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LIMITED PARTNERSHIPS Lyle R. Hepburn Release 2022-5 • May 2022

This text is a thorough guide to the law of limited partnerships in Canada. It contains relevant legislation and jurisprudence from each province and the territories. It also provides valuable forms and precedents as well as tax valuations. This publication offers an index for selected legal literature on limited partnerships, which includes citations to secondary legal literature from both the United States and the Canadian legal community. The materials indexed are useful both for theoretical studies and as an aid to the practice of law.

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What's New in this Update:

This release features updates to Chapter 3IB. Fiduciary Duty of General Partner. This release also includes updates to Chapter 15. Canada including updates to § 15:7 Income Tax Act – Case Law Digests, updates to § 15:9.1 Partnership, and the addition of the

Canada Revenue Agency's GST/HST and Investment Limited Partnerships.

Highlights:

- **The General Partner — Rights, Duties and Liabilities — Fiduciary Duty of General Partner — Fiduciary Duty of Directors of a General Partner** — On appeal, the Appellants argued that they could not be held liable for any breach because the party to whom they owed the duty, EVP GP, was different than the party that suffered the loss, Fund I. In rejecting this argument, Justice Hourigan explained that it would be an anomalous result if the law offered no remedy for the breach of a director's fiduciary duty in circumstances where the limited partnership suffered the resulting loss. If that were the case, directors could act with impunity to damage the interests of the limited partnership, including by engaging in self-dealing, and there would be no remedy for such a breach of fiduciary duty. The law of fiduciary duties, which is based in equity, should not brook such a lacuna in its remedies. The question was whether Amar and Sunny's fiduciary duty should expand to include a duty to the limited partnership. In Justice Hourigan's view, it should. Amar and Sunny conducted themselves in a manner that clearly breached their duties to EVP GP. This was not a situation where they were balancing the corporation's interests against those of the limited partnership. Instead, they acted solely in their self-interest and contrary to the interests of both the general partner and the limited partnership. For that reason, they were being sued by both Fund I and EVP GP. Where, as here, the directors ignore the interests of the general partners and the limited partnership and act solely in their self-interest, the concept of a director's fiduciary duty should be flexible enough to include duties to both the general partner and the limited partnership. Further, it should come as no surprise to the corporate directors that the limited partnership, which stands in a fiduciary relationship to the general partner and whose interests are supposed to be safeguarded, should have a right to claim against them personally. In a limited partnership, the *raison d'être* of the general partner is to manage the business operations of the limited partnership and shield the limited partners from the unlimited liability they would face in a partnership. The use of the corporate form by the general partner is in turn designed to limit its liability exposure. It would be inequitable if the corporate form could be used to insulate directors who are in breach of their duties to the general partner and who have caused damages to the limited partnership. Given the unique structure of limited partnerships, the common law should impose a fiduciary duty on corporate directors of the general partner towards the limited partnership. Justice Hourigan explained that it is well established that the "categories of fidu-

ciary relationship are never closed”. Certain status relationships give rise to a *per se* fiduciary relationship. In other circumstances, courts can find an *ad hoc* fiduciary duty. Such a duty arises where: (1) the fiduciary has the discretionary power to affect the vulnerable party’s legal or practical interests and (2) the fiduciary has made an express or implied undertaking that it will exercise the discretionary power in the vulnerable party’s best interests. Amar and Sunny owed the limited partnership an *ad hoc* fiduciary duty. Both the limited partners and the limited partnership constituted a class of vulnerable and defined beneficiaries, whose legal and substantial practical interests stood to be and in fact were adversely affected by Amar and Sunny’s exercise of discretion. Amar and Sunny’s undertaking arose from the nature of the business relationship itself — a general partner operates on behalf of the limited partnership — as well as from the Limited Partnership Agreement, which recognized the duty of the general partners towards the limited partners and the limited partnership: *Extreme Venture Partners Fund I LP v. Varma*, 2021 CarswellOnt 18074, 2021 ONCA 853 (Ont. C.A.).

ProView Developments

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