

Business Structures

Ilias Kiritsis, LL.B., J.D.

Mousseau DeLuca McPherson Prince LLP

251 Goyeau Street, Suite 500

Windsor, ON N9A 6V2

Phone: 519-258-0615 / e-mail: Kiritsis@mousseaulaw.com

Topics of Discussion

- Different business structures – legal form
 - Proprietorship
 - Partnership
 - Corporation
 - Key commercial differences
- Contracts and Legal Agreements
- Non-Disclosure Agreements (Confidentiality)
- Intellectual Property Law

DIFFERENT BUSINESS STRUCTURES

- PROPRIETORSHIP
- PARTNERSHIP
- CORPORATION

PROPRIETORSHIP

- Small, simple organizations: someone setting up a commercial enterprise, risky
- Same natural person holds the business assets and his own personal assets / no legal separation
- Falls under definition of “business” in *Business Names Act*

PROPRIETORSHIP

3 Major issues:

➤ Ownership:

- Sole proprietorship is essentially the business with five consequences:
 - They cannot employ themselves as an employee
 - All benefits or losses accrue to the proprietor
 - Business responsibilities, bills, liabilities belong to the proprietor
 - Assets of the business are the proprietor's assets
 - Taxes payable to proprietor are owned by them personally

PROPRIETORSHIP

➤ Unlimited legal liability:

- Others can make claims on all their personal assets and not just those of the business (car, house, etc).
- To protect yourself you have to get insured.

➤ Business name and legal actions (BNA) Section 2(2): Registering name:

- No individual shall carry on business or identify his or her business to the public under a name other than his or her own name unless the name is registered by that individual
- If you don't register name there is a fine involved

PROPRIETORSHIP

ADVANTAGES:

- Easy to start up
- Low start-up costs
- Personal incentive and profits = getting all the revenues
- Limited regulation
- Easy to dissolve: Assets belong to proprietor upon dissolution
- No stringent reporting requirements (except CRA)
- Proprietor can offset business losses against personal income

PROPRIETORSHIP

DISADVANTAGES:

- Unlimited personal liability
- Can be difficult to obtain credit without personal guarantee
- Hard to raise capital (ex: to expand operations)
- Profits are taxed at progressive personal tax rates (usually higher compared to corporation)
- No real continuity (general existence) business dies when proprietor dies (unless trust arrangements)

PARTNERSHIP

- The *relation that subsists between persons carrying on business in common with the view to profit...*
Partnerships Act, R.S.O. 1970, c. 339. s.2
- Legal institution of partnership can occur even contrary to intentions of partners
- Partnership does not have separate legal statutes (cannot be both partner and employee of partnership).

PARTNERSHIP

- **"In common"**: each member of partnership has some degree of personal involvement: doesn't have to be actively engaged in the partnership (one can be silent: don't have to know a lot about business for example)
- **"View to profit"** - view to profit has to be apparent

PARTNERSHIP

Partnership Agreement:

- Agreement can **be inferred from actions and activities**
- Default rules: *Partnership Act* is applicable unless there is a partnership agreement. Can opt out of partnership provisions by deciding own agreement
- PA: Section 24 Rules as to interest and duties of partners -
- When partnership dissolves it is divided in terms of partnership agreement, if there is no agreement the assets are divided equally. s.24.

PARTNERSHIP

What can be included in a partnership agreement?

- 1) Business name
- 2) Nature of the business
- 3) Partners names and addresses
- 4) Address of business
- 5) Duration of the partnership
- 6) Financial structure of the business

PARTNERSHIP

What can be included in a partnership agreement?

- 7) How profits will be shared (if no provision: share equally: section 24(1) – PA)
- 8) Share of the losses (also equal if no provision, even with different contribution)
- 9) Management and voting powers: section 24 (5) each partner can take part of management
- 10) Provision for retirement of the partnership

PARTNERSHIP

What can be included in a partnership agreement?

- 11) How are we going to settle the disputes
- 12) Procedure for introducing new partners: all parties must agree (section 24(7) – PA)
- 13) Procedure for purchasing interests of retired or deceased partner
- 14) Set out partners' duties
- 15) Fiscal periods

PARTNERSHIP

ADVANTAGES:

- Easy to start up
- Low start up costs
- Personal incentive
- Additional sources of capital
- Broader management base
- Limited regulation
- Also getting possibility of continued existence if adding on new partners

PARTNERSHIP

DISADVANTAGES:

- Unlimited liability
- Difficult raising capital
- Lack of continuity
- Possible heavier taxation
- Relatively frozen assets
- Divided authority
- Hard finding suitable partners
 - falling out

CORPORATION

- Corporations can incorporate either:
 - Provincially
 - Ontario Corporations Act
 - Federally – national business
 - Canada Business Corporations Act

CORPORATION

ADVANTAGES:

- Limited person liability for shareholders
- Easier to raise capital (ability to raise money from a wider group: company has another source of revenue)
- Potential tax advantages (corporate tax rates are lower compared to individuals)
- Continuous existence (corporation is an entity that is separate and distinct from any shareholders, directors, managers, and its employees)

CORPORATION

ADVANTAGES:

- To participate in a corporate structure is attractive for shareholders because it provides the ability to participate in business without expertise.
- Separate legal entity
- Easier to raise funds through shares
- Easy to transfer ownership through the sale of shares – instead of potentially more cumbersome process under Partnership
- Where partners can bind the firm – a shareholder alone cannot bind the firm

CORPORATION

DISADVANTAGES:

- Expensive to start up
- Closely Regulated (Increase administration: heightened level of governmental supervision)
- Extensive Record-keeping
- Possible double taxation
- Multiple filing fees

KEY COMMERCIAL DIFFERENCES

- Implications of being a separate legal entity
- Ability to change ownership (buy/sell)
- Shareholder agreements – some key things to consider:
 - Dividend rights
 - Voting rights
 - Exit clauses
- Ongoing legal obligations of a company

Contracts and Legal Agreements

- are they needed and necessary
- enforcement
- evidence of agreement between parties
- types
 - Partnership agreements for partnerships
 - Shareholders agreements for corporations
 - employment agreements for employees
- typical issues dealt with in agreements - relationship between parties, death, distributions, sale of business, expense sharing, breakdown in relationship

Non-Disclosure Agreements (Confidentiality)

- protect trade secrets, or keep employees from using information
- enforcement easier if written
- signed between arms length parties OR by employees not to use secrets
- non-competition agreement

Intellectual Property Law

➤ Trademark

- letters, words, sounds, designs, etc. (ie. coca cola) that distinguish one party's goods or services from others.
- already have it BUT registering it to protect it (proof)

➤ Patent

- newly development technology, or improvement on products or processes
- register (up to 20 years)
- new, useful, inventive

Intellectual Property Law

- Copyright
 - literacy, dramatic, musical, artistic work
 - exclusive legal right to produce, reproduce, publish or perform the work
 - original work automatically protected BUT registering it gives you evidence you can use it in court
 - exists during lifetime + 50 years after death