur, *supra* note 77.

113 Subsequent cases are mixed. Compare, for example, *Chitel v. Bank of Montreal* (2002), 26 B.L.R. (3d) 83 (Ont. Sup. Ct. J.) with *Seaspan International Ltd. v. British Columbia Railway*, 2005 BCSC 256, [2005] B.C.J. No. 628 (QL) and *Zynik Capital v. Faris*, 2007 BCSC 527, 30 B.L.R. (4th) 32.

114 (2003), 38 B.L.R. (3d) 239 (Ont. Sup. Ct. J.).

115 See Flannigan, "Status Assertion," *supra* note 2.

> managed and how it would be terminated. All of this supports the conclusion that they did not intend to create a partnership. I find that they were successful in accomplishing that.[116]

There are significant difficulties with these remarks. The first is the assumption by the parties and the judge that there exists a distinct legal form known as a joint venture. It cannot matter that the parties intended to create a joint venture if there is no such form known to the law. It is also thin analysis to conclude that an arrangement is not a partnership because the parties "did not want to form a partnership."[117] The test is whether they carried on business in common with a view to profit. If the actual arrangement they established (the arrangement they *intended*) demonstrates such an intention (to carry on a business in common), they attract partnership status even though their own subjective intention as to the legal characterization of their arrangement is different.[118] It is then for the parties to modify by agreement the default parameters of that status. To the extent the default parameters remain unmodified, they continue to govern the relation. Usually that means that the parties will be treated as partners relative to third parties. Nor is it of significance that the parties structure their duties as "several" and not joint, as that may be the case in a conventional partnership, and is not, in any event, an incident or attribute of consequence. The same applies to the supposed fourth criterion. In the end, the remarks of the judge fail to make it clear that status assertions bind only the contracting parties. Consequently, even though the issue in the case was an internal one, the judgment may lead others to apply the stated criteria without regard to that qualification.

VIII. CONCLUSION

The joint venture claim has not been accepted in England. While the claim did find a measure of acceptance in a few American courts, it was largely rejected there. Developments elsewhere were no more favourable.[119] Canadian courts, however, appear to be stumbling towards recognition of discrete status. That is happening despite any discernible justification. Assertion, and deference to assertion, seem to be the order of the day. Presumably the recognition of the joint venture for tax purposes in Canada has been a significant factor, both in creating incentives for the claim and in suggesting to judges that the joint venture has legal status. It is clear, however, that there is no conceptual foundation for the claim. Though many distinguishing criteria have been proposed, they are inconsequential either on principle or when understood in their developmental context.

The difficulty with the joint venture claim is that while it is possible to pursue a joint objective and still avoid partnership regulation, it is not possible to do so where there is joint control. If the assets involved, whether contributed jointly or severally, are subject to joint direction in the production process, partnership status is engaged in order to impose the

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116 2007 BCSC 1069, 37 B.L.R. (4th) 52 at para. 109.

117 *Ibid.*

118 The point is worth emphasizing as courts and commentators regularly make this conceptual error. If the arrangement intentionally designed by the parties satisfies the criteria for partnership status, the parties *intended* to create what the law designates as a partnership.

119 Consider *Chirnside v. Fay*, [2006] NZSC 68, [2007] 1 N.Z.L.R. 433.

default regulation that reflects the social norms we apply to joint commercial effort.[120] If parties instead merely agree to coordinate delivery of their separate products, as for example in a production chain from supplier to manufacturer to retailer, they are not carrying on a business in common. They share an overall linked objective, but they do not by their contracts submit or subject themselves collectively to the joint exercise of their discretion or judgment.

The issue, on a conventional analysis, is not whether an arrangement is a partnership or a joint venture. It is whether the parties are principals to each other, rather than partners. The joint venture claim is an attempt to insert a new legal concept at the existing border between partner and principal status. To date, that initiative has met firm rejection, or has languished in the realm of half truths and analytical denial. It will not be a grand adventure for Canadian courts to attempt, in the Canadian way, to accommodate the joint venture. It will get messy quickly. The better approach is to directly confront the issue and determine the validity of the joint venture claim on the basis of our established norms of commercial regulation.

[120] Robert Flannigan, "The Economic Structure of the Firm" (1995) 33 Osgoode Hall L.J. 105; Robert Flannigan, "The Economics of Fiduciary Accountability" (2007) 32 Del. J. Corp. L. 393.