Joint ventures in Canada: overview

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DOMESTIC COMPANY JOINT VENTURES (JV)

Regulation

1. Are JVs expressly regulated?

The term “joint venture” (JV) has no precise legal meaning in Canada. In its broadest sense, a JV refers to a business model under which two or more entities pool resources and share expertise for the purposes of a common venture.

JVs are expressly regulated in Canada to a varying extent depending on their activities, the form that they take and the particular jurisdiction in which they carry on business.

Canada is governed by a federal system that divides constitutional powers between the federal government and the provinces and territories, with some overlap in areas such as trade, commerce and taxation. The province of Quebec is governed by a civil law system with French civil law origins. The federal law and the laws of the other nine provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan) and three territories (the Northwest Territories, Nunavut territory and the Yukon Territory) are based on English common law.

JVs are primarily subject to provincial laws, with some aspects subject to federal laws. Generally, the legislation of the provinces or territories govern the carrying on of a business, except for certain areas specifically reserved to the federal government, such as banking, inter-provincial transportation and telecommunications. The federal government is also generally responsible for regulating international trade and commerce, including the administration of the Customs Act (Canada), which regulates the importation of goods into Canada. Canada is a party to the North America Free Trade Agreement (NAFTA) and the Agreement Establishing the World Trade Organization. Canada’s trade policies are also influenced by its membership in other international organisations such as the United Nations and the Organisation for Economic Cooperation and Development (OECD). Therefore, Canada’s laws and trade policies often reflect internationally accepted norms.

This article discusses each type of JV from a general point of view and points out material differences between the different Canadian jurisdictions where relevant. For the purposes of this article, discussions on corporate JVs are primarily based on the federal Canada Business Corporations Act, and differences between the federal act and those of the provinces and territories which may be of particular interest to foreign investors are highlighted. In addition, given that, in theory, any corporation with two or more shareholders may be construed as a corporate JV, references to a corporate JV in this article mean a newly established special purpose vehicle established for the purpose of pursuing a specific common venture.

Types

2. Which types of JV are allowed?

JVs can be formed by a contract between two or more entities, or can be carried out using corporate or partnership vehicles depending on various factors including, but not limited to, liability, tax and governance matters.

The selection of the appropriate vehicle will therefore depend on the particular situation and specific legal advice should be sought when considering any new venture. The parties to a JV may be individuals or entities such as corporations, partnerships, trusts or any combination of those.

Contractual JV

A contractual JV is formed by two or more entities agreeing to combine resources or expertise with a view to carrying out a specific project or venture, with the explicit expectation that the venture does not constitute a partnership. Since there are no express laws that govern contractual JVs, they are governed by the contractual law of the particular jurisdiction selected by the parties.

The advantages of a contractual JV include the following:

• Its formation and governance are not governed by any specific legislation, allowing great flexibility for the parties;

• It is not considered a taxpayer under Canadian tax legislation; the revenue and losses of the JV are taxed at the level of each joint venturer.

However, disadvantages of contractual JVs may outweigh their benefits:

• Courts may view contractual JVs as a partnership, regardless of the fact that the JV agreement expressly stipulates that the parties do not intend to create a partnership. A court may conclude, after examining the situation and the conduct of the parties, that a partnership exists, with the consequence that the parties find themselves subject to laws that they may have intentionally sought to avoid through their contract;

• Since contractual JVs are unknown entities under statutory legislation, they are not easily recognised by some Canadian jurisdictions for the purposes of issuing licences or permits, or even for registration of a trade name;

• The uncertain nature of a contractual JV can give rise to complications that result in delay and increased costs and risk.

Corporate JV

A corporate JV arises where two or more entities decide to use a corporation as the JV vehicle and become shareholders of the corporation.

Corporations in Canada can be incorporated under provincial, territorial or federal legislation, and their governance can be tailored by their shareholders through the provisions of their articles of incorporation, bye-laws and shareholders’ agreements.
The corporate law of the jurisdiction in which the corporation is formed or carried out governs the corporation.

Except for unlimited liability corporations that are available under the laws of the provinces of British Columbia, Alberta and Nova Scotia, the liability of shareholders is limited to the value of their investment. Significant exceptions to the principle of limited liability include:

- The personal guarantee by a shareholder of the performance of the corporation’s obligations.
- Entering into a "unanimous shareholders' agreement" under which the shareholders take on the powers and responsibilities that are usually exercised by the directors.
- The obligation of a shareholder to return funds received from the corporation in violation of applicable solvency tests.
- Fraud.

Unlimited liability corporations are sometimes used for the tax benefits they provide to foreign investors under certain conditions, but are not usually used as JV corporate vehicles. Not-for-profit corporations are not considered in this article.

The advantages of corporate JVs include:

- Separate corporate personality and limited liability, although limited liability does not apply in certain circumstances (see above).
- Corporations are well understood by governments and the business and lending communities, and subject to a developed body of law defining and interpreting the rights, obligations and remedies of the parties.
- Government bodies issue licences and permits to corporations without hesitation, provided that they meet the necessary requirements.

The disadvantages of corporate JVs include:

- Corporations are subject to formal requirements that may be more onerous than those of partnerships (for example, additional filings, record keeping, audits and other forms of statutory compliance).
- The duties of directors of corporations are generally more significant than those imposed on the managers of a partnership.
- A corporation is taxed as a separate taxpayer, with separate payment and reporting obligations.

Partnership

The other common JV vehicle is a partnership. A partnership can be formed under the laws of the province or territory chosen by the joint ventures. It is usually formed by an agreement under which the partners agree to carry on an activity in common with a view to generate profit, to contribute to it by way of property, knowledge or activities and to share any resulting profits.

In common law jurisdictions, a partnership can arise where a joint business venture satisfies the common law criteria and, once formed, becomes subject to the applicable partnership statutes of that jurisdiction. In Québec, the applicable partnership legislation is found in the Civil Code of Québec.

JVs that are partnerships are either general partnerships or limited partnerships. In a general partnership, the partners have unlimited joint and several liability to third parties for the debts of the partnership. In addition, each partner has the right to contract on behalf of, and to bind, the partnership, unless this right is restricted by the terms of the partnership agreement. However, such restrictions are usually not binding on third parties acting in good faith in their dealings with the partnership.

Limited partnerships were created by statute. A limited partnership differs from a general partnership as it must be composed of both:

- One or more general partners who are the sole persons authorised to administer and bind the partnership.
- One or more limited partners who play a passive role as investors.

General partners have unlimited liability towards third parties for the debts contracted by the limited partnership, but exposure may be minimised by making the general partner a special purpose vehicle with little or no assets. The liability of each limited partner does not exceed the amount of its investment, provided that it does not participate in the management of the limited partnership or hold itself out as a general partner. Limited liability partnerships are not considered further in this chapter. However, they are typically used by professionals such as lawyers and accountants, except in British Columbia where they may also be used for general business purposes.

The advantages of partnership JVs include:

- Statutes applicable to partnerships are less comprehensive than corporate statutes, with relatively few provisions governing the rights and obligations of the partners that cannot be modified by the partnership agreement. This flexibility allows the parties to structure their relationship, including governance structure, as they see fit.
- Although a partnership is not a legal person distinct from its partners, it possesses some of the characteristics of a legal person in some jurisdictions (for example, a partnership name and head office, partnership assets and liabilities (in Québec this is referred to as a separate patrimony)). A partnership may also have legal standing in court.
- Government bodies tend to treat partnerships as distinct entities for licensing and registration purposes. The partnership obtains its own registration numbers for sales and payroll taxes and workers’ compensation purposes, and is treated as a separate entity for payment and reporting purposes, which facilitates compliance with the applicable legislation.
- Partnerships are easier to establish, maintain and dissolve than corporations.
- Unlike a corporation, a partnership is a "flow-through" structure for income tax purposes. While profits and losses are determined at the partnership level, the partnership is not a taxpayer and taxes are paid at the partner level with the result that losses or profits can be offset against the other sources of income of the partners (subject to certain limitations applicable to the losses that can be used by limited partners).

The disadvantages of partnership JVs include:

- Since partnerships do not necessarily have a separate legal personality in all cases, there are jurisdictions in which it is more complex to enter into certain legal acts (such as real estate title registration or the granting of security).
- In a general partnership, the partners have unlimited joint and several liability towards third parties (the use of a limited partnership can minimise this risk).
- In a general partnership, even if the partnership agreement or applicable statute authorises one partner to represent the entire partnership, this power is often questioned by potential counterparties and government authorities.

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3. What are the principal corporate/company laws governing corporate JVs?

Corporate JVs require the incorporation of a corporation under the corporate law statute of the federal government, or that of any of the provinces or territories. The choice of jurisdiction is usually based on features of the corporate law that are attractive to the joint venturers (for example, whether there is a requirement for Canadian resident directors, the extent of protection of minority shareholders or the flexibility of governance provisions). A JV corporation must comply with the corporate law statute of its jurisdiction of incorporation and that of its extra-provincial registration (if any).

Formation and registration

4. What are the typical JV founding documents for a corporate JV?

See Question 2, Corporate JV.

5. Is the use of foreign language in a JV’s founding documents (both corporate and contractual) restricted?

Contractual JV

There is no restriction regarding the use of foreign language in a JV contract.

Corporate JV

Canadian federal corporate law provides that the founding documents can be in:

- Either English or French (the official languages of Canada).
- Both English and French.
- A bilingual format using both English and French equally.

Most provincial and territorial corporate statutes allow an English and/or French corporate name, and a name in any other language for use outside of Canada.

Regardless of their place of incorporation, corporations operating in Québec must comply with the Charter of the French Language, which requires a corporation to have a French name. Such corporations can also have a version of the corporate name in another language provided that the French name features as prominently as the other name. Other provinces (for example, British Columbia, Manitoba, Newfoundland & Labrador, Nova Scotia and Ontario) allow corporate names to be in any language, provided that they also have a version in English and/or French.

Partnership

There are no restrictions on the use of a foreign language in the founding documents of a partnership JV. However, the partnership name is subject to the same rules as those applying to corporate names (see above, Corporate JV).

6. Are public officers (for example, public notaries) involved in a JV’s formation procedure?

Subject to the authorisation requirements set out in Question 7, public officers are not involved in the formation of JVs.

7. Are JVs registered with any local registries? Are public sector bodies’ authorisations required for a JV’s establishment?

Local registries

Contractual JV. There is generally no registration requirement for contractual JVs, although they may be permitted to register in the provinces in which they carry on business in some cases. However, the participating corporate or partnership members of the JV are subject to registration as described below. Some jurisdictions allow the registration of a trade name by contractual JVs.

Corporate JV. A corporation is subject to registration requirements in the jurisdiction in which it is formed, and must register as an extra-provincial corporation under the laws of any other province or territory in which it carries on business.

Partnership. A partnership is subject to registration requirements in the jurisdiction in which it is formed, and must register as an extra-provincial partnership under the laws of any other province or territory in which it carries on business.

Public sector bodies

The federal Competition Act restricts certain forms of collaborations between competitors, and includes a notification and approval regime for mergers (including combinations and amalgamations) that exceed certain monetary thresholds, which can apply to certain JVs.

Agreements or arrangements between competitors or potential competitors that influence price, supply levels or which allocate markets are illegal, regardless of their actual impact on competition (section 45, Competition Act). Entering into such agreements or arrangements is a criminal offence punishable by up to 14 years in prison and/or fines up to C$25 million for each offence.

Agreements or arrangements between competitors or potential competitors that do not influence price, supply levels or allocate markets are considered under section 90.1 of the Competition Act. This is a civil provision that requires a substantial lessening or prevention of competition to establish a violation. Sanctions for violation are generally limited to an order of the Competition Tribunal prohibiting the conduct in question.

There is no requirement to obtain advance authorisation for a JV from the Competition Bureau unless the formation of the JV or its parents’ acquisition of shares or assets falls within the definition of “merger” under the Competition Act. Transactions requiring notification are subject to a statutory waiting period before closing is permitted. The definition of merger is broad and can include amalgamations or acquisitions of assets or shares by JVs or their participants. There is an exemption from notification for non-corporate JVs that:

- Impose on one or more of the parties an obligation to contribute assets.
- Govern a continuing relationship among the parties.
- Restrict the range of activities of the JV.
- Contain provisions that allow for its orderly termination, provided that there is no change in control over any party to the JV that results from such JV.

Parties to proposed JVs that are not subject to notification can carry out a self-assessment using the Competitor Collaboration Guidelines (www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html) to determine whether their conduct could lead to an inquiry by the Competition Bureau for the violations described above. In the case of uncertainty, parties can request a written opinion from the Competition Bureau.

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Subject to the authorisation requirements set out in Question 7, public officers are not involved in the formation of JVs.

8. What other formal requirements must be complied with to validly constitute a JV?

See Question 7.

Permitted markets

9. Can the JV structure be used in every industry sector? Are there any restrictions to be considered and carefully assessed before investing in a JV?

Joint venturers must carefully examine the specific regulations that govern the industry in which they intend the JV to operate. Certain industries require the approval of federal or provincial agencies and/or the issuance of a licence, including:
- Broadcasting and telecommunications.
- Financial services.
- Energy.
- Mining.
- Forestry.

Joint venturers should consider the necessity, the costs and the chance of success in applying for or transferring licences within such industries.

Purpose

10. Can a JV be established with any purpose?

Regarding the impact of industry-specific regulations on the purpose for which a JV is established, see Question 9. Subject to those rules, the purpose of a JV is only subject to limitations set by the parties, who may take into account considerations such as taxation and liability.

Contractual JV

The purpose of a contractual JV can be agreed by the parties, subject to any public policy and public order considerations.

Corporate JV

Corporate legislation in Canada has eliminated the requirement to stipulate the “objects” or purposes of the corporation.

Partnership

The partnership legislation of some jurisdictions requires that the purpose of the partnership be set out in the partnership agreement or in the registration documents. The partnership’s purpose can generally be stated in broad terms and must involve a profit motive.

Share capital and participation

11. What possible forms of participation are there in a JV’s share capital? How can a JV member contribute and are there statutory limits on the possibility to make contributions in kind?

Contractual JV

There are no limitations on the possible forms of participation in a contractual JV.

Corporate JV

Generally, corporate legislation provides that shares can be issued for money, property or past services. The directors of the corporation determine the consideration payable for each issue of shares. For property or past services, the directors determine the fair equivalent of the money that the corporation would have received if the share had been issued for money, taking into account reasonable charges and expenses of organisation and re-organisation and payments for property and past services reasonably expected to benefit the corporation.

Some corporate statutes provide that “property” does not include a promissory note, or a promise to pay, that is made by a person to whom a share is issued, or a person who does not deal at arm’s-length (within the meaning of the Income Tax Act (Canada)) with the person to whom a share is issued.

With the exception of Québec, all corporate statutes require full payment of consideration before shares are issued.

Partnership

Subject to the provisions of the partnership agreement, a partner can make its contribution in the form of cash, property, knowledge or activities. However, for limited partnerships, limited partners cannot contribute services if they wish to preserve their limited liability status. Participating actively in the management and control of the partnership negates limited liability.

12. Can a corporate JV’s share capital be denominated in a foreign currency?

The share capital of a corporate JV can be indicated by making reference to a foreign currency.

The federal Currency Act allows any transaction for money or financial instrument to be made in Canadian currency or the currency of another country. For Canadian tax reporting purposes, Canadian resident corporations can elect to use certain foreign currencies, which currently include the British pound, the euro and the Australian and US dollars.

Duration and limits on membership

13. Are there statutory limits on a JV’s duration?

Contractual JV

Contractual JVs do not have a minimum or maximum period of existence.

Corporate JV

Corporate JVs do not have a minimum or maximum period of existence.

Partnership

A partnership can be of a fixed or an indeterminate duration. A partnership formed for a single venture or undertaking terminates with that venture or undertaking, unless the partners have agreed otherwise. If the parties have agreed to a fixed duration, the partnership can be continued with the consent of all the partners. Expiration of the term provided in the partnership agreement constitutes a cause of dissolution.

14. Are there statutory limits on the number of members participating in a JV?

A JV will necessarily require the involvement of more than one entity, whether the JV is a contractual, corporate or partnership JV.
If the JV is a limited partnership, it must consist of at least one general partner and at least one limited partner.

There is generally no maximum number of members that can participate in a JV. However, Canadian securities laws are relevant when considering the number of participants to a corporate JV or a partnership. A corporate JV or a partnership beneficially owned by more than 50 security holders will generally be subject to more stringent rules regarding the issuance of shares, partnership units, options or other securities.

**Public sector bodies**

15. Can a public sector body enter into a JV agreement? Subject to what conditions? In particular, do public private partnerships (PPP) laws and regulations apply?

A public sector body can enter into a contractual JV with one or several private sector bodies. A public private partnership (PPP) is an agreement between a governmental or quasi-governmental body and a private sector entity that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards, such as the design, build and finance of major infrastructure (for example, hospitals, bridges or roads) or the provision of services, and under which the risks associated with the project are transferred to the private sector.

The legal framework applicable to PPPs varies depending on the legislation of the jurisdiction that governs the public sector body involved in the PPP. Some provincial statutes apply to PPPs, but these are typically enabling legislation. Other acts also regulate specific fields of PPPs such as the:

- Transport Infrastructure Partnerships Act (Québec) which gives powers to the Québec Minister of Transport in the context of PPPs.
- Electricity Act (Ontario) which gives powers to the Ontario Minister of Energy on matters relating to electricity.

The federal government and some of the provinces have established agencies to oversee the formation and implementation of PPPs in their respective jurisdictions (such as PPP Canada, Infrastructure Québec, Infrastructure Ontario, Partnerships BC and Partnerships New Brunswick).

The private sector entities involved in a PPP are often organised as a corporate JV created specifically for the relevant project. Depending on the location of the project and the participants, design builders and service providers may participate through a corporate JV, partnership or contractual JV.

**Non-compensation and anti-trust clauses**

16. Are there statutory constraints on the use of non-compensation or anti-trust clauses in a JV agreement?

**During period of effectiveness**

As described in Question 7, non-compensation clauses are subject to the provisions of the federal Competition Act. Such clauses can be either "hard-core" violations giving rise to criminal liability, or can be assessed under the civil competitor agreements provisions. The non-binding but persuasive Competitor Collaboration Guidelines issued by the Competition Bureau indicate that non-compensation clauses will rarely be examined under the criminal provisions as hard-core conduct. Rather, these types of clauses will raise issues under the civil provisions if, "as a result of the non-compete, the agreement substantially lessens or prevents competition in any relevant market". The Bureau will consider the following:

- Whether the non-compensation provision is reasonably necessary for the implementation or continuation of the collaboration.
- The geographical scope and duration of the non-compensation clause.
- The parties and products subject to the non-compensation clause.

Where the Competition Act does not apply, non-compensation clauses are subject to provincial law. Generally, restrictive covenants are strictly construed by Canadian courts. To be enforceable, they must be reasonable and must clearly specify the precise nature of the restricted activity, as well as the geographical scope and duration of the restrictive covenant.

**Contractual JV.** A contractual JV may or may not give rise to fiduciary duties between the joint venturers. If the parties are in a fiduciary relationship, they will not be able to engage in competing ventures. Even where the relationship is not fiduciary, a duty of confidence may prohibit misuse of confidential information for competing projects. As a result, the JV contract should explicitly address the extent to which the parties may engage in competing projects.

**Corporate JV.** As a general rule, corporate statutes do not prohibit shareholders from competing with the corporation. However, they may be a party to a shareholders' agreement providing that they will not compete or use certain confidential information. To the extent that shareholders assume the rights and obligations of the directors under a unanimous shareholders' agreement, they will be bound by the fiduciary duty or duty of loyalty of the directors to act honestly and in good faith vis-à-vis the corporation and avoid conflicts of interest with the corporation.

**Partnership.** The partnership legislation of most provinces provides that partners must account to the partnership for the profits of any business undertaken individually, in competition with the partnership. This flows from the law on fiduciary duties, which is the guiding principle of partnership law. In Québec, this obligation cannot be avoided contractually. At common law, a partner's fiduciary duty not to prefer personal interests may require that a partner surrender any profit earned personally in competition with the partnership or, at a minimum, share that profit with the other partners.

**Following termination**

It is not unusual for a non-compensation clause to survive the termination of a JV for a certain period of time. Generally, to be enforceable, a non-compete covenant must be reasonable and precise as to the nature of the restricted activity, geographical scope and duration of the covenant.

**De facto company/partnership**

17. Must the contractual JV satisfy any conditions to avoid falling within the definition of de facto company/partnership?

Canadian courts can disregard the express intention of the JV parties to avoid the creation of a partnership. Instead, the courts look at the substance and reality of the transaction itself to determine the nature of the business relationship. Some of the elements held to indicate an intention to form a partnership rather than a contractual JV include:

- A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking.
- A joint property interest in the subject matter of the venture.
- A right of mutual control or management of the enterprise.
- Expectation of profit.
- A right to participate in the profits.
- Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.
Parties wishing to create a contractual JV should draft a sufficiently discrete contract that gives a strong indication of the independence of each entity in the business relationship. Parties should avoid the appearance of a common business venture, sharing in profits, agency, and any other indications of mutual fiduciary obligations.

**Limiting member liability**

### 18. Can a JV agreement provide that a JV member can participate without incurring any risk, loss or reward?

**Contractual JV**

Contractual joint venturers are free to allocate risk, losses and rewards.

**Corporate JV**

The principle of limited liability protects a shareholder from being responsible for liabilities in excess of its investment in the corporation. There are exceptions to this rule, including those mentioned in Question 2, Corporate JV.

**Partnership**

Partnership legislation provides that each partner is entitled to share equally in the profits and capital of the business and must contribute equally towards the losses, unless the partners agree otherwise. However, a partner does not generally share in the profits without bearing a proportionate risk for the liabilities of the partnership.

In a limited partnership, the liability of each limited partner does not exceed the amount of the partner’s agreed contribution. Limited partners cannot take part in the partnership’s business, and will lose the benefit of limited liability status if they breach this prohibition.

**Anti-trust**

### 19. Do any anti-trust rules, guidelines or policies apply to a JV agreement?

The Canadian Competition Bureau’s Competitor Collaboration Guidelines (www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html), which provide guidance but are not binding, set out the approach used to assess collaborations between competitors, including the assessment of:

- Commercialisation and joint selling agreements.
- Information-sharing agreements.
- Research and development agreements.
- Joint production agreements.
- Joint purchasing agreements.

For JVs that trigger the merger notification requirements, the Competition Bureau has issued the Merger Enforcement Guidelines that set out the factors considered in the review of mergers.

**Governance and limits on directors**

### 20. Can the parties to a JV freely regulate the JV or are they subject to certain restrictions?

**Contractual JV**

There are no limitations on the parties to freely regulate the JV.

**Corporate JV**

Unless the articles of the corporation provide otherwise, each share of a corporation entitles its holder to one vote. Most shareholder decisions can be approved by a simple majority. However, certain significant decisions require the affirmative vote of not less than two-thirds of the votes cast. In some cases, shareholders holding shares that do not normally carry the right to vote are entitled to vote (for example, amalgamation of the corporation or amendment to the share capital that will affect the rights of the non-voting shareholders). A corporation’s articles or shareholders’ agreement can also give shareholders a veto regarding certain decisions by providing for greater majority requirements than those under the applicable corporate statute.

**Partnership**

The default rule for partnerships is that all partners are entitled to participate in management and that decisions on day-to-day matters are made by majority vote. However, these default rules can be varied by agreement of the partners, whether expressly or through a course of dealing. In Québec, however, the law provides that the partnership agreement cannot prohibit a partner from participating in collective decisions. Such collective decisions include those that modify the object of the partnership, the contributions due, participation in the profits or losses and the dissolution of the partnership.

### 21. Are there limits or restrictions on the eligibility of an individual as a member of the board of directors/statutory auditor?

**Contractual JV**

Contractual JVs are not governed by any statutory regime and do not have “directors” or “auditors” in the corporate sense, although they may create such positions under the contract. Consequently, there are no limits or restrictions on the eligibility of an individual to act as a director or auditor.

**Corporate JV**

Generally, a director must be an individual of at least 18 years of age, have full capacity and must not have the status of a bankrupt. Unless the articles of incorporation provide otherwise, a director of a corporation is not required to hold shares issued by the corporation. Federal corporation law and many provincial corporation statutes require that at least 25% of the directors be Canadian residents (one-third for holding corporations). If a corporation has less than four directors, at least one director must be a Canadian resident. For corporations doing business in certain restricted industries, such as book publishing and uranium mining, the residency requirement is higher.

A Canadian resident is a person who is either a Canadian citizen, or a permanent resident under the federal Immigration and Refugee Protection Act. Subject to some limited exceptions, a person must already be living in Canada in order to be considered to have resident status.

It is possible to avoid residency requirements by incorporating in British Columbia, New Brunswick, Nova Scotia, Québec or the Yukon Territory, which have no residency requirements.

Most corporate statutes provide that an "auditor" includes a partnership of auditors or an auditor that is incorporated. Therefore, auditors do not need to be individuals. Generally, a person is disqualified from being an auditor of a corporation if the person is not independent of the corporation, its affiliates or its directors or officers.

**Partnership**

Partners need not be individuals and are not subject to residency or other requirements. A partner can be a corporation, a trust or...
another partnership. Corporate partners must comply with the provisions of their governing corporate statute regarding their directors.

Subject to the restrictions placed on limited partners of a limited partnership discussed in Question 2, Partnership, all partners are entitled to participate in the management of the partnership, and decisions on day-to-day matters are made by majority vote. This is often varied by agreement of the partners to allow the delegation of management powers to a single partner, a committee of partners or a non-partner manager.

Partnerships are not required to have auditors under provincial partnership legislation. There are therefore no restrictions on who can act as an auditor.

Termination

22. What legal regime applies to a JV’s termination? Can a JV be terminated for just cause on request of one party?

Contractual JV

A contractual JV is a purely contractual arrangement and is not subject to a specific statutory regime. Termination other than by prior agreement or consent of all parties will normally require a court order.

Corporate JV

Most corporate statutes provide that a corporation that is not insolvent or bankrupt can be dissolved either on a voluntary or involuntary basis. Corporate JVs can be voluntarily dissolved by a resolution adopted by a two-thirds majority of shareholders where the corporation has no property or liabilities, or the directors have distributed any property and discharged any liabilities before filing the articles of dissolution. There is also a process under which a liquidator can be appointed by the shareholders to liquidate and wind up the affairs of the corporation before its dissolution.

Corporate JVs can be wound up involuntarily on application to the court where the court finds that the business or affairs of the corporation, or the powers of the directors, have been carried out in a manner that is oppressive or unfairly prejudicial to the interests of any security holder, creditor, director or officer. In addition, dissolution can be ordered if the court is satisfied that either:

- A unanimous shareholders’ agreement entitles a complaining shareholder to request the dissolution of the corporation after the occurrence of a specified event, and that event has occurred.
- It is just and equitable that the corporation should be liquidated and dissolved.

On filing the articles of dissolution, a certificate of dissolution is issued and the corporation ceases to exist from the date of such certificate. The shareholders remain liable to creditors of the dissolved corporation for debts up to the amount that they received on liquidation, provided that such creditors bring an action within two years from the date of dissolution.

Corporations can also be dissolved by the governmental authority if the corporation:

- Has not commenced business within a specified period.
- Has not carried on business for a specified period.
- Is in default of filing the prescribed fees or reports.
- Does not have any directors, or all the directors have resigned or have been removed without replacement.

In some jurisdictions, the consent of the relevant taxation authority is required before dissolution.

23. Is the termination of a JV agreement subject to any public sector body’s approval?

See Question 22.

Choice of law and jurisdiction

24. Are there constraints on the choice of the law and the jurisdiction applicable to a JV?

Contractual JV

Canadian courts generally respect the choice of law and jurisdiction stipulated by the parties.

Corporate JV

The joint venturers are free to choose the jurisdiction of incorporation that most serves their needs. A corporation can be active in any sector and throughout Canada, regardless of whether it is incorporated under federal, provincial or territorial statutes.

Partnership

Canadian courts generally respect the choice of law and jurisdiction agreed on by the partners in the partnership agreement.

JVs WITH FOREIGN MEMBERS

Validity and authorisation

25. What are the rules relating to validity and authorisation of JVs with foreign parties?

Validity

JVs with foreign parties are allowed in Canada, subject to certain conditions (see Question 29).

Limits

There is no minimum/maximum number of parties who must be local, subject to certain conditions (see Question 28).

Authorisation

See Question 26.

Effect of foreign membership

26. Are any of the rules relating to domestic company JVs (see Questions 1 to 24) different for JVs with members

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The Investment Canada Act applies where a non-Canadian establishes a new Canadian business or acquires control of any existing Canadian business. A business is a Canadian business if it satisfies the following conditions:

- It is carried on in Canada with a place of business in Canada.
- An individual or individuals in Canada are employed or self-employed in connection with the business.
- Assets in Canada are used in carrying on the business.

A non-Canadian is an individual, entity, government or government agency that is not Canadian. However, the rules used to determine whether a particular entity is, in fact, considered Canadian can be complex. For example, a corporation is Canadian if the ultimate controlling shareholders are Canadian. Individual shareholders are Canadian if they are Canadian citizens or permanent residents of Canada ordinarily resident in Canada for not more than one year after first becoming eligible to apply for Canadian citizenship.

Where a non-Canadian (or non-Canadians) is seeking to establish a new JV in Canada that meets the definition of a Canadian business (see above), a notification must be submitted to Innovation, Science, and Economic Development Canada (ISED). The notification process does not require any form of approval, and notification can be submitted up to 30 days after the establishment or acquisition of the business. However, where the JV operates a cultural business, Heritage Canada can review (at its discretion) the investment to determine whether it is of net benefit to Canada.

The acquisition of control of a Canadian JV by a non-Canadian that exceeds certain monetary thresholds can be subject to mandatory review prior to closing. The review thresholds are high. However, in the case of the acquisition of a cultural business or the acquisition of any business by an acquirer based in a non-WTO member state, or if the buyer is a state-owned or controlled entity, the thresholds are significantly lower. The review considers a number of factors to determine whether the transaction is of net benefit to Canada. The acquirer will often provide contractually enforceable undertakings to the Canadian Government related to the business to secure a net benefit ruling.

Where the JV is considered to have the potential to be “injurious to national security” (a phrase that is not defined in the Investment Canada Act), specific considerations and a separate review process may potentially apply. If the Minister of ISED is satisfied that the investment will not be injurious to national security, he advises the investor that no further action will be taken. Otherwise, the investment will be referred to the Governor in Council (Cabinet) who is authorised to take any measures necessary to protect national security (for example, directing the investor not to implement the investment).

There may also be tax consequences if one of the members of the JV is resident in, or controlled by a resident of, a foreign country.

**Economic or financial incentives**

**27. Are there economic or financial incentives for foreign direct investments in a JV?**

General Canadian tax incentives include tax credit and deductions for scientific research and experimental development (SR&ED), as well as various provincial grants and subsidies from provincial governments for investments in certain industries. For example, eligible film productions may receive tax credits.

**Minimum investments/contributions**

**28. Are there mandatory minimum equity investments or contributions in kind thresholds for a foreign JV member?**

Generally, there are no mandatory minimum equity investments or contributions in kind thresholds for a foreign JV member. However, the thin capitalisation rules limit the debt to equity ratio for Canadian corporations or partnerships held by certain specified non-resident investors to 1.5:1. For any debt that exceeds this ratio, one of the Canadian income tax implications would mean that the deductibility of interest paid to non-resident investors is limited. This encourages non-resident investors to finance Canadian operations through equity rather than debt only.

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**THE REGULATORY AUTHORITIES**

**The Competition Bureau**

**Main activities.** The Competition Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. Headed by the Commissioner of Competition, the Bureau is responsible for the administration and enforcement of the Competition Act, the Consumer Packaging and Labelling Act (except as it relates to food), the Textile Labelling Act and the Precious Metals Marking Act.


**Innovation, Science, and Economic Development Canada**

**Main activities.** ISED works with Canadians in all areas of the economy and in all parts of the country to improve conditions for investment, enhance Canada’s innovation performance, increase Canada’s share of global trade and build a fair, efficient and competitive marketplace.

ONLINE RESOURCES

Laws and regulations of Canada
W http://laws-lois.justice.gc.ca/eng/

**Description.** The Government of Canada's online source of consolidated acts and regulations of Canada. The consolidations are generally updated every two weeks.

**Competition Bureau's guidelines**
W www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html **Description.** These guidelines describe the general approach of the Competition Bureau in applying sections 45 and 90.1 of the Competition Act to collaborations between competitors.

W www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html **Description.** The Competition Bureau's guidelines that provide general direction on its analytical approach to merger review.

**Laws and regulations of Québec (Les Publications du Québec)**
W www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/P_9_001/P9_001_A.html **Description.** Les Publications du Québec is the publishing house of the Québec government and is updated every few weeks.

**Laws and regulations of Ontario**
W www.ontario.ca/laws/statute/98e15 **Description.** The Government of Ontario's online source of consolidated acts and regulations of Ontario. The consolidations are generally updated every few weeks.

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