

CAN A PARTNER ENTER INTO A CONTRACT WITH A PARTNERSHIP OF WHICH THE PARTNER IS A MEMBER?

As a matter of law, can a partner (A Co) enter into a valid and enforceable contract with a partnership (ABLP) of which A Co is a member? The question is important, because A Co may, for example, want to transfer property to or borrow money from ABLP.

The Income Tax Act does not define the meaning of “partnership” for the purposes of the Act. The case law concerning partnerships has developed over a considerable time, and today much of it is embodied in provincial statutes. For Alberta’s purposes, section 1 of the Partnership Act (Alberta) defines “partnership” to mean “the relationship that subsists between persons carrying on a business in common with a view to profit.” Thus, a partnership is not a separate legal entity, although the law attaches to a partnership some degree of distinctness from its partners for certain legal purposes. For income tax purposes, a partnership is not recognized as a separate taxpaying entity, although the Income Tax Act provides that the income of a partnership is to be computed as if the partnership were a separate person, with the income from the partnership allocated to each of the partners.

Because a partnership is not a separate legal entity, it appears likely that at common law A Co cannot enter into a valid contract with ABLP because A Co would be contracting with itself (*Rye v. Rye*, [1962] AC 496 (HL)). In *The Law of Contract in Canada* (6th ed.), G.H.L. Fridman summarizes the common-law position (at 139):

At common law it was not possible for a person to contract with himself. This meant that A could not contract with A and B jointly; nor could A and B contract with A, B and C. Hence, also A and B could not contract with B and C. Any attempt to make such a contract resulted in a legal nullity, a transaction that was void.

In Alberta, the common-law rule against contracting with oneself has been displaced in some respects by “common parties to contracts” legislation. Section 10(1) of the Law of Property Act (Alberta) provides that a contract is valid and enforceable in accordance with its terms notwithstanding that in or by the contract, inter alia, one of the parties (in our example, A Co) enters into an agreement with that party and some other person (A Co and its partner in their capacity as partners of ABLP). By virtue of section 10(3) of the Law of Property Act, section 10 applies to a “contract”

that provides for the “conveyance of an interest in real or personal property.”

If the requirements in section 10(3) are satisfied and the agreement entered into between A Co and ABLP is governed by and construed in accordance with the laws of Alberta, section 10(1) should prevent the common-law rule against contracting with oneself from applying to the agreement, and should thereby cause the agreement to be a valid and enforceable contract. This conclusion is supported by, or consistent with,

- 1) section 12(1)(a) of the Law of Property Act, which provides that an “interest in real or personal property may be validly conveyed” by a person to that person jointly with another person;
- 2) section 60 of the Partnership Act, which expressly authorizes a limited partner of a limited partnership of which the limited partner is a member to loan money to and transact other business with the limited partnership;
- 3) some administrative views expressed by the CRA, including those in CRA document no. 2001-0103605 (May 15, 2002), in which the CRA stated that the question of whether a partner can loan money to a partnership of which the partner is a member can be answered only after a review of all the relevant facts and of the applicable law other than tax law, and CRA document no. 2001-0095675 (March 17, 2003), in which the CRA stated that pursuant to subsection 12(1) of the Ontario Limited Partnerships Act, a limited partner may loan money to and transact other business with a limited partnership of which the limited partner is a member; and
- 4) the conclusion reached by Fridman:

[The Law of Property Act] is retroactive and it applies to contracts conveying interests in real or personal property. Thus in Alberta, if not in other provinces, there is no longer any such limitation upon contractual capacity as existed at common law. A person may contract with himself.

In Alberta, therefore, A Co can enter into a valid and enforceable contract with ABLP if the contract provides for the conveyance of an interest in real or personal property (for example, if A Co transfers property or loans money to ABLP). In provinces other than Alberta, practitioners should consider whether equivalent provincial legislation displaces the common-law rule against contracting with oneself.

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