LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

THE ANNOTATED Partnership Agreement 2017

CHAIR

Alison Manzer
Cassels, Brock & Blackwell LLP

September 25, 2017

cpd Continuing Professional Development

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The Law Society of Upper Canada | Barreau du Haut-Canada

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September 19, 2017

THE ANNOTATED
Partnership Agreement 2017

Chair: **Alison Manzer, *Cassels Brock & Blackwell LLP***

September 25, 2017
9:00 a.m. to 12:00 p.m.

Total CPD Hours = 2h 30m Substantive + 30m Professionalism

Donald Lamont Learning Centre
The Law Society of Upper Canada
130 Queen St. W.
Toronto, ON

SKU CLE17-0090701

Approved For LawPRO Risk Management Credit

Agenda

9:00 a.m. – 9:10 a.m.	**Welcome and Opening Remarks** Alison Manzer, *Cassels Brock & Blackwell LLP*
9:10 a.m. – 9:40 a.m.	**Contracting with Partnerships: Some Issues to Consider When the Borrower, Lender, or Other Counterparty is a Partnership** Robert Scavone, *McMillan LLP*

9:40 a.m. – 10:10 a.m.	**Transitions: Issues in Transitioning a Partnership To a Corporation and Vice Versa** Sunita Doobay, *TaxChambers LLP*
10:10 a.m. – 10:35 a.m.	**Provisions Dealing with Expulsion and Withdrawal** Mark Dunn, *Goodmans LLP*
10:35 a.m. – 10:50 a.m.	**Coffee and Networking Break**
10:50 a.m. – 11:15 a.m.	**Provisions Dealing with Non-Competes and Client/Customer Rights** Jeremy Schwartz, *Stringer LLP*
11:15 a.m. – 11:45 a.m.	**Managing Conflict of Interest Decisions** **POLLING** **(30 minutes P)** Alison Manzer, *Cassels Brock & Blackwell LLP*
11:45 a.m. – 12:00 p.m.	**Overview and Question and Answer Session**
12:00 p.m.	**Program Ends**

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LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 1

THE ANNOTATED Partnership Agreement 2017

The Annotated Partnership Agreement With LLP and Professional Corporation(s) Precedent

Alison Manzer
Cassels Brock & Blackwell LLP

September 25, 2017

cpd Continuing Professional Development

ANNOTATED PARTNERSHIP AGREEMENT WITH LLP AND PROFESSIONAL CORPORATION(S) (PRECEDENT)

Alison R. Manzer
Cassels Brock & Blackwell LLP
amanzer@casselsbrock.com
Updated to August 2017

Initial Observations:

*** Partnerships Act, relevant sections, set out in full; there have been no amendments to the Partnerships Act, R.S.O. 1990, c. P. 5 since December 15, 2009, c. 33, Sched. 2, s. 57.**

*** References to section numbers (such as 3.110 and similar) are to those sections of Manzer, A Practical Guide to Canadian Partnership Law - those sections discuss matters of relevance on the topic.**

*** Underlined portions indicate suggested additions or limited liability partnerships.**

***This is a generic precedent only. It is not recommended for use in any specific arrangement; it must be reviewed and tailored for the specific legal and business circumstances at hand for every use. Many variations exist for each of the clauses and careful consideration needs to be given to a suitable variation crafted for the matter at hand.**

A M O N G:

Set out the partners - for a smaller partnership this should be done by name, for a larger partnership the following format simplifies signing and change:

Those persons or entities whose names appear in and who from time to time sign Schedule A hereto or a certificate of adherence hereto substantially in the form as that set out in Schedule "A" hereto (each hereinafter referred to as a "**Partner**" and collectively as **"the Partners"**.

If the partnership allows professional corporations as partners add the following (this can also be used where there is a partnership including both individual and corporations):

provided that, where the context requires, the term "Partner" shall also include, to the extent the context requires the Designated Shareholder of a corporate Partner and the words "he" or "she" or "his" or "her" used when referring to a Partner shall also include reference to "it" or "its" in the case of corporate Partners, unless the context otherwise requires).

Annotation:
Who Are the Partners
B 3.110 to 3.160 - Contract
B 3.540 to 3.603 - Admission and Holding Out B.3.2725 to 3.3075 - Holding Out
Cite: Lampert Plumbing (Danforth) Ltd. v. Agathos (1972), 27 D.L.R. (3d) 284 (Co. Ct)

Marshal 3-84 Marshall v. Darling (1996), 27 B.L.R. (2d) 84 (Ont. Ct. (Gen. Div.))
572927 B.C. Ltd. v. Russell J. Holdings Ltd. (2011), 92 B.L.R. (4th) 80, 2011 BCSC 993, 2011 CarswellBC 1959, M.A. Humphries J. (B.C. S.C.)

Describe Partners: Partnerships can be formed among individuals, partnerships or corporations. The representation that each partner is acquiring its interest for its own account is desirable to ensure certainty of partnership identity. The legal capacity of partners should be confirmed and each, of course, must have legal capacity as a consequence of the ability and need of each to be able to bind the partnership. Absent agreement to the contrary, and suitable arrangements to deal with the loss of legal capacity and assets, a bankruptcy of a partner will dissolve a partnership, section 33; insolvency is defined at section 1(2) of the Partnerships Act. Each partner should, by recital or representation, confirm their legal status. If a partnership is to include partners which do not have legal capacity a number of issues have to be considered, such as contracting for and by the partnership and ability to satisfy obligations relating to the partnership.
Partnerships Act, Section 2 and 3 - Definition of "Partnership" and the Rules for Determining the Existence of Partnership: These should be reviewed to determine if they could indicate a partnership exists where none is intended. Although these are indicative only, if the statutory indicators are present it is likely a partnership will be found to exist. If it is intended to contract out of a partnership relationship, or to create a partnership relationship where it might otherwise not meet the definition or rules, then amendment will be required to disclaim a partnership and create an alternate legal relationship. While this may not be determinative the expression of intent is a strong indication of the relationship that will be found to exist.

For good and valuable consideration, the Partners each agree with each other as follows:

1. FORMATION AND BUSINESS

1.1 Formation. The parties to this Agreement agree to become Partners and to form a general partnership under the laws of the Province of _____.

The Partners shall, on a timely basis whenever required, execute all such certificates and other documents and take or cause to be taken such other action as may be necessary to accomplish all filing, recording, publishing and other acts as may be necessary or appropriate to comply with all requirements for the formation, preservation and operation of the Partnership as a general partnership in the Province of **[_____]**, Canada and such other provinces or territories of Canada or other jurisdictions in which the Partnership may conduct its business.

Annotation:
B 2.103 to 2.180 - General Criteria for Formation of a Partnership
2.240 - Intention to Form a Partnership
Cite: Canada Dry Ltd. v. Nova Recreation Development Co. (1982), 56 N.S.R. (2d) 167 (S.C.); Tel-Ad Advisors Ontario Ltd. v. Tele-Direct (Publications) Inc. (1986), 8 C.P.C. (2d) 217 (Ont. H.C.J.);
4T's Industries Ltd. v. Kahle (1992), 33, A.C.W.S. (3d) 336 (B.C.S.C.)

Alternate
1.1 Formation. The Partnership was formed on _____, __ pursuant to the laws of _____, by way of contributions of the assets and undertaking of _____ by #1 and the contribution of capital by #2. The Partners shall carry on the partnership business (as more particularly set out

in Section 1.6) and the Partnership shall continue as a partnership until terminated in accordance with the provisions of this Agreement.

Annotation:

Partnerships Act

2. *Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act. R.S.O. 1990, c. P.5, s. 2.*

Rules for determining existence of partnership

3. *In determining whether a partnership does or does not exist, regard shall be had to the following rules:*

1. *Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.*
2. *The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.*
3. *The receipt by a person of a share of the profits of a business is proof, in the absence of evidence to the contrary, that the person is a partner in the business, but the receipt of such a share or payment, contingent on or varying with the profits of a business, does not of itself make him or her a partner in the business, and in particular,*
   - *(a) the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him or her a partner in the business or liable as such;*
   - *(b) a contract for the remuneration of a servant or agent or a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;*
   - *(c) a person who,*
     - *(i) was married to a deceased partner immediately before the deceased partner died,*
     - *(ii) was living with a deceased partner in a conjugal relationship outside marriage immediately before the deceased partner died, or*
     - *(iii) is a child of a deceased partner,*

     and who receives by way of annuity a portion of the profits made in the business in which the deceased partner was a partner is not by reason only of such receipt a partner in the business or liable as such;
   - *(d) the advance of money by way of loan to a person engaged or about to engage in a business on a contract with that person that the lender is to receive a rate of interest varying with the profits, or is to receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing and signed by or on behalf of all parties thereto;*
   - *(e) a person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him or her of the goodwill of the business, is not by reason only of such receipt a partner in the business or liable as such. R.S.O. 1990, c. P.5, s. 3; 1999, c. 6, s. 52; 2005, c. 5, s. 55.*

B. 2.640 to 2.650; 2.740; 2.773 - Contract

Cite: Chung v. Hoy (1994), 49 A.C.W.S. (3d) 1230 (B.C.S.C.)

1A. The Partnership is hereby designated a limited liability partnership under the *Partnerships Act* (Ontario) by this Agreement signed by all of the current Partners, and an advertisement of such designation in **[Recite Publication name] on [insert date of publication]** and:

(a) Notwithstanding any other provision of the Partnership Agreement to the contrary but subject to sub-clause (b) below, no Partner in the partnership shall be liable, by means of indemnification, contribution, assessment or otherwise, for debts, obligations and liabilities of the partnership or any Partner arising from negligent acts or omissions that another Partner or employee, agent or representative of the partnership commits in the course of the partnership business while the partnership is a limited liability partnership.

(b) Sub-clause (a) above does not affect the liability of a Partner for the Partner's own negligence or the negligence of a person under the Partner's direct supervision or control.

(c) The Partnership may file a registration statement to register the Partnership as a limited liability partnership under applicable legislation in any other jurisdiction in which the Partnership carries on business and to take the steps necessary to meet the laws, regulations and rules respecting limited liability partnerships applicable in any such jurisdiction.

Annotation:

Partnerships Act (Ontario)

"limited liability partnership" means a partnership, other than a limited partnership, that is formed or continued as a limited liability partnership under section 44.1 or that is an extra-provincial limited liability partnership. ("société à responsabilité limitée") R.S.O. 1990, c. P.5, s. 1 (1); 1998, c. 2, s. 1.

Limited liability partnerships

(2) Subject to subsections (3) and (3.1), a partner in a limited liability partnership is not liable, by means of indemnification, contribution or otherwise, for,

(a) the debts, liabilities or obligations of the partnership or any partner arising from the negligent or wrongful acts or omissions that another partner or an employee, agent or representative of the partnership commits in the course of the partnership business while the partnership is a limited liability partnership; or

(b) any other debts or obligations of the partnership that are incurred while the partnership is a limited liability partnership. 2006, c. 34, s. 19.

Limitations

(3) Subsection (2) does not relieve a partner in a limited liability partnership from liability for,

(a) the partner's own negligent or wrongful act or omission;

(b) the negligent or wrongful act or omission of a person under the partner's direct supervision; or

(c) the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner's direct supervision, if,

(i) the act or omission was criminal or constituted fraud, even if there was no criminal act or omission, or

(ii) the partner knew or ought to have known of the act or omission and did not take the actions that a reasonable person would have taken to prevent it. 2006, c. 34, s. 19.

Same

(3.1) Subsection (2) does not protect a partner's interest in the partnership property from claims against the partnership respecting a partnership obligation. 2006, c. 34, s. 19.

Partner not proper party to action

(4) A partner in a limited liability partnership is not a proper party to a proceeding by or against the limited liability partnership for the purpose of recovering damages or enforcing obligations arising out of the negligent acts or omissions described in subsection (2). 1998, c. 2, s. 2 (2).

Formation

44.1 *A limited liability partnership that is not an extra-provincial limited liability partnership is formed when two or more persons enter into a written agreement that,*

(a) designates the partnership as a limited liability partnership; and

(b) states that this Act governs the agreement. 1998, c. 2, s. 6.

Supervisory Liability - Limited Liability Partnership

Some statutes that recognize supervisory liability do not clarify whether courts should hold the supervisory lawyer strictly liable for conduct of supervised lawyers, leaving open the question of whether a plaintiff seeking to hold a supervising lawyer personally liable must establish some negligence on the part of the supervising lawyer. Other statutes require a showing of partner negligence or fault, specifying the types of activities that could trigger negligence liability, including supervision and cooperation. Statutory language also raises questions on the level of "supervision" that gives rise to liability.

Conversion to a limited liability partnership (LLP) may completely transform the dynamics and culture of law firm practice, creating financial and administrative problems. There is initially concern the limited liability rules, under LLP legislation, may adversely affect incentives to assure quality legal services. The change in liability profile affects a number of aspects of law firm practice, including the manner in which lawyers conduct themselves before and after malpractice claims arise. In traditional partnerships, the unlimited liability shared by partners encourages the partners to participate actively in firm affairs in an effort to control their own personal liability exposure. Active participation takes a number of forms, including acting as supervising partners or serving on various committees, such as opinion review or peer review committees. Such monitoring and consultation is likely to "improve the quality of services delivered, control liability losses, and enhance the human capital of the partners."

A law firm owes a duty to all clients to ensure that the law firm has measures in effect which give reasonable assurance that all attorneys in the firm conform to the rules and standards of professional conduct. A partner avoids violating this requirement by making reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the associates' and other partners' conduct conforms to the Rules of Professional Conduct.

A survey of malpractice case law indicates that most cases against nonparticipating partners turn on vicarious liability principles. Occasionally, plaintiffs have asserted a direct negligence claim alleging failure to monitor and supervise the malpracticing partner.

The hybrid in place, of continuing supervisory liability, is intended to preserve those original tort law concepts while extending liability only where there is effective control. This extension of supervisory liability which is being seen in the United States to firm implemented process and control can affect firm management.

Supervisory liability is a more extensive form of vicarious liability than it might first appear. For example, it is a potential concern for billing partners and others who have overall responsibility for a client or who serve on audit or opinion committees. A lawyer's supervisory liability could extend broadly to the firm's activities beyond those of the lawyer's particular work group. Moreover, the scope of supervisory liability depends not only on lawyers' direct liability to clients but also on non-supervisors' agreements to indemnify supervisors in order to persuade them to serve in this capacity.

*Some firms have taken the opposite approach and rather than pull back from active monitoring those firms have moved to formal peer review where "law firm peer review" means the process in which law firm partners monitor and evaluate the job performance of their colleagues. Peer review provides a mechanism for reexamin*ing the competency of all *lawyers on* a continuing basis. Such reexamination is import*ant because, as m*alpractice statistics reve*al, senior partners cause problems more than associates or* nonlawyers. Periodic peer review may empower firm management to detect and deal with senior partners who are incapacitated or incompetent.

[NOTE: Set out the applicable professional requirements for Partners (e.g. that they are called to the bar and agree to act in accordance with the Law Society's rules.)]

1.2 The name of the Partnership shall be _____. The Partners, or any one of them, on the Partnership's behalf shall sign and cause to be filed and published an appropriate business name declaration within ____ days after the Partnership begins doing business. Each of the Partners appoints the other Partners as its agent and attorney-in-fact solely to execute on its behalf any business name statement or registration relating to the Partnership and allowing the Partners to carry on business using the declared name of the Partnership.

1.2 Declaration of Partnership. _____, shall be required on or before _____, to cause to be executed and filed such declarations, instruments and documents as may be desirable, required or considered advisable under the laws of the Province of _____, including any required declarations specified by statute, to evidence the formation of the Partnership, the admission to Partnership of any party and the retirement from Partnership of any Partner. Amendments to the declarations, reports and filings completed by the _____, shall be made from time to time, upon any change in the information included in any prior report or declaration, such further report, filing or declaration to be made within __ days of the date of occurrence of such change. The remaining Partners shall execute and deliver within ___ business days from the date of receipt of a filing, a report or a declaration presented by the _____ Partner for the purposes of this paragraph.

Note: For a Limited Liability Partnership the name must include the words "limited liability partnership" or the abbreviation "LLP".

Annotation:

Firm Name: A partnership may use a firm name. If the partnership carries on business under this name, it should register and protect the name to avoid the possibility of conflict with another name, resulting in loss of goodwill or injunction and passing off action. The name should be searched as a trade name and with the Trade Marks Office, in addition to partnership and corporate searches. Corporate partners may have to register the use of the name under the Corporations Information Act. Using a registered name can simplify dealing with creditors by allowing contracts and registrations (such as under the Personal Property Security Act) to be in the name of the partnership rather than in the names of the partners.

Registration: It should be determined whether the partnership will be registered, registration of a general partnership is not required in any Canadian jurisdiction. Registration may be desirable if the partnership intends to sue in the name of the partnership; undertake business in a partnership name, or in the Province of Quebec access the benefits of a declared partnership. It also simplifies other dealings allowing the firm to conduct business in a partnership name including contracting, granting security over assets and allowing a simplified firm name registration under the Personal Property Security Act. Registration is made in Ontario pursuant to the Business Names Act, R.S.O. 19 c. B17.

Personal Property Security Act (Ontario) Minister's Order, section 16 (4) 1.

1. If the artificial body is a partnership and the partnership is,

- *i. registered under the Business Names Act, the registered name of the partnership,*
- *ii. a limited partnership, the name of the partnership filed tinder the Limited Partnerships Act, or*
- *iii. a partnership other than a partnership described in subparagraph i or ii,*
  - *A. the name of the partnership as set out in the security agreement, and*
  - *B. whether or not the person creates a security interest, the name of at least one of the partners, and if the partner is,*
    1. *a natural person, the name in the manner required under subsection (1), or*
    2. *an artificial body, the name in the manner required under this subsection.*

Partnerships Act (Ontario) as to a limited liability partnership

Business name

44.3(1) No limited liability partnership formed or continued by an agreement governed by this Act shall carry on business unless it has registered its firm name under the Business Names Act. 1998, c. 2, s. 6.

Amendments, cancellations and renewals

(2) To amend, renew or cancel a registration of its firm name, a limited liability partnership mentioned in subsection (1) shall register an amendment, renewal or cancellation of a registration in accordance with the requirements of the Business Names Act. 1998, c. 2, s. 6.

Firm name

(3) The firm name of a limited liability partnership mentioned in subsection (1) shall contain the words "limited liability partnership" or "société à responsabilité limitée" or the abbreviations "LLP", "L.L.P." or "s.r.l." as the last words or letters of the firm name. 1998, c. 2, s. 6; 2006, c. 19, Sched. G, s. 7 (1).

Same

(3.1) A limited liability partnership mentioned in subsection (1) may have a firm name that is in,

- *(a) an English form only;*
- *(b) a French form only;*
- *(c) a French and English form, where the French and English are used together in a combined form; or*
- *(d) a French form and an English form, where the French and English forms are equivalent but are used separately. 2006, c. 19, Sched. G, s. 7 (2).*

Same

(3.2) A limited liability partnership mentioned in subsection (1) that has a firm name described in clause (3.1) (d) may be legally designated by the French or English version of its firm name. 2006, c. 19, Sched. G, s. 7 (2).

Use of registered name only

(4) No limited liability partnership mentioned in subsection (1) shall carry on business under a name other than its registered firm name. 1998, c. 2, s. 6.

Extra-provincial limited liability partnerships

44.4(1) No extra-provincial limited liability partnership shall carry on business in Ontario unless it has registered its firm name under the Business Names Act. 1998, c. 2, s. 7; 2006, c. 19, Sched. G, s. 7 (3).

Amendments, cancellations and renewals

(2) To amend, renew or cancel a registration of its firm name, an extra-provincial limited liability partnership shall register an amendment, renewal or cancellation of a registration in accordance with the requirements of the Business Names Act. 1998, c. 2, s. 7.

Use of registered name only

(3) No extra-provincial limited liability partnership shall carry on business under a name other than its registered firm name. 1998, c. 2, s. 7.

The (Ontario) Business Names Act, R.S.O. 1990, c. B.I7, provides at s. 2(3) that no persons associated in partnership shall carry on business or identify themselves to the public, except as a limited liability partnership carrying on business in accordance with the Partnerships Act, unless the name of the partnership is registered by all of the partners. A registrant under the Business Names Act is required to register any change in the information set out in the registration, by the provisions of s. 4(4), within 15 days after the change. Registrar has the power to cancel a registration under s. 4(7) only if a name was accepted that does not comply with the prescribed requirements or the registrant requests the cancellation. The Registrar may also cancel a registration under s. 4(8) if the registrar gives notice to the registrant requiring a correction or updating of the information and the registrant does not comply with such action. Other than where a registration is cancelled by the registrar at the request of the registrant, or pursuant to court order, by the provisions of s. 4(10), the registrar must give the registrant 21 days notice of intention to cancel. Registrations are available for a period of five years only, and renewals must be filed within 60 days after the date of expiry (s. 5(2)).

10.1280-10.1340 4. Name of a Limited Liability Partnership

Note: The following clauses are not commonly used but should be considered for large partnerships.

1.3 No Partner has the right to use any part of the Partnership name to carry on any business or activity other than the business of the Partnership unless such part is his own surname or the surname of another living person with whom he forms a new partnership.

1.4 The Partnership may continue to use, as part or all of the Partnership name, the name of any Partner who has withdrawn for any reason from the Partnership and each Partner to this Agreement hereby irrevocably consents on their own behalf, as well as on behalf of their estate, to such continued use of their name. No Partner, nor the estate of any Partner, shall receive, or

be entitled to receive, any remuneration in any form for the use of the Partner's name as part or all of the Partnership name.

1.5 Term. The term of the Partnership shall be from the date set out in this Agreement to _____, ____, unless sooner determined by applicable law or terminated as hereinafter provided.

Alternate

1.5 Term. The Partnership commenced on the date of the Initial Partnership Agreement and shall continue in full force and effect until dissolved or terminated pursuant to the terms hereof or pursuant to the mandatory provisions of applicable Law (the **"Term"**).

Alternate

1.5 Term. The Partnership shall not be dissolved or terminated by, and shall continue in existence notwithstanding, the change in Partnership composition, whether by withdrawal, expulsion or admission of any Partner.

Note: Alternate - use a term tied to completion of a venture or an event, or a triggering event such as a vote of partners or the withdrawal or expulsion of named or a number of partners.

Annotation:
Term of Partnership: Insert date of commencement of the partnership relationship, otherwise the date of signing should govern. Unless a specific term is stated, it is a partnership at will of all the partners. Subject to the provisions of the agreement, the Partnerships Act states that any partner withdraw from a partnership at will at any time, by written notice. Terms for the partnership can also be tied into an enterprise or event with termination on conclusion. The default terms of the Partnerships Act should be reviewed and agreement reached on each compulsory termination which is not desired to be applied.

Partnerships Act, Sections 32 and 33 - Dissolution by Expiry of Term or Notice: The provisions of sections 32 and 33 are subject to agreement by the partners. Absent agreement section 32 sets out the basis upon which the partnership is dissolved by term or notice. The dissolution arrangements dictated by these default terms should be specifically reviewed to determine if they are suitable for the partnership and otherwise amended. Section 33 dealing with dissolution caused by the death or insolvency of a partner also needs to be reviewed, and an agreement as to the basis continuation of the partnership if these events occur should be included if this is intended.

1.6 Business of the Partnership. The business of the Partnership is to acquire, hold, maintain, operate, improve, develop, sell, exchange, lease and otherwise use the "Partnership Property" (hereinafter defined) for profit and to engage in all activities related thereto, specifically including _____.

1.7 Activity Outside of Partnership Business

No Partner or employee of the Partnership shall become a director or executive officer of any corporation, unless for the sole purpose of incorporating and organizing a corporation, or a candidate for political office, without the prior written consent of the Partners or a committee to

which the Partners have delegated the authority to provide such consent in each case by ● **[NOTE: Set out basis for authorizing]** and subject to such terms and conditions as the Partners or such other committee shall specify. Such consent shall not imply our agreement on behalf of the Partnership to indemnify such Partner or employee with respect to any liability incurred as a result of becoming such director, executive officer or candidate and no such indemnification shall be provided unless authorized by Special Resolution with respect to a specific incurred liability.

Annotation:
Description of Business: The description of business will, as between partners, define the scope of the business and thereby, indirectly, the authority and agency of each partner. The nature of the business cannot be changed without the consent of all partners, by section 24 of the Partnerships Act unless there is an express or implied agreement to the contrary. The defined business should be broad enough to avoid the need for unanimous consent for the planned or likely evolution of the partnership business.
Partnerships Act:
S.1(1) business only
1. *(1) In this Act,*
"business" includes every trade, occupation and profession; ("entreprise")

Limitation on business activity for limited liability partnerships
44.2 *A limited liability partnership may carry on business in Ontario only for the purpose of practising a profession governed by an Act and only if,*
(a) that Act expressly permits a limited liability partnership to practise the profession;
(b) the governing body of the profession requires the partnership to maintain a minimum amount of liability insurance; and
(c) the partnership complies with section 44.3 if it is not an extra-provincial limited liability partnership or section 44.4 if it is an extra-provincial limited liability partnership. 1998, c. 2, s. 6.

10.1540-10.1580 Limited to Professions

Note: This clause should be consistent with or may replace or be replaced by Section 3 - Capital

1.8 Partnership Interest and Capital. The Partnership shall be formed as a general partnership pursuant to the laws of _____. #1 shall be required to contribute to the Partnership the assets consisting of _____, and to receive for such contribution as _____% interest in and the assets and undertaking of the Partnership, as a Partner. #2 shall receive, for a contribution of $_____, as and by way of capital contribution, to be contributed at those times, in those amounts, as set out in Schedule "B" to this Agreement, a _____% interest in and to the assets and undertaking of the Partnership, as a Partner, provided that the percentage interest of #2, as a Partner of the Partnership, shall be issued in favour of #2 on the basis of a pro rata share based upon a _____% interest in exchange for a contribution of $_____, such that the percentage interest of #2 shall be recognized as and when contribution is completed. Subject to the percentage interest of each of the Partners, the interest of the Partners shall be pro rata and pari passu, in and to the assets, and any distribution of the assets or proceeds of undertaking of the business of the Partnership.

Alternate

1.8 Capital of the Partnership

The original capital of the Partnership shall consist of $_____ contributed by the Partners as follows:

Name	Amount	% of Total Capital

The "Partnership Interest" of each Partner shall be equal to the percentage of the total capital contributed by each Partner. The capital contributions of a Partner shall be determined by adding the total contributions the Partner has made, other than any additional capital treated as debt under Section 3.2, and deducting from such total any repayments of capital to such Partner. Partners shall not be entitled to demand a return of their capital contribution to the Partnership, except as may be expressly provided for hereunder.

1.8 Initial Capital Contributions.

(a) The Partners shall collectively contribute to the Partnership the Royalty (hereinafter defined) (which is valued as of the date hereof $_____ in the aggregate) as their collective capital contribution to the Partnership.

(b) Each of the Partners shall make his capital contribution in _____ equal installments of principal on the _____ day of each month, beginning _____, ____.

1.8 Classes of Partnership Interests

The Partnership shall have two classes of interests in the Partnership: Common Partnership Interests and Preferred Partnership Interests having the attributes set forth below. Common partnership Interests and Preferred Partnership Interests shall be issued only as provided in this Agreement

Annotation:

Percentage and/or Amount of Contribution to Capital: Capital obligations should be clear and complete as to timing, changes, valuation and withdrawal. The initial contribution should be valued if it is other than cash or is based on a percentage of firm value at the time of contribution. The timing of the initial and any subsequent capital contributions should be agreed. The outline of any obligation to make future contributions to capital can include retaining a percentage of profits. In the absence of agreement, the partners are required to contribute equally and to share equally on winding-up and interest is payable at 5% per annum on excess capital contributed but is not otherwise payable (section 24)

Capital Contribution: The nature and quantum of the capital contribution by each of the partners must be discussed. Any assets which are owned by partners and are to be contributed, at the time of formation of the partnership or subsequently should be discussed and a value allocated or valuation process agreed to. Tax planning advice may be required during the course of this discussion, however, the partners should discuss their understanding of the business arrangements. The timing, valuation and form of contributions for capital contributions after

formation should also be considered. This could be contributions required for an unusual purchase of equipment or other requirements such as new premises. This would also consider ongoing capital contributions by way of leaving some profit in the partnership for running purposes. None of these matters have default contract provisions in the Partnerships Act, other than the requirement under section 24 to share equally in the losses, capital or otherwise, of the firm. Section 24 also provides for a requirement to pay interest at 5% on amounts of capital contributed in excess of agreed capital.

Note the consequences and requirements of a partner if the capital account becomes negative should be considered.

1.9 No. Assignment No Partner shall be permitted, without the consent of the other Partners, to transfer, assign, hypothecate, pledge, otherwise alienate or deal with his, her or its Partnership interest, or shall suffer to be done anything whereby his, her or its interest in the Partnership may be taken in execution or in any way assigned, transferred, pledged or encumbered [except that a Partner may pledge his or her capital account to a recognized financial institution which has granted a capital loan to such Partner]. The existence of a right in a person other than a Partner pursuant to a statute implementing provisions of family law shall not contravene the foregoing requirement. Each Partner shall punctually pay and discharge his or her present and future separate debts and obligations and shall at all times keep indemnified the other Partners and the property of the Partnership against such debts and obligations and all actions, proceedings, claims and demands in respect thereof.

Alternate

1.9 Permitted Transfers

Any Partner (in this Section a **"Transferor"**) may (upon written notice to the other Partners) assign all, but not less than all, of its interest in the Partnership to

(a) its Principal; or

(b) any entity which is Controlled by the Transferor,

provided that at the time of the transfer, the assignee agrees to be bound by the terms of this Agreement. The Transferor will, at all times after the transfer, be jointly and severally liable with the permitted assignee for the observance and performance of the covenants and obligations of the permitted assignee under this Agreement.

Annotation:

Partnerships Act

Rights of assignee of share in partnership

31. *(1) An assignment by a partner of the partner's share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. R.S.O. 1990, c. P.5, s. 31 (1).*

On dissolution

(2) In the case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between the assigning partner and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution. R.S.O. 1990, c. P.5, s. 31 (2).

B3.607 to B 3.609.3 - Assigns of a Partnership Interest

Cite: Zawadzki v. Matthews Group Ltd. (1999), 46 C.L.R. (2d) 1 (Ont. S.C.J.)

Stow v. R. (2010) 2010 TCC 406, 76 B.L.R. (4th) 187, (T.C.C.) for tax effect.

Sales of Partnership Interest: A partnership interest in not transferable unless otherwise agreed or specifically approved by all partners. The Partnerships Act does not prohibit assignment of the rights to profits, absolutely or for security, but section 31 states that an assignment gives no other rights. An assignment intended to give other rights is an admission to partnership which requires the consent of all partners (section 24.7) unless there is an agreement amending this statutory provision.

1.10 Fiscal Year. The fiscal year of the Partnership (herein called the **"fiscal period"**) shall end on _____ in each year or on such other date as may from time to time be determined by the Partners by Special Resolution.

Annotation:

B. 6.130 to 6.140 - Fiscal Year

Fiscal Year: There is generally no longer any tax advantage to using a fiscal year other than the calendar year for Canadian partnerships. Rather, any partnership using a year end other than the calendar year will have to have two year end financial cut offs and two sets of statements, one for tax filing and one for partnership year end. Business considerations should be reviewed, however, and the fiscal year set, taking business needs, tax filing and statement preparation into account.

Annotation:

Partnerships Act:

Meaning of "firm"

5. *Persons who have entered into partnership with one another are, for the purposes of this Act, called collectively a firm, and the name under which their business is carried on is called the firm name. R.S.O. 1990, c. P.5, s. 5.*

B.2.830 to 2.880 - Declaration of Partnership - Filing and Holding Out

B. 2.1098 to 2.1099 - Registrations

3.170 to 3.300 - Filings

1.11 Location. The Partnership shall carry on business at such location, and pursuant to lease or ownership arrangements, as may from time to time be determined by the Partners by Special Resolution.

Annotation:

Place of Business: This is not a necessary clause and is included only for definition to restrict the geographical area of operation of the business of the partnership.

2. PARTNERS AND ADMISSIONS TO PARTNERSHIP

2.1 Admission of New Partners. No new Partner, **[Include if allowing corporate partners** including a corporation which meets the requirements of Section 2.4**]**, shall be admitted to the Partnership except by [Special Resolution] and further, unless he or she shall first execute an agreement in the form of this Agreement or a certificate of adherence substantially in the form of Schedule "A" hereto. A newly admitted Partner shall make a capital contribution to the Partnership in such amount and at such time as determined by the _____Committee, at or prior to the time that such Partner is admitted into the Partnership. A newly admitted Partner shall participate in the net profits and net losses of the Partnership from and after the date of admission in accordance with the terms of this Agreement. The Partnership shall not be dissolved, terminated or novated by the admission of the new Partner, but shall continue with the new Partner as a member thereof. **[NOTE: Set out basis for setting and revising Partnership admission criteria from time to time]**.

Alternate

2.1 Admission of New Partners. No new Partner shall be admitted to the Partnership except upon the affirmative vote of at least two-thirds (^{2}/3) of the Partners present at a meeting called for the purpose of considering admission, and further, unless he or she shall first execute an agreement in the form of this Agreement. A newly admitted Partner shall make a capital contribution to the Partnership in such amount and at such time as determined by the Partners, at or prior to the time that such Partner is admitted into the Partnership. A newly admitted Partner shall participate in the Net Profits and Net Losses of the Partnership from and after the date of admission in accordance with the terms of this Agreement. The Partnership shall not be dissolved, terminated or novated by the admission of the new Partner, but shall continue with the new Partner as a member thereof.

Alternate

2.1 Admission of New Partners. It is specifically acknowledged and agreed that it is the intention of #1 and #2, to seek further capital contribution for the undertaking of the exploitation and development of the business of the Partnership, such further contribution to represent an acquisition of a _____% interest, such to be offered in consideration of a cash contribution of $_____, and such to represent a dilution of the Partnership interest of #1, but not of #2, such that the further _____% interest shall be offered from the percentage interest held by _____, so as to reduce the percentage interests of #1 to an interest of _____%.

2.2 Interest of New Partners. New Partners shall not be entitled to any interest in the work-in-progress as of the date of their admission to the Partnership, nor in any other assets of the Partnership existing at the time of their admission including, without limiting the generality of the forgoing, any interest in any shares or investments held by the Partnership prior to their date of admission.

Annotation:

Partnerships Act:

Persons liable by "holding out"

15. *(1) Every person, who by words spoken or written or by conduct represents himself or herself or who knowingly suffers himself or herself to be represented as a partner in a particular firm, is liable as a partner to any person who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the persons so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made. R.S.O. 1990, c. P.5, s. 15 (1).*

Continuing business after death of partner

(2) Where after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof does not of itself make his or her executor's or administrator's estate or effects liable for any partnership debts contracted after his or her death. R.S.O. 1990, c. P.5, s. 15 (2).

Liability commences with admission to firm

***18.** (1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before the person became a partner. R.S.O. 1990, c. P.5, s. 18 (1).*

Liability for debts, etc., incurred before retirement

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before the partner's retirement. R.S.O. 1990, c. P.5, s. 18 (2).

Agreement discharging retiring partner

(3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between the partner and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted. R.S.O. 1990, c. P.5, s. 18 (3).

Admission of a New Partner: The Partnerships Act provides that a new partner cannot be admitted except with unanimous consent of the remaining partners at section 24. If this is not the desired approval level for admission of a partner, it should be amended by the partnership agreement. Also, there are no detailed mechanics for admission as to capital contribution, participation in the interests of the partnership, timing for integration, and contribution to the business and management affairs of the partnership in the statutes so these should all be considered in the admissions terms. Otherwise the simple concepts of equal contribution of capital, participation in profit and loss, and right to participate in management will apply.

Admission of New Partners: The basis for new partners to be admitted needs to be amended if it is to be other than on unanimous approval as is provided in the Partnerships Act. The criteria for selecting partners does not need to be set out but is a useful addition if less than unanimous approval is agreed to for partnership admission. The requirements for capital contribution required in relation to the admission of new partners should be considered in the agreement, there are no statutory terms other than the concept of equal contribution.

Partnerships Act, Section 18 - Liability Commences with Admission to Firm: A person does not acquire liability for the affairs of the partnership prior to them becoming a partner. If there is to be an assumption of liability for matters prior to admission, this needs to be included in the partnership agreement. On retirement, a partner remains liable for debts and obligations incurred before retirement. Partners cannot, by contract effect the result as to third parties but should consider and reach agreement as to indemnity among partners for these liabilities. Significant contracts with third parties should also consider the extent and nature of liability for later admitted or withdrawing partners.

2.2 Spousal Release Each Partner will obtain a release of any spouse entitled to a share of matrimonial property validly releasing any right to a security interest, charge or ownership interest in the Partnership Assets or the Partnership Interest of the Partner.

Annotation:

Spousal Releases: The Family Law Act which came into law in Ontario in 1986 gives spouses, at the time of separation or divorce, a prima facie interest in all assets of the other spouse, subject to evaluation and equalization. The assets include business assets. This would mean that the spouses of the partner could potentially have a claim against the financial interest of

their spouse in the partnership interest. It has not become common practice to have the spouses release their interest in the partnership practice and obtain their equalization of assets through other family assets but this issue should not be overlooked. The courts in Ontario have not been awarding a direct interest in the partnership, and very arguably could not force that on the partners, but can impose a sharing of distributions (as an assignee) which could have undesirable results. Family law of any other jurisdiction should be considered.

2.3 Interest of New Partners. New Partners shall not be entitled to any interest in the work-in-progress as of the date of their admission to the Partnership, nor in any other assets of the Partnership existing at the time of their admission including, without limiting the generality of the forgoing, any interest in any shares or investments held by the Partnership prior to their date of admission.

Annotation:
An agreement should set out as to how to calculate the admission date values and allocations when admitting partners. This is one possible agreement for illustration.

2.4 Professional Corporations. A corporation may be admitted as a Partner in the same manner as an individual Partner provided that:

(a) the corporate Partner is and remains at all times permitted under applicable law (including any rules of the **[Name professional organization]** (or other applicable regulatory body) relating to the practice of **[Identify profession]** in each jurisdiction in which the Partnership carries on business and as may be applicable to the corporate Partner) to carry on the business of providing **[Describe the business]** through the Partnership;

(b) each corporate Partner shall, at the time of its admission to the Partnership, designate the individual shareholder through whom the corporate Partner provides **[Describe profession]** (the "**Designated Shareholder**");

(c) the corporate Partner shall not carry on any active business other than the provision of **[Describe profession]** through the Partnership. For greater certainty this restriction shall not prohibit corporate Partners from making passive investments such as investments in entities in respect of which neither the corporate Partner nor the Designated Shareholder will play an active role in the day-to-day operations nor will the corporate Partner or Designated Shareholder control significant decisions or act as an asset or property manager;

(d) the Designated Shareholder is and remains the sole voting shareholder of the corporate Partner and controls and continues to control the corporate Partner;

(e) the Designated Shareholder provides and continues to provide his or her personal services to the corporate Partner in a manner acceptable to the **[Describe how oversight will be undertaken]**;

(f) the Designated Shareholder agrees to be personally responsible for, and to indemnify the Partnership and all other Partners in respect of, all duties, obligations and liabilities of the corporate Partner to the Partnership and the other Partners as if such individual were a Partner in the place and stead of the corporate Partner;

(g) the corporate Partner and, where applicable, the Designated Shareholder have met and continue to meet the requirements of subsections (i) through (vii) of this Article 22, all other requirements of this Agreement and all other requirements established by the **[Describe oversight functions from time to time]** as applicable to Partners or corporate Partners, as appropriate.

Additionally,

(i) Notwithstanding any other provision of this Agreement, if the Designated Shareholder of a corporation seeking admission to the Partnership is already a Partner, the **[Describe oversight function]** may admit the corporation as a Partner upon assignment of the Designated Shareholder's interest in the Partnership to the corporate Partner, without the requirement for a vote of the Partners. In that case, the corporate Partner shall be admitted to the category of partnership held by the assigning Designated Shareholder and the partnership interest held by the corporate Partner shall be deemed for all purposes to be a continuation of the partnership interest of the former individual Partner;

(ii) a Designated Shareholder of a corporate Partner shall provide services to such Partner and not to the Partnership and the corporate Partner shall be solely responsible for the remuneration, workers compensation, employee source deductions (including unemployment insurance Canada Pension Plan and income taxes), supervision and discipline of the Designated Shareholder and all matters arising out of the relationship between the Designated Shareholder and the corporate Partner as employee and employer;

(iii) the corporate Partner shall ensure that the Designated Shareholder complies with the provisions of this Agreement as amended from time to time and with all policies, rules and procedures of the Partnership to the same extent and effect as if the Designated Shareholder is a Partner;

(iv) a Designated Shareholder shall not pledge or otherwise encumber his or her shares in the corporate Partner or otherwise incur liabilities that could adversely affect the corporate Partner's ability to fulfill its obligations as Partner, in each case without the express written consent of the **[Describe oversight function]** given upon such conditions as the **[Describe oversight function]** in its absolute discretion may determine;

(v) a corporate Partner is entitled to attend Partners' meetings and otherwise to be represented in Partnership matters only by its Designated Shareholder;

(vi) a corporate Partner shall cease to be a Partner:

a. if the Designated Shareholder would have ceased to be a Partner if he or she was the Partner instead of the corporate Partner; or

b. if the corporate Partner is wound-up, dissolved, becomes insolvent or bankrupt, or is required to withdraw from the Partnership in accordance with the provisions of this Agreement;

(vii) the manner of application of Partnership policies to a corporate Partner and/or to its Designated Shareholder may be determined by **[Describe oversight function]** from time to time and **[Describe oversight function]** may from time to time establish requirements that a corporate Partner and its Designated Shareholder must meet and continue to meet in order for the corporate Partner to continue to be eligible to be a Partner, provided that such application and the substance of such requirements is no more onerous to the corporate Partner and the Designated Shareholder together than the requirements that would apply to an individual Partner.

Annotation

B. Chapter 13 Incorporated Professional Corporations into the Professional General Partnership

3. CAPITAL

3.1 Initial Capital Contributions. The initial capital contributions of the Partners shall be as follows:

(a) #1. C shall contribute in cash the total sum of $_____, contribution shall be made on or before _____

(b) #2. On the Closing Date, #2 shall contribute all of its rights, interests and obligations in the Partnership Property held by #2, on or before _____. The Partners agree that the value of such rights, interest and obligations is $_____ and that #2 shall each be credited with $_____ for such contribution.

Alternate

3.1 Initial Capital Contributions.

(a) The Partners shall collectively contribute to the Partnership the sum of _____ dollars as their collective capital contribution to the Partnership. Each Partner shall contribute, as his initial capital contribution to the Partnership, that sum which is set forth on Schedule ___. Where noted in Schedule ___ the capital contribution may be made by donation of the designated assets, valued as set out therein.

(b) Each of the Partners shall make his capital contribution in ____ equal installments of principal on the ____ day of each month, beginning _____,____. Each Partner shall, contemporaneously with this Agreement, execute and deliver to the Partnership a promissory note in substantially the form attached hereto as Schedule ____ evidencing the obligation to advance the capital contribution to the Partnership. If any Partner fails to contribute the balance required by the terms of this paragraph, and the promissory note, such Partner shall be subject to the right of the Partnership to recover the debt owing to it by summary application, and to a lien in favour of the Partnership over all rights and entitlement of the Partner, including participation in any payment or distribution which shall be paid to the Partnership until capital contribution hereunder is made in full.

Annotation:

B 2.440, 2.490 - Formation of the Partnership
2.515 - Control or Management
B 3.410 to 3.440 - Contribution and Profit Participation
B. 4.10 - Introduction - Contribution of Capital and Assets,
4.30, 4.40 - Partnership Capital
4.80, 4.90 - Contribution of Assets

4.120 - Equality of Capital
7.1070, 7.1080 - Capital Entitlement
Cite: Barker v. British Columbia (1989), 14 A.C.W.S. (3d) 320 (B.C. Co. Ct.)
Vallelunga v. Larizza (1986), 34. A.C.W.S. (2d) 372 (Ont. S.C.)

Canada Dry Ltd. v. Nova Recreation Development Co. (1982), 56 N.S.R. (2d) 167 (S.C.)
Percentage and/or Amount of Contribution to Capital: Capital obligations should be clear and complete as to timing, changes, valuation and withdrawal. The initial contribution should be valued if it is other than cash or is based on a percentage of firm value at the time of contribution. The timing of the initial and any subsequent capital contributions should be agreed. The outline of any obligation to make future contributions to capital can include retaining a percentage of profits. In the absence of agreement, the partners are required to contribute equally and to share equally on winding-up and interest is payable at 5% per annum on excess capital contributed but is not otherwise payable (section 24).

Capital Contribution: The nature and quantum of the capital contribution by each of the partners must be discussed. Any assets which are owned by partners and are to be contributed, at the time of formation of the partnership or subsequently should be discussed and a value allocated or valuation process agreed to. Tax planning advice will likely be required during the course of this discussion, however, the partners should discuss their understanding of the business arrangements. The timing, valuation and form of contributions for capital contributions after formation should also be considered. This could be contributions required for an unusual purchase of equipment or other requirements such as new premises. This would also consider ongoing capital contributions by way of leaving some profit in the partnership for running purposes. None of these matters have default contract provisions in the Partnerships Act, other than the requirement under section 24 to share equally in the losses, capital or otherwise, of the firm. Section 24 also provides for a requirement to pay interest at 5% on amounts of capital contributed in excess of agreed capital.

3.2 Additional Capital Contributions. Capital account of each Partner shall be increased by undistributed profit, and further contributions by each Partner. The capital account shall further be increased by appraised surplus over assets, and decreased by distributions made to the Partner, by way of distribution of Partnership profit; provided that no Partner shall have the right or power to (i) withdraw or reduce his contribution to the capital of the Partnership except as a result of the dissolution of the Partnership or as otherwise provided by law; or (ii) demand or receive property other than cash in return for his capital contribution.

Except as expressly provided in this Agreement, no Partner shall be entitled to withdraw capital or to receive distributions of or against capital without the prior written consent of, and upon the terms and conditions agreed upon by, the other Partners.

Alternate
3.2 Capital Contributions. The Partners may, by Special Resolution, determine, from time to time, the amounts of capital to be contributed by the Partners, provided that the capital contributions shall be proportionate to unit allocations, and the rate of interest or rates of interest, if any, payable thereon by the Partnership. Until each Partner has contributed the amount of any capital required to be contributed by him or her or it, such Partner shall be chargeable with interest on the amount thereof unpaid from the date when the contribution was required to be made, at the highest rate or rates of interest from time to time paid by the Partnership to its bankers during the relevant period.

Alternate

3.2 Further Capital Contributions

If the Partners determine at any time, and from time to time, after the effective date of this Agreement, that further capital is required from the Partners for carrying on the Business such capital shall be advanced by the Partners in proportion to each Partner's Partnership Interest. If any Partner shall bring in additional capital in excess of the amount such Partner is required to, or leave any part of its profits in the Business such amount shall be considered a debt due to the Partner from the Partnership and shall bear interest at the rate determined by the Partners and such amount shall not be drawn out except upon giving sixty (60) days' written notice to the Partnership. The Partner shall be required to draw out such amount on sixty (60) days notice from another Partner. Subject to the foregoing, any and all capital of the Partnership from time to time belongs to the Partners in the same proportion as their respective Partnership Interests. Any such amounts are to be treated as debt and so will not affect the Partners' relative Partnership Interests.

Alternate

3.2 Additional Capital Contributions. The capital account of each Partner shall be increased further be increased by appraised surplus over assets, and decreased by distributions made to the Partner, by way of distribution of Partnership profit; provided that no Partner shall have the right or power to (i) withdraw or reduce his contribution to the capital of the Partnership except as a result of the dissolution of the Partnership or as otherwise provided by law; or (ii) demand or receive property other than cash in return for his capital contribution. Except as expressly provided in this Agreement, no Partner shall be entitled to withdraw capital or to receive distributions of or against capital without the prior written consent of, and upon the terms and conditions agreed upon by, the other Partners.

Alternate

3.2 Additional Capital Contributions The Partners may determine from time to time the amount of additional capital to be contributed by the Partners and the rate or rates of interest, if any, payable thereon by the Partnership. Until each Partner has contributed the amount of any capital required to be contributed by it, such Partner shall be charged interest on the amount unpaid from the date when the contribution was required to be made at a rate equal to Prime Rate plus 1% per annum.

Alternate

3.3 Capital Accounts. The Partners shall each have separate capital accounts **[**which shall be maintained in equal amounts at all times**]**, the capital accounting shall be undertaken, annually, and the capital account calculation shall be completed based upon the capital accounting methods previously set out. In the event that, as a consequence of calculation of capital hereinbefore provided, the capital accounts are then not equal, each Partner shall be required to contribute to the Partnership, an amount as is required, to equalize this capital account with the remaining Partners.

Alternate

3.3 Capital Accounts

The Partnership shall maintain a capital account (a "Capital Account") for each Partner. The Capital Account for each Partner shall consist of such Partner's initial capital contributions and shall be:

(a) increased by additional capital contributions by such Partner pursuant to this Agreement; and

(b) Decreased by distributions hereunder to such Partner.

Where a capital contribution or a distribution is made in property, the Partnership shall determine the fair market value of such capital contribution or distribution and the relevant Capital Account(s) shall be increased or decreased accordingly. Where a capital contribution is made in a currency other than Canadian dollars, the Partnership shall determine the Canadian dollar equivalent of such capital contribution and shall add such Canadian dollar equivalent to the Capital Account of the Contributing Partner and reflect such Canadian dollar equivalent in the Partnership register.

3.4 Funding and Subsequent Contributions

(a) On the basis of the Cash Management Policy and all Approved Plans and Budgets then in effect, or if required to fund Emergency Costs or to fund an Acquisition that has been approved in accordance with Section **[_____]**, the Management Committee may from time to time submit to each Common Partner a notice (a **"Funding Demand"**) setting out each Common Partner's, Proportionate Share of any funding required. All Funding Demands shall be funded by all of the Common Partners by way of, at the determination of the Management Committee:

(i) equity contributed by way of cash payment (**"Cash Payment"**); or

(II) a cash advance to the Partnership in the form of a loan (a **"Cash Advance"**) at an interest rate and on terms to be determined by the Management Committee, all such Cash Advances to be convertible at the same time into Common Partnership Interests at the discretion of the Management Committee.

(b) Each Common Partner shall deposit into the Partnership Funding Account the amount set out in the Funding Demand submitted to it by no later than the **[_____]** Business Day after receipt of a Funding Notice (such day, the **"Funding Deadline"**).

(c) All amounts received by the Partnership from a Partner pursuant to this Section, shall constitute Contributions by the applicable Partner and shall be added to the Capital Account of the applicable Partner.

Alternate

3.3 Capital shall be maintained and contributed by the Partners in the proportions in which they share in Partnership profits and losses.

3.4 Capital Contribution - New Partners. A new Partner shall make a capital contribution to the Partnership in an amount equal to _____% of the capital then contributed by the Partners and reflected as a capital in the records of the Partnership (the **"Capital Contributed"**). Such amount is payable by the new Partner to the Partnership by _____ days after admission of the Partner.

By the end of the first fiscal year of the Partnership after the admission of a new Partner, the new Partner shall have a capital level at least equal to _____% of Capital Contributed. By the end of the second fiscal year after the admission of the new Partner, such new Partner shall have contributed at least _____% of the Partnership's Capital Contributed. By the end of the third fiscal year after the admission of the new Partner, the new Partner shall have a capital level equal to that Partner's proportionate share of the Partnership's Capital Contributed.

3.5 Interest on Capital. If at the end of a fiscal year a Partner's capital account is in excess of that Partner's required capital level for that fiscal year, that Partner shall be paid interest on the amount of excess capital in the Partner's Capital account at the same rate which the Partnership pays on its operating loan.

Alternate
3.5 Interest on Capital. No Partner shall be entitled to receive interest on the amount of his capital contribution or any balance in his capital account from the Partnership. No Partner shall be liable to pay interest to the Partnership on any negative balance in his capital account.

Annotation:
B 4.35 - Partnership Capital
Canada Dry Ltd. v. Nova Recreation Development Co. (1982), 56 N.S.R. (2d) 167 (S.C.);
B 4.260 t0 4.300 - Interest on Capital
Bray v. MacLeod (1978), 6 B.C.L.R. 295 (S.C.)

4. PARTNERSHIP ASSETS

4.1 Contribution of Assets. The assets of the Partnership will consist of: (i) those assets contributed by any Partner which will be accepted and recognized by valuation as an addition to the capital account of such Partner, initially being those assets listed in Schedule __; and (ii) those assets acquired using the funds of the Partnership, whether contributed by the Partners, borrowed or earned from the business of the Partnership, and will be known as Partnership Property.

Alternate
4.1 Partnership Property All of the property, real or personal, tangible or intangible, used by the Partners in carrying on the Business shall be assets of the Partnership and shall belong to the Partners in the same proportion as their respective Partnership Interests. If the Partnership sells any (or all or substantially all) of such property, distributions shall be made pro rata to the Partners in proportion to their respective Partnership Interests.

Alternate
4.1 Ownership and Use of Partnership Assets All property and assets contributed to the Partnership pursuant to this Agreement shall be held, used and disposed of by the Partnership solely for the purposes of the Partnership and in accordance with this Agreement. Partnership Assets shall be held and recorded in the name of the Partnership or a nominee and agent of the Partnership or In other manner as the Management Committee may determine. All Partnership Assets shall be deemed to be owned by the Partnership as an entity and, except as expressly provided in this Agreement, the Partners have no separate right, title or interest whatsoever in the Partnership Assets. The Partnership shall have the right to form and to hold interests, directly or indirectly, through one or more corporations for the purpose of owning Partnership Assets or operating all or any part of the Business of the Partnership. Each of the Partners

hereby waives all rights it may have at any time to maintain any action for division or sale of the Partnership Assets as now or hereafter permitted under any applicable Laws.

Annotation:

Cite: Tremblett v. Tremblett (2012), [2012] N.J. No. 385, 2012 CarswellNfld 409, 2012 NLTD 166, 329 Nfld. & P.E.I.R. 265, 1022 A.P.R. 265, Garrett A. Handrigan J. (N.L. T.D.) successfully as, appealed in the Supreme Court of Newfoundland and Labrador Court of Appeal, *Tremblett v. Tremblett* 2013 NLCA 53.

Partnerships Act:

incurred by an individual partner. R.S.O. 1990, c. P.5, s. 8.

Partnership property

21. *(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act "partnership property", and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement. R.S.O. 1990, c. P.5, s. 21 (1).*

Devolution of land

(2) The legal estate or interest in land that belongs to a partnership devolves according to the nature and tenure thereof and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section. R.S.O. 1990, c. P.5, s. 21 (2).

Co-owners of land

(3) Where co-owners of an estate or interest in land, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of purchase. R.S.O. 1990, c. P.5, s. 21 (3).

Property bought with partnership money

22. *Unless the contrary intention appears, property bought with money belonging to the firm shall be deemed to have been bought on the account of the firm. R.S.O. 1990, c. P.5, s. 22.*

B 3.1550 to 3.1650 - Contribution and property ownership

4.770 to 4.830 - Ownership of partnership property

Cite: Molson Brewery B.C. Ltd. v. Canada (2001), 199 F.T.R. 210; and

Gillette Canada Inc. v. Canada, 2001 DTC 895, affd [2003] 3 C.T.C. 27 (F.C.A.)

Partnership Property: A partnership acquires assets, which is property that is to be used exclusively for the business of the partnership (section 21), by contribution as capital by a partner or is bought using partnership resources. There is no statute provision dealing with the valuation of property contributed to the firm and this must be agreed upon for capital contribution purposes. If any partnership property is to be available for other than partnership business this would need to be agreed otherwise any partner using the property will need to account for any benefit from that use. The partnership property must be used for partnership purposes but it is desirable to determine how ownership will be registered, and specify who has, and the scope of, the authority to deal with partnership property, the delegation of management and administration, and the voting mechanics for significant dealings with the assets of the partnership should also be included.

Partnerships Act, Section 21 - Partnership Property: Section 21 sets out the statutory default rules as to the partnership's interest in property used by the partnership. If partnership interests

are to be acquired by the partnership, other than through the use of partnership funds where "ownership" by the "firm" is automatic, then this should be contemplated in the agreement. Property, to be "partnership property", must be brought in by contribution to or acquired on account of the firm. If individuals are to clearly retain their separate right to an asset, or to reacquire an asset, this should need be included in the partnership agreement because it is likely contribution will be implied from the use in the partnership business. The provisions of section 22, "Property Bought with Partnership Money", and section 23, "Conversion of Land Bought with Partnership Money Into Personalty", also should be reviewed to ensure the deeming provisions reflect the intention of the partners. These clauses govern the relations of partners among themselves and can be altered by the agreement as desired by the partners.

Partner using credit of firm for private purposes
A partner may not use partnership assets for personal use unless agreed by the partners. While not directly on this point the provisions of Partnership Act Section 8 support this concept.

8. *Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he or she is in fact specially authorized by the other partners, but this section does not affect any personal liability.*

4.2 Return of Capital. A Partner is only entitled to demand a return of his capital contribution upon the dissolution, winding-up or liquidation of the Partnership as provided in Article __ hereof. Except as herein expressly provided, the Partners acknowledge and agree that all of the tangible and intangible assets presently contributed to, owned by or used in the business of the Partnership, are and shall continue until disposed to be assets of the Partnership. The Partnership assets are generally described in Schedule ____, hereto. There shall be excluded from the assets of the Partnership those assets which are used in the business of the Partnership but which are specifically designated as being owned by individual Partners, or third parties, in Schedule ____ which is annexed hereto. All assets which may hereafter be acquired by or for the Partnership, shall also belong to the Partnership. No Partner shall have any right to or interest in the assets of the Partnership, including goodwill, if any, except as provided in the provisions applicable to dissolution of the Partnership.

Annotation:
This should coordinate with any return provision in Section 3.2.
Partnerships Act, Section 43 - Retiring or Deceased Partner's Share to be a Debt: The interest of a retiring partner is deemed to be a debt by section 43, other than if agreed to the contrary. This can have significant impact for the ongoing firm, elevating the interest of a retired partner ahead of that of the ongoing partners. Initially, the agreement should clarify what is owed and the basis for payment should be agreed. Then, it should be agreed whether the debt is one only against the partnership assets, or, as per other partnership debts, is also a liability of the partners. The order of entitlement to payment both in the ordinary course and on a dissolution should also be considered. Agreement to the contrary may be desirable from an ongoing partnership's point of view. Case law has indicated that as a consequence of the payment being a debt, the partnership may not have set-off rights against damages or other entitlements which the partnership may have against the partner, if the amount is claimed by a third party. This is a fundamental change in character of the rights among partners and deserves careful consideration in the agreement.

4.3 Co-mingling. The funds and assets of the Partnership shall not be commingled with the funds or assets of any other person, including any Partner.

5. ACCOUNTING AND RECORDS

5.1 Annual Budget. Each year during the term of the Partnership the Partners shall, upon the majority vote of all of the Partners, adopt a budget for that year, which shall include the projected earnings of the Partnership. The Partners shall be provided with the annual budget, together with the supporting schedules thereto, not less than ___ days before the date of the meeting of Partners to consider the budget. Any Partner may request and receive access to review the working papers used to prepare the budget materials.

5.1 Annual Budget. Each year during the term of the Partnership the Partners shall, upon the majority vote of all of the Partners, adopt a budget for that year, which shall include the projected earnings of the Partnership. The Partners shall be provided with the annual budget, together with the supporting schedules thereto, not less than sixty (60) days before the date of the meeting of Partners to consider the budget. Any Partner may request and receive access to review the working papers used to prepare the budget materials.

Alternate

5.1 Annual Plans and Budgets

(a) A proposed annual operations plan and budget for the Business of the Partnership shall be prepared by **[**Management**]** and submitted to the Management Committee at least 60 days prior to the first day of each Fiscal Year. Such plan and budget shall:

(i) reflect the Cash Management Policy and any Plan or Budget then in effect; and

(ii) to the extent commercially reasonable, shall be consistent with the Strategic Long Term Plan;

and shall include:

(A) forecasts of capital expenditures;

(B) revenue, income and operating expenditures;

(C) Sources and application of funds;

(D) anticipated timing of funding requirements; and

(E) estimating staffing requirements.

Within 20 days after submission of a proposed annual plan and budget, any proposed modifications to the proposed annual plan budget, may shall be submitted to and will be considered in good faith by the Management Committee. Following such consideration, Management shall submit a proposed final annual plan and budget to **[Set approval by Partners or Committee as appropriate].**

5.2 Emergency Costs. In case of emergency, the Partnership may take any reasonable action it deems necessary to protect life, limb or property, to protect the Partnership Assets, to comply with applicable Law. The Partnership may also make reasonable expenditures for

Emergency Costs. The Management Committee may issue a Funding Demand to the Partners to provide the Partnership with the necessary funds to pay Emergency Costs provided that, if immediate funds are required, the Management Committee may request a Partner to provide a loan to the Partnership through a Cash Advance.

Management Committee shall give written notice to each Partner of any material emergency or Emergency Costs as soon as it becomes aware of such emergency or aware that Emergency Costs are reasonably likely to be incurred and thereafter shall provide written updates, on a weekly basis, relating to such emergency and such Emergency Costs until such emergency has been addressed in a manner acceptable to the Management Committee and all of the Emergency Costs related thereto have been incurred. Each such notice and update shall set out in reasonable detail (a) the actions being taken or proposed to be taken to respond to such emergency and minimize its impact on the Partnership, the Partners and the Partnership Assets, and (b) the Emergency Costs that have been incurred and are reasonably likely to be incurred.

5.3 Cash Management Policy. The Partners acknowledge and agree to the Cash Management Policy of the Partnership set out in Schedule ___.

Annotation:

A budget and budget approval process is not commonly included for smaller partnerships but is recommended as a valuable discipline reducing conflict over contributions and allocations. It would generally be included for a larger partnership with process and voting tailored to the business cycle.

5.4 Recordkeeping and Reporting

(a) _____ shall have charge of all of the activities of the accounting, bookkeeping and recordkeeping of the Partnership.

(b) The Partnership books of account shall be kept on a **[**cash basis**]** as determined by generally accepted accounting principles.

(c) _____ shall cause to be maintained complete and accurate books, records, reports, and accounts of all Partnership transactions. Each Partner shall cause to be entered into the Partnership books an accurate account of all transactions carried out by such Partner on behalf of the Partnership.

(d) Adequate accounting records shall be kept of all Partnership business and these shall be open to inspection by any of the Partners at any reasonable times. Within **[**90 days**]** after the end of each fiscal year, an accounting of the affairs of the Partnership shall be furnished to each Partner, together with such appropriate information as may be required by each Partner for the Purpose of preparing his income tax return for that year. Such accounting shall include: _____.

(e) Every ____ months, _____ shall deliver to the other Partners a balance sheet showing the assets and liabilities of the Partnership as of the end of such period, and a statement of profit and losses of the Partnership during such period and since the end of the last fiscal year of the Partnership on a cumulative basis, together with the following additional statements:

(f) The books, records, reports, and accounts of the Partnership shall be kept at the Partnership's principal place of business or at such other location as shall be agreed upon by a majority of the Partners. Each Partner shall, at all times, have access to, and may inspect and copy, any Partnership books and records.

Alternate

5.4 Recordkeeping and Reporting. Proper accounts shall be kept of all Partnership transactions and all books, securities, letters and other documents relating thereto shall be kept at the main office where the Partnership business is carried on, and each Partner shall have the right to inspect, examine and copy the same. Each Partner shall furnish to the Partnership full and correct information, accounts and statements of and concerning all Partnership transactions with which he or she is concerned.

5.4 Recordkeeping

(a) The Partnership shall maintain and keep the Partnership's books and records (**"Partnership Records"**) and, without limitation, shall keep accurate records of:

(i) the Contributions made by each Partner;

(ii) the Distributions made to each Partner;

(iii) Partner' capital accounts (**"Capital Accounts"**) which show, at any time, the capital of each Partner in the Partnership calculated as the aggregate dollar value of all Contributions made by such Partner in consideration for Common Partnership Interests, plus the dollar value of common capital transferred to the Common Partner as a result of an acquisition of a Common Partnership Interest from a Common Partner, plus the aggregate dollar value of income of the Partnership allocated to such Partner, less the aggregate dollar value of losses of the Partnership allocated to such Partner, less the dollar value of common capital disposed of by the Common Partner as a result of a transfer of a Common Partnership Interest to another Person; and less the aggregate of all Distributions (other than Preferred Distributions) made to such Partner by the Partnership;

(iv) financial statements and records;

(v) taxation records and returns; and

(vi) any loans to the Partnership made by a Partner, including the principal amount thereof, the Interest rate thereon, the date of advance, all interest accrued thereon and all payments of principal and interest made by the Partnership to the Partner respect thereof.

Annotation:

The reference to cash basis should be carefully reviewed and revised for tax and accounting requirements, many partnership will need to use accrual for tax. Tax reporting for partners will be needed to be provided by end of March for December 31 year end partnerships. There is no specific requirement for record keeping on the Partnerships Act and both record keeping and reporting should be tailored to the needs of the partnership and the partners.

5.4 Record Book A Minute Book shall be maintained at the office of the Partnership. The Minute Book shall contain a copy of this Agreement, all prior agreements superseded by this Agreement, all future amendments to this Agreement, all policy statements adopted by the Partnership and minutes of the meetings of Partners and any committee.

Annotation:
B 4.510 to 4.535 - Manner in which Accounts should be kept
5.120 - The Fiduciary Concept - Generally
Cite: Yip v. Tsang (1994), 47 A.C.W.S. (3d) 400 (B.C.S.C)
B 6.160 to 6.250 - Discretionary Deductions

Accounting and Other Records: The nature of the records to be kept and the financial statements to be given to partners should be considered. The statements should be sufficient for tax filing purposes, to determine rights of third parties and among partners, and of course, for efficient business operation. In the absence of an agreement, each partner is entitled to full access to the partnership books by section 24, but there are no statutory dictated requirements or default terms as to the partnership records and statements which are required to be maintained.

Banking, record keeping, etc.: The partners should discuss the nature of their banking arrangements and record keeping for the partnership. The appointment of a bank, the designation of signing authorities for the bank, the operation of the banking arrangements and the general nature of the record keeping for the partnership should be outlined. There are no default provisions in the Partnerships Act dealing with these activities. Bank will generally require either specific written authority by a partner or a group of partners (and often business registration of the partnership) or will require all partners to sign banking agreements and authorities.

5.5 Auditors Auditors shall be appointed for the Partnership, and the auditors of the Partnership shall be such firm of chartered accountants, as may from time to time be appointed by ● **[NOTE: Set out basis for approval or appointment.]**.

Alternate
5.5 Auditors Accountants shall be appointed for the Partnership, and the accountants of the Partnership shall be such firm of accountants, as may from time to time be appointed by the Partners by Special Resolution. The accountants of the Partnership shall make an annual audit of the books of the Partnership in accordance with generally accepted auditing standards and shall report to the Partners the results of their audit.

The audited statements, if and when approved by the Partners by Ordinary Resolution, shall be conclusive, except that if an accounting error, excluding any errors in estimates, shall be discovered therein within six months after the date of the report of the auditors, such error shall be rectified with respect to such fiscal period and otherwise, unless generally accepted accounting principles require restatement with respect to a prior fiscal period, with respect to the fiscal period in which the error is discovered.

Annotation:
Auditor: There is no statutory requirement or default term requiring an auditor be appointed and no basis for requiring one to be appointed by the partners unless terms for such an amendment

is included in the agreement. Therefore, the basis for the appointment of an auditor and the mechanics for change of the auditor should be agreed to.

5.6 Audit Committee ● **[NOTE: Set out who shall appoint]** shall appoint an Audit Committee comprised of ● **[set out membership].** The Audit Committee shall be responsible for and accountable to the Partnership for carrying out the mandate of the Audit Committee as established or amended from to time by the Partners by ●.

[NOTE: Set out the basis for approving and setting the mandate of the Audit Committee.]

5.7 Goodwill. On any accounting to determine the value of the capital of the Partners for the purposes provided for in this Agreement, the goodwill of the Partnership business shall be valued _____.

Alternate

5.7 Goodwill. No value shall be given to the goodwill of the Partnership on the balance sheets.

5.8 Work in Progress Work in progress and unbilled disbursements at any given time shall be valued as the actual work in progress and unbilled disbursements at the time in question as determined by the generally accepted accounting practice prevailing in Canada at the time in question.

Annotation:

The tax treatment for the treatment o work in progress should be considered in any provision dealing with its value and allocation. The basis for allocation both as to timing and entitlement varies widely and should be adjusted for the business intention and tax consequences.

5.9 Financial Information. The **[**Managing Partner**]** shall be responsible for the preparation of annual unaudited financial statements of the Partnership.

Annotation:

There is no specification as to responsibility for financial statements or information and the responsibility can be delegated as described.

Alternate

5.9 Financial Statements and Reports. The Managing Partner shall distribute to the Partners, quarterly, within sixty (60) business days after the end of each calendar quarter, a report setting out, in generally consistent format, status of the marketing of the product forming the business of the Partnership, the marketing of the Partnership interests or the shares of any corporation assets of the Partnership, if applicable, the development, interests and protection of technology of the Partnership and the financial status of the Partnership.

Alternate

5.9 Financial Statements and Reports The Partnership shall prepare quarterly and annual financial statements of the Partnership on an accrual basis and in accordance with IFRS in such form and detail as will enable the Partners to obtain the information necessary for Partners to prepare and maintain accounting, tax and other financial records and to prepare and file applicable tax and information returns in accordance. The Partnership shall prepare, or cause to be prepared, and deliver to each Partner:

(a) for each Fiscal Year, a balance sheet, a statement of earnings, a statement of cash flows and a statement of financial position of the Partnership in accordance with IFRS. A copy of the **[**audited**]** annual financial statements shall be delivered to each Partner within 90 days after the end of each Fiscal Year;

(b) an **[**unaudited**]** statement of earnings, a statement of cash flows and a statement of financial position for each quarterly period in each Fiscal Year and the year-to-date (as applicable) with comparative figures for the corresponding period of the preceding year. A copy of the **[**unaudited**]** interim financial statements shall be delivered to each Partner within 45 days of the end of each fiscal quarter;

(c) a statement as to all necessary income tax reporting information for the Partners related to the Partnership Interest, including the net income or net loss of the Partnership for each Fiscal Year as allocated for accounting and income tax purposes among the Partners as calculated at the end of each Fiscal Year; and

(d) such other reports as the Partnership may be required by Law to deliver to Partners.

Annotation:
This is an example only, there are no requirements of the Partnerships Act dictating the nature of information or reports to the partners. This provision may be revised as suitable or deleted.

5.10 Banking Arrangements. The Partnership shall enter into banking arrangements with such bank or other financial institutions as the Partners shall from time to time select. All Partnership money shall, as and when received, be paid and deposited with the bankers of the Partnership to the credit of the Partnership account.

Alternate
5.10 Banking Arrangements The parties agree that the Partnership shall enter into banking arrangements withany bank or banks or other financial institutions as may be determined from time to time. All Partnership money shall, when received, be immediately paid and deposited with the bankers of the Partnership to the credit of the Partnership account. All disbursements on account of the Partnership shall be made by cheque, wire transfer, letter of credit or other such instrument or document on such bank or other financial institution.

Cheques payable to the Receiver General of Canada may be signed by only one Partner, all other cheques, drafts and other instruments and documents on behalf of the Partnership shall be signed by two Partners, unless otherwise agreed between the Partners. Any Partner who ceases to be a Partner shall cease to have any rights as a Partner notwithstanding section 98(1) of the *Income Tax Act*.

Annotation:
Banking, record keeping, etc.: The partners should discuss the nature of their banking arrangements and record keeping for the partnership. The appointment of a bank, the designation of signing authorities for the bank, the operation of the banking arrangements and the general nature of the record keeping for the partnership should be outlined. There are no default provisions in the Partnerships Act dealing with these activities. Banks will generally require either specific written authority by a partner or a group of partners (and often business registration of the partnership) or will require all partners to sign banking agreements and authorities.

Banking Arrangements: There should be an agreement as to the initial banking arrangements for the partnership, and mechanics established for changing the banking arrangements. The nature and kind of accounts to be opened, the types of agreements to be entered into, and the designation of authority for signatories should be included.

6. FINANCIAL PARTICIPATION: DETERMINATION AND DISTRIBUTION

6.1 Draw and Profit Distribution. Each Partner shall have the right to draw _____ _____.

Alternate

6.1 Profit Distribution. For purposes of this Agreement, "Net Profits" and "Net Losses" shall mean **[define as suitable]**.

Each Partner shall be entitled to receive a cash draw quarterly, or at such other intervals as determined by the Partners, which shall be paid to each Partner as an advance against their share of the net profits for the current year. The cash available, if any, for each such draw shall be determined based on the formula set out in Schedule **[_____]**. If any Partner has drawn out during the past year an amount greater than the net profits to which such Partner is entitled, such Partner shall forthwith repay the excess to the Partnership. Notwithstanding anything in this Section, the Partnership shall not make any distributions of cash flow if and to the extent that, after giving effect to the distribution, (i) the Partnership would not be able to pay its debts as they become due in the usual course of business, (ii) the Partnership's total assets would be less than the sum of its total liabilities, (iii) any such distribution would otherwise be in contravention of the Act, or (iv) any such distribution would result in a breach of the Partnership's financial or non-financial covenants with a third party.

6.1 Profit Distribution The Net Profits and Net Losses of the Partnership for each fiscal year shall be allocated among the Partners' shares determined by _____.

Distributions to the Partners shall be made at such times and in such amounts as determined by _____. Such distributions, when made, shall be distributed to the Partners as set out below: **[Set up a workable protocol]**

6.1 Profit Distribution The net profits for each fiscal period shall be determined **[Set out basis and time]**.

Loss. The net profits of the Partnership shall be divided between the Partners in the same proportion as their respective Partnership Interests. The expenses and losses of the Partnership in any one Partnership year shall first be paid out of the earnings of the Partnership for that year and if such earnings shall be insufficient to pay all such expenses and losses the deficiency shall, unless otherwise agreed by the Partners, be made up by the Partners in the same proportion as their respective Partnership Interests. For tax purposes, earnings and losses of the Partnership shall be determined in accordance with the ITA and applicable provincial tax legislation and shall be allocated to the Partners in proportion to their respective Partnership Interests.

A loss of the Partnership in a fiscal period shall be borne by each of the Partners in the proportion which his or her unit allocation in the fiscal period bears to the total of the unit allocations of all Partners in the fiscal period and each Partner shall be entitled to contribution from and shall be bound to indemnify each of the other Partners accordingly.

[NOTE: Set out the agreed basis for determining, allocating and distributing profits and responsibility for losses of the Partnership otherwise the equal shares default of the Partnerships Act will govern.]

Annotation:

B 2.465 - Sharing of Profit and Contribution
B 3.450 to 3.480 - Contribution and Profit Participation
B 3.1690, 3.1693 - Share in losses
B 3.1720 to 3.1740 - Participation in Profit
B 3.2000, 3.2010 - Salary
Cite: Dover Financial Corp. v. W.K. Sharpe & Son Contractors Ltd. (1996), 147 N.S.R. (2d) 186, 26 C.L.R. (2d) 1 (C.A.)
Reid v. Morwick (1918), 42 D.L.R. 244 (Ont.C.A.), affd 17 O.W.N. 296 (S.C.C.)
Manak v. Judge (1996), 64 A.C.W.S. (3d) 871 (B.C.S.C.) [096/206/009-13 pp]
Dallin v. Montgomery (2011), 530 W.A.C. 87, 513 A.R. 87, 2011 CarswellAlta 1111, 2011 ABCA 189, Carole Conrad J.A., J.D. Bruce McDonald J.A., Jean Côté J.A. (Alta. C.A.); additional reasons at (2011), 2011 CarswellAlta 1103, 2011 ABCA 202, Carole Conrad J.A., J.D. Bruce McDonald J.A., Jean Côté J.A. (Alta. C.A.); affirming (2010), 2010 ABQB 470, 2010 CarswellAlta 1355, 498 A.R. 269, Donald Lee J. (Alta. Q.B.)
Ranjbar v. Charmchi (2010), 2010 CarswellOnt 8057, 2010 ONSC 5759, Echlin J. (Ont. S.C.J.)

Division of Net Profits: In the absence of agreement amending the statutory provision, the partners share equally in capital, profits and losses. Any variation on the sharing of any of these will require agreement to the contrary. Note should be made of the Partnerships Act provisions dictating entitlement in other than ordinary course circumstances; section 29 accountability for private profits, section 30 accounting for activities in competition, section 31 rights of an assignee, sections 39 and 40 regarding dissolution, section 42 and 43 as to a withdrawing partner. These can have a significant effect on rights to profit and should be reviewed to determine if amendment is desired.

There are no provisions of the Partnerships Act that guides how or when partners are to received their share of the profits (or other distribution) from the partnership. Matters such as a basis for periodic draw and true up must be dealt with in the agreement or this determination will be one of partnership agreement required to be made by all partners.

Allocation of Profit and Loss: The partners should determine allocation of profits and losses otherwise the default terms of section 24 dictate an equal sharing in the capital, profit and losses of the firm. There are no statutory restrictions on the ways that profits and losses of a partnership can be allocated among the partners. A few of the bases for allocation which are frequently used are allocation on the basis of billings generated or produced by the partners with an allocation for overhead expenses; a percentage basis of net profits based on seniority, group or individual profitability or other listed criteria; fixed participation with mechanics for allocating excess or short fall, among others.

6.2 Draws. Each Partner will receive such bi-weekly draw as may be agreed from time to time by the Partners. The bi-weekly draws as of the date of this Agreement are set out in Schedule "B". In addition to the bi-weekly draws referred to above, each Partner shall also be entitled to such additional draws as may be agreed upon from time to time by the _____.

Alternate

6.2 Draws Each Partner shall be entitled to receive a cash draw quarterly, or at such other intervals as determined by the Partners, which shall he paid to each Partner as an advance against their share of the net profits for the current year. The cash available, if any, for each such draw shall be determined based on the formula set out in Schedule **[ ]**. If any Partner has drawn out during the past year an amount greater than the net profits to which such Partner is entitled, such Partner shall forthwith repay the excess to the

Partnership. Notwithstanding anything in this Section, the Partnership shall not make any distributions of cash flow if and to the extent that, after giving effect to the distribution, (i) the Partnership would not be able to pay its debts as they become due in the usual course of business, (ii) the Partnership's total assets would be less than the sum of its total liabilities, (iii) any such distribution would otherwise be in contravention of the Act, or (iv) any such distribution would result in a breach of the Partnership's financial or non financial covenants with a third party.

6.2 Draw Each Partner shall be entitled to draw from his capital account reasonable amounts for the payment of the disability insurance, extended medical and dental insurance and automobile expenses required by Partnership policy. All tax payments including income tax instalments and final payments, which are due and payable on the Partner's proportionate share of income and shall be paid by the Partnership on behalf of the Partner and charged to the Partner's capital account.

No draw shall be made to any Partner which would have the effect of maintaining the Partner's capital account in a deficit position.

Annotation:

Drawings: The partners should discuss the timing and extent of the draws which will be taken by partners against profit during the course of the year from the partnership. Naturally, this should represent an amount somewhat less than the anticipated profit for the year in order to ensure that the funds are available for operations of the partnership during the course of the year and recognize seasonality or other billing patterns.

Springer v. Aird & Berlis LLP, 2010 ONCA 287 at para 3.
The salient issue raised in Springer is:
"Did the respondent owe and breach a fiduciary duty to inform the appellant of where he "fit" under a new firm compensation system to be implemented in 2002 and to warn the appellant that his remuneration as a partner would be significantly reduced under that system."

The plaintiff in Springer, argued he was entitled to warning that his partnership units would be significantly reduced, and that Aird & Berlis' failure to do so was a breach of a fiduciary duty owed to him.

The parties had "agreed in their partnership agreement to give the Executive Committee the exclusive right to set the partner's income by means of allocating units to the partners." While participation of a partner in profits is a key element of partnership, division of profits does not have to be done on an equal basis.

Profit participation does not have to be fixed, equal, or on a percentage basis. Case law and the relevant the legislation across Canada allows for partners to specify what manner profit participation will take, so long as there is participation in the profits by all the partners.

It mentions section 28, 29(1) and 30 of the Ontario Partnerships Act *which provide for 'fiduciary type' obligations, but notes of the lack of distinct statutorily imposed ones. Springer establishes that there is no fiduciary duty to warn a partner of a decrease in the allocation of partnership units.*

Duivenvoorde v. R. (2011), [2012] 2 C.T.C. 2057, 2012 D.T.C. 1006 (Eng.), 2011 CCI 525, 2011 CarswellNat 5567, 2011 TCC 525, 2011 CarswellNat 4600, Gaston Jorré J. (T.C.C. [Informal Procedure])

Ruggiero v. Swartz, 2003 Carswell Ont 6018, reversed in part by Ruggiero v. Swartz 2004 Carswell Ont 1999, 130 A.C.W.S. (3d) 1211 [Ruggiero].

Swartz, a former partner of the firm Baker Schneider Ruggiero, was subject to Law Society proceedings. The firm brought an action against him to compensate the firm from losses stemming from his conduct. Swartz counterclaimed seeking, among other things, an equitable distribution of partnership profits for the years he was a partner. He plead that the distribution of profits was contrary to the terms of the partnership agreement, including its sprit and intent, and profits were to be distributed equitably. The court drew attention to section 20 of the Ontario Partnerships Act, and evidence that indicated Mr. Swartz's consent to partnership agreements with specific provisions for allocating profits. The court found that profits were distributed in accordance with the principles and processes set out in the partnership agreement.

Swartz argued in the alternative that the other partners were fiduciaries. This claim failed to resonate with the court, which held that "[g]iven the terms of the partnership agreement, a partner would not have a reasonable expectation that the other partners would be bound to act in his interest when it came to the distribution of profits." It was stressed that while a fiduciary relationship governs certain aspects of partners relations it did not cover all areas such as profit sharing since the partners had entered into a contractual relationship with each other.

In Springer, Ruggerio v. Swartz is used to support the finding that there is no fiduciary duty on the part of the Executive Committee when allocating units in accordance with the partnership agreement. It was their "exclusive entitlement and obligation" as afforded by the agreement. The court did recognize a duty to act in good faith in exercising this duty, but found no evidence of bad faith conduct in their decision to allocate Mr. Springer units in 2001 or 2002.

6.3 Reimbursement. If, for any reason, the amounts paid by the Partnership to or for the account of any Partner with respect to a fiscal period exceed his or her share of the net profits for such period, including as a result of allocation of net loss, he or she shall forthwith refund such excess, with interest thereon from the end of such fiscal period until such refund is made at the highest rate or rates of interest from time to time paid by the Partnership to its bankers during the relevant period.

6.4 Accounting Principles. Profits, losses, taxable income and tax losses of Partnership will be determined by _____ and reviewed by the accountants in accordance with generally accepted accounting principles consistently applied and the *Income Tax Act* (Canada), as applicable, and such determination shall be binding upon the parties hereto.

Annotation:

Accounting Principles: Generally, a partnership will follow GAAP (generally accepted accounting principles) to prepare its financial statements. However, there can be specific agreement as to valuation of assets, at cost, market or depreciated value, valuation of goodwill, allocation to capital or income, depreciation policy and interest on advances or capital and these should be considered. Policies for write-offs, reserves for working capital or otherwise, recognition of receivables and value of inventory should also be agreed among the partners. A policy which sets out the basis for allocating expenses as between partnership or personal expenses is desirable. The formula for the calculation of profit should be included in any

agreement to avoid disputes as to what constitutes profit. There is no statutory guidance on any of these issues. Tax filing requirements will dictate several of these points but only for tax filing position. There is much flexibility under GAAP, and for some of these matters no GAAP guidance. Before simply accepting GAAP for any accounting or allocation issue the GAAP provisions should be reviewed to determine if they are applicable and suitable.

6.5 No Salary. No Partner shall receive any salary for services rendered to the Partnership and shall be entitled only to the distribution of Net Profits as provided herein.

Annotation:
Partnerships Act:
Rules as to interests and duties of partners
24. *The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:*

6. No partner is entitled to remuneration for acting in the partnership business.

6.6 Additional Charges. **[Set out any agreement amongst the Partners for responsibility for obtaining, and paying costs associated with, retirement and health benefits.]**

The partnership may agree to pay a salary based remuneration, if so this will need to be fully set out in the agreement.

6.7 Outside Activity Payment. If a Partner **[**or Designated Shareholder**]** engages in activities not strictly on account of the Partnership, but relating to the Partnership business or with the use of Partnership assets, unless that Partner **[**or Designated Shareholder**]** has obtained the consent of the other Partners, all remuneration received as a result of such activities shall be paid to the Partnership.

Without limiting the generality of the foregoing, teaching salaries and honoraria, book royalties, officers or directors salaries and bonuses, consulting fees or remuneration received for acting as a hearing officer in an arbitration or other alternate dispute settlement mechanism shall be paid by the Partner **[**or Designated Shareholder**]** to the Partnership.

The first concept requiring accounting for proceeds arising from use of partnership assets reflects law under the Partnerships Act. This can be changed by consent or agreement. The complete restriction on a partner taking on other activities for gain is common but is not a required concept of partnership. Involvement in activities outside of the partnership should be considered in the agreement.

Alternate
6.7 Outside Activity Payment Unless otherwise determined by the Partners by ● **[Note: set out basis for approval (e.g., Special Resolution)],** all:

(a) compensation and other remuneration received or receivable by a Partner or Designated Shareholder for or in connection with his, her or its duties and services as an executor, administrator, committee, guardian or trustee, either alone or with one or more other persons or with a corporation, of or under any will, estate, trust, settlement, agreement or Court order or judgment, other than in connection with such duties or services with

respect to a deceased person, person or beneficiaries related to the Partner or Designated Shareholder by blood, marriage or close personal ties in cases where the amount of time that the Partner or Designated Shareholder devoted to such duties or services is not significant;

(b) fees, commissions, honoraria, royalties, profits or other remuneration of more than nominal amount paid or payable to any Partner or Designated Shareholder for or in connection with any lecturing, instructing or examining in or writing, editing or acting as panelist, conference or interview participant in connection with any legal subject;

(c) remuneration for or in connection with his, her or its duties and services as a member, director, governor, board member, trustee or officer of any company, corporation, association, institution or society or any governmental, legislative, civic, public or quasi-public board, commission, tribunal, committee, council or similar body or authority; and

(d) fees for or in connection with the placing of any investment or loan or the negotiation of any transaction relating to any client or the business of the Partnershipshall belong and be paid forthwith to the Partnership.

6.8 Competitive Business Except as expressly provided herein, each Partner shall have the right to independently engage in and receive full benefits from business activities, whether or not competitive with the Partnership, without consulting the other. The doctrines of "corporate opportunity" and "business opportunity' shall not apply to any other activity, venture or operation of any Partner and no Partner shall have any obligation to any other Partner with respect to any opportunity to acquire property.

Annotation:

This clause is unusual but should be considered. It is more usual to restrict involvement in competitive business, which is in accordance with partnership law concepts.
Chandler v. Rasmussen (2012), 2012 BCSC 1010, 2012 CarswellBC 2031, S.C. Fitzpatrick J. (B.C. S.C.) as amended pursuant to 2013 BCSC 1461.

Partnerships Act:

Accountability for private profits

29. *(1) Every partner must account to the firm for any benefit derived by the partner without the consent of the other partners from any transaction concerning the partnership or from any use by the partner of the partnership property, name or business connection. R.S.O. 1990, c. P.5, s. 29 (1).*

Extends to survivors and representatives of deceased

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner and before its affairs have been completely wound up, either by a surviving partner or by the representatives of the deceased partner. R.S.O. 1990, c. P.5, s. 29 (2).

Duty of partner not to compete with firm

30. *If a partner, without the consent of the other partners, carries on a business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits made by the partner in that business. R.S.O. 1990, c. P.5, s. 30.*

6.9 Time and Effort. Each Partner **[**and Designated Shareholder**]** shall devote a reasonable amount of time and attention to the undertaking of the business of the Partnership and related activities in connection therewith, as shall be reasonably required to provide for the successful undertaking of the business of the Partnership as described hereunder, and as shall be in accordance with usual past practice for the Partner and the Partnership. It is specifically acknowledged that each Partner shall be permitted and allowed annual vacation periods, in

accordance with usual past practice, and that sabbatical, full time teaching or other leaves of absence shall be permitted upon the approval of a majority of the Partners, other than the Partner requesting such leave of absence or other indulgence. During the period of any leave of absence including illness or disability, pursuant to the approval provided hereunder, the Partner shall continue to be required to participate in the payment of expenses of the Partnership as provided by the terms of this Agreement unless provided otherwise by unanimous consent of all Partners at a meeting specifically called to deal with this issue.

Annotation:

Partners to Devote Full Time and Attention: The Partnerships Act, and applicable law, do not dictate the extent of the requirement to devote time and attention to a partnership. As a result any requirement of the partners to devote their time and attention, and to the extent and nature of that contribution, to the business affairs of the partnership should be included in the agreement. Where the partnership is intended to be the sole business enterprise of the individual partners, then this will likely require devotion of full time and attention. There may also be a requirement to account for outside income earned, even if not concerned with or in competition with the partnership. A requirement to account for income outside of the statutory requirement should be very clearly specified. The Partnerships Act requires only that a partner account for outside income if it arises from the use of partnership assets, therefore if income from other activities is to be accounted for, this must be included in the agreement. If the partnership involvement is not intended to be full time, then the specific requirements as to the amount of time and effort to be expended should be included to ensure there are no issues from fiduciary obligations which could require efforts of an extent and nature not intended.

7. ADMINISTRATION AND MANAGEMENT

7.1 Voting Notice. No vote required or permitted by this Agreement shall be valid unless, in addition to other requirements set forth in this Agreements, such vote is taken at a meeting for which a written notice has been delivered to all Partners at least ____ days prior to the meeting and such notice clearly describes the purpose of the meeting.

Every meeting shall be held either in the _____ or at such other place in Canada as may be approved by Ordinary Resolution.

Notice of any meeting shall be given to the Partners by prepaid registered mail, by personal delivery or by electronic communication to the address on file, not less than _____ days prior to such meeting, and shall state:

(a) the time, date and place of such meeting; and

(b) to the extent possible, in general terms, the nature of the business to be transacted at the meeting, including any decision to be decided by Special Resolution.

[ex Management officers] _____ and any representatives of the Accountants shall be entitled to attend and receive notice of any meeting of Partners.

A quorum at any meeting of the Partners shall consist of _____ the Partners, present in person, by their duly appointed representative.

Alternate

7.1 Voting Notice No vote required or permitted by this Article shall be valid unless, in addition to other requirements set forth in this Agreements, such vote is taken at a meeting for which a written notice has been delivered to all Partners at least forty-eight (48) hours prior to the meeting and such notice clearly describes the purpose of the meeting.

7.2 Voting Decisions Except as provided elsewhere in this Agreement, all matters relating to the management of the Partnership shall be decided by a simple majority of the Partners, each Partner having one vote. The Partnership may not make a decision about, take action on, or implement any decision that may be expected to have a material impact on Partner 1, as determined by Partner 1 acting reasonably, without the approval of Partner 1. Partner 1 shall provide the other Partners with advance notice of any decision of the Partnership that it determines may reasonably be expected to have a material impact on Partner 1.

7.2 Voting Decisions Whenever any decision may be or is required or permitted to be made by Special Resolution, the decision, in order to be effective and binding upon the Partner or Partners affected thereby, shall be decided:

(a) at a meeting of Partners of which at least forty-eight (48) hours notice in writing specifying the decision proposed to be decided by Special Resolution has been given to all Partners and by the votes of at least _____ in number of those Partners present and voting in their own right with respect to the decision and having an aggregate interest of at least two-thirds ($^{2}/_{3}$) in the capital of the Partnership;

(b) by resolution deemed to be a Special Resolution pursuant to Section _____ hereof; or

(c) by written resolution pursuant to Section _____ hereof.

Provided, if a decision with respect to a matter otherwise requiring a Special Resolution is so urgently required in the interest of the Partnership that such notice of meeting is not practicable, notice of such length as is practicable of a meeting to make a decision with respect to such matter is given in such manner as is practicable to all Partners whom it is practicable to notify, and, regardless of order, a meeting pursuant to such notice is held and an instrument in writing containing the decision with respect to such matter is signed by at least three-quarters ($^{3}/_{4}$) in number of the Partners, having an aggregate interest of at least two-thirds ($^{2}/_{3}$) in the capital of the Partnership, such matter shall be decided thereby.

7.2 Voting Decisions All decisions which may or are required to be decided by the Partners, other than by Special Resolution, shall be decided at a meeting of Partners by a majority in number of those Partners present and voting in their own right with respect to the decision (**"Ordinary Resolution"**) and such decision shall be binding upon all the Partners. The Partners may at such meeting make any decision which could be made by the Management Committee and may reverse or modify any decision previously decided by the Management Committee to the extent possible.

Annotation:
There is no legal requirement for a particular percentage of partners to form a quorum. Partners should agree as desired.

Annotation:

Partnerships Act:
Rules as to interests and duties of partners

24. *The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:*

1. *All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm, but a partner shall not be liable to contribute toward losses arising from a liability for which the partner is not liable under subsection 10 (2).*
2. *The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him or her,*
   (a) in the ordinary and proper conduct of the business of the firm; or
   (b) in or about anything necessarily done for the preservation of the business or property of the firm.

2.1 *A partner is not required to indemnify the firm or other partners in respect of debts or obligations of the partnership for which a partner is not liable under subsection 10 (2).*

3. *A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital that he or she has agreed to subscribe is entitled to interest at the rate of 5 per cent per annum from the date of the payment or advance.*
4. *A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by the partner.*
5. *Every partner may take part in the management of the partnership business.*
6. *No partner is entitled to remuneration for acting in the partnership business.*
7. *No person may be introduced as a partner without the consent of all existing partners.*
8. *Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.*
9. *The partnership books are to be kept at the place of business of the partnership, or the principal place, if there is more than one, and every partner may, when he or she thinks fit, have access to and inspect and copy any of them. R.S.O. 1990, c. P.5, s. 24; 1998, c. 2, s. 4 .*

Each of these default provisions must be considered and either accepted or specifically modified to address the business and relationship needs of the partners.

B 2.520 to 2.630 - Control or Management
B 3.350 to 3.400 - Voting and Management
Cite: Moyen v. Disanto (1992), 79 Man. R. (2d) 72 (Q.B.), revd 88 Man. R. (2d) 105 (C.A.)
Kryton c. Immobilière Montagnaise Ltée, 1992 CanLII 3616 (QC CA)

Management: The management provisions of the agreement will be the most flexible as to what can be agreed, there being little statutory guideline. Agreements on management systems and protocol should consider the specific business of the partnership, the relationship between the partners, and the required contribution of each of the partners. In the absence of an agreement, all of the partners are entitled to take part in management; this may not be suitable for the partnership. The management and administration provisions should include procedures for meetings, and the procedures for any voting process to be followed. Administrative expediency may require partners to designate decisions to be delegated to committees or individuals, leaving a listing of those which require a simple majority, and those which require a greater majority or unanimous agreement to a list of significant decisions.

Management: In a small partnership management can be, and often is, undertaken by all partners, generally on an ad hoc consensus basis. This is effective to recognize the right of all partners to have a say and involvement in management of the partnership and can work from a practical viewpoint only in the small partnership. Consideration should, however, be given to the nature of the delegation of management responsibilities if this is needed because of size of the partnership or matters such as skills, desired contribution and geographic location. Also, use of a management corporation, whether reflecting the partnership structure or organized on some other basis, might be useful for tax planning or liability purposes. Generally, the partners should consider, in business and professional terms, how the partnership will most effectively run from a day to day business management viewpoint. If the partners are to perform different functions, the scope and duties and responsibilities should be agreed. Also effective management often involves delegation to committees to oversee various aspects of the business. Those matters that can be determined by these delegated persons or committees and those that require a partnership level consideration and votes should be clearly set out. For a very large partnership, copying corporate law concepts of directors and officer responsibility and election may be a practical way of functioning.

Meetings, Voting, Etc.: Although in a two-man partnership, it seems somewhat ludicrous to make provisions for formal partnership meetings, this should be discussed by all prospective partners. The meeting and the voting arrangements would then govern in the event of any dispute between the partners. The smaller partnership will, in general, ignore formal process and operate by consensus but the larger partnership must have effective meeting and voting mechanics. Section 24 of the Partnerships Act provides that "ordinary matters" are to be decided by a majority of the partners. There are a number of matters that require unanimous agreement, including a change in the nature of the business, dissolution of a fixed term partnership other than at the fixed time (or by law), and expulsion of a partner (including that partner). All of these default terms for voting can be varied by the agreement of the partners.

Annotation:
There is no legal requirement for notice period or voting threshold so this may be agreed as desired by the Partners.

There is no legal requirement to set Ordinary Resolutions at 50%. Agree as desired by the Partners.

7.3 Calling Meetings. An annual meeting of the Partners shall be called by _____ within _____ **[months/days]** of each fiscal year-end of the Partnership. In addition _____ will convene a meeting of the Partners at any time that **[any Partner]** shall requisition such a meeting, such meeting to be held within _____ days within receipt of the request for meeting by requisitioning Partners.

Alternate
7.4 Meetings without Notice. A meeting of Partners may be held without notice if all Partners are present or if all those to whom notice of such meeting should have been sent and who are absent waive notice before or after the meeting. Accidental failure to give notice to a Partner shall not invalidate a meeting or proceeding thereat.

7.5 Adjournment of Meetings. If a quorum is not present at the opening of any meeting of Partners, the Partners present may adjourn the meeting to a fixed time and place but may not transact any other business. If a quorum is not present at such adjourned meeting then such meeting the Partners present may further adjourn the meeting to a fixed time and place but

may not transact any other business. At the following meeting resulting from such adjournments, if a quorum is not met, then the Partners in attendance shall be deemed to constitute a quorum for the purposes of such meeting and all decisions of the Partners in attendance shall be decided by Ordinary Resolution and such resolution shall be deemed to be a Special Resolution to the extent any such decision is required be made by Special Resolution pursuant to the terms of this Agreement.

7.6 Resolution in Lieu of Meeting. A resolution in writing signed by all the Partners entitled to vote on that resolution at a meeting of Partners is as valid as if it had been passed at a meeting of Partners. A copy of every such resolution shall be kept with the minutes of the proceedings of the Partners.

Annotation:
Partners may agree as desired as to the number and nature of meetings. However, it is desirable to include some number of Partners that are able to call meetings.

7.7 Vote Binding Any resolution passed in accordance with this Agreement shall be binding on all the Partners and their respective heirs, executors, administrators, successors and assigns, whether or not any such Partner was present in person or voted against any resolution so passed.

7.8 Special Resolution Required. In addition to those powers which are exercisable by Special Resolution as provided elsewhere in this Agreement, the following powers shall be exercisable by Special Resolution passed by the Partners, as follows:

(a) approving or disapproving any amendment to the business structure and relationship of the Partners of the Partnership, including therewith specifically the sale or exchange of the business interest comprising the business of the Partnership;

(b) consenting to the amendment of this Agreement except as otherwise provided for in this Agreement;

(c) continuing the Partnership in the event that the Partnership is terminated by operation of law;

(d) agreeing to any compromise or arrangement by the Partnership with any creditor, or class or classes of creditors;

(e) changing the fiscal year end of the Partnership;

(f) amending, modifying, altering or repealing any Special Resolution previously passed by the Partners;

(g) dissolving or terminating the Partnership;

(h) approving a settlement of an action against the Managing Partner, as a result of a breach of its duties;

(i) approving the restructuring of the Partnership, in accordance with applicable securities law, of the interest held by the Partnership or any corporation formed as a successor in

interest to the Partnership pursuant to a public offering or sale on the terms and conditions as provided for in the approval; and

(j) approving the undertaking of a business or activity out of the ordinary course of business;

(k) approving any financing, in excess of $_____, secured by the assets of the Partnership; and

(l) approving the admission or withdrawal of any person as a Partner of the Partnership.

Note: this list is by way of example only and should be tailored to the size, business and relationship to the partnership.

7.9 Special Resolution Whenever any decision, act, request, determination, direction, appointment, election, designation, valuation, notice, agreement, consent, requirement, delegation, approval, waiver or opinion (hereinafter referred to as a "decision") may be, or is required or permitted to be, made, done, taken, decided, given, prescribed or expressed (hereinafter referred to as "decided") by Special Resolution, the decision, in order to be effective and binding upon the Partner or Partners affected thereby, shall be decided:

(a) at a meeting of Partners of which at least _____ business days' notice in writing specifying the decision proposed to be decided by Special Resolution has been given to all Partners; and

(b) by the votes of at least _____ in number of those Partners present and voting in their own right with respect to the decision and having an aggregate interest of at least two-thirds in the capital of the Partnership.

7.10 No Disqualification. A Partner shall not be disqualified from voting on or signing any instrument containing any decision even though such Partner is differently affected thereby.

Alternate

7.11 No Partner shall do any of the following acts without the consent of the _____ Committee:

(a) Borrow money in the Partnership's name, except as permitted by the provisions of section ____.

(b) Transfer, hypothecate, compromise or release any Partnership claim except on payment of the full amount of such claim.

(c) Sell, lease, charge, encumber or hypothecate any Partnership property or enter into any contract for any such purpose, except in the ordinary course of the Partnership business.

(d) Knowingly permit or cause Partnership property to be seized, attached, or taken in execution, or its ownership or possession otherwise endangered.

Any Partner who breaches this provision shall be individually liable to the other Partner for the entire amount of any loss sustained because of such breach.

Alternate

7.11 Partner Authority. Each Partner shall have authority to bind the Partnership in making contracts and incurring obligations in the Partnership name and on its credit in the ordinary course of the Partnership business. No Partner, however, shall incur any obligation in the Partnership name or on its credit exceeding the sum of _____ Dollars ($_____) without the consent of the _____ Committee. Any Partner who incurs any obligation in the name and on the credit of the Partnership in violation of this provision shall be individually liable to the other Partner for the entire amount of the obligation incurred.

Alternate

7.11 Authorized Signatories. All moneys from time to time received which are the property of the Partnership shall be endorsed on behalf of the Partnership by such person or persons as may be designated by the _____ Committee **[NOTE: Set out basis for designating signatories.]** and shall be paid immediately into the bank or banks for the time being of the Partnership in the same drafts, cheques, bills or cash in which they are received. All bills, notes, drafts, cheques, orders, instructions and electronic permission for the payment of money of or on behalf of the Partnership shall be signed by ● **[NOTE: Set out basis for designating signatories.]**. Payment for disbursements on behalf of clients shall be requisitioned and issued only in accordance with the disbursement policy of the Partnership from time to time.

No Partner shall, except in implementation of a decision within the jurisdiction of a committee empowered by the Partners of which such Partner is a member, without the consent of the Partners provided by ● **[NOTE: Set out basis for authorizing.]**, contract any debt or sign any lease, bond, promissory note, bill of exchange or other obligation for the payment of any money on account of or in the name of the Partnership or in any manner pledge the credit of the Partnership.

No Partner shall, without the consent of a committee empowered by the Partners by ● **[NOTE: Insert process for approval of the Committee (e.g., Special Resolution).]** or in accordance with rules established by such committee, release, discharge, compromise, settle or compound any debt owing to or any claim of the Partnership, or make or authorize any payment in settlement of any claim or demand against the Partnership or make or authorize any voluntary or gratuitous payment on behalf of the Partnership, and if any Partner shall do so, he or she shall, if required by the Partners, make good to the Partnership such debt or claim or the amount of any such payment, as the case may be.

All bonds, debentures, share certificates of public companies and securities for payment of money and other valuables owned by or in the possession of the Partnership shall, as soon as practicable after receipt thereof, be lodged in a safety deposit box or boxes held in the name of the Partnership in the safety deposit vault of one of the bankers of the partnership or in such other safety deposit box or boxes as may be agreed upon by the Partners.

Annotation:

Partnerships Act:

Admissions and representations of partners

16. *An admission or representation made by a partner concerning the partnership affairs and in the ordinary course of its business is evidence against the firm. R.S.O. 1990, c. P.5, s. 16.*

Revocation of continuing guaranty by change in firm

19. *A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in*

respect of the transaction of which, the guaranty or obligation was given. R.S.O. 1990, c. P.5, s. 19.

B 3.1480 to 3.1490 - Authority to bind
3.3450, 3.3475 - Authority to bind
3.3500 to 3.3675 - Partner authority
Cite: Fisher & Co. v. Robert Linton & Co. (1897), 28 O.R. 322 (C.A.)
Bank of Montreal v. Kiwi Polish Co. (Canada) Ltd. et al., 1971 CanLII 108 (SCC); [1971] SCR 991
Canadian Bank of Commerce v. Donoghue (1909), 12 W.L.R. 30 (Y.T. Terr.Ct.)
McDonic Estate (Re), 1997 CanLII 1019 (ON CA); 142 D.L.R. (4th) 648, 31 O.R. (3d) 577, 96 O.A.C. 289 (C.A.)

Partnerships Act, Section 6 - Power of Partner to Bind Firm: Every partner is an agent of the firm and is capable of binding the firm, and the individual partners on a joint and several basis. This result is avoided only by persons being advised that the partner does not have authority to act for the firm.

Partnerships Act:
Power of partner to bind firm
6. *Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member, bind the firm and the other partners unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner. R.S.O. 1990, c. P.5, s. 6.*
Partners bound by acts on behalf of firm
7. *An act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm by a person thereto authorized, whether a partner or not, is binding on the firm and all the partners, but this section does not affect any general rule of law relating to the execution of deeds or negotiable instruments. R.S.O. 1990, c. P.5, s. 7.*
Effect of notice that firm not bound by act of partner
9. *If it is agreed between the partners to restrict the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement. R.S.O. 1990, c. P.5, s. 9.*

B 3.490 to 3.530 - Signing Authority

Signing Authority: The agreement should consider the nature of contractual arrangements to be entered into by the partnership; this should include consideration of negotiable instruments such as cheques. The delegation of signing authority, and the procedures to be followed to authorize the entering into of the contracts should be included.

Signing Authority: Every partner is an agent of the firm for the purpose of the business of the firm; Partnerships Act section 6, and thereby binds the firm and each partner unless the third party being dealt with knows the partner does not have authority. Therefore, absent restriction, every partner signing binds the firm and all partners. The agreement should consider the nature of contractual arrangements to be entered into by the partnership, and the desired delegation of signing authority. The procedures to be followed for approval to authorize the entering into of

the contracts should be agreed as well. The nature of notice to the world and persons being dealt with as to approvals required and signing authority should be considered. Banking and credit arrangements will usually not cause a problem because the third party will require evidence of authority to bind rather than accepting the general legal position that any partner binds the firm.

Banking Arrangements: There should be an agreement as to the initial banking arrangements for the partnership, and mechanics established for changing the banking arrangements. The nature and kind of accounts to be opened, the types of agreements to be entered into, and the designation of authority for signatories should be included.

Contracts and Cheques: Decision must be made as to who will have the right to sign contracts, cheques and other documents in relation to the operation of the partnership. It is often desirable for convenience of execution, that a single signature be used for cheques or contracts below a specified amount and two or more signatures for those above the specified amount. The partners may agree to any arrangement but one suggestion is that all contracts or documents should require the approval of more than one partner, cheques under a set sum the signature of only one partner and cheques over that amount with signature of more than one partners. Larger partnerships will often use a management committee or an authorized partner concept to eliminate the need for all partners to sign or to take away the ability, at least among partners, for a partner to be able to sign and bind the firm. As a result of any partner being able to bind the firm any of these arrangements should be accepted by third parties dealing with the firm.

7.12 Day-to-Day Management. There shall be a Management Committee of the Partners, elected by the Partners at each annual meeting or as otherwise agreed, by secret ballot containing the names of all Partners nominated, and consisting of such number of Partners as is fixed from time to time by the Partners. The Management Committee shall consist of _____ Partners. The Partners having the highest numbers of votes from among the nominees shall be deemed to have been elected. The Management Committee shall elect a chairman from among its number. The Management Committee shall manage or supervise the day-to-day management of the affairs of the Partnership, and develop administrative and governing structures of the Partnership and policies and plans for the Partnership for the approval of the Partners; provided that the Partners, acting by Special Resolution, rather than the _____ Committee, shall have authority:

(a) to make or authorize any expenditure or commitment in excess of $_____;

(b) to engage the services of persons to _____;

(c) to set from time to time limits upon the amount which may be borrowed by the Partnership;

(d) to appoint such bank or banks as may from time to time be decided; and

(e) _____.

7.13 Officers of the Partnership: The Partners at each annual meeting or otherwise as may be necessary shall elect a Chairman and a Secretary of the Partnership to hold office until the next annual meeting. The Chairman shall, if present, preside at meetings of the Partnership and shall perform such other duties as may be assigned to him or her by the Partners or as are

incident to his or her office. The Secretary shall ensure that minutes of all meetings of the Partnership are kept and circulated to the Partners, and keep available for inspection by the Partners copies of all decisions of the Partnership which have continuing relevance to the Partnership and memoranda relevant thereto. The Secretary shall also have responsibility for the custody, maintenance and preservation of the archives and memorabilia of the Partnership.

7.14 Insurance **[Needs to be tailored to business and composition]**

Note: this list of delegated matters should reflect the needs of the partnership business to run efficiently given size and required speed of execution.

Annotation:
Establish the desired committees, officers and their mandates and authority, and how they are elected by the Partners. Set out the basis for the appointment and removal of the officers of the Partnership, their roles and their duties. Set out how, and by whom, the allocations to Partners is determined.

Management: In a small partnership management can be, and often is, undertaken by all partners, generally on an ad hoc consensus basis. This is effective to recognize the right of all partners to have a say and involvement in management of the partnership and can work from a practical viewpoint only in the small partnership. Consideration should, however, be given to the nature of the delegation of management responsibilities if this is needed because of size of the partnership or matters such as skills, desired contribution and geographic location. Also, use of a management corporation, whether reflecting the partnership structure or organized on some other basis, might be useful for tax planning or liability purposes. Generally, the partners should consider, in business and professional terms, how the partnership will most effectively run from a day to day business management viewpoint. If the partners are to perform different functions, the scope and duties and responsibilities should be agreed. Also effective management often involves delegation to committees to oversee various aspects of the business. Those matters that can be determined by these delegated persons or committees and those that require a partnership level consideration and votes should be clearly set out. For a very large partnership, copying corporate law concepts of directors and officer responsibility and election may be a practical way of functioning.

Insurance: Depending upon the business enterprise of the partnership, insurance may be a vital component to its continued success and protection of the partners and their business. The joint and several liability of partners particularly dictates careful attention to insurance protection. Insurance provisions should be included in the agreement and crafted to deal specifically with the nature of the business liabilities and obligations of the firm, being tailored to meet the business needs of the partnership. There is no statutory or common law guidance as to the need to insure assets or business activities.

7.15 Securities Transfer Act The interest of each Partner as to the Partnership is a security for the purposes of the *Securities Transfer Act* (Ontario), Securities Transfer Act, S.O. 2006, c. 8 Ontario, s. 12 (1).

Annotation
If a partnership agreement does not opt in to the Securities Transfer Act and expressly state that partnership units are securities it is harder for a lender to those partners to get security over the partnership interest.

The Section 12(1):

Section 12(1) of the STA establishes that an interest in a partnership or a limited liability company will not be a security unless:

> *(a) "that interest is dealt in or traded on securities exchanges or in securities markets;*
> *(b) the terms of that interest expressly provide that the interest is a security for the purposes of this Act; or*
> *(c) that interest is a mutual fund security within the meaning of section 11."*

Section 12(b) is to facilitate the use of partnership units as collateral for secured loans, but only if the Partners opt into this legislation expressly.

Section 12 complements the definitions of security and financial asset in section 1(1). In concert they establish that all units issued by partnerships are securities for the purposes of the STA only if they are publicly traded, unless the issuers of such a unit voluntary opt into the application of the STA by specifying that the units are securities for the purpose of the STA. The provision also stipulates that indirect holding system rules of the STA apply to all such units where they are held in a securities account.

The pledging of partnership units as security, and not taking the appropriate corresponding action for protection of such interest, such as ensuring units are expressly included as securities in the partnership agreement, can result in a failure to properly acquire the desired security interest. In order to ensure perfection and priority of the security interests steps need to be taken, for example partnership units outside the definition of security under the STA must be perfected by control; either through the possession of certificates or the execution of a control agreement. An action, such as possession, may give priority over lender who has only registered a financing statement.

Any partnership agreement drafted before the enactment of the period will likely be silent on partnership units constituting security and therefore would require perfection by registration to maintain priority in partnership units to be pledged. Therefore, secured parties with an interest in such partnership units need register a financing statement and should take control, either through a simple agreement or physical control, to prevent the possibility of losing priority over the security interest to another secured party.

7.16 Appealing Decisions: **[NOTE: Set out a process for appeal of decisions regarding Partners, including disputes relating to allocations and compensation.]**

8. RETIREMENT, WITHDRAWAL AND EXPULSION

8.1 Event of Default by a Partner. The happening of any of the following events of default by a Partner or a Designated Shareholder (the **"Defaulting Partner"**) shall give the non-defaulting Partner or Partners, as the case may be (the **"Non-Defaulting Partners"**) the right to require the withdrawal of such Defaulting Partner from the Partnership, and the Partnership shall not be dissolved but shall continue following the withdrawal of the Defaulting Partner:

(a) The levy of execution or attachment of any interest of the Defaulting Partner in the Partnership or the Partnership Property by a judgment creditor or by any other claimant

perfecting a lien thereon which is not discharged by _____; any assignment by the Defaulting Partner for the benefit of creditors; the adjudication that the Defaulting Partner is a bankrupt or insolvent or the appointment of a receiver for all or substantially all of the Defaulting Partner's business or assets of the appointment of a trustee;

(b) Any transfer by the Defaulting Partner of any of its rights or interests in the Partnership or any purported transfer of the Partnership Property;

(c) Failure on the part of the Defaulting Partner to cure any default in the performance of its obligations under this Agreement within _____ days after notice from the Non-Defaulting Partner of such default and demand to cure the same; or

(d) if the Defaulting Partner is found to be guilty of fraud by a court of competent jurisdiction, or makes an assignment of its property for the benefit of its creditors, or makes a proposal to its creditors under the *Bankruptcy and Insolvency Act* (Canada), or has an assignment or receiving order made against it under the said Act, or any other act, such Partner shall be required to withdraw from the Partnership, effective on the date of such funding, assignment or proposal.

Note: This list is for illustration only the list should consider the matters relating to status of a partner that effects business, licensing, operations and include failure of those matters in the list.

Annotation:
B.7590 to 7.710 - Withdrawal of a Partner; General Requirements; Notice of Withdrawal; Non-Competition Clauses;
Ernst & Young v. Stuart (1997), 144 D.L.R. (4th) 328 (B.C.C.A.)

Expulsion of Partner: The Partnerships Act does not permit the expulsion of a partner unless the partnership agreement specifically provides for the capability of expelling, and then only if strictly in compliance with the agreement. Generally, the notice period, grounds for expulsion, and the vote required for expulsion would also need to be included. The agreement should also deal with the rights of the expelled partner as to return of capital, indemnity for liabilities before and after expulsion, rights to assets, distribution to the point of expulsion, rights in and the obligation to complete and account for work in progress and reimbursement for overpayment, damages and similar.

Expulsion of a Partner: The terms and conditions on which a partner can be expelled from the partnership should be considered; any ability to expel a partner has to be agreed or it is prohibited by section 25 of the Partnerships Act. The circumstances which can lead to expulsion can, and likely should be, clearly set out to provide a solid basis for assessing when expulsion is to be considered. This generally is only in circumstances where the partner has committed fraud or theft on the partnership, the partner has lost professional credentials required for practice, chronic under performance, substance abuse, failure to adhere to firm key policies and similar matters. In the larger partnership there should be the ability to expel on a specified percentage vote otherwise the terms of section 25 of the Partnerships Act will prevent expulsion of the partner.
Partnerships Act, Section 25 - Expulsion of a Partner: The partners, even by majority vote, cannot expel a partner unless the power to do so is provided by the agreement. This is a key issue which should be considered in every partnership agreement. The needs of the remaining partners to remove an unsatisfactory partner should be balanced against security of tenure and

business interest for the partners. For a large partnership, this is usually achieved by requiring a significant percentage of the partners to approve and expulsion or by setting out clear objective grounds for expulsion.

Alternate

8.1 Event of Default by a Partner. A Partner shall be deemed to have withdrawn from the Partnership upon:

(a) such Partner's or a Designated Shareholder's bankruptcy, unless otherwise determined by the Partners;

(b) such Partner's or a Designated Shareholder's loss of professional licence or capability of practice in the jurisdiction in which the Partnership carries on business; or

(c) such Partner's or Designated Shareholder's acceptance of appointment or election to a judicial or comparable public position.

Alternate

8.1 Event of Default by a Partner. If any Partner or Designated Shareholder becomes unable to perform his duties hereunder relating to the business of the Partnership by reason of suspension or loss of any licence, membership, professional designation or qualification or otherwise which is required to entitle him to carry on the business of the Partnership, the following provisions shall apply:

(a) in the event that the suspended Partner or Designated Shareholder is suspended for a period of _____ or longer, he shall not be entitled to receive any drawings from the Partnership during the period of suspension; and

(b) in the event that the suspended Partner or Designated Shareholder is suspended for a period of _____, the suspended Partner may be required to withdraw from the Partnership by a determination of the Partners given by [Ordinary Resolution] and, notwithstanding any other provision hereof, the Defaulting Partner shall not be entitled to any share of net profits nor any discretionary allowance with respect to any period of such suspension. Any such suspension shall not prevent or delay the effect of any requirement in writing to withdraw.

8.2 Voluntary Withdrawal. Any Partner may withdraw from the Partnership on not less than ____ prior written notice to the remaining Partners provided, however, that in the case of acceptance of appointment or election to a judicial or comparable public position or in the case of disability, in which case the Partner may give such shorter notice as is practicable. The termination of such withdrawing Partner's interest shall be effective at the expiration of the said notice period.

Annotation:

B 7.812, 7.814 - Choice of Dissolution of the Partnership
Cite: Keith v. Mathews, Dinsdale and Clark (1999), 87 A.C.W.S. (3d) 574 (Ont. Ct. (Gen. Div.))

Partnerships Act, Section 26 - Retirement from Partnership at Will: If a fixed term is not agreed upon for the duration of a partnership, a partner may withdraw at any time by giving notice of intention. A partnership "at will" is any partnership for which no fixed term (by time or event) has been agreed. This may be unsuitable for the partnership, and should be amended by clear

and specific notice requirements, withdrawal terms, and an agreement as to the continuation of the partnership where that is the case.

Withdrawal: A partner has a statutory default term providing a right to withdraw from the partnership, under section 26 of the Partnerships Act, where the partnership is at will, by providing written notice. This right can be modified by agreement and other agreed terms for withdrawal reached. The protections for third parties, including ongoing liability under section 18, can not be modified. As among the partners, the mechanics of withdrawal of a partner should be outlined, including the amount and timing of any payment, method of accounting and any non-competition agreement. Also any indemnity for the withdrawing partner for ongoing liability should be included.

8.3 Retirement of Partner. Any Partner or a Designated Shareholder of a corporate Partner shall, after attaining the age of _____ years, enter into a plan (hereinafter "**Retirement Plan**") for his or her retirement from the Partnership, effective _____ and with payment of capital and profit participation as specified in the retirement plan approved by the Partners from time to time provided that profit participation shall only be paid to the date of reaching age _____ years, shall not be paid out prior in interest or timing to that paid to the remaining Partners and repayment of capital shall be in installments so payment shall be made no more rapidly than _____.

Annotation:
B 7.949 Agreed Buy/Sell
Laschuk v. Poon, [1993], 3. W.W.R. 745 (Alta. Q.B.)

Alternate
8.3 Retirement of a Partner. Each Partner shall withdraw on the last day of the fiscal period in which he or she or, in the case of a corporate Partner, its Designated Shareholder attains the age of _____. Notwithstanding the foregoing, the Partners or a committee authorized by the Partners **[NOTE: Set out how, and by whom, the required retirement may be waived.]** may agree with a withdrawing or retiring Partner or the Designated Shareholder of a corporate Partner with respect to continued service by him, her or it to the Partnership on a specified basis for a specified period.

8.4 Expulsion of a Partner. A Partner may be required to withdraw from the Partnership by requirement in writing so to do, authorized by Special Resolution in accordance with this Article 8 (*Retirement, Withdrawal and Expulsion*).

At least _____ business days' notice shall be given of any meeting of Partners called for the purpose of authorizing by Special Resolution a requirement to a Partner to withdraw. At such meeting the Partners shall be entitled to consider and act upon any information which they consider relevant and the Partner in question shall be entitled to be heard. No Partner or committee of the Partnership shall be entitled to be represented by legal counsel at the meeting. A meeting of Partners called for the purpose of requiring a Partner to withdraw may be called by ● **[Set out ability to call the meeting.]**. Notice calling such meeting must be in writing and accompanied by a summary of the reason or reasons advanced for the proposed requirement to withdraw.

Alternate
8.4 A Partner may be required to withdraw from the Partnership by requirement in writing so to do:

(a) in the case of a corporate Partner, upon notice given by ● **[insert designated body]** in the event that ● determines that the corporate Partner is in breach of any of the requirements of any of the subsections of Section **[_____];** or

(b) in all other cases, authorized by Special Resolution in accordance with this Article (*Retirement, Withdrawal and Expulsion*).

Annotation:
Partnerships Act:
Expulsion of partner

25. *No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners. R.S.O. 1990, c. P.5, s. 25.*

B 7.300 to 7.585 - Expulsion of a Partner
Cite: Morris Architectural Group Inc. v. C.L. Bain Interior Design Ltd., 1994 CanLII 9015 (AB QB), 22 Alta LR (3d) 130
Tilley v. Hails,1992 CanLII 7693, 8 OR (3d) 169, [1992] OJ No 937;Ont; Tilley v. Hails, 1992 CanLII 7816 (ON CA), 9 OR (3d) 255 (C.A.)
Gregory Yates Professional Corp. v. Gary S. Sankoff Professional Corp. (1995), 170 A.R. 28 (Q.B.)
H.A.L. Consulting Services Inc. v. Creekside Consulting (1988), 10 A.C.W.S. (3d) 44 (B.C. Co. Ct.)
Canadian Imperial Bank of Commerce v. Bramalea Inc., 1995 CanLII 7262 (ON SC), 33 OR (3d) 696, [1995] OJ No 4884

Expulsion of Partner: The Partnerships Act does not permit the expulsion of a partner unless the partnership agreement specifically provides for the capability of expelling, and then only if strictly in compliance with the agreement. Generally, the notice period, grounds for expulsion, and the vote required for expulsion would also need to be included. The agreement should also deal with the rights of the expelled partner as to return of capital, indemnity for liabilities before and after expulsion, rights to assets, distribution to the point of expulsion, rights in and the obligation to complete and account for work in progress and reimbursement for overpayment, damages and similar.

Expulsion of a Partner: The terms and conditions on which a partner can be expelled from the partnership should be considered; any ability to expel a partner has to be agreed or it is prohibited by section 25 of the Partnerships Act. The circumstances which can lead to expulsion can, and likely should be, clearly set out to provide a solid basis for assessing when expulsion is to be considered. This generally is only in circumstances where the partner has committed fraud or theft on the partnership, the partner has lost professional credentials required for practice, chronic under performance, substance abuse, failure to adhere to firm key policies and similar. In the larger partnership there should be the ability to expel on a specified percentage vote otherwise the terms of section 25 of the Partnerships Act will prevent expulsion of the partner.
Partnerships Act, Section 25 - Expulsion of a Partner: The partners, even by majority vote, cannot expel a partner unless the power to do so is provided by the agreement. This is a key issue which should be considered in every partnership agreement. The needs of the remaining partners to remove an unsatisfactory partner should be balanced against security of tenure and business interest for the partners. For a large partnership, this is usually achieved by requiring

a significant percentage of the partners to approve and expulsion or by setting out clear objective grounds for expulsion.

8.5 Withdrawal on Expulsion of a Partner. The Partner withdrawing shall remove his personal effects from the premises of the Partnership, provide the notice of withdrawal, and shall be entitled to the payments specified hereunder on the dates provided in the said Section ___. The _____ committee shall cause a notice of withdrawal to the published in the Gazette for all relevant legal jurisdictions, and in a newspaper of local circulation in the city in which the withdrawing Partner last undertook business for the Partnership.

8.6. (a) A Partner shall withdraw and shall be deemed to have withdrawn on the date of delivery to such Partner of the Special Resolution requiring withdrawal.

(b) If a Partner or Designated Shareholder has committed a crime or has materially breached the ● **[professional association requirements]** (or other applicable regulatory body) of any jurisdiction in which the Partnership carries on business and as may be applicable to that Partner or Designated Shareholder, the Partners, by majority vote, may require the Partner or Designated Shareholder to take a leave of absence and quit the premises of the Partnership for a period of **[30 days]** or, if earlier, until the Partner withdraws from the Partnership. Prior to making such request, which shall specify the basis on which it is made, the Partner shall, on request, have an opportunity to be heard by the Partners but shall not be entitled to be represented by legal counsel at such hearing.

8.7 Payment on Expulsion

Note: The basis for payment and release of interest in partnership assets should be considered and tailored to the nature of the participation assets and business, but it can be included here or from part of Article IV. Expulsion usually will have less generous payment, often reimbursing the firm.

8.8 Maximum Aggregate Payment on Withdrawal. Notwithstanding anything elsewhere contained in this Agreement, the total of all payments required to be paid to all withdrawing Partners shall not, unless otherwise agreed by the Partners, exceed in aggregate _____% of the net income of the Partnership in any fiscal year. In the event that it appears that the required payments may exceed _____%, then all payments due in such a year may be reduced proportionately so that they will not in the aggregate exceed such sum, and the time for payment of the balance shall accordingly be extended.

Annotation:

Partnerships Act, Section 43 - Retiring or Deceased Partner's Share to be a Debt: The interest of a retiring partner is deemed to be a debt of the partnership by section 43, other than if agreed to the contrary. This can have significant impact for the ongoing firm, elevating the interest of a retired partner ahead of that of the ongoing partners. Initially, the agreement should clarify what is owed and the basis for payment should be agreed. Then, it should be agreed whether the debt is one only against th e partnership assets, or, as per other partnership debts, is also a liability of the partners. The order of entitlement to payment both in the ordinary course and on a dissolution should also be considered. Agreement to the contrary may be desirable from an ongoing partnership's point of view. Case law has indicated that as a consequence of the payment being a debt, the partnership may not have set-off rights against damages or other entitlements which the partnership may have against the partner, if the amount is claimed by a

third party. This is a fundamental change in character of the rights among partners and deserves careful consideration in the agreement.

8.9 Special Arrangements. Any special arrangements or obligations with respect to the admission or withdrawal of Partners from the partnership shall be approved by Special Resolution and a record thereof shall be maintained if the retirement or expulsion requires Special Resolution.

Note: A vote of less than a Special Resolution (such as majority) can be agreed to govern an expulsion. Expulsion is usually reserved for more egregious issues which should be tailored to the business needs of the partnership.

9. DEATH AND DISABILITY OF A PARTNER

9.1 Death or Disability of Partner (No Dissolution). The death or the physical or mental incapacity of any Partner, or of the Designated Shareholder or director of any Partner that is a corporation, shall not cause the Partnership to dissolve, and the Partnership shall continue subject to the withdrawal of the deceased or disabled Partner. The surviving or non-disabled Partners shall undertake and assume all of the responsibilities and obligations of the deceased or disabled Partners under this Agreement. The deceased or disabled Partner shall be deemed to have withdrawn from the Partnership and the remaining Partners shall pay to that withdrawing Partner, or their estate the payments to be made by this Agreement.

Annotation:
Partnerships Act:
Right of outgoing partner as to share in profits after dissolution
42. *(1) Where any member of a firm dies or otherwise ceases to be a partner and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his or her estate, then, in the absence of an agreement to the contrary, the outgoing partner or his or her estate is entitled, at the option of the outgoing partner or his or her representatives, to such share of the profits made since the dissolution as the court finds to be attributable to the use of the outgoing partner's share of the partnership assets, or to interest at the rate of 5 per cent per annum on the amount of his or her share of the partnership assets. R.S.O. 1990, c. P.5, s. 42 (1).*
Proviso as to option of remaining partners to purchase share
(2) Where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his or her estate, as the case may be, is not entitled to any further or other share of profits, but if any partner, assuming to act in exercise of the option, does not in all material respects comply with the terms thereof, he or she is liable to account under the foregoing provisions of this section. R.S.O. 1990, c. P.5, s. 42 (2).
Retiring or deceased partner's share to be a debt
43. *Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share, is a debt accruing at the date of the dissolution or death. R.S.O. 1990, c. P.5, s. 43.*

Retirement, Disability, Withdrawal or Death of a Partner: The agreement should generally provide the continuation of the partnership upon the happening of the bankruptcy, retirement, disability, withdrawal or death of a partner. If the partnership is intended to terminate on the

happening of these events, then this should be clearly specified although many of them will result in the termination of a partnership in law.

Temporary Absence and Disability: The partnership agreement should differentiate temporary absences, particularly those which must be recognized such as maternity leaves, and those which may be desirable such as sabbaticals, education absences and vacation. The general policy, and the mechanics and means of changing the policies, should be included. Short term disability provisions should generally differ from long term, permanent, disability, the differences being dependent on the nature of the partners' participation, the business of the partnership, access to disability insurance, and similar provisions. Disability may include both mechanics for altering participation in the profits of the partnership, and eventually withdrawal from the partnership.

Disability: Provisions governing the disability of partners should be dealt with in the agreement, either as to continued membership, with or without adjustment in participation, or required withdrawal. Initially a clear definition of disability should be considered, generally a number of consecutive days absent as a result, a period of time of absence in a stated period (such as 120 days in a 1 year period), or a non-consecutive period if the period(s) of return are less than a minimum. It is usual to provide a period of time whereby the partner would continue to receive draw and some profit from the partnership, followed by a period of lessened participation in the partnership and finally by purchase of the disabled partner's interest. This can, of course, be combined with compulsory or optional disability insurance.

9.2 Disability. If any Partner or Designated Shareholder becomes unable to perform his duties hereunder relating to the business of the Partnership, for any reason whatsoever, other than such reasons as are otherwise specified herein as being permitted reasons for failing to perform duties, for a period in excess of _____ months, such Partner (or the corporate Partner to which such Designated Shareholder relates) may be required to withdraw from the Partnership by the remaining Partners by majority vote. In the event such withdrawal is required, a statement of Partnership assets shall be prepared by the Partnership's accountants and the remaining Partners hereunder shall pay out to the withdrawing Partner any undistributed net billings to which the withdrawing Partner is entitled hereunder in the ordinary course and any positive balance remaining in the capital account of the withdrawing Partner in equal monthly instalments without interest over a period of one year, and the Partnership interest of the withdrawing Partner shall be deemed to have been fully terminated as at the expiration of the said _____-month period and the interests of the remaining Partners hereunder shall be adjusted as to percentage participation accordingly.

Alternate

9.2 Disability. Except with the consent of the Partners given by Special Resolution:

(a) each of the Partners or Designated Shareholders shall, subject to reasonable attention to family and personal affairs, the exercise of rights with respect to parental leave, childcare responsibilities and other entitlements under anti-discrimination policies, and reasonable holidays and sick leave, devote the whole of their time and attention to the Partnership business and to the performance of the duties of any of the offices which they hold; and

(b) no Partner or Designated Shareholders shall, either alone or with any other person or persons or corporation, directly or indirectly, be actively engaged in any other profession, or any business except _____.

If a Partner or Designated Shareholder has become partially disabled but such Partner or the corporate Partner to which such Designated Shareholder relates is still able to make a useful contribution to the Partnership as a Partner or has become totally disabled but has a prospect of complete or partial rehabilitation to the point of again making a useful contribution as a Partner, then unless and until the Partners make a decision to expel such Partner, ● **[Set out consequences of disability and who decides.]**. With respect to any case where disability insurance is in effect, the _____ Committee shall not reduce or eliminate such share of profits with respect to any waiting period for such disability insurance not exceeding _____ weeks. Such Partner or, in the case of a corporate Partner, the Designated Shareholder shall be entitled to apply for and receive any available benefits under any policy of disability insurance under which they are insured. In determining the reduction or elimination of such Partner's share of profits with respect to such period, **[deciding body]** may take into account the amount and the timing of payments of any such disability insurance benefits and the extent, if any, to which any such disability insurance benefits are not includable in the Partner's income for income tax purposes. No wholly or partially disabled Partner or Designated Shareholder shall apply for and receive disability insurance benefits for any period with respect to which their share of profits has not been reduced or eliminated. Any Partner whose share of profits is reduced shall make full disclosure to any such disability insurer of any receipt of profits from the Partnership with respect to any period with respect to which disability insurance benefits are to be received.

10. PAYMENT ON WITHDRAWAL

10.1 Payment for Partnership Interest. On the death of any Partner or Designated Shareholder of a corporate Partner, or withdrawal from Partnership of any Partner, the remaining Partners shall pay to such Partner or the estate of such Partner the following amounts, according to the following schedule, in full satisfaction of such Partner's interest in the Partnership:

(a) any specific loan made by such Partner or Designated Shareholder to the Partnership to be repaid according to the terms of the loan;

(b) within _____ months of the date of death, such Partner's or Designated Shareholder's estimated excess capital as of the end of the fiscal year last completed less any repayment thereof prior to the date of death;

(c) such Partner's capital account as determined by generally accepted accounting practice as calculated utilizing the Partnership's current practice of calculating undistributed income or loss as of the date of death, exclusive of any amount for goodwill; and

(d) a retirement allowance calculated and paid as set forth in Schedule "**[_____]**",

Alternate

10.1 Payment for Partnership Interest. Effective as of the date of termination, the Partner, the Designated Shareholder or the estate of the Partner or Designated Shareholder, as the case may be, shall be entitled to receive the net income arising from the billings generated and received by the Partnership relating to such Partner or Designated Shareholder, net of the payment of shared expenses allocated as provided hereunder, calculated in the ordinary course as hereinafter specified, to the date of death, withdrawal or expulsion as the case may be. Payment shall be made in the same manner as if the former Partner or Designated Shareholder

had continued to be a Partner of the Partnership, with the allocation of the same expenses and deductions, to the end of the month of termination, but not thereafter. The Managing Partner shall be required to pay out any monies due and owing pursuant to this provision, within ___ business days after the date of _____.

Alternate

10.1 Payment for Partnership Interest. Except as herein expressly provided, on the withdrawal or retirement of a Partner, either voluntary or because of disability, death or _____ of a Partner or Designated Shareholder, the Partnership shall pay to the person legally entitled thereto, in full satisfaction of that Partner's interest in the Partnership, an amount equal to any positive balance in the Partner's capital account as of the close of the month in which such withdrawal, retirement or death occurs. The amount to be paid shall be paid in _____ equal consecutive monthly installments, bearing interest at the rate of _____% per annum, commencing on the first day of the month immediately following the date of such withdrawal, retirement or death.

On the expulsion or required withdrawal of a Partner for cause, as hereafter specified, the Partnership shall pay to the person legally entitled thereto, in full satisfaction of that Partner's interest in the Partnership, the amount provided for in the immediately preceding paragraph in the manner provided therein, less the amount, if any, by which the Partnership suffers damage as a result of such expelled Partner's conduct valued by _____.

Alternate

10.1 Payment for Partnership Interest. The Partnership shall pay to the Withdrawing Partner or to his or her or, in the case of a corporate Partner, or the Designated Shareholder's spouse, estate or heirs the following amounts:

(a) the capital, if any, of the Withdrawing Partner; and

(b) the entitlement of the Withdrawing Partner based on his, her or its entitlement to allocation of project for the fiscal year in which the Withdrawal Date occurs, as his or her percentage share of the pre-discretionary allowances income or loss of the Partnership up to the Withdrawal Date.

Annotation:

Note: Mechanics for dealing with any assets being given to the withdrawing partner in species should be considered. Treatment of client information, files and work in process can and should be agreed and the mechanics clearly set out.

Partnerships Act:

Right of outgoing partner as to share in profits after dissolution

42. *(1) Where any member of a firm dies or otherwise ceases to be a partner and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his or her estate, then, in the absence of an agreement to the contrary, the outgoing partner or his or her estate is entitled, at the option of the outgoing partner or his or her representatives, to such share of the profits made since the dissolution as the court finds to be attributable to the use of the outgoing partner's share of the partnership assets, or to interest at the rate of 5 per cent per annum on the amount of his or her share of the partnership assets. R.S.O. 1990, c. P.5, s. 42 (1).*

Proviso as to option of remaining partners to purchase share

(2) Where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his or her estate, as the case may be, is not entitled to any further or other share of profits, but if any partner, assuming to act in exercise of the option, does not in all material respects comply with the terms thereof, he or she is liable to account under the foregoing provisions of this section. R.S.O. 1990, c. P.5, s. 42 (2).

Retiring or deceased partner's share to be a debt

43. *Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share, is a debt accruing at the date of the dissolution or death. R.S.O. 1990, c. P.5, s. 43.*

Partnerships Act, Section 43 - Retiring or Deceased Partner's Share to be a Debt: The interest of a retiring partner is deemed to be a debt by section 43, other than if agreed to the contrary. This can have significant impact for the ongoing firm, elevating the interest of a retired partner ahead of that of the ongoing partners. Initially, the agreement should clarify what is owed and the basis for payment should be agreed. Then, it should be agreed whether the debt is one only against the partnership assets, or, as per other partnership debts, is also a liability of the partners. The order of entitlement to payment both in the ordinary course and on a dissolution should also be considered. Agreement to the contrary may be desirable from an ongoing partnership's point of view. Case law has indicated that as a consequence of the payment being a debt, the partnership may not have set-off rights against damages or other entitlements which the partnership may have against the partner, if the amount that would be is claimed by a third party. This is a fundamental change in character of the rights among partners and deserves careful consideration in the agreement.

10.2 Withdrawal Mechanics.

(a) The Partnership shall not be terminated or dissolved in the event of the death, insolvency or bankruptcy of a Partner or the Designated Shareholder of a corporate Partner, the dissolutions, winding-up, insolvency or bankruptcy of a corporate Partner, the giving of notice by a Partner of his, her or its intention to dissolve the Partnership or the withdrawal or deemed withdrawal of any Partner.

(b) A Partner who has given notice of withdrawal or has been given notice to withdraw, a Partner who has died or become bankrupt, a corporate Partner whose Designated Shareholder has died or become bankrupt, and his, her or its personal representative or trustee in bankruptcy in the case of death or bankruptcy, a corporate Partner which has wound-up, dissolved, become insolvent or bankrupt, is herein referred to as a "Withdrawing Partner", whether or not the process of withdrawal has been completed.

(c) In the case of withdrawal of a Partner, the remaining Partners shall, subject to payment of the amounts provided in this Agreement on withdrawal, be entitled to the share of the Withdrawing Partner in the Partnership business and assets, as of the date of his or her withdrawal.

(d) For the purpose of financial adjustments between the Partnership and a Partner hereunder, the death, bankruptcy, disbarment, withdrawal or deemed withdrawal occurring on any date up to and including the **[15th]** day of any month shall be deemed to have occurred on the last day of the month preceding, and such event occurring after

the **[15th]** day of any month shall be deemed to have occurred on the last day of the month (the "**Withdrawal Date**").

(e) A Withdrawing Partner shall not be exonerated from and shall indemnify the Partnership with respect to:

(i) any neglect, default, omission or negligence done, made, committed or contributed to by him, her or it up to his, her or its Withdrawal Date, to the extent to which indemnity is not recoverable under any policy of insurance; and

(ii) any willful or fraudulent act or default.

Annotation:
The terms for payment should be considered and coordinated with that for an expelled partner. The basis for participation and needs of the business should be considered.

Annotation:
Set out agreed terms as to timing for payments and any adjustment to the payment amount – such as for "bad" behavior, competition or multiple withdrawals.

10.3 No Interest. The amounts which are to be paid to a Withdrawing Partner or his or her or the Designated Shareholder's spouse, estate or heirs shall be paid without interest.

10.4 Tax Treatment. The right of a Withdrawing Partner to payments shall be treated by the partnership and by the Withdrawing Partner as an allocation of a share of income under section 96 (1.1) of the Income Tax Act, as amended or superseded from time to time, with the result that such payments will be treated as an allocation of the earnings and income of the partnership for tax purposes and treated by the Withdrawing Partner or his or her or the Designated Shareholder's spouse, estate or heirs as income as if he, she or it were still a Partner, and hence effectively allowed as an expense insofar as the Partners are concerned.

Note: Return of capital should be considered and change potentially made, this clause results in income tax being paid twice because the capital would have been contributed from after tax funds.

10.5 Set Off Rights In any case where the Partnership owes money to a Partner or former Partner or to his or her spouse, estate, heirs or personal representatives or, in the case of a corporate Partner, to the spouse, estate, heirs or personal representatives of the Designated Shareholder, and the Partner, former Partner or Designated Shareholder of a Partner or former Partner that is a corporation or his, her or its spouse, estate, heirs or personal representatives owes money to the Partnership, the Partnership shall be entitled to set off against any amount owing to the Partner or his, her or its Designated Shareholder's spouse, estate, heirs or personal representatives any amount owing by the Partner or his, her or its Designated Shareholder's spouse, estate, heirs or personal representatives to the Partnership. If the Partnership has an unliquidated claim against a Partner or his, her or its Designated Shareholder's spouse, estate, heirs or personal representatives, the partnership may defer payment of any amount otherwise owing by it to the Partner or his, her or its Designated Shareholder's spouse, estate, heirs or personal representatives until the amount of such unliquidated claim is liquidated and then set it off against any such amount owing by it to the Partner or his or her spouse, estate, heirs or personal representatives.

Alternate

10.6 Set-off Rights. The Partnership shall be expressly, by contract, entitled to set-off from any payment owing to any retiring, expelled or withdrawing Partner or the Designated Shareholder of any retiring, expelled or Withdrawing Partner, any amount owing by such Partner or Designated Shareholder to the Partnership and the amount of any cost, expenses, liability or payment, required to be incurred or paid by the Partnership on account of or relating to the conduct of the Partner or the Designated Shareholder or their withdrawal, or expulsion from the Partnership.

10.7 Date of Withdrawal. Without limiting the generality of the forgoing, the date of withdrawing shall be:

(a) in the case of the death of a Partner or a Designated Shareholder, the last day of the month in which the Partner or Designated Shareholder dies;

(b) in the case of a Partner who is removed by Special Resolution, the date of receipt by the withdrawing Partner of notice advising of the removal at the end of the _____-month period;

(c) in the event of the voluntary withdrawal of the Partner, _____ months subsequent to the date of the notice of the voluntary withdrawal unless an earlier date is agreed to; and,

(d) in the case of a Partner who is removed upon default _____(s) month after the date of receipt by the Partner of the notice of the decision of the remaining Partners to remove the Partner from the Partnership.

10.8 Cooperation Following his or her Withdrawal Date, each Withdrawing Partner shall extend full co-operation to the Partnership with respect to the transition of management of client files to continuing Partners, including without limitation, communicating his or her recollection of relevant events and his or interpretation of documents and notations, and attending upon assessments of fees relating to services performed by him or her or persons under his or her supervision.

Annotation:

Partnerships Act:

Rights of persons dealing with firm against apparent members

36. *(1) Where a person deals with a firm after a change in its constitution, the person is entitled to treat all apparent members of the old firm as still being members of the firm until the person has notice of the change. R.S.O. 1990, c. P.5, s. 36 (1).*

Notice

(2) An advertisement in The Ontario Gazette shall be notice as to persons who had not dealings with the firm before the dissolution or change so advertised. R.S.O. 1990, c. P.5, s. 36 (2).

Estate of dead or insolvent partner, how far liable

(3) The estate of a partner who dies, or who becomes insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, insolvency, or retirement. R.S.O. 1990, c. P.5, s. 36 (3).

Right to give notice of dissolution

37. *On the dissolution of a partnership or retirement of a partner, any partner may publicly give notice of the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, that cannot be done without his, her or their concurrence. R.S.O. 1990, c. P.5, s. 37.*

Partnerships Act, Section 18 - Liability Commences with Admission to Firm: A person does not acquire liability for the affairs of the partnership prior to them becoming a partner. If there is to be an assumption of liability for matters prior to admission, this needs to be included in the partnership agreement. On retirement, a partner remains liable for debts and obligations incurred before retirement. Partners cannot, by contract affect the result as to third parties but should consider and reach agreement as to indemnity among partners for these liabilities. Significant contracts with third parties should also consider the extent and nature of liability for later admitted or withdrawing partners.

10.9 Effect of Retirement or Withdrawal. On the effective date of retirement or withdrawal, the retiring or withdrawing Partner shall be retired from the Partnership and will have no further rights, duties, or privileges therein, and such of his Partnership interest as remains at that time shall be purchased by the remaining Partners as hereafter set out.

10.10 Continuation of the Partnership's Business Following Partner Withdrawal. Upon any dissolution of the Partnership pursuant to this Agreement as a result of occurrence of an event with respect to an individual Partner, the remaining Partners shall be deemed to possess the property of the Partnership and continue the business of the Partnership in the form of a reconstituted partnership. The Partner withdrawing or expelled shall be paid the amounts due such Partner as hereafter set out but shall not otherwise be entitled to any interest in or accounting for such assets: _____.

10.11 Funding of Payment. The _____ Committee, in its sole discretion, may from time to time, purchase annuities, policies of insurance or other similar plans for the purpose of funding the obligations of the remaining Partners or the Partnership pursuant to this Agreement to retiring Partners.

10.12 Indemnity by Continuing Partners. No withdrawing Partner shall be liable (as between the Partner and the Partnership) for, and the Partners and the Partnership shall indemnify each retiring Partner against, any liability of the Partnership, whether or not based upon any event or any act or failure to act and regardless of when such event, act or failure occurred, from and after the date of withdrawal from the Partnership.

Alternate

10.12 Indemnity by Continuing Partners. In the event that a Partner ceases to be a Partner for any reason other than dissolution of the Partnership, the remaining Partners shall indemnify and hold harmless the former Partner and his or her heirs, executors and assigns from all Partnership liabilities existing on the date of or arising after the date that the former Partner ceases to be a Partner and the Partnership and the remaining Partners shall use their best efforts to have the former Partner released from all liability under any guarantee of liabilities of the Partnership given by the former Partner.

Alternate

10.12 Indemnity by Continuing Partners. The Partners hereby indemnify and save harmless any Partner who withdraws for any reason from the Partnership, as well as that Partner's estate,

from any liability resulting solely from the use of the former Partner's name in the Partnership name arising subsequent to the withdrawal of the former Partner from the Partnership.

10.13 Continued Liability. Any Partner who ceases to be a Partner shall remain liable, if the Partnership shall remain liable, for:

(a) his share of any obligation or liability of the Partnership which had accrued or existed at the date when he ceased to be a Partner, provided that such obligation or liability was authorized under this Agreement; and,

(b) his share under any lease or rental agreement of the Partnership which may have been entered into by the Partnership at the date when he ceased to be a Partner, for payments in respect of periods after the date when he ceased to be a Partner.

Annotation:
B s. 5.3200 to 5.3240 - Indemnification Among Partners
Cite: Hughes v. Baldwin (2003), 40 B.L.R. (3d) 293

11. PARTNERSHIP DISPUTES

11.1 Waiver of Court Dissolution. The Partners agree that irreparable damage will be done to the goodwill and reputation of the Partnership if any Partner shall bring an action in court to dissolve the Partnership. Accordingly, each of the Partners accepts the provisions of this Agreement with respect to expulsion, withdrawal and death of a Partner and dissolution of the Partnership as specifying their sole entitlement upon the termination of the relationship between themselves and the Partnership or dissolution of the Partnership. Each Partner hereby waives and renounces all rights to seek a court decree of dissolution or to seek the appointment by a court of a liquidator for the Partnership. Each Partner agrees that this provision may be raised in any claim of estoppel of any such action which might be commenced by a Partner.

Annotation:
Greg Dowling Architects Inc. v. J. Raymond Griffin Architect Inc. (2012), 556 W.A.C. 155, 327 B.C.A.C. 155, [2013] 1 W.W.R. 82, 36 B.C.L.R. (5th) 269, 356 D.L.R. (4th) 81, 2012 CarswellBC 2751, 2012 BCCA 366, Garson J.A., K. Smith J.A., Saunders J.A. (B.C. C.A.); affirming (2009), 2009 CarswellBC 1900, 2009 BCSC 960, N. Smith J. (B.C. S.C. [In Chambers]); leave to appeal refused (2013), 2013 CarswellBC 555, 2013 CarswellBC 554, Abella J., Cromwell J., McLachlin C.J.C. (S.C.C.)
Naramalta Development Corp. v. Therapy General Partner Ltd. (2010), 67 C.B.R. (5th) 298, 2010 BCSC 590, 2010 CarswellBC 1072, Rice J. (B.C. S.C.)
Tangerine Financial Products Limited Partnership v. Reeves Family Trust (2012), 2012 CarswellBC 3076, 2012 BCSC 1479, P. Willcock J. (B.C. S.C.); additional reasons to *Tangerine Financial Products Ltd. Partnership v. Reeves Family Trust* (2012), 86 C.B.R. (5th) 254, 2012 BCSC 9, 2012 CarswellBC 34, P. Willcock J. (B.C. S.C. [In Chambers])
Sagacity Professional Corp. v. Buchanan Barry LLP (2011), 2011 ABQB 58, 2011 CarswellAlta 136, M.C. Erb J. (Alta. Q.B.); additional reasons to (2010), 2010 ABQB 629, 2010 CarswellAlta 2025, M.C. Erb J. (Alta. Q.B.); additional reasons to (2010), 2010 CarswellAlta 399, 2010 ABQB 151, 69 B.L.R. (4th) 119, M.C. Erb J. (Alta. Q.B.)
Dispute Resolution: Dispute resolution procedures should be included for all the usual reasons for a contractual relationship. These should include both resolution of disputes for an ongoing partnership and those arising in a termination or winding-up. The reasons and the suggested types of dispute resolution do not differ from those for most other commercial contract relationships.

11.2 Survival. It is specifically agreed that the terms and conditions of this Article shall survive any expulsion of a Partner, as to the Partner expelled, any withdrawal from the Partnership, as to the Partner who has withdrawn, and any dissolution or termination of the Partnership arrangements so as to continue in full force and effect as to each and every matter which may arise as a consequence of the Partnership, or the termination thereof. The terms and conditions of this subsection shall survive, as provided herein, for a period of time, after any termination of the Partnership arrangements, including dissolution or winding-up of the Partnership, for a period of _____.

11.3 Arbitration. If at any time during the continuance of the Partnership or after the dissolution or termination thereof any dispute, difference or question shall arise between the Partners, or any of their legal representatives, touching the Partnership, or the accounts of transactions thereof, or the dissolution or winding-up thereof, or the construction, meaning or effect of this Agreement, or anything herein contained, or the rights and liabilities of the Partners or their legal representatives under this Agreement, then every such dispute, difference or disagreement shall be referred to a single arbitrator mutually appointed, if the Partners or their legal representatives agree upon one, but should the Partners or their legal representatives be unable to agree upon the identity of such a single arbitrator within _____ days of one Partner notifying the other Partner in writing of such dispute, then each such dispute, difference or agreement shall be referred to a single arbitrator, to be appointed by _____ and the procedure to be followed shall be that set out in the *Arbitrations Act* (_____) and every award and determination thereof shall be final and binding and there shall be no appeal therefrom.

Application for arbitration may be commenced at any time that issues to be determined by arbitration arise. Application may be made by _____, to commence arbitration proceedings, and the proceedings shall commence by notice of intention to apply for arbitration provided by _____, to each other Partner of the Partnership. The notice to each of the other parties shall specify the matter or issue to be determined by arbitration, the proposed basis upon which the arbitrator is to determine the issue, and an outline of the essential facts and evidence surrounding the issue at dispute. The remaining Partners, or other persons with specific interest in the arbitration, shall have a period of _____, to provide a responding notice, outlining their acceptance, or dispute with, the basis upon which the matters or issues are to be determined, and outlining their outline of facts and evidence relating to the same. Reference to the arbitrator shall then include the list of matters or issues identified by the initial notice and response, and the views of each Partner as to the basis upon which the matters are to be determined, and the outline of the facts and evidence to be presented. The arbitration proceedings shall commence with the arbitrator determining the procedures to be followed, including the timing for deliveries and the nature and extent of deliveries to be provided. The determination of the arbitrator is binding upon the parties to the arbitrated dispute. The issue as to responsibility for the costs of arbitration shall be submitted to the arbitrator, arguments presented thereon, and the arbitrator shall determine the responsibility for the costs of arbitration based upon the success of the parties with regard to their position as to the issues presented, the capability of the Partnership satisfying the costs and expenses, if suitable, and considering that other than if the results so merit, the costs of arbitration shall be borne equally by the parties thereto.***Alternate***
11.3 Dispute Resolution The Parties will make, and participate in, good faith efforts to resolve any dispute, disagreement, controversy, question or claim arising out of or relating to this Agreement (each a **"Dispute")** by negotiation. The period for negotiation (the **"Negotiation Period"**) will begin on the day that a Party receives notice of a Dispute and will end on the earlier of:

(a) the date that the applicable Parties conclude in good faith that amicable resolution through continued negotiation of the matter in issue is not likely to occur; or

(b) the **[_____]** day after the first day of the Negotiation Period; or

(c) **[Other suitable date]**.

The negotiations and other settlement efforts of the Parties under this Section will, in all respects, be kept confidential and will be strictly without prejudice. All information provided, documents disclosed or statements made in the course of those negotiations and settlement efforts, including any admission, view, suggestion, notice, response, discussion, position or settlement proposal, will be held in strictest confidence among the Parties and, unless otherwise discoverable, will not be subject to disclosure through discovery or any other process, and will not be relied upon by any Party and will not be admissible into evidence for any purpose, including impeaching credibility, in any subsequent proceeding except as required by law, or to enforce any settlement agreement reached between the Parties.

Once the Negotiation Period has ended, if the Dispute is not resolved, the Parties agree that the Dispute shall be submitted to mediation subject to the following terms and conditions:

(a) the Parties to the Dispute will, acting reasonably, jointly appoint a mediator who will be a qualified and experienced professional mediator whose mediation practice is based in **[**Southern Ontario**]**;

(b) not more than **[_____]** days after the date of the appointment of the mediator, each Party to the Dispute will submit to the mediator and to *each* other Party to the Dispute a without prejudice written mediation brief of not more than **[_____]** pages in length setting out the Party's positions and perspectives concerning the matter in Dispute;

(c) the mediation will be attended by the Parties to the Dispute or representatives of such Parties with full authority to settle the Dispute who will participate in the mediation in good faith and will make their best efforts to resolve the Dispute. The Parties' legal counsel will not attend any mediation meetings or sessions held by the mediator, although this does not preclude the Parties and the mediator from unanimously agreeing that legal counsel may attend one or more of the meetings or sessions;

(d) the fees and expenses of the mediation will be borne and paid by the Parties to the Dispute in equal shares. Any out-of-pocket costs or expenses incurred by a Party in connection with the mediation will be paid by the Party incurring those costs or expenses;

(e) the period of mediation (the **"Mediation Period"**) will end on the earlier of: (i) the date that the applicable Parties enter into a binding settlement agreement with respect to the Dispute; and (ii) on the day that is the **[_____]** day after the appointment of the mediator, unless otherwise agreed to by the Parties to the Dispute;

(f) the mediation will, in all respects, be kept confidential and will be strictly without prejudice. The fact that the Parties have agreed to proceed to mediation will itself be confidential. All information provided, documents disclosed or statements made in the course of those negotiations and settlement efforts, including any admission, view, suggestion, notice, response, discussion, position or settlement proposal, will be held in strictest confidence among the Parties and, unless otherwise discoverable, will not be subject to disclosure through discovery or any other process, and will not be relied upon by any Party and will not be admissible into evidence for any purpose, including impeaching credibility, in any subsequent proceeding except as required by law, or to enforce any settlement agreement reached between the Parties; and

(g) at the end of the Mediation Period, if the Dispute is still not resolved, either Party may avail itself of any remedies available at law or equity.

Note: there are no requirements as to any aspect of an agreement to use alternate dispute resolution. Any form of dispute resolution can be agreed and will only be subject to usual contractual interpretation and jurisdictional restrictions.

12. TERMINATION AND WINDING UP OF AFFAIRS

12.1 Continued Existence. Except as expressly provided in this Agreement, the Partnership shall not be terminated by the happening of any act or event and, without limiting the generality of the foregoing, the Partnership shall not be terminated by reason of any one or more Partners having disposed of their interest in the Partnership in accordance with the provisions of this Agreement, by operation of law or in any other manner whatsoever, or having otherwise ceased to be Partners, or by reason of the admission of any one or more new Partners to the Partnership or the acquisition by any person in accordance with this Agreement of the Partnership Interest of any Partner.

12.1 No Dissolution by Voluntary Action of a Partner. Each Partner agrees not to dissolve the Partnership by the voluntary action of such Partner, but rather any Partner wishing to terminate the partnership relationship may provide notice of such intention to the other Partners and will be entitled to withdraw from the Partnership on the date specified in the notice and to be paid for his interest in the Partnership as follows: ____

The Partnership shall continue, notwithstanding the withdrawal of the Partner providing such notice of intention to dissolve.

12.2 Events of Termination. The Partnership shall terminate upon the first to occur of the following events with termination effective on the effective date of such occurrence:

(a) Upon the happening of any of the following to a Partner if the remaining Partners do not exercise the right to purchase the interest of such Partner within ___ days of the happening of any of such matters:

[List];

(b) At the option of any Partner, if another Partner shall have committed or there shall have occurred any of the acts or events hereafter specified and the remaining Partners do not

exercise the right to purchase the interest of such Partner within ___ days of the happening of any of such matters; and

(c) By **[**unanimous agreement**][**Special Resolution**]** among the Partners,

in all other circumstances, which would otherwise affect the termination or dissolution of the Partnership, pursuant to the provisions of the *Partnerships Act*, the Partnership shall be deemed to continue and shall not be terminated or dissolved.

Alternate

12.2 Events of Termination. The Partnership shall be terminated by agreement of the Partners by decision by Special Resolution. The Partnership shall be wound up as of the last day of the fiscal period or the last day of the first half of such fiscal period, as the case may be, next following such agreement or decision. The property of the Partnership shall be realized, reserves for contingencies shall be established as appropriate, and the proceeds shall be applied in the following order: first, in paying or making adequate provision for the debts and liabilities of the Partnership; secondly, in paying to each Partner the capital, if any, of such Partner in the Partnership together with accrued interest, if any, thereon to the date of payment; thirdly, in paying to each Partner his or her unpaid share, if any, in the net profits in previous fiscal periods; and the surplus or deficit, after any necessary adjustments for payments up to the day of winding up with respect to the net profits of the then current fiscal period, shall be divided among or contributed to by the Partners in proportion to the net profits to which each would be entitled (including in the case of a surplus, any allocations of net profits on the basis of discretionary allowances) with respect to the fiscal period during or as of the end of which the effective date of such winding up occurs.

Annotation:

Toor v. Dhaliwal (2010), 2010 BCSC 1065, 2010 CarswellBC 2020, E.A. Arnold-Bailey J. (B.C. S.C.)
Dyck v. Dahl (2011), 2011 CarswellBC 1051, 2011 BCSC 568, Truscott J. (B.C. S.C.)

Partnerships Act:

Retirement from partnership at will

26. *(1) Where no fixed term is agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his or her intention to do so to all the other partners. R.S.O. 1990, c. P.5, s. 26 (1).*

Notice of retirement

(2) Where the partnership was originally constituted by deed, a notice in writing, signed by the partner giving it, is sufficient for that purpose. R.S.O. 1990, c. P.5, s. 26 (2).

Presumption of continuance after expiry of term

27. *(1) Where a partnership entered into for a fixed term is continued after the term has expired and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will. R.S.O. 1990, c. P.5, s. 27 (1).*

Arises from continuance of business

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term without any settlement or liquidation of the partnership affairs shall be presumed to be a continuance of the partnership. R.S.O. 1990, c. P.5, s. 27 (2).

Dissolution by expiry of term or notice

32. *Subject to any agreement between the partners, a partnership is dissolved,*

(a) if entered into for a fixed term, by the expiration of that term;

(b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking; or

(c) if entered into for an undefined time, by a partner giving notice to the other or others of his or her intention to dissolve the partnership, in which case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice. R.S.O. 1990, c. P.5, s. 32.

Dissolution by death or insolvency of partner

33. *(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or insolvency of a partner. R.S.O. 1990, c. P.5, s. 33 (1).*

Where partner's share charged for separate debt

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers that partner's share of the partnership property to be charged under this Act for that partner's separate debt. R.S.O. 1990, c. P.5, s. 33 (2).

By illegality of business

34. *A partnership is in every case dissolved by the happening of any event that makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership. R.S.O. 1990, c. P.5, s. 34.*

By the court

35. *On application by a partner, the court may order a dissolution of the partnership,*

(a) when a partner is found mentally incompetent by inquisition or is shown to the satisfaction of the court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his or her committee or litigation guardian or person having title to intervene as by any other partner;

(b) when a partner, other than the partner suing, becomes in any other way permanently incapable of performing the partner's part of the partnership contract;

(c) when a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business;

(d) when a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself or herself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with the partner;

(e) when the business of the partnership can only be carried on at a loss; or

(f) when in any case circumstances have arisen that in the opinion of the court render it just and equitable that the partnership be dissolved. R.S.O. 1990, c. P.5, s. 35.

B. 6.680 - Dissolution
B 7.10 to 7.298 -Grounds for Ending the Relationship - Automatic Dissolution; Automatic Dissolution : partnership circumstances; Decision to Terminate; Court intervention; Automatic dissolution: partner status; Continuation of the partnership; Partnership at will
7.730 to 7.810 - Choice of Dissolution of the Partnership
Kucher v. Moore (1991), 3 B.L.R. (2d) 50 (Ont. Ct. (Gen. Div)), supplementary reasons 29 A.C.W.S. (3d) 1048 (Ont. Ct. (Gen. Div)) [091/305/099-8 pp]
Gendron v. Begin, 1996 CanLII 529 (BC SC)
Landford Greens Ltd. v. 746370 Ontario Inc. (1993), 12 B.L.R. (2d) 196 (Ont. Ct. (Gen. Div.))
Alvarez v. Daly (1964), 45 D.L.R. (2d) 421 (B.C.S.C.)

<u>Grounds for Dissolution (Termination)</u>: The Partnerships Act should be reviewed, and the specific clauses which will terminate the partnership as a consequence of the legal status of a partner considered. If these are not desired as a consequence of the nature of the partnership or its business, then these should be specifically contracted out of. The specific grounds for dissolution or termination of the partnership as a whole should be included, this is particularly of concern for a partnership at will because the terms of section 32(c) allow one partner to give

notice causing the dissolution of the partnership, except for the very smallest partnerships this is unlikely to be the desired provision.

Termination: The partners should consider any event in which the partnership will be terminated, this of course will also include termination on mutual consent which is always available. The Partnerships Act has default terms governing dissolution in sections 32 to 44. Absent agreement, partnerships are, or can be, dissolved on the happening of the specified events, these include expiry of a fixed term, death or insolvency of a partner, the business purpose becoming illegal and court order. The partners may want to provide that the partnership will continue in those named circumstances, which is permitted other than where the purpose has become unlawful. The partners may also want to dissolve the partnership on a vote of less than all the partners or the happening of other specified events.

Partnerships Act, Sections 32 and 33 - Dissolution by Expiry of Term or Notice: The provisions of sections 32 and 33 are subject to agreement by the partners. Absent agreement section 32 sets out the basis upon which the partnership is dissolved by term or notice. The dissolution arrangements dictated by these default terms should be specifically reviewed to determine if they are suitable for the partnership and otherwise amended. Section 33 dealing with dissolution caused by the death or insolvency of a partner also needs to be reviewed, and an agreement as to the basis for continuation of the partnership if these events occur included if this is intended.

12.3 Notice of Termination. Upon termination of the Partnership, the _____ committee shall immediately publish, in the Gazette and in a newspaper of local circulation, notice of the dissolution and termination of the Partnership, in such a manner as to indicate the effective date of dissolution, and with sufficient particularity as to avoid further liability or responsibilities for the Partners, for the affairs of the Partnership.

(a) fourth, to provide for such reserves as the Management Committee (or the liquidator) may deem reasonably necessary to repay any contingent or unforeseen liabilities or obligations of the Partnership, as determined by the Management Committee, other than liabilities and obligations to any Partner or liabilities and obligations to be assumed by a Partner in connection with the liquidation of the Partnership;

(b) fifth, to make payments necessary to satisfy all debts, liabilities and obligations of the Partnership to the Partners (other than debts, liabilities and obligations to be assumed by a Partner in connection with the liquidation of the Partnership);

(c) sixth, to provide for such reserves as the Management Committee (or the liquidator) may deem reasonably necessary to repay any contingent or unforeseen liabilities or obligations of the Partnership to the Partners (other than debts, liabilities and obligations to be assumed by a Partner in connection with the liquidation of the Partnership); and

(d) seventh, to the rights, privileges, restrictions and conditions of their Partnership Interests, to distribute any balance then remaining to the Partners in accordance with their Proportionate Share as of the date of dissolution.

12.3 Notice of Termination. The _____ Partnership shall cause to be published notification of the dissolution of the original partnership in the Gazette, and in a newspaper with local circulation, providing sufficient particulars of the dissolution, including the effective date of dissolution.

12.4 Distribution on Termination. Upon dissolution of the Partnership its assets shall be divided as follows:

(a) firstly such assets shall be applied to repay all authorized liabilities and loans to the Partnership and then to pay all excess capital of any Partners, and if the assets are insufficient for this purpose, each Partner shall be liable for his share of any such outstanding liability;

(b) next, the remaining assets shall be applied to repay to each Partner his capital, and if such remaining assets are sufficient only to pay a percentage of the total required capital, then each Partner shall receive that percentage of their required capital;

(c) next, any remaining assets shall be applied to pay to each Partner his proportionate share of the income of the Partnership for the year in which the dissolution occurred, less his drawings for the same period calculated up to the date of dissolution; and,

(d) each Partner shall receive his share of any surplus remaining after payment as set forth in sub-paragraphs (a) to (c) inclusive.

Alternate

12.4 Distributions Upon Dissolution Unless otherwise agreed by the Partners, the net proceed, from the liquidation of the Partnership Assets hall be distributed as follows:

(a) first, to pay costs involved in the liquidation of the Partnership and in the distribution of the Partnership Assets;

(b) second, to make payments necessary to discharge Liens registered against the Partnership Assets, as the case may be, in respect of liabilities of the Partnership to creditors;

(c) third, to make payments necessary to satisfy all other debts, liabilities or obligations of the Partnership to creditors, other than debts, liabilities and obligations to any Partner or debts, liabilities and obligations to be assumed by a Partner in connection with the liquidation of the Partnership;

(d) fourth, to provide for such reserves as the Management Committee (or the liquidator) may deem reasonably necessary to repay any contingent or unforeseen liabilities or obligations of the Partnership, as determined by the Management Committee, other than liabilities and obligations to any Partner or liabilities and obligations to be assumed by a Partner in connection with the liquidation of the Partnership;

(e) fifth, to make payments necessary to satisfy all debts, liabilities and obligations of the Partnership to the Partners (other than debts, liabilities and obligations to be assumed by a Partner in connection with the liquidation of the Partnership);

(f) sixth, to provide for such reserves as the Management Committee (or the liquidator) may deem reasonably necessary to repay any contingent or unforeseen liabilities or obligations of the Partnership to the Partners (other than debts, liabilities and obligations to be assumed by a Partner in connection with the liquidation of the Partnership); and

(g) seventh, subject to Section 4.1 and to the rights, privileges, restrictions and conditions of their Partnership Interests, to distribute any balance then remaining to the Partners in accordance with their Proportionate Share as of the date of dissolution.

Alternate

12.4 Distribution of Assets. Upon the termination of the Partnership, all of the assets of the Partnership shall be assembled, sold and realized or retained in their present form, in such manner as may be determined by the unanimous agreement in writing of the Partners and the proceeds thereof shall be applied as hereinafter provided. The accountants of the Partnership shall prepare a financial statement or statements which shall set forth all of the assets of the Partnership, including accounts receivable, and all of the debts and liabilities thereof and each Partner's capital interest in the Partnership at the date of termination. In the event that the Partners cannot reach an agreement as to whether the assets of the Partnership are to be sold or retained, then such assets shall be sold.

Upon termination of the Partnership, the obligations of the Partnership to any third party creditors shall first be satisfied out of the assets available in the Partnership, second the Partners shall receive, by way of refund, any positive balance in the capital account of such Partner, and last any surplus remaining after such payment shall be realized and paid to the Partners in the same percentages as they hold percentage interests in the profit and loss of the Partnership on the date of termination.

12.5 Distribution on Termination

(a) All of the Partnership Property other than cash and that specified in Schedule ___ shall be offered for sale upon such terms as the Partners shall agree, or, failing such agreement, upon the best terms available in the open market. A Partner shall not be precluded from negotiating or bidding for the purchase of any or all of the Partnership Property being sold provided the sale is completed by public auction or tender or the purchase by the Partner is approved by all remaining Partners as being at fair market value. The sale proceeds net of expenses of sale and all other cash shall be applied and distributed first in payment of all obligations and liabilities of the Partnership and thereafter as follows: _____

(b) The Partners may agree that as to those assets specified in Schedule ___ that it would be to the mutual advantage of the Partners to distribute the Partnership Property, after valuing the same and crediting the value against payment otherwise to be made to the Partner receiving distribution of such assets.

Annotation:

Winding-Up: Although the Partnerships Act has several sections dealing with dissolution (s. 32 to 44) these can generally be amended other than where they require repayment of third party debt prior to payment to partners. An agreement on winding-up procedures should be reached, particularly covering ongoing responsibilities for winding-up and any variations in payment and other distribution that might be suitable. Allocation of work in process, responsibility for finishing, billing and collection is particularly important to deal with.

Partnerships Act, Section 39 - Rights of Partners as to Application of Partnership Property: This section sets out the order of application of proceeds from realization on the partnership property. Although the rights of third parties cannot be compromised, those which relate to inter-partner relationships may be amended by agreement. This would involve setting out any priority or postponement of payment to the partners after satisfying third party debt.

Partnerships Act, Section 44 - Final Settlement: Section 44 sets out rules for distribution and final settlement of accounts. The third party rights cannot be contracted out of but the rights between partners can be amended and should be considered specifically based upon contribution, ongoing relations, and the survival of the firm. This section deals with the priorities and allocation to profit and capital and allocates payout rateably among partners until capital is repaid. The balance is divided in the same percentage as profit. Any amendment to this scheme must be specifically agreed.

Annotation:
B. 7.1240 to 7.1400 - Contribution for Shortfall; Retained Assets; Process of Asset Distribution; Surplus;
7.1460 to 7.1600 - Accounting between Partners on Dissolution
7.2080 - Post-Dissolution Obligations
Cite: Kamin v. Kellen (1994), 46 A.C.W.S. (3d) 769 (Ont. C.A.)

David M. Stone & Co. v. Steingart (1992) 32 A.C.W.S. (3d) 147, supp. reasons 47 A.C.W.S. (3d) 399 (Ont. Ct. (Gen. Div.)), affd 73 A.C.W.S. (3d) 1050 (Ont. C.A.)
Antman v. Feldstein (1996), 62 A.C.W.S. (3d) 594) (Ont. Ct. (Gen. Div.)) [096/11/-101 -36 pp]

Canadian Bonded Credits v. Allied National Credit Corp. (1995), 59 A.C.W.S. (3d) 525 (Ont. Ct. (Gen. Div.)), supp reasons 63 A.C.W.S. (3d) 152 (Ont. Ct. (Gen.Div.))

Perry v. Heywood, 1997 CanLII 16018, 154 Nfld & P.E.I.R. 91 (Nfld. S.C.); upheld in Perry v. Heywood, 1998 CanLII 18075 (NL SCTD), 175 Nfld & PEIR 253, [1998] NJ No 251; 537 APR 253; 82 ACWS (3d) 1013
Morrow v. Stikeman (1995), 56 A.C.W.S. (3d) 198 (Ont. Ct. (Gen.Div.))

12.7 Distribution in Species. Those assets listed in Schedule "A" hereto, shall be deemed to be non-saleable, and shall be valued, in accordance with usual commercial business valuation principles, and distributed to the Partners noted in that schedule, as partial distribution and payment of the entitlement otherwise permitted pursuant hereto, in the event that there is no residual value to be distributed to such Partner, from any of the other assets, the Partner shall remain entitled to receive such assets, it being acknowledged and confirmed that such assets have no value other than based upon the in species distribution to the Partner noted.

Annotation:
Continuing authority of partners for purposes of winding up
38. *After the dissolution of a partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue despite the dissolution so far as is necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise; provided that the firm is in no case bound by the acts of a partner who has become insolvent; but this proviso does not affect the liability of a person who has, after the insolvency, represented himself or herself or knowingly suffered himself or herself to be represented as a partner of the insolvent. R.S.O. 1990, c. P.5, s. 38.*
Rights of partners as to application of partnership property
39. *On the dissolution of a partnership every partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm and to have the surplus assets after such payment applied in payment of what may be due to*

the partners respectively after deducting what may be due from them as partners to the firm, and for that purpose any partner or the partner's representative may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm. R.S.O. 1990, c. P.5, s. 39.

Apportionment of premium on premature dissolution

40. *Where one partner paid a premium to another on entering into a partnership for a fixed term and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued, unless,*

(a) the dissolution is, in the judgment of the court, wholly or chiefly due to the misconduct of the partner who paid the premium; or

(b) the partnership has been dissolved by an agreement containing no provision for a return of a part of the premium. R.S.O. 1990, c. P.5, s. 40.

Rules for distribution of assets on final settlement of accounts

44. *In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:*

1. *Losses, including losses and deficiencies of capital, are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits, but a partner is not required to pay any loss arising from a liability for which the partner is not liable under subsection 10 (2).*
2. *The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, are to be applied in the following manner and order,*
   (a) in paying the debts and liabilities of the firm to persons who are not partners therein;
   (b) in paying to each partner rateably what is due from the firm to him or her for advances as distinguished from capital;
   (c) in paying to each partner rateably what is due from the firm to him or her in respect of capital.
3. *After making the payments required by paragraph 2, the ultimate residue, if any, is to be divided among the partners in the proportion in which profits are divisible. R.S.O. 1990, c. P.5, s. 44; 1998, c. 2, s. 5.*

B 6.690, 6.700 - Cessation of Business
7.1950 to 7.2045 - Post- Dissolution Obligations
Cite: Wodehouse Invigorator Ltd. v. Ideal Stock & Poultry Food Co. (1917), 35 D.L.R. 721 (Ont. C.A.)
Moffat v. Wetstein (1996), 135 D.L.R. (4th) 298, 29 O.R. (3d) 371, 5 C.P.C. (4th) 128 (Gen. Div.), leave to appeal refused 144 D.L.R. (4th) 188 (Gen. Div.)

Winding-up: The mechanics for the winding-up of the partnership and its business should be included. At the time of a winding-up there is likely to be little attention on the part of the partners to the finalization of the ongoing business needs of the partnership. Partnerships will not be capable of a "sudden stop" termination at a point in time, and post-termination provisions should be included, in order to minimize dispute, and maximize participation in the winding-up process. These provisions should include both ongoing responsibilities on the part of the partners, payment requirements, and the valuation and distribution of the assets of the partnership. The Partnerships Act gives the necessary authority to partners to bind the firm, and as needed the partners after dissolution for the purpose of winding up the affairs of the partnership and completing outstanding transactions.
Winding-Up: Although the Partnerships Act has several sections dealing with dissolution (s. 32 to 44) these can generally be amended other than where they require repayment of third party

debt prior to payment to partners. An agreement on winding-up procedures should be reached, particularly covering ongoing responsibilities for winding-up and any variations in payment and other distribution that might be suitable. Allocation of work in process, responsibility for finishing, billing and collection is particularly important to deal with.

Partnerships Act, Section 38 - Authority After Dissolution: This section provides that partners have continuing authority after dissolution but only to the extent of and for the purposes of completing a winding-up and finishing uncompleted transactions. The mechanics and extent of authority are, however, far from complete, and may not be suitable particularly as to who the partners want to retain power over the partnership business and assets during the winding-up.

Note: If this concept is included revise the asset sale provisions to be consistent with this clause.

12.8 Dissolution Committee. The Partners hereby agree, which agreement shall specifically survive the termination and dissolution of the Partnership, that a committee shall be formed, upon dissolution, charged with the duties and responsibilities of managing and administering the affairs of the Partnership during the process of dissolution and in particular dealing with those issues and responsibilities which survive dissolution. The committee shall be a committee of ____ Partners, appointed at the time of dissolution, by the _____ Committee. The Dissolution Committee shall have the full authority and responsibility, and shall be capable of binding the Partnership and the remaining Partners, as to all matters reasonably necessary to conclude the duties and responsibilities of the Partnership, provided that the members of the Dissolution Committee shall not be required to undertake any matters, for which there is inadequate assets of the Partnership or assets contributed by the remaining Partners, to permit satisfaction of any liability or obligation arising therefrom. The Partnership shall be deemed to continue after dissolution of the Partnership, solely to the extent reasonably necessary to permit the undertaking of the duties and responsibilities of the Dissolution Committee. Each of the Partners acknowledges that their responsibility for contribution and liability specifically survives with regard to the matters required to be undertaken by the Dissolution Committee. The costs and expenses of undertaking the process of dissolution shall be a cost and expense of the Partnership, and shall be satisfied, in the ordinary course, from the assets of the Partnership, and thereafter by the contribution of the remaining Partners. The contribution shall be required to be made, in accordance with the percentages in which Partners shared in the profits and losses of the Partnership, immediately prior to termination. The Dissolution Committee shall specifically advise the Partners, quarterly, as to the matters undertaken with regard to the dissolution of the Partnership, the satisfaction of the obligations and liabilities of the Partnership and the cost thereof, together with an accounting of the value of the remaining assets of the Partnership.

12.9 Receiver. In the following circumstances and upon a vote by Special Resolution resolving to terminate the Partnership, then the _____ Committee may at any time thereafter resolve to appoint a receiver of the assets of the Partnership, or any part thereof (hereinafter called the **"Receiver"**), and may remove any Receiver so appointed and appoint another in his stead, and the following provisions shall take effect:

(a) the circumstances permitting appointment are ___:

(b) such appointment may be made at any time after the occurrence of the circumstances set out in (a) pursuant to an appointment made by _____; the appointment shall be made by provision of a notice to all remaining Partners, and notice to the person

requested to be appointed as receiver, no other person shall have a right to dispute the chosen appointment of the receiver, and upon acceptance by the receiver that person shall be the receiver, fulfilling the duties and responsibilities herein outlined;

(c) every such receiver shall be vested with all or any of the powers and discretions of the _____ Committee of the Partnership as to the undertaking of the affairs of the Partnership during dissolution and wind-up;

(d) such receiver may carry on the business of the Partnership or any part thereof to the extent necessary to complete the winding-up process;

(e) the _____ Committee may from time to time fix the remuneration of every such receiver, which remuneration shall be reasonable, and direct the payment thereof out of the Partnership assets;

(f) every such receiver may borrow money for the purpose of carrying on the business of the Partnership or for the maintenance of the Partnership assets or any part or parts thereof to a maximum of _____ and may secure such borrowings against the Partnership assets provided the receiver obtains an acknowledgment that the liability of the Partners therefore does not exceed _____;

(g) all moneys from time to time received by such receiver shall be used to satisfy the obligations of the Partnership and thereafter to payment to the Partners, in accordance with law and as agreed herein;

(h) every such receiver shall so far as concerns responsibility for his acts and omissions in exercising all or any of the powers and discretions conferred upon him hereunder be deemed the agent of the Partnership;

(i) the costs and expenses of the receiver, in the event that the assets of the Partnership are insufficient to complete payment of such costs and expenses, shall be borne by _____; and

(j) upon the completion of the distribution and allocation of the assets of the Partnership, the receiver shall be discharged, the discharge shall be effective on the second business day after provision of notice to the receiver and to each other Partner, provided by the Partner undertaking appointment of the receiver; upon provision of notice to the receiver by the Partner appointing the receiver, the receiver shall be deemed to have satisfied each and every of its obligations and responsibilities to the Partnership, and shall be fully released from any other ongoing duties, responsibilities, obligations or liability.

Note: Generally 12.8 use of a dissolution committee and 12.9 use of a receiver will be mutually exclusive with the receiver being used for winding up where there are entitlement disputes.

12.10 Storage and File Retention. It is specifically acknowledged that the Partnership, and accordingly the Partners thereof, shall be responsible for the ongoing storage, record-keeping and maintenance, of client file materials. The _____ Committee shall complete an inventory of closed and completed files, and files which require the provision of ongoing services, and shall provide a report of all such files to each of the Partners. The _____ Committee shall thereupon determine, and require that the Partners follow, a procedure for contacting and obtaining the direction of each client, as to the files of that client maintained in each category. Each of the Partners specifically covenants and agrees to follow the direction and requirements of the

_____ Committee to ensure the appropriate record-keeping, storage, forwarding and maintenance of the client files in order to minimize liability to each of the Partners.

12.11 Continued Co-operation. Each Partner upon request from time to time by the _____ Committee shall extend full cooperation to the Partnership with respect to the transition and management of client files, including without limitation, communicating his recollection of relevant events and his interpretation of documents and notations, and attending upon assessments of solicitors' fees relating to services performed by him or persons under his supervision.

Note: a clause of this type is recommended for professional partnership and where possible should be expanded with agreement as to how client files will be allocated and transmitted.

12.12 Ongoing Insurance. The _____ Committee will be responsible for obtaining the advice of a qualified insurance consultant, which insurance consultant may be a broker of insurance services, as to the nature, extent, appropriate coverage, company to provide coverage, nature of premium payment, so as to ensure ongoing errors or omissions, or product, liability, in favour of the Partnership, and the former Partners thereof. It is specifically acknowledged that the Partnership, and the individual Partners thereof, shall be obliged to obtain such insurance as shall be reasonably recommended by the insurance consultant, and to pay the premiums required in connection therewith. The premiums shall paid first from Partnership assets available for the payment of such fees and expenses, and thereafter by the individual Partners.

Partnerships Act, Section 36 - Continuing Liability: Third parties dealing with the firm, are entitled to consider persons who were apparently members of the old firm, as continuing as members until they are given notice that person has withdrawn; this results in the potential for continued liability after withdrawal . A notice or advertisement of the withdrawal from the firm should eliminate this ongoing liability for the withdrawing partners. The agreement should provide for publication of such notices to supplement any agreement as to the consequences of withdrawal and cut off of liability.

12.13 Shortfall Payment. (a) Any Partner whose capital is less than his required capital at the date of dissolution shall promptly, upon notification of the deficiency, pay the deficiency to the Partnership.

(b) Each Partner's share of the profit of the Partnership in the year of dissolution shall be the same as their share for the fiscal year last completed.

(c) In calculating the profit of the Partnership in the year of dissolution, work-in-progress shall be valued as the actual work-in-progress at the time in question, as determined by generally accepted accounting practice prevailing in Canada at the time in question.

(d) Each Partner shall execute such forms and documents as may be necessary including any elections which may be required to be signed and filed under the *Income Tax Act*.

13. RESTRICTIVE COVENANTS

13.1 Non-Compete. Each of the Partners agree that he shall not, without the prior written consent of the Partnership, during the term hereof and for a period of _____ years from the date that the Partner ceases to be associated with the Partnership, directly or indirectly, either individually or in partnership or in conjunction with any other person, firm, partnership or corporation:

(a) engage in, be interested in or be concerned with any business or undertaking which is substantially similar to the business of the Partnership as at the date of his ceasing to be associated with the Partnership within [geographic restriction]:

(b) in any manner, directly or indirectly, disclose, develop or otherwise reveal, or use for the benefit or profit of the withdrawing Partner, any customer list, formula, method of manufacturing or distribution, source of supplies, manufacturing, distribution or sales techniques, manners or methods, trade secrets or other information or data of a confidential or private nature with respect to the business of the Partnership to any person, firm, partnership or corporation; or

(c) by letter or other communication, either for himself or any person, firm, partnership or corporation other than the Partnership, contract with or solicit orders from, make sales to or deal with any person, firm, partnership or corporation who are customers or suppliers of the Partnership as at the date of termination or have been suppliers or customers within _____ years immediately preceding the date of such contract, solicitation, sale or dealing.

Alternate

13.1 Non-Compete. If a Partner who has withdrawn from the Partnership engages directly or indirectly, whether in private practice or as an employee of a corporation or otherwise, as _____, within _____ years following the date of termination of partnership, then that Partner shall be deemed to be a Partner on a competitive basis. If at any time it is determined by the Partners that a Partner has withdrawn on a competitive basis, such Partner shall, or the estate of such Partner shall, upon receipt of notice of such determination, repay any sum paid to him as a retirement allowance.

Note: ensure this is consistent with earlier clauses regarding partner contribution.

Annotation:

Some professions, notably lawyers in Ontario, have professional obligations which focus on client/customer rights to utilize a service provider of their choice. See for example Subrule 3.7-7A(1) of the Rules of Professional Conduct and associated Commentary. As such, consideration should be given to any such obligations when drafting a non-competition clause.

13.2 Competition during Retirement. Any Partner who competes with the Partnership in any way during the period following retirement shall forfeit all rights to payment, save for return of capital, and shall be subject to deemed expulsion from the Partnership in the manner otherwise provided in this Agreement.

Annotation:

Partnerships Act:

Duty as to rendering accounts

28. *Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or the partner's legal representatives. R.S.O. 1990, c. P.5, s. 28.*

Accountability for private profits

29. *(1) Every partner must account to the firm for any benefit derived by the partner without the consent of the other partners from any transaction concerning the partnership or from any use by the partner of the partnership property, name or business connection. R.S.O. 1990, c. P.5, s. 29 (1).*

Extends to survivors and representatives of deceased

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner and before its affairs have been completely wound up, either by a surviving partner or by the representatives of the deceased partner. R.S.O. 1990, c. P.5, s. 29 (2).

Duty of partner not to compete with firm

30. *If a partner, without the consent of the other partners, carries on a business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits made by the partner in that business. R.S.O. 1990, c. P.5, s. 30.*

B 3.1495 to 3.1497 - Duty Not to Compete

Cite: MacDonald Estate v. Martin(1993), 89 Man. R. (2d) 161 (Q.B.), vard 70 W.A.C. 123, 95 Man. R. (2d) 123 sub nom. MacDonald Estate (Re) (C.A.);
McKnight v. Hutchinson, 2002 BCSC 1373 (CanLII), 28 BLR (3d) 269
Schwartz Levitsky Feldman v. Stone, 1999 CanLII 2992 (ON CA)

Non-Competition Clause: Many partnerships include a non-competition clause on the part of the partners. The Partnerships Act does not prohibit a partner from competing with the business of the partnership during the currency of the partnership arrangement, but only requires an accounting for the benefits from such activity, as is also the status of common law and fiduciary principles. If this is not the intended agreement then it should be amended by the agreement either disclaiming an interest in the benefits or restricting the competitive activity. If a non-competition is intended, its scope and term must be clearly identified, although the requirements for an enforceable non-competition clause for a partnership do not basically differ from those which involve restraint of trade employment or commercial matters, respectively.

Cite: JG Collins Insurance Agencies Ltd v Elsley, [1978] 2 SCR 916; KRG Insurance Brokers (Western) Inc. v. Shafron, 2009 SCC 6; IRIS The Visual Group Western Canada Inc. v. Park, 2017 BCCA 301

Non-Competition: Consideration should be given as to whether the partners will be constrained from competing against the business undertaken by the partnership. The Partnerships Act does not provide a default term which requires accounting for private benefit derived from a transaction "concerning the partnership". Common law and fiduciary principles would have a similar result. If the intention is to prohibit or control competition, or to clarify those benefits would require accounting to the firm this would need to be agreed among the partners.

Partnerships Act, Section 30 - Competing with Partnership: Section 30 states that a partner may not compete with the business of the partnership, and if a partner does so, the partner must account to and pay over to the firm the profits from that business unless the partner has the consent of the "other partners". The basis for approval by the other partners should be agreed, it would not be ordinary course which requires a majority vote absent any other agreement.

Annotation:
B. 4.230, 4.240 - Restrictive Covenants and Forfeiture of Capital,
4.400, 4.410 - Separation of Partnership Assets from Those of Individual Partners
Kelly v. Kelly (1912), 10 D.L.R. 343 (P.C.)
Mall Medical Group v. Benoit (1991), 77 Man. R. (2d) 110 (Q.B.)

13.3 Permitted Competition. No Partner shall have any obligation during the currency of the partnership relationship to make business opportunities other than those relating to the business of the Partnership available to the Partnership, or to the other Partners. Any Partner may engage in or possess interests in business ventures other than those relating to the business of the Partnership of every nature and description, independently or with others, and neither the Partnership nor the other Partners shall have any rights, by virtue of this Agreement or the existence of this Partnership in and to said ventures or to the income or profits derived therefrom. The terms and conditions of this Agreement shall continue after any termination of the partnership relationship, and the Partners shall be committed to continue to engage in such business ventures as such Partner shall determine. This shall include the right, after termination, to undertake business with, including the provision of goods or services, to the customers of the Partnership, and to undertake business with the suppliers of the Partnership, in accordance with an allocation of the customers and suppliers of the Partnership as agreed from time to time, or failing agreement, based upon the entitlement of the Partner who introduced such customer or supplier to the Partnership, to solely and exclusively undertake ongoing business with such supplier or customer.

13.4 Partnership Property. The Partners agree that all copyrights, inventions, trade marks and all other industrial property developed by any of the Partners during the period of this Agreement which are conceived or developed in conjunction with the business of the Partnership, provided that the industrial property remains capable of use in any way in connection with the business of the Partnership, and without further consideration except as the Partnership may voluntarily offer, shall be the property of the Partnership. Each Partner hereby grants and agrees to convey to the Partnership the entire right, title and interest, domestic or foreign, in and to such industrial property and further agrees to sign all applications for copyright, patent, assignment and other papers and writings and to perform all acts necessary or convenient to make this Agreement effective as to such industrial property.

14. GENERAL PROVISIONS

14.1 Survival. The provisions and obligations of this Agreement survive the termination of the Partnership, dissolution of the Partnership, withdrawal, expulsion or other termination of the Partnership arrangement on the part of any Partner, and survives for all purposes for the period of time specified hereunder as being applicable to the specified restrictions, and for the purpose hereof, this Agreement shall be deemed to be an agreement in favour of the Partnership, in and any surviving portion of the Partnership upon dissolution or termination of the partnership relationship, and an obligation in favour of each of the other Partners, enforceable by each of them individually and separately.

14.2 Notice. Any notice required or permitted to be given hereunder by the Partnership to any Partner other than notice of a meeting of Partners must be in writing, signed by any _____ Partners, and delivered personally or by electronic communication with verified receipt or mailed at _____, in a prepaid envelope, addressed to him or her at his or her place of ordinary residence as last known to the Partnership, and shall be deemed to have been given, if delivered or by verified electronic communication, on the date of delivery and, if mailed, on the _____ business day next following the date of mailing. Any notice required or permitted to be given hereunder by any Partner to the Partnership must be in writing, signed by or on behalf of the Partner concerned, and delivered personally to [____].

Annotation:
Partnerships Act:
Notice to acting partner to be notice to the firm
17. *Notice to a partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner. R.S.O. 1990, c. P.5, s. 17.*

Notices: The mechanics for notices to partners should be included. This can be particularly crucial in an expulsion or withdrawal arrangement. Notices should provide for notice addresses other than the business address of the partnership. The timing and nature of notices to the partnership might also be included, with the designation of a partner to receive notices provided to the partnership as a whole.

14.3 Complete Agreement. This Agreement [and any schedules hereto] expresses the complete and entire agreement and understanding between the parties hereto with respect to all matters herein contained or referred to.

Annotation:
Partnerships Act:
Variation by consent of terms of partnership
20. *The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either expressed or inferred from a course of dealing. R.S.O. 1990, c. P.5, s. 20.*

14.4 Amendment

Except as otherwise expressly provided herein, this Agreement shall not be altered, amended or qualified except by a memorandum in writing signed by the Partners as by Special Resolution.

Annotation:
Sagacity Professional Corp. v. Buchanan Barry LLP, 2010 ABQB 151 (CanLII), 2010 CarswellAlta 399, 69 B.L.R. (4th) 119, M.C. Erb J. (Alta. Q.B.); additional reasons at (2011), 2011 ABQB 58, 2011 CarswellAlta 136, M.C. Erb J. (Alta. Q.B.); additional reasons to (2010), 2010 ABQB 629, 2010 CarswellAlta 2025, M.C. Erb J. (Alta. Q.B.)
Amendment: The partners should agree as to the mechanics for the amendment of the partnership agreement. This should include the right of a partner requesting review of a potential amendment, and the voting procedures and percentages to be followed for a validly enforceable amendment. If there is no agreement as to required approval levels and mechanics every amendment will require unanimous approval.

14.5 Binding Effect. Subject to the restrictions on assignment and transfer herein contained, this Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators and other legal representatives and successors and assigns except that no relationship of partnership shall exist between the Partners and any such person.

14.6 Counterpart Signature. A Partner may execute this Agreement by executing a counterpart hereof and delivering it to the Secretary of the Partnership, with the same result as if such Partner had executed such principal copy, or by executing a certificate of adherence substantially in the form attached hereto as Schedule “A”.

14.7 Governance. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and each of the parties hereto does hereby irrevocably attorn to the jurisdiction of the courts of the Province of Ontario.

14.8 Supremacy. To the extent that the *Partnerships Act* would apply to any matter provided for herein, the provisions hereof shall prevail in the case of any inconsistency.

14.9 Further Acts. The parties hereto agree to execute and deliver such further and other documents and perform and cause to be performed such further and other acts and things as may be necessary or desirable in order to give full effect to this Agreement and every part thereof.

14.10 Independent Legal Advice

Each of the Partners acknowledges that they have read and understand the terms and conditions of this Agreement and acknowledges and agrees that it or he has had the opportunity to seek, and was not prevented or discouraged by any other Partner to this Agreement from seeking, any independent legal advice which it or he considered necessary before the execution and delivery of this Agreement and that, if they did not avail themselves of that opportunity before signing this Agreement, they did so voluntarily without any undue pressure, and agrees that their failure to obtain independent legal advice will not be used by them as a defence to the enforcement of their obligations under this Agreement.

14.11 Discharge of Individual Debt

Each of the Partners shall, at all times, duly and punctually pay and discharge its separate debts, liabilities and obligations whether or not in connection with the Partnership and each of the Partners agrees to indemnify and save harmless the Partnership and the other Partners from all actions, proceedings, costs, claims and demands of every nature or kind whatsoever with respect to the separate debts, liabilities and obligations incurred by such Partner which are not related or in any manner connected to the Partnership.

14.12 Confidential Information

"Confidential Information" means the existence, contents and subject matter of this Agreement and any other agreement contemplated hereby and all financial, business, capital, operating, administrative and personal information, memoranda, analysis, client lists, business and industry information, and all other information relating to:

(a) the Partnership, the business of the Partnership or the Partnership Assets; and

(b) any Partner or its' shareholders, partners, directors, officers, employees, customers, suppliers, clients; Affiliates or consultants,

all to the extent prepared or acquired for, or provided to or by, the Partnership or any Partner.

The Partnership and each Partner must:

(a) use the Confidential Information only for the purposes of the Business of the Partnership or, in the case of Partners, to make decisions regarding its Partnership Interest in the Partnership;

(b) keep the Confidential Information confidential and not disclose it or allow it to be disclosed to a third party except:

(i) with the prior written approval of the party or parties beneficially owning the Confidential Information;

(ii) where the Confidential Information is beneficially owned by or concerns or is about the Partnership or the Business of the Partnership, with the prior written approval of the Partnership and the other parties; or

(iii) to officers, employees, consultants and advisers of the party (or its Affiliates) who have a need to know (and only to the extent thtt.ek0 has a need to know) and are aware, and acknowledge, that the Confidential Information must be kept confidential; and

(c) take or cause to be taken reasonable precautions necessary to maintain the secrecy and confidentiality of the Confidential Information.

A party who ceases to be a Partner must immediately deliver to the Partnership or the party or parties beneficially owning the Confidential Information all documents or other materials containing or referring to the Confidential Information, in the possession, power or control of the party who ceases to be a Partner or in the possession, power or control of persons who have received Confidential Information through that party.

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SCHEDULE "A"
[INSERT NAME OF PARTNERSHIP]

ADMISSION TO PARTNERSHIP - CERTIFICATE OF ADHERENCE

The undersigned hereby becomes a Partner in the Partnership, and subscribes to and acknowledges himself, herself or itself bound by the partnership agreement of the Partnership dated as of ●, as amended to the date hereof including the special arrangements, if any, with respect to the undersigned annexed hereto, effective as of the date hereof.

DATED _____, 20___

_____
Partner
Print Name: _____

[in the case of a Partner that is a corporation, acting by

_____ (insert name of Designated Shareholder)]

Acknowledged on behalf of the Partnership

_____
Secretary

SUPPLEMENTAL PROVISIONS OF INTEREST TO THE LARGER PROFESSIONAL PARTNERSHIP – DEALING WITH EMERGING ISSUES AND RESPONSES

Explanation

During the last 15 years or so, from 2000, the management and administration of partnerships has been undergoing practical, financial and documentation changes to the agreements for both limited partnerships and for the larger general partnerships. The partner or professional manager providing management for the larger general partnership are facing an array of new challenges.

Partnerships are increasingly providing for management delegation even within the general partnership, as large complex partnership arrangements, particularly for professionals, does not allow the consensus participation by partners which had been the traditional hallmark of general partnership law. This right to full participation on the part of a partner can only be amended by written agreement, and according the increasingly complex agreements relating to management administration, with delegation to committees, substantially resembling the limited partnership or even the corporate model, are increasingly prevalent. The difficulty of dealing with partnership membership in the large, often multi-jurisdictional, partnership is also leading to significant changes in the provisions of partnership agreements as they deal with the administration and expulsion of partners. Delegation to smaller committees, and more set criteria for admission and expulsion are finding their way into the partnership agreements even for smaller general partnerships replacing full consensus, and in the case of admission and expulsion potentially unanimous agreement which is not realistically possible.

The changing size and scope of partnerships, particularly for professionals which continue to be required to use partnership structures, are leading to a need to deal within the partnership agreement with management and administration complexities in a manner that has never been before required. The purpose of the clauses which have been selected are to illustrate some of the key issues which are practically arising for partnerships in the face of these changing economic realities.

Expanding partnership size is resulting in a requirement to reconsider the basis upon which partners participate in their partnership. There is a growing need to consider multi-jurisdictional issues, a necessity of delegation to committees and individuals rather than dealing with consensus decision making, the management of increasingly complex business structures, among other matters.

The larger professional partnerships are now dealing with very large scale partnership participation, frequently across multiple jurisdictions, and in many instances with significantly differing business models. The result is that management cannot be retained in the hands of the partnership as a whole, and delegation, with the ability to enforce participation on the basis of that delegation and the decisions of the delegated authorities, must be included in the partnership agreements. Partners can agree to any adjustment to the default legal position of equal participation in management but this must be clearly set out, in an enforceable manner, to ensure that partners are required to abide by the decisions and processes of the delegated committees and individuals. This will extend to the delegation of general management and administration to committees and individuals, but also to the larger issues such as forced retirement, admission and expulsion, and profit participation. These decisions must be fully and completely documented as otherwise the default legal position of equal and unrestricted participation in management by all partners will be the basis for partnership participation.

Committees of a Partnership

The committees which are outlined following are far from being suggested as an exclusive approach to delegation to committees or individuals within the partnership. They are offered as guideline only as to what might form a suitable suite of committees for management administration, and as to the powers and responsibilities which might be given to those committees. Each partnership will need to clearly and explicitly consider its needs based upon its size and nature, jurisdictional reach, nature of business, nature of business participation by persons otherwise known as partners, among matters. These committees will need to be established by written agreement, signed by all partners, with agreement not only as to the nature and composition of the committee, but the manner in which the committee will be appointed or elected.

Executive Committee

There shall be an Executive Committee of the Partners consisting of [_____] Partners or such other number as is approved by the Partners by [Describe basis for vote], elected by the Partners at a meeting of Partners or as otherwise agreed. Members of the Executive Committee shall have [-] year terms. Any member elected to fill a vacancy on the Executive Committee will hold office for the unexpired term of that member's predecessor. Each member of the Executive Committee will have responsibility of discharging his or her duties in the best interests of the Partnership as a whole.

The following clause is merely one method of appointing a committee, there are any variety of methods for the election of committees as might be chosen by the partnership. The election of committees must be carefully considered, and a full outline of the basis for the appointment or election of the committee included.

Prior to each meeting to be held for the election of an Executive Committee, the Executive Committee shall appoint a Nominating Committee consisting of [_____] Partners as it shall determine who broadly represent the Partnership. Concurrently therewith the Executive Committee shall give notice to the Partners of the date for the election of the new Executive Committee and the names of the members of the Nominating Committee and shall invite Partners to submit to the Executive Committee the name of any nominee or nominees for election to the Executive Committee. Within a time frame to be determined by the Executive Committee, the Nominating Committee shall, based on input it receives from Partners submit to the Executive Committee a list of not fewer than [_____] Partners or such other number as is approved by the Partners by [Describe vote], for election to the Executive Committee. Any Partner shall be entitled to submit the name or names of any nominees within such time frame. Any Partner nominated for election to the Executive Committee shall be eligible to stand for election if such Partner consents thereto in writing before the time of the election. The Executive Committee shall announce the names of the nominees selected by the Nomination Committee and any other nominees for election to the Executive Committee prior to the time of the election.

The Executive Committee shall be elected by a show of hands or, if the number of Partners nominated exceeds the number of positions to be filled, by secret ballot. If a ballot is conducted the Chairman of the partnership with the assistance of a Partner appointed by him or her shall count the ballots. The prescribed number of Partners

having the highest number of votes from among the nominees shall be deemed to have been elected. In the event of a tie, the Chairman shall have a casting vote. The Executive Committee shall elect a chairman each year from among its members and shall also appoint a Partner (who does not need to be a member of the Executive Committee) to serve as the Chairman of the partnership. The Executive Committee may designate other persons who may attend and participate for specified purposes in meetings of the Executive Committee, without voting.

A member of the Executive Committee may be removed from office by [Describe basis].

The Executive Committee shall manage or supervise the management of the affairs of the partnership. Without limiting the generality of the foregoing, the Executive Committee shall be responsible for and accountable to the partnership for carrying out the mandate of the Executive Committee as established or amended from time to time by the Partners.

The Executive Committee may in its discretion refer any matter within its jurisdiction for decision by the Partners. The Executive Committee may from time to time appoint or constitute, and, to the extent not previously delegated, delegate such powers as it shall see fit to, persons, other committees, departments, other divisions of the firm and heads of such departments or divisions.

The Executive Committee and each other committee and department shall meet regularly and as often as necessary to perform its functions. The Executive Committee shall issue [Describe regular reports].

Officers

In addition to delegation to committees, there is frequently delegation to individuals who then operate essentially identically to the officers of a corporation. These roles and functions must be fully documented, with the power and authority agreed to in writing in the partnership agreement. Failing such fulsome agreement the partners all have an equal right to participate in management and the individuals will have no power or authority to enforce compliance on the part of the partners. The roles of persons who will fill what are effectively officer roles must be fully set out, the delegation clearly designated, and the power and authority to enforce the decisions of those individuals must be clearly established. While not provided in detail in the following clauses the establishment of a mandate for a committee, and each office, is crucial. The mandate must clearly set out the scope of authority, the manner in which the authority is to be exercised, and the manner in which the authority is to be constrained. These mandates must be clear, fully encompassing, and ensure consistent behaviour of the committees and the delegated authorities with the overall provisions of the applicable partnership agreement.

The Chairman of the partnership shall, if present, preside at meetings of the partnership and shall perform such other duties as may be assigned to him or her by the Executive Committee or as are incident to his or her office.

A Partner shall be designated by [Set out basis of appointment or vote] to serve as Secretary of the partnership. The Secretary shall ensure that minutes of all meetings of the partnership are kept and circulated to the Partners, and keep available for inspection by the Partners copies of all decisions of the partnership which have continuing relevance to the partnership and memoranda relevant thereto. The Secretary shall also

have responsibility for the custody, maintenance and preservation of the archives and memorabilia of the partnership.

Requirement for Insurance Coverage

An issue of increasing concern in larger, generally now aging, partnerships is the desire, perhaps even requirement, to ensure that each of the partners is appropriately protected for long term disability, and retirement, to ensure that no call can be made upon the partnership for assistance other than what is specifically agreed.

It is imperative in the partnership agreement to ensure that the rights of a partner as to matters such as continued participation in the event of disability, rights and entitlements in the event of withdrawal or death, are clearly set out and it is equally important the insurance for these matters be considered. In many instances professional firms are requiring that their partners participate in mandatory, group based, insurance programs to ensure effective coverage for long term disability, health coverage, life insurance to ensure that there can be no call, either at law or in equity, by the partner or their estate against the remaining partners or the assets of the partnership. The following is an illustration is a mandatory participatory insurance program.

Unless otherwise agreed by the Partners, each Partner shall:

(a) until he or she attains the age of [65] participate in the partnership's group insurance plan for partial or total disability of Partners as it may be maintained from time to time, if available at reasonable cost, commencing not more than 17 weeks, or such longer period as may be determined by the Executive Committee, after the onset of such disability, continuing until such Partner's [65th] birthday, and meeting such other requirements as may be prescribed by the Partners; and

(b) participate in such group insurance or other benefit plans as are adopted by the partnership as mandatory for Partners if such participation is available to such Partner at reasonable cost, unless substantially equivalent coverage is afforded to such Partner under a plan unconnected with the partnership and the Partner provides proof of same.

Disability and Contribution

General partnership law does not deal effectively with the issue of a partnership facing a disabled partner no longer able to contribute in the manner contemplated. In those instances a failure to have dealt effectively with the disability arrangements can result in a very considerable draw on the partnership by the disabled partner, who cannot, absent agreement, be effectively expelled without termination of the partnership. Accordingly, the terms with regard to disability, including the integration of disability insurance and its payments, needs to be clearly contemplated in the partnership agreement. These arrangements most generally provide for a period of time of continued participation, with a required withdrawal in the event of an inability to resume the undertaking of duties, and with some form of payment support which fits with disability payments planned by the disability program. The following is not intended to be anything other than provide an example of a disability program which might be used, these will need to be tailored for the size and nature of the partnership, and the contributions of the individual partners.

If in the opinion of the Executive Committee a Partner has become partially disabled but is still able to make a useful contribution to the partnership as a Partner or has become totally disabled but has a prospect of complete or partial rehabilitation to the point of again making a useful contribution as a Partner, then unless and until the Partners make the decision to expel such disabled partner, the Executive Committee may reduce or eliminate the share of profits of such Partner with respect to all or part of the period during which, in the opinion of the Executive Committee, such partial or total disability exists.

[NTD – check the long term disability policy - this clause could compromise the insurance - delete or revise as needed With respect to any case where disability insurance is in effect, the Executive Committee shall not reduce or eliminate such share of profits with respect to any waiting period for such disability insurance. Such Partner shall be entitled to apply for and receive any available benefits under any policy of disability insurance under which he or she is insured. In determining the reduction or elimination of such Partner's share of profits with respect to such period, the Executive Committee may take into account the amount and the timing of payments of any such disability insurance benefits and the extent, if any, to which any such disability insurance benefits are not includable in the Partner's income for income tax purposes. No wholly or partially disabled Partner shall apply for and receive disability insurance benefits for any period with respect to which his or her share of profits has not been reduced or eliminated. Any Partner whose share of profits is reduced shall make full disclosure to any such disability insurer of any receipt of profits from the partnership with respect to any period with respect to which disability insurance benefits are to be received.]

If the Partners decide by Special Resolution at any time that any Partner, by reason of disability, has been or will be unable for a continuous period of six months, or an aggregate of nine months in any twelve month period, to provide an adequate level of contribution to the partnership, and that such Partner should withdraw, and such Partner is notified accordingly, such Partner shall be deemed to withdraw on a date specified in the [describe vote].

Absence

Partnerships increasingly allow absences, generally for secondment to a client or for educational purposes. The partnership will need to have the ability to impose restrictions on the activities and participation by the partner during such leave of absence. Simply providing for a secondment, without the ability to control activities during the secondment, can lead to potential liability and cost for the remaining partners in the partnership.

In the case of a leave of absence or secondment of a Partner to a governmental agency, client or the like, while remaining a Partner, a Partner shall observe any restrictions imposed by the partnership as a condition of the granting of the consent for such absence or secondment or imposed by the terms of any such secondment upon his or her continuing involvement in partnership meetings or affairs, but shall be bound by all partnership proceedings conducted without his or her participation.

Withdrawal and Required Withdrawal

The partnership will need to have the ability to require withdrawal from the partnership for specified reasons, these need to be carefully considered and should tie into the contribution of the partner to the partnership. The partnership will also need to have requirements around withdrawal, particularly as to notice and working notice, right to assets of the partnership including specifically clients and know how, competition and non-competition provisions, among others. A clear regime as to payment entitlement, which would include participation in profits, work in progress, and capital return, should be clearly identified and outlined in the provisions. With the aging of the baby boomer generation, forced retirement from partnerships is becoming an increasing issue. The courts in Canada have confirmed that a partnership relationship is not an employment relationship and accordingly human rights legislation which protects employees from discrimination on the basis of age is not applicable. Partnerships may require mandatory withdrawal from the partnership, on an enforceable basis, as a consequence of reaching a specified age. Partnerships will need to consider whether this type of arrangement is suitable or required for them, and if so whether the mandatory withdrawal is to be without exception or exceptions allowed, based upon exception negotiated with delegated committees or the partnership as a whole. The agreements around required retirement must be clear, unequivocal, and provide for a complete regime, partnership law does not otherwise support the ability to require a partner to withdraw on any basis, including the basis of age. The clauses that follow are not necessarily recommended as being suitable for the circumstances of the partnership but may give ideas to contemplate in the crafting of the business arrangement which would accompany an age required withdrawal.

Each Partner shall withdraw on the last day of the fiscal period in which he or she attains the age of [-]. Notwithstanding the foregoing, the Executive Committee may agree with a Partner with respect to continued service by him or her to the partnership on a specified basis (which may include amendments to the basis of withdrawal) for a specified period, which agreement shall not provide for his or her continuing as a Partner.

The Partnership shall pay to the Retiring Partner or to his or her spouse, estate or heirs the following amounts, namely:

(a) the capital, if any, of the Retiring Partner together with accrued interest, if any, thereon to the date of payment;

(b) the entitlement of the Retiring Partner [Set out specific agreement as to participation in profit, proration of such, WIP and asset value] – [Consider if flexibility is needed to adjust such as - may be reduced by determination of the Executive Committee in its sole discretion, having regard to, among other things

(i) the level of effort made by the Retiring Partner as a Partner since the beginning of the immediately preceding fiscal period in relation to the level of effort that is reasonably expected to be made by him or her; and

(ii) the actual experience of the Partnership in (a) collecting accounts receivable, and (b) billing work in progress plus disbursements in existence at the time of withdrawal and collecting the resulting accounts receivable, in each case where the Retiring Partner was

the partner who was responsible for billing and collecting within the firm for the matters in question or had docketed time to or had been allocated personal fee credits on the matters in question.]

In the event of any such reduction, notice thereof shall be given to the Retiring Partner. In exercising its discretion the Executive Committee shall review all of the relevant circumstances, but its decision shall be final, not subject to appeal or any form of judicial review and binding upon the Retiring Partner;

The amounts to be paid hereunder are completely determinative of the Retiring Partner's entitlement, and for greater certainty the Retiring Partner shall not be entitled to claim on any other basis against the partnership whether with respect to goodwill, work in process, unbilled disbursements, other assets which in whole or part may not appear or be fully valued in the financial statements of the partnership, or for damages, or otherwise.

Basis of Allocation of Profit to Partners

Absence an agreement to the contrary, partners are entitled to share equally in the results of the partnership, whether profit or loss. Where it is intended to alter that basic legal provision, it will be necessary to clearly provide for the agreement to the alternative. Case law has clarified that it is within the ability of partners to agree to alternative allocations of participation and profit, and to do so on the basis of delegated authority to committees or individuals. As a consequence the partnership agreement should clearly contemplate the basis upon which partners will participate in the results of the partnership, whether profit or loss, allocation of taxable income or tax loss, and will need to fully provide for a regime for participation. The following is a fairly common provision which delegates the determination as to participation to designated committees of the partnership. Other models do exist and should be considered as to whether suitable for the partnership.

Each Partner's unit allocation with respect to profits for each fiscal period will be determined by the Partners following receipt of a report and recommendation of the Executive Committee, which may be made before, during, or after the end of such fiscal period. Such unit allocations shall be based primarily upon the contribution or prospective contribution of a Partner to the partnership in such past, present or future fiscal periods as the Partners consider relevant. The factors to be taken into account in determining such contribution of a Partner shall include without limitation: his or her approved individual plan hereinafter referred to for such fiscal period or periods; the performance and/or anticipated performance of such Partner in meeting or attempting to meet such plan; the attracting of new clients; contribution to the generation of billable time whether through the attracting of new clients, the servicing and retaining of existing clients or the expansion of the firm's services to existing clients; the generation of billable time, provided that there be specifically taken into account the effective percentage of billable time converted into accounts receivable and from accounts receivable into cash and the elapsed time from the generation of billable time to completion of payment of the resulting accounts receivable; the undertaking of administrative responsibilities including without limitation those relating to client liaison and the supervision, training and delegation of work to other lawyers in the firm; the effectiveness of practice management including the degree of efficiency in the generation of billings, accounts receivable and the collection of accounts receivable; the

undertaking of non-billable work generally relating to professional development and promotion of the partnership, specifically including the promotion of specialty skills; and the contribution of the Partner to any non-billable work specifically approved in advance by the Executive Committee which is specifically intended to promote the professional reputation and community involvement of the partnership.

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TAB 2

THE ANNOTATED Partnership Agreement 2017

Contracting with General Partnerships and LLPs What to Look for in Your Due Diligence

Robert Scavone
McMillan LLP

September 25, 2017

cpd Continuing Professional Development

CONTRACTING WITH GENERAL PARTNERSHIPS AND LLPS:

WHAT TO LOOK FOR IN YOUR DUE DILIGENCE

Robert M. Scavone

McMillan LLP

When you're acting for a lender or other creditor about to enter into a credit agreement or other contract with a general partnership or limited liability partnership ("**LLP**") as a counterparty, or if you're acting for the partnership itself and are asked to give a legal opinion on it, you need to adopt a somewhat different mindset than when dealing with corporations.

First, it's important to keep front and centre the fundamental legal fact that unlike a corporation, a partnership is not a separate legal entity.[1] It is basically a contractual relationship governed by statutory default rules, as varied by the partnership agreement, and principles of agency law. As provided in section 2 of the Ontario *Partnerships Act*[2] (the "**OPA**"), partnership is "the *relation* that subsists between persons carrying on a business in common with a view to profit". As a result, the due diligence required to satisfy yourself that a general partnership actually exists, that it has the capacity and authority to enter into the agreement, that it has authorized, executed and delivered the documents and that the documents are enforceable in accordance with their terms are significantly less straightforward than dealing with a corporation. (Of course if some or all of the general partners are themselves partners you will need to apply the usual corporate due diligence to those partners as well.)

Second, it's important to recall that principles of agency law, such as apparent authority and vicarious liability, govern the relationship between the partners and the partnership on the one hand and third party creditors on the other. That fact has an important implications for

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[1] *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.* (1998), 41 O.R. (3d) 577 (On CA).

[2] R.S.O. 1990, c. P. 5

understanding why, in certain circumstances, the courts will ascribe partnership liability to contracting parties who are not actually carrying on business in partnership and whether knowing less rather than more about a counterparty might sometimes be a good thing.

This paper does not purport to be a course in Partnerships 101. Instead, it discusses the basic legal due diligence that should be conducted against general partnerships given their unique characteristics and the legal justification for that due diligence.

1. Existence of the Partnership

(a) *Why it Matters Whether the Counterparty is a Partnership*

The threshold question of whether the counterparty exists as a partnership or some other relationship such as a joint venture or co-ownership arrangement is important for a number of reasons.

First, except for LLP partners,[3] every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner[4] and, even for LLPs,[5] the firm itself is liable for any loss or injury caused to a third party by any wrongful act or omission of a partner acting in the ordinary course of the business of the firm, or with the authority of the co-partners.[6] That means, for example, if the partnership has entered into a credit agreement and one or more of the partners becomes insolvent or bankrupt the remaining partners will still fully liable for the loan on default. That will not automatically be the case if the counterparty is a joint venture or co-ownership arrangement or an unincorporated association of some sort. Unless the contract provides otherwise, joint venturers generally are liable to third parties only for their own contractual obligations, not

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[3] OPA, s. 10(2), (3). See discussion of LLPs in part 4 below.

[4] OPA, s. 10(1).

[5] OPA, s. 10(3.1)

[6] OPA, s. 11

those of the other members of the joint venture[7]. Likewise while a co-ownership agreement will determine the respective rights of the co-owners *inter se* to the co-owned property, *vis à vis* third parties, each co-owner is severally, not jointly and severally, liable for its own contractual obligations.

Second, on dissolution of a partnership, the assets of the firm are to be applied first in paying the debts and liabilities of the firm to third parties and second to pay the partners what are owed to them by the firm for advances and return of capital.[8] That will not be the case with a joint venture or co-ownership agreement unless the agreement with the creditor expressly provides for such recourse, preferably by way of a security agreement.

Third, whether the counterparty is a partnership or some other similar relationship such as an co-ownership or joint venture may have a bearing on the extent to which the signatory has the authority to bind the counterparty, and its character will affect liability issues. Each general partner is an agent of the firm and the other partners, and by virtue of the doctrine of holding out and ostensible authority, discussed further below, each partner can bind the firm and the other partners even without actual authority unless the other party has notice of the partner's lack of such authority.[9] While ostensible or apparent authority applies to other agency relationships as well (and the related indoor management rule for corporations), it may not apply to joint ventures or co-ownership arrangements.

On the other hand, as will be discussed later, whether the counterparty is in fact a partnership may matter less than whether it appears to be so and how much the creditor actually knows, but with partnerships, ignorance is not necessarily bliss.

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[7] See, e.g. *Miller v. First City Development Corp.* (1987), 35 B.L.R. 278 (B.C. Co. Ct.). (Liability of joint venturers on a debt obligation is joint, rather than joint and several.)

[8] OPA, s. 44-2

[9] OPA, s. 6.

(b) *Due Diligence to Determine if the Partnership Exists and the Identity of the Partners*

So what due diligence should you undertake to satisfy yourself that ABC Partnership actually *is* a partnership?

The fact that contracting parties call themselves "partners" does not determine whether they are as a matter of law carrying on business in partnership. [10] The term "partner" is often used colloquially to describe a relationship which legally is not a partnership. For example, the arrangements commonly referred to as "public-private partnerships" formed to build, operate and maintain large infrastructure projects rarely if ever involve a true partnership between the public authority and the project entity, and in fact the project agreement will typically disclaim such a relationship. Marriage is often described as a "partnership", even by legislation, [11] but a spousal relationship without an agreement to form a partnership is not enough to constitute husband and wife as true "partners"[12]. Business persons may refer to themselves loosely as "partners", even publicly, but as was found in one case, the term could simply be "meant to convey the spirit of the project rather than a legal relationship"[13]. By the same token, a disclaimer that the parties are partners will not in itself prevent a court from finding that they have formed a partnership and are liable as such.[14] To determine whether the partnership exists, one must go beyond what the parties call themselves.

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[10] See e.g. *Donkin v. Disher* (1913), 5 W.W.R. 870 (S.C.C.); see also *Breslaw Holdings Ltd. v. Tuer Enterprises Ltd.* (1991), 77 Man. R. (2d) 137 (Man. Q.B.); varied (1992), 81 Man. R. (2d) 106 (Man. C.A.) (incorporated "company" may be declared by court to be partnership arrangement).

[11] The preamble to the *Family Law Act* (Ontario) R.S.O. 1990, c. 3, for example, states that "it is necessary to recognize marriage as a form of partnership".

[12] See., e.g. *Klutz v. Klutz* (1968), 2 D.L.R. (3d) 332 (Sask. Q.B.),

[13] R.L. Wilson Engineering & Construction Ltd. v. Metropolitan Life Insurance Co., , [1988] C.L.D. 1897, 11 A.C.W.S. (3d) 380 (Ont. S.C., H. C of J.), at para. 83.

[14] See, e.g. Lansing Building Supply (Ontario) Ltd. v. Ierullo (1989), 71 O.R. (2d) 173 (Ont. Dist. Ct.) (three parties signing co-ownership agreement specifically stating relationship not a partnership; evidence was nevertheless consistent with existence of partnership); Halifax School District No. 44-1/2 v. Oland (1900), 35 N.S.R. 409 (N.S. C.A.) (partnership existing notwithstanding denial by co-owners; co-owners having community of interest in capital employed and net proceeds of

(i) Indicia of Partnership in the OPA

The logical starting point might seem to be the framework legislation, the OPA itself. Section 3 sets out a number of negative and positive "rules" for determining whether a partnership does or does not exist:

- Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership;
- the sharing of gross returns does not of itself create a partnership;
- the receipt by a person of a share of the profits of a business is proof, in the absence of evidence to the contrary, that the person is a partner in the business, subject to a number of exceptions.

In practice, however, while these indicia may assist one putative partner in proving or disproving the existence of a partnership against another, they rarely have much relevance for the due diligence in which a counterparty typically engages to establish that existence before entering into an agreement. The first two negative indicia are unhelpful since they set out factors that are *not* sufficient to constitute a partnership. The third would require a factual inquiry or even an audit of the partnership's books. Instead, the usual starting point is the agreement that sets out the contractual relationship – the general partnership agreement.

(ii) The Partnership Agreement

(1) Existence of the Partnership

Because partnership is at root a contractual relationship, no partnership can exist in fact without a partnership agreement of some sort (even an oral one). As Duff J. stated in *Porter & Sons v. Foster & Armstrong*[15]:

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operation being divided equally). Woodlin Developments Ltd. v. Minister of National Revenue 1986 CarswellNat 273, [1986] 1 C.T.C. 2188, [1986] B.C.W.L.D. 1064, 86 D.T.C. 1116 (partners in joint venture denying partnership).

[15] [1926] 2 D.L.R. 340 (S.C.C.), at 341.

> Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing. It is not sufficient there should be community of interest; there must be contract.

On the other hand, as will be discussed later, the court can still find non-partners liable as partners by virtue of holding themselves out as such even in the absence of a partnership agreement.[16]

Although an oral agreement can suffice to constitute a partnership, the vast majority of general or limited liability partnerships that are parties to commercial contracts will be memorialized by a formal partnership agreement. Accordingly, the usual practice for counterparties to determine whether the partnership entering into an agreement actually exists as such is to rely on the general partnership agreement, a certified copy of which will be attached to an officer's certificate of one of the partners, and a legal opinion of the partnership's external counsel.

Of course as with the terms "partner" and "partnership", it's obviously not enough for a partnership agreement to be labeled as such to support a third party's conclusion that it evidences a partnership: a partnership agreement will not suffice to prove the existence of a partnership unless the agreement in fact governs the operation of the business.[17] In determining whether a complete agreement evidencing the intention to form a partnership has been entered into, the courts have regard to the usual provisions typically found in partnership agreements. In a leading tax case McLachlin J. stated for the Supreme Court of Canada:

> . . . where the parties have entered into a formal written agreement to govern their relationship and hold themselves out

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[16] Alison R. Manzer, *A Practical Guide to Canadian Partnership Law* (Toronto; Thomson Reuters Canada, 2016+) ("**Manzer**") at 2.770: "An agreement among the parties as to whether or not a partnership is intended to be formed will be persuasive but not conclusive. In circumstances where the parties have declared their intention as to the form of legal relationship (in one fashion or another), the courts are free to find against that specific statement of intention."

[17] Se e.g. *Minister of National Revenue v. Shields*, [1962] C.T.C. 548, [1963] Ex. C.R. 91, 62 D.T.C. 1343; *Mahon v. Minister of National Revenue* (1991), 91 D.T.C. 878 (T.C.C.]; *Continental Bank of Canada v. R.* (1998), [1998] 4 C.T.C. 119 (S.C.C.).

> as partners, the courts should determine whether the agreement contains the type of provisions typically found in a partnership agreement, whether the agreement was acted upon and whether it actually governed the affairs of the parties.[18]

In *Surerus Construction & Development Ltd. v. Rudiger*[19], the B.C. Supreme Court found despite the fact that that the parties considered themselves to be partners and held themselves out as such, no partnership existed because the agreement was incomplete, lacking many of the provisions typically found in partnership agreements. If a partnership agreement is seriously deficient in these respects, therefore, merely having reviewed a copy of it may not be a sufficient basis for concluding that a partnership exists. For example, if the agreement has no description of the business or makes no provision for the sharing of profits or contributions of capital, a court may find that no partnership exists. Accordingly, in reviewing a general partnership agreement as part of the due diligence process, it would be useful to consult a precedent such as the Annotated Partnership Agreement as checklist to any identify any major gaps – not to advise the partners themselves, of course, but to alert your client to the possibility that the partnership agreement does not evidence an actual partnership.

(2) Names of the Partners and Limits on Authority

The partnership agreement should also be reviewed to determine who the partners are and if there are any relevant limitations on the authority of one of the partners who actually signs the agreement. In one respect, this is one of the areas where it may seem that the less you know the better . Because every partner is an agent of the firm and the other partners[20], the doctrine of ostensible or apparent authority applies to whether a given partner can bind the firm: Sections 6 and 9 provide as follows:

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[18]*Continental Bank of Canada v. R.*, *supra,* note 17, at para. 25.

[19]2000), 11 B.L.R. (3d) 21, supp. reasons 104 A.C.W.S. (3d) 939.

[20]OPA s. 6.

Power of partner to bind firm

6 Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member, bind the firm and the other partners unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner

Effect of notice that firm not bound by act of partner

9 If it is agreed between the partners to restrict the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

For example, Partner X of XYZ Partnership signs the credit agreement purportedly on behalf of the partnership, and below her signature are the words "I have authority to bind the Partnership". However the partnership agreement provides that only partners Y and Z have the authority to enter into agreements for borrowing money or pledging security. Once the agreement is reviewed by you or your client, you are fixed with notice of the restriction and the agreement could be found to be unenforceable against the partnership.

If you or your client never reviewed the partnership agreement, there is at least an argument that X's signature binds the firm. So should you request that you *not* be given a copy of the partnership agreement and advise your client to remain blissfully ignorant of its contents as well? On balance, I would say no. Because ostensible authority is very fact specific, relying on it can be risky business. First, it would have to be established that entering into a major contract such as a credit agreement is an "act for carrying on in the usual way business of the kind carried on by the firm". While a routine contract of the sort entered into every day by the

partnership (such as a purchase order[21] for supplies) would likely be in scope, that is less obvious for other one-off or unusual agreements.[22] Second, even without reading the partnership agreement, you or your client may otherwise have actual knowledge that X had no authority to sign the agreement in question –for example, there could be email correspondence indicating that only Y and Z had the authority to sign any of the documents. Finally, while partnership law is based on agency law principles, assuming that the law relating to holding out with respect to partnerships is identical to the law of apparent or ostensible authority in agency law in all respects can be risky as well. As Middleton J.A. once said,, "the law in relation to agency is in many but not in all respects a safe guide to the law applicable to partnership"[23].

(c) *Public Filings as Evidence of Existence*

Determining whether a corporation exists is relatively straightforward because corporations come into existence only by virtue of a public filing (with, for example, the federal Corporations Branch or the provincial Ministry of Consumer and Commercial Relations). For corporations, therefore, the usual practice is to obtain a certificate of status, which for opinion purposes is generally regarded as conclusive evidence that the corporation exists and has not been dissolved.[24] A limited partnership is formed only when a declaration is filed with the Registrar in accordance with the *Limited Partnership Act*[25]; although a limited partnership must also satisfy the requirements for partnerships under the OPA, a certified copy of the Declaration is usually accepted as evidence of its formation. In contrast, no filing is required for a general partnership to be formed and accordingly there is no counterpart to the corporate certificate of

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[21] See e.g. *Ferguson v. Fairchild* (1892), 21 S.C.R. 484 (S.C.C.) (ordering of goods within scope of partner's authority; other partners liable);

[22] See e.g. *Sabbaugh v. Rawdah* (1978), 16 A.R. 326 (Alta. T.D.) (purporting to sell whole business undertaking not constituting act in usual course of business);

[23] *Sutton v. Forst* (1924), 55 O.L.R. 281 (Ont. C.A.)

[24] Wilfred M. Esky, *Legal Opinions in Commercial Transactions* (3rd ed.) (Toronto: Lexis, Nexis Canada Inc., 20(3), at 111.

[25] R.S.O. 1990, c. L.16, s. 3(1).

status for a general partnership and there is no other public document that provides conclusive evidence of its existence.

In Ontario and most other provinces general partnerships must register their partnership name under such business names legislation as *the Business Names Act* [26](“**OBNA**”) in order to carry on business in the province and maintain an action. Subsection 2(3) provides:

> No persons associated in partnership shall carry on business or identify themselves to the public unless the firm name of the partnership is registered by all of the partners.

In addition, no persons associated in partnership shall carry on business or identify themselves to the public under a name other than a firm name registered under subsection 2(3) unless the name is registered by all of the partners.[27]

Although registration under the OBNA does not determine whether a general partnership exists, the fact that a purported partnership has registered its name as such under the OBNA could support an argument that the registrant is holding itself out as partnership and that its “partners” should be liable as such even if in fact they are not carrying on business in partnership. In addition, as will be discussed below, a search of the firm name is essential for ensuring that the correct name is used for searches and registrations under the *Personal Property Security Act*[28] (“**PPSA**”). Accordingly, part of the routine due diligence for general partnerships is to request a search of the Ontario Business Information (“**ONBIS**”) database of the partnership name and obtain a certificate of the Registrar as to whether the name has or has not been registered under the OBNA.

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[26] R.S.O. 1990, c. B. 17 (the “**ONBA**”)

[27] ONBA, s. 2(3.1).

[28] R.S.O. 1990, c. P.10

What if the ONBIS certifcate shows that the firm name has not been registered under the OBNA? The fact that a partnership has failed to register under the OBNA should not be a cause for concern regarding enforceability of the agreement with the partnership. Subsection 7(3) of the OBNA expressly provides :

> No contract is void or voidable by reason only that it was made by a person[29] who was in contravention of this Act or the regulations at the time the contract was made.

The main adverse consequence to a general partnership for failing to register under the OBNA is that until registration it is not capable of maintaining a proceeding in a court in Ontario in connection with its business except with leave of the court.[30] (Section 10 also provides for fines of up to $25,000 for contravening section 2 without reasonable cause, but these provisions are rarely enforced.) If the partnership is sued, it will therefore need to register and then obtain leave of the court to defend the action. But that is the partnership's problem, not the counterparty's.

Although registration under OBNA is not determinative as to whether a general partnership exists, the registration itself can be a useful source of information about the partnership. Subsection 2(1) of the General Regulation under the OBNA requires the registration form include such information as:

- the firm name,
- LLP" or "L.L.P." to indicate that it is a limited liability partnership
- its mailing address and principal place of business in Ontario

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[29] "Person" is defined in the BNA as including a partnership.

[30] BNA, s 7(1)

- a description of the activity being carried out under the firm name, and
- the name and address for service of each partner.

However, if the partnership has more than 10 members, the last requirement can be omitted so long as the "designated partner" who submits the registration form maintains a record at the partnership's principal place of business containing this information required[31] . That explains why the BNA registration for law firms having more than 10 partners will almost invariably not list the names of the partners, and it makes an ONBIS report unreliable as a source for the names of partnerships having more than 10 partners.

For smaller partnerships, however, the OBNA registration could form the basis for an argument that the partners whose names are listed the registration are liable as partners on the basis that they have been held out as partners.

What if there is a discrepancy between the OBNA registration and the partnership agreement – for example if the partners listed on the OBNA registration are not the same as those party to the partnership agreement? If you have no knowledge of the discrepancy, then it should be sufficient to rely on the OBNA registration as evidence that the named partner is in fact a partner. However, if you have read the partnership agreement, the situation becomes more complicated. I was recently faced with this situation. I was asked by my own client, an investment dealer, to give an opinion on its client, a general partnership formed in 2014 between partners A and B. The ONBIS report showed that an amendment had been filed in 2016 replacing partner B with partner C. The partnership agreement, however, still referenced only A and B; but no one could find an amendment replacing B with C and an officer for Partner A certified that A and B were still the only partners. No one could explain the origin of the 2016 registration. In giving the opinion I had to call my client's attention to the unexplained

[31] BNA Regulation. s. 3(2).

discrepancy, but since my client now had actual knowledge that only A and B were partners, it could not rely on the OBNA registration to make a claim against C, but by the same token it could rely on the partnership agreement and the officer's certificate as the basis for making a claim against B. It remains to be seen whether an amended partnership agreement will turn up solving the mystery!

One final point of interest: Subsection 12(2) of the General Regulation also provides as follows:

> The name of the partnership or business association, together with the words "Registered Name", "nom enregistré", "Reg'd Name" or "nom enr." must be set out in all contracts, invoices, negotiable instruments and orders involving goods or services issued or made by the association or partnership requires that the name of the partnership.

It seems to be relatively uncommon for general partnerships to actually comply with the above requirement with respect to contracts, invoices negotiable instruments or orders.

2. Signature Requirements

As with any formal agreement, the usual evidence that the parties have come to an agreement is their respective signatures on the written contract. Although there are no special formalities associated with execution of documents by partnerships, the form of signature varies for that used for corporations.

(a) General

There is no need for all the partners of a general partnership or LLP to sign a contract in order to bind the partnership or LLP, which is why if you're a partner in a law firm you did not have to sign the firm's lease or maintenance contracts. Section 7 of the PA provides:

> An act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm by a person thereto authorized, whether a partner or not, is binding on the firm and all the

> partners, but this section does not affect any general rule of law relating to the execution of deeds or negotiable instruments

There is no particular magic formula that must be used in the signature block of an agreement signed by a general partnership to evidence the requisite intention to bind the firm. The usual format is "ABC Partnership, by Joan Smith, Managing Partner". Since section 7 also contemplates authorization of persons who are not partners, the agreement could also be signed by an authorized signatory who is not a partner or officer of a partner.

Possibly in order to provide the counterparty with a basis for relying on section 7, is conventional although not required to include below the signature line a legend such as "I have the authority to bind the firm". This legend could be useful if Ms. Smith in fact lacked actual authority to sign the agreement on behalf of the firm. Recall that under section 6 of the OPA, the acts of every partner "who does any act for carrying on in the usual way business of the kind carried on by the firm" bind the firm "unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner." By representing that she has the authority to bind the firm Ms. Smith gives the other party a basis for asserting that he did not know she lacked authority and believed her to be a partner. However, as a practical matter, as with corporations, as part of their due diligence, counterparties and their counsel will also almost invariably require a certificate of incumbency attesting to the authority of the individuals signing the agreement, usually attached to the partnership information certificate, simply because it is better to have positive assurances of authority than have to rely on possibly ambiguous words or actions that could support a claim of holding out.

Even if the execution of the document is so deficient that it is not apparent on its face that the parties are signing in their capacity as partners, there may still be a strong argument that the partnership is bound if there are other indicia of intention.[32]

(b) Contracts Under Seal

As a general rule, it is best to avoid having a contract with a partnership signed under seal. Because partnership is an agency relationship, if the contract is executed under seal, it may engage the somewhat obscure and antiquated doctrine known as the sealed contract rule, which the Supreme Court of Canada has affirmed is still alive and well in the 21st century.[33] Under this rule, an "undisclosed principal" is not bound by a contract executed under seal (known as a "deed") by an agent unless the principal is also party to the deed or has expressly authorized the signature. In terms of partnership law this means that if a partner signs a contract under seal under the firm name but without authorization, the remaining partners and the partnership are not bound[34]. Therefore. if the contract in question is signed under seal by a partner who has not been expressly authorized to do so by the other partners or they are not party to the deed, the other party cannot sue the partnership or the other partners on the deed, regardless of whether the other party had notice of that lack of authority.[35]

The rule has particular relevance for real property transactions because Section 13(1) of the *Land Registration Reform Act*[36] provides as follows:

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[32] See, e.g., *Bank of Montreal v. Kiwi Polish Co*. (1971), 19 D.L.R. (3d) 356 (S.C.C.), revg 9 D.L.R. (3d) 579 (B.C.C.A.), affg 6 D.L.R. (3d) 710 (B.C.S.C.), where the court considered a secured debenture that was signed by partners without expressly stating that they covenanted as partners of the partnership. The court found that that the debenture nevertheless created a valid charge on the assets of the firm because the intention to do so was otherwise apparent.

[33] *Friedman Equity Developments v. Final Note,* 2000 SCR 842.

[34] *Knight v. Hyde* (1966), 57 D.L.R. (2d) 374 (B.C.C.A.).

[35] *Porter v. Pelton* (1903), 33 S.C.R. 449, affg 23 C.L.T. 213 (N.S.C.A.).

[36] R.S.O. 1990, c. L.4

> Despite any statute or rule of law, a transfer or other document transferring an interest in land, a charge or discharge need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal.

Does "has the same effect for all purposes" mean that the sealed contract rule is engaged even if the transfer or charge is not executed under seal? That would seem to be a somewhat perverse result in that a provision whose whole purpose was to abolish the necessity for the archaic formalities of seals in real property conveyances perpetuated one of the most archaic of those formalities, and yet this is exactly what the Supreme Court of Canada held in *Final Note*[37]. It would appear, therefore, that in order to be bound by a real estate conveyance every partner in a partnership must either sign the conveyance or expressly authorize the partner signing it. The situation is further complicated by the fact that because partnerships are not legal entities, title to real property cannot be taken in the firm name; it must be taken in the name of one of the partners.[38]

(c) *Holding Out*

Because partnership law depends on principles of agency, in some respects when dealing with a general partnership it's less important to establish that the partnership actually exists and that the signing partners have actual authority than to have evidence that the signatories held themselves out as partners of the named firm as having such authority. As noted above, pursuant to section 6 of the OPA, a partner can bind the firm in its dealing with third parties

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[37] *Supra,* footnote 33, at para 38:"The words 'for all purposes' have the effect of making all documents transferring an interest in land, and charges or discharges, sealed instruments for all purposes, including the application of the sealed contract rule. I agree with Morden A.C.J.O. that the purpose of the subsection is to preserve the common law substantive consequences associated with traditional forms of conveyancing and mortgages. As a result, the provision has the effect of deeming all of the interests within its scope to have the same legal effects as if they were executed under seal. In circumstances where s. 13(1) of the LRRA governs, the intention to create a sealed instrument is thus irrelevant."

[38] *Kucor Construction*, supra, note 1.

even if the partner lacks the actual authority to do so unless the third party knows of that lack of authority. In addition, section 15(1) of the OPA provides for liability by "holding out":

> Persons liable by "holding out"
>
> **15** (1) Every person, who by words spoken or written or by conduct represents himself or herself or who knowingly suffers himself or herself to be represented as a partner in a particular firm, is liable as a partner to any person who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the persons so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

Section 15(1) has two distinct elements. First, holding out: the persons sought to be fixed with liability as partners, must "represent" themselves as partners or "knowingly suffer" themselves to be represented as partners. Second, reliance: the plaintiff must have "on the faith of any such representation given credit to the firm". A case illustrating of how these two requirements could be applied to law firm liability is *Bet-Mur Investments Ltd. v. Spring*[39], which involved a mortgage fraud perpetrated by lawyer Spring, who was associated in practice with lawyer Alexandor. Spring did all the work on the fraudulent mortgage; Alexandor was not involved at all. The court found as a fact that Alexandor was an employee of Spring and not his partner. However, Alexandor allowed his name to be used as part of the firm name (Spring, Alexandor); the letterhead reflected that name as did the sign on the door to the firm and the firm bank account, and the fraudulent mortgage payment was paid to "Spring, Alexandor in trust". On these fact the court found that Spring and Alexandor held themselves out as partners. However, the court also held that the onus of proving that the plaintiff had "given credit" to the firm in reliance on this holding out lay on the plaintiff and that in this case the plaintiff failed to discharge that onus because the representation that Alexandor was a partner

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[39] (1994), 17 B.L.R. (2d) 55, 20 O.R. (3d) 417, 50 A.C.W.S. (3d) 138 (On. Ct. of J. (Gen. Div.)). For another example see *Marshall v. Darling*, (1996), 27 B.L.R. (2d) 84 (Ont. Ct. (Gen. Div.)) (organizers of a fraudulent investment scheme found liable as partners on the basis of holding out.)

in fact had nothing to do with the plaintiff's choice of the firm: the principal of the plaintiff gave the legal work to the firm only because Spring had been his lawyer for the previous ten years.

Subsection 15(1) equivalent in other provinces has been held to hold ostensible "partners" liable even where no partnership existed at all, despite the words "in a particular firm", which seems to presuppose the existence of a firm to begin with.[40]

Again, however, the fact that by virtue of subsection 15(1), a non-partner holding herself as such could be found liable as a partner does not relieve counsel of the due diligence necessary to confirm that the persons representing themselves as partners are in fact partners, to the extent possible. Otherwise, the counterparty will be faced with discharging the onus of establishing reliance on the false representation in "giving credit" to the firm.

Section 15(1) also raises an interesting question about the practice of many law firms to represent to the public that certain lawyers who are essentially salaried employees of the firm (called internally by various titles such as "non-equity partners", "principals" or "restricted partners") are partners of the firm, and their business cards and signatures use the term "partner" without qualification. Does this practice expose a non-equity partner to potential partner liability? Possibly, but only if the third party "gave credit to the firm" on the faith of that representation. One might ask how many clients of a major downtown law firm would decide to retain the firm on the basis that it thought a particular salaried junior lawyer was in fact a partner. However, if the non-equity partner has a sufficiently high profile in a specialized field, it is not inconceivable that a client would decide to choose that firm over a competitor in the belief that the young superstar who would have carriage of the matter was an equity partner. Non-equity partners may therefore want to weigh the prestige of the "partner" label on their

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[40] *Brown Economic Assessments Inc. v. Stevenson,* 2004 SKCA 89; [2004] S.J. No. 377; [2006] 5 W.W.R. 654; 132 A.C.W.S. (3d) 162; 249 Sask. R. 214; 325 W.A.C. 214; 45 B.L.R. (3d) 223; See also *Westfair Foods Ltd. v. Coopers & Lybrand* 1997 CarswellBC 1831, [1997] B.C.J. No. 1780, 45 B.C.L.R. (3d) 186, 72 A.C.W.S. (3d) 1057

business cards against the risk of potential unlimited liability, especially if their partnership is an LLP and they sign an opinion that turns out to have been negligent.[41]

3. Lending to General Partnerships

In addition to the general due diligence discussed above as to the existence of the partnership and authority of the partners, lending to a general partnership raises a few unique iissues.

(a) *Separate Guarantees?*

One issue that sometimes comes up where a general or limited partnership is the borrower is whether the lender should also obtain personal (or corporate) guarantees from each of the general partners in their personal or corporate capacities. Because general partners already have unlimited joint and several liability for the partnership's debts and obligations, this may seem to be overkill: why require partners to guarantee obligations for which they are already liable as principal? However, obtaining separate guarantees may afford the lender some incremental benefit if the partnership and the partners go bankrupt, by virtue of subsection 142 of the *Bankruptcy and Insolvency Act* (Canada)[42], subsections (1) and (4) of which provide as follows.

> 142 (1) Where partners become bankrupt, their joint property shall be applicable in the first instance in payment of their joint debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts.
>
> (4) Where a bankrupt owes or owed debts both individually and as a member of one or more partnerships, the claims shall rank first on the property of the individual or partnership by which the debts they represent were contracted and shall only rank on the other estate or estates after all the creditors of the other estate or estates have been paid in full.

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[41] See discussion of LLPs below.

[42] RSC 1985, c. B-3.

The effect of these somewhat opaque provisions is that if Partner A is liable under a separate guarantee of the debts owed by a partnership of which bankrupt A is a partner, and the partnership has other competing creditors as well, the obligations of A under the guarantee are "separate debts" of the partner and A's joint and several liability as a partner are A's "joint debts". The beneficiary of the guarantee would therefore have a first claim against the assets of the partner in payment of the separate guarantee obligations. Only after those obligations are paid would other creditors of the partnership have a claim against the assets of the bankrupt partner for its general obligations. In case of a shortfall in the partnership's assets, this may enable the lender to recover under A's guarantee an amount not recoverable against A under the credit agreement

(b) *Pledges of General Partnership Interests*

Although limited partnership units are often pledged as security for the obligations of the partnership, this practice is less common with general partnership interests. This is probably the result of the fact that general partners have unlimited joint and several liability for the debts and obligations of the partnership, and few lenders would want to assume that liability by foreclosing on a general partnership interest and stepping into the shoes of the general partner. If the general partner is a corporation, the more common approach would be for the lender to require the shareholder of the general partner to pledge its shares in the general partner as security to provide the buffer of a limited liability corporation. Realizing on those shares would give the lender control of the general partner without exposing it to the risks of unlimited liability for the partnership's debts.

If despite these concerns the lender still wants to take a direct pledge of the general partnership interests, there is no reason that it could not do so, but some care must be taken to ensure that the lender has priority over competing interests.

One possible pitfall is that under the *Securities Transfer Act, 2006* ("**STA**") an interest in the partnership may not be a "security" for the purposes of that Act. The consequence of this

result is that the partnership interest is only an "intangible". That means that a security interest in it can be perfected only by registration under the PPSA but not by "control", which would give the secured party some assurance of priority.[43] A partnership interest is not a "security" under the STA unless (a) the interest is dealt with or traded on securities exchanges or in securities markets, (b) the terms of the interest provide that the interest is a security for the purposes of the STA or (c) the interest is a mutual fund security.[44] In the case of general partnerships, (a) and (c) will rarely apply. Requirement (c) will apply only if the partnership agreement itself expressly states that the interests of the general partners are securities for the purposes of the STA. Accordingly, if you are acting for a lender that wants to take security in general partnership interests, part of your due diligence should be to confirm that the general partnership agreement contains that statement, and if it does not, to require an amendment to the agreement to include it.

A second issue is whether those partnership interests are "certificated securities" – i.e. represented by physical certificates. Perfecting a security interest in certificated securities by control is a simple matter of taking delivery of the certificates either endorsed or accompanied by a signed transfer power of attorney. [45] However, unlike limited partnership units, interests in a general partnership typically will not be represented by certificates that can be delivered. Perfection by control will therefore require either registration of the secured partner on the books of the partnership or a "control agreement" between the partnership and the lender.[46] The first option may be undesirable for the same reasons that a direct pledge itself may be undesirable – the lender does not want to appear on the books of the partnership as a general partner having unlimited liability. The second option requires an agreement between the

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[43] Under section 30.1(2) of the PPSA, a security interest of a secured party having control of investment property has priority over a security interest of a secured party that does not have control.

[44] STA s. 12(1).

[45] PPSA, s. 2(2). STA s. 23.

[46] STA s. 24

"issuer" and the secured party under which the "issuer" agrees to act on the instructions of the issuer. However since a general partnership is not an entity and only the partners have the requisite authority, it is not clear what the control agreement would say if the very partners who are pledging their interests are also the partners agreeing to take instructions from the issuer: a partner cannot direct itself. Accordingly, if a pledge of general partnership interests is desirable it would be best to have them represented by physical certificates.

(c) *PPSA Searches and Registrations*

If the partnership is granting a security interest in its personal property to the counterparty (for example, by way of a general security agreement, conditional sales contract or equipment lease), the counterparty should ensure that appropriate searches are conducted under the PPSA against the partnership (and if necessary, the partners) and that the security interest is perfected by registration of a financing statement in prescribed form under the PPSA against the correct debtor name or names.

In this regard, the searches and registrations must be in accordance with the requirements of section 4 of the Minister's Order under the PPSA[47]. If the debtor is a partnership registered under the OBNA, the debtor's name on the financing statement must be its registered name.[48] If the debtor is a partnership (other than a limited partnership) that is not registered under the OBNA, then the financing statement must set out both (a) the name of the partnership as set out in the security agreement and, (b) whether or not the person creates a security interest, the name of at least one of the partners, and if the partner is, a natural person, the name in the manner required under subsection (1) of section 16, or an artificial body such as a corporation, the name in the manner required under this subsection (4). PPSA searches to determine whether there are any existing registrations against the partnership should be conducted

[47] Available at https://www.ontario.ca/page/ministers-order-personal-property-security-act-1990.

[48] *Ibid*., s. 16, para. 4(a)(i)

following the same logic -- that is, if the name is registered under the OBNA, a search against the registered name, and if it is not registered, searches against both the name set out in the partnership agreement and searches against the names of all the partners.

4. Dealing With Limited Liability Partnerships: Special Issues

Created to limit the liability of certain professionals carrying on business in partnership, the LLP is a type of general partnership that limits the liability of its general partners for certain obligations incurred or wrongs committed by other partners. Used most often for law firms and accounting firms, an LLP may carry on business in Ontario only for the purpose of practising a profession governed by an act of the legislature and only if that act expressly permits a limited liability partnership to practise the profession, the governing body of the profession requires the partnership to maintain a minimum amount of liability insurance; and the LLP complies with the name registration requirements of the ONBA.[49]

An LLP is formed when two or more persons enter a written agreement that designated the partnership as an LLP and states that the OPA governs the agreement. [50] The review of the partnership agreement for an LLP should therefore confirm that these provisions are present.

Parties dealing with LLPs need to be aware that unlike partners in an ordinary general partnership, those in an LLP are shielded from liability for wrongs committed by their fellow partners and for many obligations incurred by the firm itself. Since the amendments that were proclaimed in 2006, the OPA has offered "full shield" protection to LLP partners – that is, subject to certain exceptions, it limits liability of LLP partners not only for the negligence of their other partners but for other debts obligations of the LLP as well. Subsection 10(2) provides as follows:

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[49] OPA, s. 44.2.

[50] OPA., ss. 44.1(1)

(2) Subject to subsections (3) and (3.1), a partner in a limited liability partnership is not liable, by means of indemnification, contribution or otherwise, for,

(a) the debts, liabilities or obligations of the partnership or any partner arising from the negligent or wrongful acts or omissions that another partner or an employee, agent or representative of the partnership commits in the course of the partnership business while the partnership is a limited liability partnership; or

(b) any other debts or obligations of the partnership that are incurred while the partnership is a limited liability partnership.

Subsection (3) sets out certain exceptions.

(3) Subsection (2) does not relieve a partner in a limited liability partnership from liability for,

(a) the partner's own negligent or wrongful act or omission;

(b) the negligent or wrongful act or omission of a person under the partner's direct supervision; or

(c) the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner's direct supervision, if,

(i) the act or omission was criminal or constituted fraud, even if there was no criminal act or omission, or

(ii) the partner knew or ought to have known of the act or omission and did not take the actions that a reasonable person would have taken to prevent it. 2006, c. 34, s. 19.

Furthermore, even the "full shield" does not protect the partnership's assets from claims: subsection (3.1) provides: "Subsection (2) does not protect a partner's interest in the partnership property from claims against the partnership respecting a partnership obligation."[51]

The operation of some these provisions can be illustrated by considering a negligent financing opinion rendered by a law firm LLP. The opinion was drafted by Jason, a first year associate, for review by Kim, a senior partner. It stated that a financing statement against the borrower had been registered under the PPSA and that the security interest in favour of the lender had been perfected by such registration. In fact, the registration had been inadvertently discharged by the time the opinion was given, through an error of a law clerk under Kim's supervision. Kim, an experienced and very busy banking lawyer, approved the opinion and signed it, not noticing the error. Kim's younger partner Kevin worked on the transaction but did not sign the opinion. He did notice that the registration had been discharged when the clerk gave him a copy of the verification statement but decided not to mention it to Kim because he assumed that such an experienced lawyer knew what she was doing. S uffering a loss when it tried to realize on the security, the lender successfully sued the firm for negligence. Because Jason and the law clerk were under Kim's direct supervision, Kim is liable for the lender's losses. So is Kevin because he knew about the negligent omission but failed to take the reasonable step of calling it to Kim's attention. Her other partners are not liable, but the lender still has a claim against the partnership's assets.

Consider another example. Thomas, a partner in Thomas and Associates LLP, is acting for a client who perpetrates a mortgage fraud against a bank lender. Thomas is fully aware of the fraud and in fact facilitates it, but none of his partners have any idea what's going on. Because

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[51] *Allen v. Aspen Group Resources Corp.* (2009), 67 B.L.R. (4th) 99 (Ont. S.C.J.) (class action pleadings disclosing cause of action against limited liability partnership and partner based on partner's negligence and statutory liability; while limited liability partnership can incur liability under *Partnerships Act* for acts of partner, individual partners not incurring personal liability in excess of their respective interests in partnership property).

fraud is involved neither Thomas nor his partners will be protected from a claim by the defrauded lender.

5. Conclusion

Dealing with general partnerships presents a set of issues that may be unfamiliar to lawyers more familiar with corporations, but once the basic principles are understand, the necessary due diligence can be nearly as straightforward. As a practical matter, to ensure that the counterparty or opining counsel has all the necessary information in one place, the best practice is to require a certificate signed by all the partners (or if that is not possible, by a partner attesting the partner's authority to act for the other partners), certifying that:

(a) a true copy of the partnership agreement is attached as a schedule;

(b) that the partnership agreement is the only agreement between the partners governing their relationship and that it is un full force and effect, unamended;

(c) that the parties to the partnership agreement are the only partners (or if the partnership agreement is not signed by all the partners, a list of the non-signing partners);

(d) that there are no restrictions on the business that he partnership may conduct except as set out in the partnership agreement;

(e) that the partnership remains in existence and no steps or proceedings have been taken, or resolutions passed to terminate, dissolve or liquidate the partnership; and

(f) that no events have offered that would permit any of the partners to terminate, dissolve or liquidate the partnership.

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TAB 3

THE ANNOTATED Partnership Agreement 2017

Provisions Dealing with Expulsion and Withdrawal

Mark Dunn
Goodmans LLP

September 25, 2017

cpd Continuing Professional Development

The Annotated Partnership Agreement 2017: Provisions Dealing with Expulsion and Withdrawal

Mark Dunn, Goodmans LLP

Goodmans LLP

Barristers & Solicitors / goodmans.ca

Statutory framework

No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners. [Emphasis added]

Partnerships Act, s. 25

Common law principles

- **If there is no express agreement, the only way to be rid of an unwanted partner is to dissolve the partnership.**

- **Partnership Agreements are construed strictly against the expelling partners.**

- **Partners must act with the "utmost good faith" towards each other.**

- **Where discretion is conferred on management or a majority of the partners, that discretion must be exercised "rationally and in good faith".**

Partners who could not be expelled

- **A theatre owner prone to "habitual intoxication".**
  - *Hemming v. Lemarquand* (1909), 11 W.L.R. 280.

- **An accountant alleged to have violated the applicable code of ethics.**
  - *Diefenbacher v. Young*, 1 B.L.R. (2d) 161.

- **A lawyer whose "attitude and demeanour" created an "extremely tense working environment and demoralized staff".**
  - *Perry v. Haywood*, [1998] N.J. No. 251.

- **The exception: a partner in a consulting firm who falsified his credentials was successfully expelled.**

- No reference was made to what (if any) right to expel was contained in the partnership.
- *H.A.L. Consulting Services Inc. v. Creekside Consulting* (1988), 10 A.C.W.S. (3d) 44.

Crafting the right clause

- **In drafting an expulsion clause, consider:**
  - ***What*** conduct will justify expulsion;
  - ***Who*** is entitled to decide to expel; and
  - ***How*** the expulsion process is to be conducted.

- **If a dispute arises, *why* the partner was expelled may be important.**

What

- **Specific criteria:**
  - Ability to participate in the business:
    - Bankruptcy;
    - Loss of professional license; and
    - Acceptance of appointment or election to judicial or comparable public position.
  - Wrongful conduct:
    - Levy of execution against partnership interest;
    - Default under the partnership agreement that is not cured within a specific period;
    - Finding of fraud (civil, criminal or both);
    - Failure to make payments required to operate the partnership business;
    - Breach of fiduciary duty; and
    - Other conduct likely to negatively impact the partnership business.
- **General criteria:**
  - "If the Policy Board unanimously determines that it is not in the best interest of the Partnership for a particular Partner to remain a Partner in the Partnership, the Policy Board shall give notice in writing to the affected Partner requesting such Partner to resign…"
    - *Tim Ludwig Professional Corp. v. BDO Canada LLP*, 2017 ONCA 292.
- **No criteria:**
  - "A partner may be expelled by the affirmative vote of 60% of the partners."

Who

- **Generally, the right to expel rests with either:**
  - **Management;**
  - **A specified committee; or**
  - **A specified majority of the partners.**

How

- **Procedure to be followed on expulsion should also be clearly stated:**
  - How votes will be held; and
  - What notice the potentially expelled partner is entitled to.

- **The partner being expelled has a "fundamental right" to be heard before expulsion.**
  - *Gregory Yates Professional Corp. v. Gary S. Sankoff Professional Corp.* (1995), 170 A.R. 28 (Q.B.).

- **It is critical that the process specified for expulsion be followed.**

- **Every step of the expulsion process must be guided by the overriding duty of good faith owed by one partner to another.**

- **Consider how disputes about expulsion (if any) will be resolved.**

Remedy for wrongful expulsion

- **Damages**
  - Expectation damages: put the expelled partner in the position he or she would occupy but-for the expulsion.
    - ➤ The expelled partner will ordinarily have a duty to mitigate.
  - Aggravated damages: compensation for mental and emotional distress.
  - Punitive/exemplary damages: sanction for extraordinarily bad conduct.

- **Injunction/specific performance: re-instate the partner**
  - The partnership agreement can address whether injunctive relief is available.

Tim Ludwig Professional Corp. v. BDO Canada LLP, 2017 ONCA 292

- **The partnership agreement permitted expulsion if the "Policy Board" determined that the expulsion was in the best interests of the partnership.**

- **Management decided to expel Ludwig and communicated its decision to him.**

- **Decision <u>subsequently</u> affirmed by the Policy Board.**

- **The termination was held to be wrongful because it was:**

  - Made by the CEO, not the Policy Board;
  - Made without any documented consideration of the partnership's best interests; and
  - Made without any evidence that expulsion was in the partnership's best interests.

- **BDO liable to Ludwig for expectation damages and aggravated damages.**

Lessons from *Ludwig*

- **The decision to expel a partner must be:**

  - Made by the person or people entitled to make it;
  - Rationally connected to the purposes of the partnership;
  - Appropriately documented; and
  - Procedurally fair to the expelled partner.

- **Clarity in the Partnership Agreement with respect to procedural aspects of expulsion will help:**

  - The expelling partners know exactly what to do; and
  - The Court (if necessary) to decide the standard to be met.

Mandatory retirement and human rights codes

- **Expulsion can create an interplay between partnership law and provincial human rights codes.**
  - Mandatory retirement is the most common and well-known example.

- **A partner will not normally be an "employee".**
  - Powers, rights, and protections normally associated with a partnership must be "greatly diminished".

- **But the SCC has held that a partner can also be an employee: the key is <u>control</u> exercised by the partnership and <u>dependency</u> of the partner.**
  - *McCormick v. Fasken Martineau Dumoulin*, 2014 SCC 39.

- **The *McCormick* test is limited to the human rights context. It is not a general test for when a person is a partner.**
  - *Daniel v. Miller, Canfield, Paddock and Stone, LLP*, 2017 ONCA 697

Expulsion and human rights <u>in Ontario</u>

- **Uncertainty with respect to whether (and how) the Ontario Human Rights Tribunal will apply the *McCormick* decision.**

- **In *Swain v. MBM Intellectual Property Law LLP*, 2015 HRTO 1011, the Ontario Human Rights Tribunal held that it had jurisdiction over a lawyer who:**
  - Co-founded the firm; and
  - Played a "crucial role" in its development.

- **The control/dependence test articulated in *McCormick* was not applied.**

- **The Tribunal found that:**
  - "the question of whether the applicant, as an equity partner in a firm, is entitled to invoke the protection of the *Code* must be answered in the affirmative."

- **Uncertainty about the application of the *Ontario Human Rights Code* cannot be addressed in the partnership agreement.**
  - *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202.

Conclusion

“There is no method except a dissolution by which one partner can be got rid of against his will, in the absence of express agreement.”

Hemming v. Lemarquand (1909), 11 W.L.R. 280

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TAB 4

THE ANNOTATED Partnership Agreement 2017

The Enforceability of Non-Competition Clauses In Partnership Agreements

Jeremy Schwartz
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September 25, 2017

cpd Continuing Professional Development

The Enforceability of Non-Competition Clauses in Partnership Agreements

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The Enforceability of Non-Competition Clauses in Partnership Agreements

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Contents

Introduction

This paper focuses narrowly on the enforceability of non-competition clauses in partnership agreements. Although partnerships are treated in other areas of the law as distinct from employment relationships, the courts have not drawn such a sharp distinction when analyzing the enforceability of restrictive covenants against departing partners. Non-competition clauses in commercial agreements are generally enforceable. However, depending on the nature and circumstances under which the partnership agreement is executed, the courts may instead apply a higher level of scrutiny to such clauses, utilizing an analysis more akin to that from employment law to protect a vulnerable partner. As such, it is imperative to draft non-competition clauses in partnership agreements with a view to the level of scrutiny the courts are likely to apply.

Non-Competition vs. Non-Solicitation

Restrictive covenants in partnership agreements generally restrain either competition or solicitation. Non-competition clauses prohibit former partners from conducting business in competition with the partnership. Non-solicitation clauses permit former partners to conduct

competing business, but prohibit them from soliciting that business.[1] The Ontario Court of Appeal has described non-competition clauses as a "more drastic weapon", with a much broader focus than non-solicitation clauses. More than merely an attempt to protect the partnership's customer base, by utilizing a non-competition clause, parties sometimes attempt to keep a departing partner out of the business altogether.[2]

Both non-competition and non-solicit clauses are restrictive covenants in restraint of trade. The courts have traditionally analyzed such clauses with regard to the competing goals of upholding the public interest in discouraging restraint of trade and encouraging free and open competition, and allowing parties the freedom to contract, especially where the parties are sophisticated, knowledgeable, and of relatively equal bargaining power.[3] However, even where the parties are sophisticated, receive legal advice, and acknowledge the purported reasonableness of the clause on signing, the courts will conduct an independent analysis in order to safeguard the public interest in free and open competition.[4]

The Level of Scrutiny

When analyzing non-competition clauses, the courts observe a distinction between commercial agreements, such as the sale of a business, and employment contracts. Courts consider the same criteria in both instances; however, the courts will apply a presumption of validity to restrictive covenants contained in commercial agreements unless they are shown on a balance of probabilities to be unreasonable, and will apply increased scrutiny to the same clause in an employment contract, where there is no such presumption of reasonableness.[5] The courts apply more rigorous scrutiny regarding the reasonableness of the covenant in an employer/employee situation than in a commercial transaction.[6]

The case law regarding partnership agreements is mixed, as the courts will examine the circumstances of the partnership itself in determining whether the arrangement is more akin to a commercial transaction, or rather to an employer/employee relationship.

The Supreme Court of Canada in *Elsley* stated as follows in regard to the rationale behind the distinction:

> …A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during

[1] *H.L. Staebler Co. v. Allan*, 2008 ONCA 576 ("*Staebler*"), para. 38.
[2] *Ibid*, para. 39.
[3] *JG Collins Insurance Agencies Ltd v Elsley*, [1978] 2 SCR 916 ("*Elsley*") at para. 13.
[4] *Martin v ConCreate USL Limited Partnership*, 2013 ONCA 72 ("*Martin*"), para. 62.
[5] *MEDIchair LP v. DME Medequip Inc*., 2016 ONCA 168 ("*MEDIchair*"), paras. 33, 35; *Payette v Guay* 2013 SCC 45 ("*Payette*"), para. 58.
[6] *Elsley*, *supra* note 3 at para. 17; *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6 ("*Shafron*"), para. 23.

> which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.
>
> A different situation, at least in theory, obtains in the negotiation of a contract of employment, where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. Again, a distinction is made. Although blanket restraints on freedom to complete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information and trade connections of the employer.[7]

The Supreme Court of Canada in *Shafron* similarly observed that,

> The sale of a business often involves a payment to the vendor for goodwill. In consideration of the goodwill payment, the custom of the business being sold is intended to remain and reside with the purchaser…The absence of payment for goodwill as well as the generally accepted imbalance in power between employee and employer justifies more rigorous scrutiny of restrictive covenants in employment contracts compared to those in contracts for the sale of a business.[8]

The British Columbia Court of Appeal recently expounded upon this distinction. In *IRIS*, the B.C. Court of Appeal noted that when considering the threshold question of how much scrutiny a restrictive covenant will attract, several factors will indicate an imbalance of power between the parties, including the use of standard form contracts drafted by one party and presented to the other with no opportunity to negotiate.[9] Although *IRIS* was not a partnership case, the Court noted that the optometrist in that case had only been practicing optometry for four years, had just moved to the area to take up a position with the organization, and had no existing patient base. The organization, in contrast, was large and multi-national.[10] As such, the Court found that the relationship was akin to an employment relationship, notwithstanding claims that the optometrists were independent contractors and so the contract more akin to a commercial agreement.

Where an individual becomes a partner in a large organization, and has very little bargaining power over the terms and conditions of the partnership agreement, the courts have applied more rigorous scrutiny. In *Stuart*, the B.C. Court of Appeal noted that where a partnership is expansive and covers the whole country, as many large accounting firms with hundreds of partners do, the relationship between the partners and the firm is not what one would call a traditional partnership. The defendant had commenced employment with Ernst & Young as a student and eventually became a partner after approximately 14 years. He signed a partnership agreement, and the Court noted that at that time, he had no choice but to sign or leave the firm. As such, the Court of Appeal upheld

[7] *Ibid*, paras. 15, 16.
[8] *Shafron*, *supra* note 6 at paras. 21, 23.
[9] *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 ("*IRIS*"), para. 49.
[10] *Ibid*, para. 48.

the trial judge's ruling that the parties did not have equal bargaining power.[11] The B.C. Court of Appeal further found that the goodwill discussed in commercial cases does not exist in such instances.[12]

There are circumstances in which partnerships have been found to be commercial arrangements. For example, in *Bassman*, the plaintiff was a chartered accountant. He was part of a two-person partnership which joined Deloitte, a large partnership of chartered accountants carrying on business across Canada which was also affiliated with other similar partnerships in other countries. The Court found that both merging firms desired a non-competition clause to protect the new partnership's fee base. The increased overhead costs associated with the merger were to be amortized over a five-year period, and so a prohibition on a former partner competing with the partnership for a five-year period was considered desirable.[13] As such, the Court distinguished the non-competition clauses in the partnership agreement from those in the employment context on the basis that the clause was for the benefit of all partners, to protect the fee base of the newly created partnership.[14]

In *Reservoir Group,* the Court rejected the defendant's contention that an inequality of bargaining power existed at the time of the negotiation and signing of the partnership agreement. The plaintiff and defendant in this case decided to pursue business together in group insurance and pensions. The defendant had ten years' experience in the industry at the time, and was a sophisticated insurance agent. If the defendant withdrew from the partnership, the agreement required the other party to purchase his interest in the partnership according to a prescribed formula. The Court held this situation was more akin to a sale of business, and that "it is reasonable for the purchaser of the other partnership interest to seek to protect its investment in the partnership by securing from the departing partner a covenant not to enter into competition for the partnership's customers".[15]

The Test for Enforceability

The test for the enforceability of a non-competition clause is one of reasonableness. Despite the presumption that restrictive covenants are *prima facie* unenforceable as being in restraint of trade, courts will uphold reasonable restrictive covenants.[16] The courts will consider whether such a restrictive covenant is reasonable as between the parties, and with reference to the public interest.[17]

Where the agreement is not clearly commercial in nature, the onus is on the party seeking to enforce the non-competition clause to show the reasonableness of its terms as between the

[11] *Ernst & Young v. Stuart*, 1993 CarswellBC 115, para. 32.
[12] *Ernst & Young v. Stuart*, 1994 CarswellBC 256 (BCCA) ("*Stuart*"), para. 10.
[13] *Bassman v. Deloite, Haskins & Sells of Canada*, 1984 CarswellOnt 91 ("*Bassman*"), para. 13.
[14] *Ibid*, para. 12.
[15] *Reservoir Group Partnership v. 1304613 Ontario Ltd*, 2009 ONCA 278 ("*Reservoir Group*"), para. 56.
[16] *Shafron*, *supra* note 8 at para. 17.
[17] *Tank Lining Corp v Dunlop Industries Ltd*, (1982), 40 OR (2d) 219, para. 13; *IRIS*, *supra* note 9 at para. 16.

parties.[18] If the clause meets that requirement, it falls to the party resisting the clause to establish that it is unreasonable with reference to the public interest.[19]

The test of reasonableness as between the parties is that the restrictive covenant, "is not more than adequate to protect the party's interest".[20] As noted above, in commercial agreements, courts will be extremely reluctant to interfere where two competently advised parties with equal bargaining power enter into a business agreement – they will generally defer to the parties' own judgment regarding what is reasonable in their respective interests.[21]

The Court of Appeal held that reasonableness is determined in light of the circumstances existing at the time the contract was signed, not at the time at which a party attempts to enforce the non-compete clause. However, the courts have noted that the reasonable expectations of the parties at the time of signing about the future activities and marketplace of the business are properly considered in the analysis.[22]

The Criteria for Reasonableness

The Court in *Elsley* noted that, "The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment of the clause, the agreement within which it is found and all of the surrounding circumstances".[23] The relevant factors in determining whether a non-compete clause is valid and enforceable are: "the geographic coverage of the covenant, the period of time that it is in effect and the extent of the activity prohibited".[24]

The Supreme Court of Canada in *Payette* held that reasonableness will be determined with regard to whether the clause is, "limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted".[25]

In applying these criteria, the courts are particularly sensitive to restrictive covenants which hinder a party's ability to earn a living in a realistic manner, especially in the context of partnership relationships that more closely resemble employment.[26]

Legitimate Proprietary Interest

At the first stage of the analysis, the courts focus on the validity of the partnership's proprietary interest. Such legitimate interests can include, for example, a fee base, a book of business,

[18] *Shafron*, *supra* note 8 at para. 27; *Ibid, IRIS*, para 17.
[19] *Ibid, IRIS*, para. 17.
[20] *Tank Lining*, *supra* note 17 at para. 20.
[21] *Ibid*, para. 20.
[22] *Martin*, *supra* note 4 at para. 54; *MEDIchair*, supra note 5 at paras. 50, 51; *Tank Lining*, supra note 17 at para. 25.
[23] *Elsley*, *supra* note 3 at para. 14.
[24] *Martin*, *supra* note 4 at para. 54.
[25] *Payette*, *supra* note 5, at para. 61.
[26] *Towers*, Perrin, Forster & Crosby Inc. v. Cantin, 2000 CarswellOnt 3372 ("Towers"), para. 36.

confidential information, or trade connections. The overall analysis focuses on "the reasonableness of the restrictive covenant to protect the [party's] legitimate or proprietary interest within the temporal and territorial scope of the covenant".[27]

It is essential to define the proprietary interest as narrowly as possible, and to tailor the features of the restrictive covenant carefully to protect the specific proprietary interest asserted. Courts have considered the fact that subsequent partnership agreements imposed less onerous restrictions on departing partners to infer that those less onerous restrictions were sufficient to protect the interest at play.[28]

Further, the courts will scrutinize the validity of the legitimate proprietary interest itself. In *MEDIchair*, the court determined that the company could have a legitimate interest in protecting certain franchises, but did not have a legitimate interest in protecting its franchise system as a whole. Particularly, not in a territory where is had made a deliberate decision not to operate a franchise store because the corporate parent company was already operating a competing store there. As such, a non-competition clause which purported to prevent competition in that territory was unenforceable.[29]

Geographic Scope

The Supreme Court has held that a non-competition clause which purports to restrict activity outside of the territory in which the business operates is contrary to public order.[30] Where non-competition clauses have not included a geographic scope, but purported to restrain individuals from conducting business with clients of the firm regardless of location, the case law has been mixed.

The Court in *Reservoir* noted that the clause in that case did not impose geographic restrictions; it was not a blanket restraint, but only sought to protect the partnership's legitimate interest in its trade connections with existing customers.[31] This made it more reasonable in the Court's view. The Court further considered the nature of the business carried on by the partnership: because the client list it sought to protect was relatively modest, a prohibition on conducting competing business with those clients would not impact the departing partner's ability to earn a living.[32]

The Court in *Towers* noted that in such cases, it is not necessary to explicitly define the geographical scope because it is implicit in the definition of "clients" that the geographical area is wherever those clients operate.[33] This of course is predicated on the departing partner being able to ascertain exactly who the clients in question are.

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[27] *MEDIchair, supra* note 5 at para. 48.
[28] *Stuart, supra* note 12 at para. 64.
[29] *MEDIchair, supra* note 5 at para. 41, 47.
[30] *Payette, supra* note 5 at para. 65.
[31] *Reservoir Group, supra* note 15 at para. 57
[32] *Ibid*, para. 58.
[33] *Towers, supra* note 26 at para. 67.

It is noted that, although they are not *prima facie* unenforceable, clauses which do not explicitly define a geographic scope have failed particularly where the prohibited activity listed in the clause is overly broad.

Prohibited Activity

The Ontario Court of Appeal in *Staebler* was critical of the fact that the clause prohibited employees from doing business with former clients no matter where they relocated in Ontario or Canada.[34] The clause, which purported to restrict "doing business" with clients of the firm, did not specify what kind of business was restricted. The Court noted that even if the defendants had chosen to leave the commercial insurance business, the clause was overly broad in that it prohibited them from working with clients of the firm even where the nature of the work did not compete with the firm.[35]

The non-competition clause in *Bassman* did not refer to a geographic scope. Rather, it prohibited the plaintiff in that case from working for clients or former clients of the firm. Although the Court found the clause to be unenforceable for other reasons, it noted that lack of geographic scope was not fatal to the clause. The clause only prohibited working with clients of the partnership, and the partnership and its affiliated partnership had clients across Canada and in many other parts of the world. As such, the Court found that protection of the partnership's fee base required a non-competition clause without a territorial limit.[36] The Court in *Bassman* found that the restriction against working with any client or *former* client was wider than necessary to protect the partnership's fee base. The Court noted that the clause would have been reasonable if it related only to clients of the partnership at the time of the severance of the partnership relationship.[37]

In *Salloum*, the Court found that a total prohibition on a lawyer practicing his profession for a one-year period in the Kelowna area, where he had practiced for the last 10 years, far exceeded the partnership's entitlement to protect its interest in present or future business from past or present clients.[38] It restricted the lawyer from working for anyone in the area, whereas the partnership only had an interest in the approximately 5,000 clients or former clients.[39]

In that case, the Court observed that incoming partners and associates had no choice but to agree to the non-competition clause. The fact that partnership had negotiated total or partial releases from the onerous restrictive covenant with other departing partners and associates in the past suggested that the partnership was using it as leverage against departing parties, as opposed to protecting its legitimate interests.[40]

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[34] *Staebler*, *supra* note 1 at para. 50.
[35] *Ibid*, para. 51.
[36] *Bassman*, *supra* note 13 at para. 14.
[37] *Ibid*, para. 16.
[38] *Salloum v. Thomas*, 1986 CarswellBC 899 ("Saloum"), para. 32.
[39] *Ibid*, para. 26.
[40] *Ibid*, para. 31.

Duration

The courts have found that non-competition clauses of longer durations may be reasonable where the departing partner was a key, senior figure, who owed a fiduciary duty to the partnership, and was the face of the partnership to clients, customers, and the public.[41] In such circumstances, a longer restriction may be necessary to protect the partnership's trade connections.[42]

However, a shorter duration will not save a clause that prohibits an overly broad list of activities. The defendant in *Stuart* was a leading insolvency specialist. The Court noted that although the restriction in that case was only for a one-year period, it prevented him from practicing not only in insolvency matters, but as an accountant more broadly, and even extended to various other fields in which he had no expertise or experience at all within a 50-mile radius. It also precluded him from servicing any client the firm had serviced within the past five years. Since many insolvency clients are large institutions, he would have been prohibited from serving them across the country.[43]

Further, the courts have been especially critical of clauses in which the duration is not fixed, but depends on outside forces, such as the consent of third parties.[44] For example, a clause in which duration was somehow tied to the consent of the other partners would likely be found to be unenforceable.

Ambiguity and Reasonableness

It is imperative to draft non-competition clauses with precision, especially where the relationship between the partners is akin to employment. The courts have held that where a clause is ambiguous, it will be *prima facie* unenforceable. This is because the onus is on the party seeking to enforce the covenant to show the reasonableness of its terms, and the party will not be able to do so where the meaning of the covenant is ambiguous.[45]

The Ontario Court of Appeal has noted that the clause must be reasonable and unambiguous as written, as "the fact that a clause might have been enforceable had it been drafted in narrower terms will not save it".[46] Whereas it may be appropriate in commercial contexts, the Supreme Court of Canada has held that notional severance is not appropriate in the case of restrictive covenants found in employment contracts, and has refused to read down such clauses to make them enforceable. The Court further noted that blue pencil severance will only be appropriate in rare cases where the part being removed is trivial.[47]

For instance, in *Shafron*, a restrictive covenant in an employment agreement purported to prohibit the ex-employee from competing in the "Metropolitan City of Vancouver". The Court noted that

[41] *Reservoir Group, supra* note 15 at para. 61.
[42] *Ibid*, para. 61.
[43] *Stuart, supra* note 12 at para. 39, 40.
[44] *Martin, supra* note 4 at para. 59.
[45] *Shafron, supra* note 8 at para. 27.
[46] *Staebler, supra* note 1 at para. 43.
[47] *Shafron, supra* note 8 at para. 37.

there was no accepted definition for this geographic area, and that it was therefore ambiguous. The Court declined to remove the word "Metropolitan" from the clause, and declined to guess as to which suburbs of the City proper the parties intended to be captured by the clause.

The Public Interest

If the non-competition clause is found to be reasonable as between the parties, the courts will consider whether it is reasonable in regard to the public interest. There are certain industries in which public interest considerations may be more prominent than in others. Lawyers in Ontario, for instance, are subject to the Rules of Professional Conduct, which require lawyers departing to practice at another firm to notify their clients as such, and place client interests to decide who to retain as counsel above all else.[48] Indeed, the courts have noted that certain professions such as lawyers, doctors, and dentists have a unique personal relationship with their clients, patients, or customers that sets them apart from other business activities.[49]

Although the case did not involve a non-competition clause, the B.C. Court of Appeal in *RBC v Merrill Lynch* made a similar observation in regard to investment advisors. The Court noted that clients have an important interest in deciding whether to remain with the old firm, or to follow their advisors when they depart.[50]

Although there may be an additional public interest consideration in certain professions, this does not necessarily mean a non-competition clause will be unenforceable. The Court in *Fickel* noted that clear language is required to restrict customers' choice regarding investment advisors because it restricts the, "otherwise untrammeled freedom of choice in an important relationship based on confidence and trust".[51]

The courts have been generally unreceptive to the argument that the public interest is harmed by preventing a professional from practicing in a set geographic scope, particularly where other professionals are available to serve the public in that area. For instance, in *Elsley*, the Court observed that there were approximately 20 to 22 general insurance agents in the Niagara Falls area, employing 80 to 90 employees. As such, it determined that the public would not suffer due to the loss, for a period of time, of the ex-employee in that case.[52]

The Court in *Bassman* noted that the restrictive covenant in that case only prohibited the defendant from competing with the firm; it did not prohibit him from working in accounting generally. The

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[48] *D. Robert Findlay Law Office Professional Corp. v. Werner*, 2015 ONSC 2955 ("*Werner*"), paras. 23-27; See Subrule 3.7-7A(1). Commentary to the Rules states, "The client's interests are paramount. Clients should be free to decide whom to retain as counsel without undue influence or pressure by either the lawyer or the firm. The client should be provided with sufficient information by the lawyer and the remaining lawyers to make an informed decision about whether to continue with the departing lawyer, remain with the firm where that is possible, or retain new counsel."

[49] *Ibid, Werner*, para. 26; Little, para. 30.

[50] RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc, 2007 BCCA 22 ("*RBC v Merrill Lynch*") paras. 81-82; rev'd in part 2008 SCC 54.

[51] *Jones Collombin Investment Counsel Inc v. Fickel*, 2016 ONSC 6536, para. 39.

[52] *Elsley*, *supra* note 6 at para. 27.

Court observed that there were many accountants available to serve the public in Windsor, and as such the plaintiff could not satisfy its onus of proving that the covenant was contrary to the public interest.[53]

The British Columbia Court of Appeal in *Green* upheld the trial judge's ruling that a restriction on a surgeon practicing medicine in Cranbrook, British Columbia was not unreasonable as against the public interest because there were various physicians and surgeons available in the area at the relevant time to serve the public in the area.[54] Contrastingly, the Ontario Superior Court has held that a restrictive covenant against an obstetrician was void due to the public interest where legislation had been passed for the beneficial purpose of providing the widest medical care for the residents of Ontario, which the Court noted was in the public interest.[55]

Conclusion

Restrictive covenants must be assessed with a view to all of the circumstances. Courts have declined to treat partnerships formalistically, and will examine the relationship between the parties to determine the level of scrutiny at which a non-competition clause will be assessed. Where a departing partner suffered from an inequality of bargaining power, and particularly where no consideration was given for the restrictive covenant, courts are more likely to treat partnerships as akin to employment relationships on this issue. Thus, where the circumstances suggest this outcome, prudence may demand that restrictive covenants be drafted as if they were subject to employment-like scrutiny.

[53] *Bassman*, *supra* note 13 at para. 19.
[54] *Green v. Stanton*, 1969 CarswellBC 115.
[55] *Sherk v Horwitz*, 1972 CarswellOnt 477, paras. 19, 21; aff'd 1972 CarswellOnt 932 (ONCA).