



# POLICY REPORT

## LIMITED LIABILITY PARTNERSHIP LEGISLATION

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## 1. Background

At present in British Columbia, there is no limited liability partnership ("LLP") legislation. The Canadian Bar Association (BC Branch) is involved in reviewing the policy regarding LLP legislation with the aim to submit amendments to government.

## 2. Canadian Bar Association, BC Branch

In 1998, the BC Branch Professional Liability Committee (the "Committee"), chaired by William McAllister, QC, reviewed the feasibility of:

- permitting lawyers and other professionals to form LLPs; and
- eliminating joint and several liability in favour of proportionate liability in commercial transactions.

The Committee recommended that no statutory reform be made regarding creating proportionate liability by statute for pure economic loss or for negligent misstatement causing economic loss. The Committee suggested amendments to the:

- *Partnership Act* to permit the formulation of LLPs which provide sufficient protection to the public; and
- *Legal Profession Act* to permit lawyers to carry on the practice of law within a LLP.

The Committee considered and rejected:

- statutory revisions to the common law contractual limitation of liability; and
- a statutory cap on liability.

In April 1999, the CBA Provincial Council accepted the Committee's recommendations.

Under the auspices of the Legislation and Law Reform Committee, a Limited Liability Partnership Committee ("LLP Committee"), chaired by Carman Overholt of Vancouver, is reviewing legislation in order to implement the Committee's recommendations.

## 3. Sources Consulted

The sources consulted for this Report are provided at the end of this Report. The information in this Report, including the Internet site addresses, is current to December 20, 1999.

## 4. British Columbia Government Position

There have been no extensive consultations by government with the CBA, other stakeholders or the public regarding LLPs in British Columbia. The Ministry of Finance and Corporate Relations is considering LLPs for the Spring 2000 legislative session but has not disclosed publicly whether that consideration is for legislation or for public consultation. No decision has yet been made in government regarding the possible form and content of any "made in BC" LLP legislation. The Ministry of Finance and Corporate Relations has stated publicly that any legislative change will involve the input from stakeholders such as the Canadian Bar Association.

## 5. LLP Legislation Generally

LLP was created in the state of Texas in 1991. Since then, LLPs have been implemented in many jurisdictions. These jurisdictions relevant to the experience in British Columbia are:

- Ontario;
- Alberta;
- the United States; and
- the United Kingdom.

Australia, a common law jurisdiction like British Columbia, has chosen not to adopt LLP legislation, opting for instead, a statutory cap on lawyers' liability.

The salient features of LLP legislation in each of these jurisdictions will be summarized below:

- Ontario;
- Alberta;
- United States; and
- The United Kingdom.

## 6. Ontario

Under the *Partnership Act*, R.S.O. 1990, c. P. 5<sup>1</sup>, LLPs may be formed only for the purpose of carrying on a profession governed by an Act, and then only if the relevant professional statute specifically provides for LLPs with a minimum amount of liability insurance. At present, lawyers and accountants are permitted to form LLPS.

Key features of this LLP legislation include:

- limited personal liability for malpractice, not contractual duties, such as debts;
- vicarious personal liability only shielded for "negligent acts or omissions" (section 10.2) and provides no shield for fraud or criminal conduct of a partner or employee;
  - liability is provided for consequences of partners' own negligence or those employees or other persons they directly supervise (for which these partners are vicariously liable) (section 10.3);

### 6.1 Law Society of Upper Canada

The Law Society of Upper Canada regulates LLPs under the *Law Society Act*. Three main requirements must be met:

1. registration of the business name of the firm as "LLP" under the *Partnerships Act*;
2. minimum level of insurance set by By-Law 26;

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<sup>1</sup> As amended by S.O. 1998, c. 2 and in force July 1998. Unofficial version available the Internet at: Ontario Statutes and Regulations (<http://209.195.107.57/en/index.html>) (current only to July 1, 1998).

3. disclosure by lawyers to their clients of the LLP and the nature of the limitation on the liability of the partners.<sup>2</sup>

## 7. Alberta

In May 1999, the *Partnership Amendment Act, 1999* (Bill 34) authorizing LLPs was passed.<sup>3</sup>

Key features of Bill 34 include:

- members of an eligible regulated profession may agree to practice as a registered LLP (to date only lawyers and accountants);
- an Alberta LLP partner will not be personally liable either directly or by means of contribution or indemnification for debts, obligations or liabilities of the partnership or of another partner that arise from the negligence, wrongful acts or omissions, malpractice or misconduct of another partner or an employee of the partnership occurring in the ordinary course of carrying on the practice of the profession (section 4);
- the innocent partner is protected from the actions of his/her partners but the innocent partner still has at risk his or her interest in the partnership, and all insurance coverage held by the LLP will be available to satisfy claims arising from the negligence or misconduct of the offending partner (section 6);
- both an offending and innocent partner will continue to incur full personal liability as will any partner who knew of the negligence or wrongful act, but failed to take remedial action, or any partner who was supervising the offending partner and failed to provide adequate and competent supervision (section 4);
- registration of extra-provincial LLPs as Alberta LLPs permitted (section 2 and 8);
- partners of LLPs will continue to be jointly liable for trade debts and similar obligations of the partnership (section 6 and 7);
- on registration as an LLP a partnership is required to send to all existing clients a notice advising of the registration and explaining in general terms the potential changes in liability of the partners as a result of the registration and the operation of the amendments to the *Partnership Act* (section 8 creating a new Part 2.1 Registration of Limited Liability Partnerships);
  - regulations are permitted to mandate matter incidental to registration, including minimum insurance requirements (section 8);
  - the contemplation for the registration of multi-disciplinary partnerships as LLPs with provisions covering extra-provincial LLPs in Alberta (section 2 and 8).

### 7.1 Law Society of Alberta

The Law Society of Alberta will add a new Part 8.1 to its Rules for the:

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<sup>2</sup> The current minimum insurance is \$1,000,000 (CDN). The unofficial version of Bylaw 26 is available on the Internet at [http://www.lsuc.on.ca/services/llp\\_info\\_en.shtml](http://www.lsuc.on.ca/services/llp_info_en.shtml).

<sup>3</sup> S.A. 1999, c. 27 (Bill 34) (Given Royal Assent May 27, 1999). Unofficial version available on the Internet at <http://www.assembly.ab.ca>. Click on Bills and Amendments. Not yet in force; expected in force January 2000.

- registration of Alberta and extra-provincial LLPs;
- requirement for insurance; and
- notification to the Law Society of non-compliance.

The Law Society of Alberta's Barry Vogel advises the Law Society does not expect LLPs to be a regulatory or administrative burden given that partnership law is not changed.<sup>4</sup>

The new Law Society of Alberta Rules for Part 8.1 will be available on its website shortly after coming into force of Bill 34, expected January 2000 (<http://www.lawsocietyalberta.com/services/profession.html>).

## 8. Uniform Law Conference of Canada

At its annual Conference in August 1999, the Uniform Law Conference of Canada ("ULCC") presented its *Uniform Limited Liability Partnership Act* along with a paper recommending form and content for the uniform statute to be adopted by all provinces and territories across Canada.<sup>5</sup> Drawing from work completed by the Alberta Law Reform Institute, key features of uniform Act include:

- adoption of the "full-shield" approach, in which partners are not, as such, personally liable for any obligations of the LLP (section 2);
- partners of a full-shield LLP are liable for obligations of the LLP for which they would be liable if the LLP was a corporation and they were its directors (section 3);
- innocent partners in an LLP are protected from vicarious liability for all manner of wrongful acts or omissions in the provision of professional services, not just for negligent acts or omissions;
- the liability shield provided by an LLP does not protect a partner from personal liability for injury suffered by a person:
  - (i) because of that partner's negligent or otherwise wrongful acts or omissions, including negligence in appointing, supervising or failing to supervise another member, employee or representative of the firm,
  - (ii) because of the negligent or otherwise wrongful acts or omissions of another member, employee or representative of the firm, where the partner knew of the wrongful acts or omissions and failed to take reasonable steps to prevent the acts, omissions or injury (section 4);
- any firm that may be carried on through an ordinary partnership is able to be carried on through an LLP;

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<sup>4</sup> Telephone Interview with the author, December 15, 1999.

<sup>5</sup> Model Uniform Limited Liability Partnership Act (1999). Available on the Internet at <http://www.law.ualberta.ca/alri/ulc/99pro/ellpact.htm>. Detailed commentary by Richard H. Bowes (Counsel, Alberta Law Reform Institute), "Limited Liability Partnership" (August 1999) (available on the Internet at <http://www.law.ualberta.ca/alri/ulc/99pro/ellp1.htm>).

- a pro forma requirement that professions or occupations to be determined by the jurisdiction be subject to minimum insurance or similar financial responsibility requirements determined by the responsible body within the jurisdiction;
- restrictions on distributions of LLP assets to LLP members based on the same principles that underlie restrictions on transfers of corporate or limited partnership property to shareholders or limited partners;
- improper distributions to be made good by the partners who receive the property (if any shortfall exists after that the partners who authorized the wrongful distribution should be jointly and severally liable for the shortfall);
- where there is a wrongful distribution of LLP property to a partner, the partner receiving the distribution is liable to restore the property to the corporation, and partners who authorized the distribution are jointly and severally liable for any shortfall in the amount recovered from the partner receiving the distribution (section 5);
- all partners of an LLP are liable for claims against the firm to the extent necessary to enforce the claims against the individual partners' interest in the partnership property;
- a claim against an ongoing LLP is enforceable against partnership property of the ongoing firm, notwithstanding changes in membership of the partnership (constituting a technical dissolution and reformation) between the time the claim arose and the time it is enforced (sections 6 and 7); and
- where an LLP is formed under the laws of one jurisdiction (the "home jurisdiction") but carries on business in another jurisdiction (the "host jurisdiction"), the uniform LLP legislation (ie. host jurisdiction LLP legislation) provides that, in general, the laws of the home jurisdiction govern the liability of individual partners of the LLP for LLP obligations incurred in the host jurisdiction (section 8).

## 9. United States

At present, forty-nine states have enacted LLP legislation. Many have adopted the *Uniform Partnership Act* (1997) ("UPA"), developed by the National Conference of Commissioners on Uniform State Laws.<sup>6</sup>

Key features of the UPA provide for:

- a corporate-styled liability shield which protects partners from vicarious personal liability for all partnership obligations incurred while a partnership is an LLP (section 306(c));
- retention of a partner's liability for personal misconduct and the normal partnership rules regarding a partner's right to indemnification from the partnership (section 401(c));
- the decision to become an LLP being a major partnership event equivalent to an amendment of the partnership agreement (section 1001(b)) such that where partnership assets are insufficient to indemnify a partner for an LLP obligation, each partner forfeits a right to receive contributions from other partners in exchange for being relieved of the obligation to contribute to the personal liability of other partners;

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<sup>6</sup> UPA has been adopted in 21 states, the District of Columbia, Puerto Rico and the US Virgin Islands. UPA is available on the Internet at: [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm).

- the liability shield applies notwithstanding inconsistent provisions of the partnership agreement existing immediately before the vote to become an LLP was taken (sections 401 and 405); and
- the requirement to file an annual report or the LLP is automatically terminated (section 1003 (c)).

## 10. United Kingdom

The *Limited Liability Partnerships (LLP)* Bill received Second Reading December 9, 1999 at the House of Lords. It is expected to be in force in 2001.<sup>7</sup>

Key features include the LLP to be:

- a voluntary and separate legal entity governed not by partnership law but subject to regulation regarding limitation of liability (section 1);
- incorporated as an LLP by at least 2 persons and registered (sections 2-3);
- voluntary subject to agreement, including ceasing to become a member (section 4);
- liable as well as its negligent partners to the full extent of their assets, the liability of the other members to be limited (section 6);
- required to register changes to the LLP (section 9);
- taxed as a partnership, not as a corporation (section 10); and
- managed by regulations to be made regarding:
  - insolvency and winding up; and
  - the law of corporations or partnerships as applied to LLPs (sections 13-18).

### 10.1 Concerns of the Law Society of England and Wales

While generally supportive of the Bill, the Law Society of England and Wales has concerns regarding the future regulations as they may affect lawyers. The key concerns are the:

- right to share in capital and profits;
- right of a member to be indemnified by the LLP in respect of payments made by him or liabilities incurred by him on behalf of the LLP;
- right to take part in the management of the business of the LLP;
- right of members to have access to the books and records of the LLP;
- right or absence of right to receive payment for services rendered by a member to the LLP;

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<sup>7</sup> The Limited Liability Partnerships Bill and Explanatory Notes are available on the Internet at <http://www.publications.parliament.uk/pa/ld199900/ldbills/006/2000006.htm>

- procedure for calling and holding meetings including any rights to appoint proxies and corporate representatives to attend meetings of members;
- right to vote at meetings on the basis of one member one vote;
- the expulsion of a member;
- right of a member to retire as a member of the LLP by giving notice without needing the agreement of the LLP members;
- the need to clarify that an LLP the member is categorised as an agent of the LLP irrespective of the member's authority to bind the LLP in any particular case; and
- the extension of LLP provisions regarding with loans to buy into partnerships; specifically, regarding the exemptions provided in section 10 of the Bill, confirmation is needed that an annuitant who exchanges an annuity due from a partnership for an annuity payable by the LLP will not be treated as a disposal for capital gains tax purposes otherwise the annuitant will be unfairly penalised.<sup>8</sup>

## 11. Australia

Australia has no LLP legislation. Two Australian states have legislation that limits the liability of lawyers by placing a statutory cap on liability. They are the *Professional Standards Acts* of New South Wales (since 1994) and Western Australia (since 1997, based on the New South Wales Act). In 1999, an initiative was begun by the Law Council of Australia to have uniform federal legislation based on the New South Wales Act implemented nationally.<sup>9</sup>

The Australian approach stands as an example to limit liability using a statutory cap, a proposal rejected by the CBA BC Branch Committee.

## 12. LLP Legislation: Options, Implications and Recommendations

The options, implications and recommendations of LLP legislation will be considered by the LLP Committee.

A review of the literature discloses the following options:

- apply LLPs to only self-governing professions or to any partnership?
- require LLPs to register or not?
- make LLPs provide full or partial shield from liability?
- have special restrictions on property distributions for LLPs in the event of a liability claim?
- have a statutory provision that LLP partners' liability be limited to their interest in the LLP?

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<sup>8</sup> [Concerns Regarding the Limited Liability Partnerships Bill - 1999], available at the Law Society of England and Wales website, [http://www.lawsociety.org.uk/dcs/fourth\\_tier.asp?section\\_id=3063#5361](http://www.lawsociety.org.uk/dcs/fourth_tier.asp?section_id=3063#5361).

<sup>9</sup> The national Law Council of Australia policy is available on the Internet at <http://www.lawcouncil.asn.au/colpol.htm>. The New South Wales scheme of its Professional Standards Council: Solicitors Professional Standards Scheme is available on the Internet at [http://www.agd.nsw.gov.au/psc.nsf/pages/lawsoc\\_1](http://www.agd.nsw.gov.au/psc.nsf/pages/lawsoc_1).

- clarify that ordinary change in membership in an LLP is a dissolution or ongoing partnership for the purposes of claims against the LLP?
- tax the LLP as a partnership or as a corporation?
- require extra-provincial LLPs' liability determined by the host jurisdiction or the home jurisdiction?
- require minimum LLP insurance or not?

The pros and cons of each option will be considered. Jurisdictions applying each option will be summarized. Implications for British Columbia will be noted. Recommendations to the LLP Committee will be provided.

## 12.1 Option: Apply LLPs to only self-governing professions or to any partnership?

Some LLP legislation provide specific application to self-governing professions such as lawyers and accountants, while others take a broader view to permit an LLP to be formed by 2 or more persons in a partnership.

Yes, application limited to self-regulating professions

### *Pros*

- limited application easier to regulate in the public interest since already regulated;
- reduces risk of loss to public;
- reduces risk of loss of personal assets of innocent partners;
- allows for specialized partnerships, including multi-disciplinary partnerships;

### *Cons*

- unfair to limit the benefits of LLP to partnerships or businesses not regulated as a self-governing profession;
- unfairly restricts competition;

No, apply to all partnerships

### *Pros*

- flexible and accommodates large partnerships or businesses;
- accommodates firms doing business internationally;

### *Cons*

- increases regulation and cost to businesses;
- increase confusion by public whether it dealing with corporation, partnership or LLP;
- different levels of regulation for LLP, partnership or corporation;
- insurance may not be sufficient to meet any losses;

## *Jurisdictions Applying Only to Self-Governing Professions*

**Ontario:** Yes

**Alberta:** Yes

**ULCC:** No, apply to all partnerships registered as an LLP under relevant legislation (Partnership Act or originating statute)(section 1);

**UPA (US):** No, applies to a partnership which is an association of two or more persons to carry on as co-owners a business where "business" includes every trade, occupation, and profession (section 101);

**UK:** No, applies to two or more persons subscribing and registering an incorporation document (section 2).

## *Implications for BC*

The Canadian trend is to have incremental application to LLP legislation to self-governing professions only. There is an overriding concern to protect the public interest. Self-regulating professions already have mechanisms for discipline and compensation for losses arising out of negligence or misconduct of lawyers. The Committee Report recommended limited amendments to the *Partnership Act* as opposed to a broader LLP Act.

### *12.1.1 Recommendation(s)*

The LLP Committee consider limiting the application of LLP legislation to self-governing professions, beginning with lawyers and accountants, with amendments to the BC *Partnership Act*.

## **12.2 Option: Registration or Not?**

Some LLP legislation requires registration with a government registry as a condition of retaining limited liability. Some require only agreement by members of the LLP. In Canada, the legislative trend has been to require registration without the disclosure of financial information as is contemplated in the UK Bill and some of the states of the United States.

### *Registration*

#### *Pros*

- LLP registration similar to current requirements for registration of partnerships, companies and sole proprietorships;
- ease of operation;
- public is notified it is dealing with an LLP;

#### *Cons*

- mere proof of registration no guarantee to prevent loss by public by offending LLP;
- increase costs for registration and administrative burden on LLPs;

### *Jurisdictions Requiring Registration*

**Ontario:** No, but need to register the business name to do business;

- Alberta:** Yes, but Alberta has no comprehensive "business name" legislation;
- ULCC:** Not stated; does not recommend disclosing financial information as in the UK;
- UPA (US):** Yes, some states require disclosure of financial information;
- UK:** Yes, detailed financial disclosure requirements akin to those for companies.

### ***Implications for BC***

The *Partnership Act*, R.S.B.C. 1996, c. 348 provides for registration of business names for limited and general partnerships and proprietorships. The proposed Business Names Act (Discussion Paper only, not in force) proposes to rationalize and consolidate all business names (corporations, partnerships and sole proprietorships) into a single statute in order to prevent new businesses from having confusingly similar names and extend name protection to more than just incorporated company names filed with the Corporate Registry as is currently the case.<sup>10</sup>

Neither Ontario or Alberta require detailed financial disclosure like the UK Bill or some of the states of the United States.

#### **12.2.1 Recommendation(s)**

The LLP Committee adopt the Ontario model and not require registration of LLP per se but require name registration under the *Partnership Act* or a future unified *Business Names Act* as a condition to conducting business as an LLP.

### **12.3 Option: Full or Partial Shield from Liability?**

LLP legislation provides either a full or partial shield from liability. "Full shield" LLP legislation protects partners from personal liability for any duties of the LLP. This includes protection from liability for all acts for which innocent partners had:

- no knowledge; or
- no involvement.

"Partial shield" LLP legislation protects against personal vicarious liability for liabilities of the firm arising from negligent or otherwise wrongful acts or omissions of other members or employees of the firm in the provision of professional services while partners remain personally liable for the firm's ordinary contractual obligations, such as debts.

#### ***Full Shield***

##### ***Pros***

- similar to corporate limited liability;
- clear, no confusion between tort and contract liability;
- often LLP minimum insurance used to lessen losses due to negligence and fraud;
- trend in US states is for full shield;

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<sup>10</sup> Available on the Internet at [http://www.qp.gov.bc.ca/bcstats/96348\\_01.htm#089](http://www.qp.gov.bc.ca/bcstats/96348_01.htm#089).

- encourages business activity by reducing the threat of partners' loss of personal property;

### **Cons**

- may put public interest and safety at risk, especially for employee wage claims;
- limits rights of injured party to bring action to attach personal assets of offending LLP partners;
- unfair to protect LLPs while partnerships and sole proprietorships left unprotected;

### **Partial Shield**

#### **Pros**

- meets goals of protection from excessive liability while leaving ordinary contractual obligations alone;
- maintains right of injured party to bring action to attach personal assets of offending LLP partners;

#### **Cons**

- confusing and arbitrary distinctions between tortious and contractual liability;
- confusing for public to determine what assets are protected from liability;

### **Jurisdictions**

**Ontario:** Partial, for negligence and imposes vicarious liability on supervising partners for employee misconduct (sections 10.2 and 10.3);

**Alberta:** Partial and imposes liability on partners who are negligent in discharging supervisory responsibilities; (section 4);

**ULCC:** Full except for permitting personal liability on negligent supervising partners for employee misconduct (section 4);

**UPA (US):** Full (sections 306( c), 401 and 405);

**UK:** Partial (section 1, the extent of liability to be made in future regulations).

### **Implications for BC**

Ontario imposes vicarious personal liability on supervising partners. Alberta and the ULCC imposes personal liability on partners who are negligent in discharging supervisory responsibilities. Interests of fairness to the public and innocent partners recommend BC adopting the Alberta and ULCC approach.

#### **12.3.1 Recommendation(s)**

The LLP Committee should consider adopting a full-shield for limiting liability, including imposing personal liability on partners who are negligent in discharging supervisory responsibilities.

## 12.4 Option: Special Restrictions on Property Distributions or Not in the Event of a Liability Claim?

Restrictions on property distributions in the event of a liability claim are common in company law legislation in order to protect the company or limited partnership, investors and the public. These restrictions generally apply to matters such as:

- dividend payments;
- share redemptions; or
- conveyances; or reductions in capital.

The general law of voidable transactions, contained in similar fraudulent preference and fraudulent conveyance statutes across Canada, provides a tool for those to use with claims to recover property improperly distributed.

### *Special Restrictions on Property Distributions for LLPs*

#### **Pros**

- could be similar to restrictions imposed on companies or limited partnerships so law would be integrated;
- restrictions protect firm, investors and the public from loss;

#### **Cons**

- existing voidable transaction legislation and caselaw interpreting it is preferable to increased regulation in these special restrictions;
- unfair to provide greater protection to LLPs vs. ordinary partnerships;

### *Jurisdictions having Special Restrictions on Property Distributions in the Event of a Liability Claim*

**Ontario:** No;

**Alberta:** No;

**ULCC:** Yes, restrictions for LLPs akin to limited partnerships and corporations where the a wrongful distribution of LLP property to a partner, the partner receiving the distribution is liable to restore the property to the corporation, and partners who authorized the distribution are jointly and severally liable for any shortfall in the amount recovered from the partner receiving the distribution (section 5);

**UPA (US):** Yes (section 503);

**UK:** No.

### *Implications for BC*

Neither Alberta nor Ontario has special restrictions on distribution of LLP property in the event of a liability claim. The ULCC adopts a broader regulatory model. The new British Columbia *Company Act*, S.B.C. 1999, c. 27 (Bill 85) does not substantially change the

statutory restrictions of corporate property.<sup>11</sup> In the absence of statutory restrictions the general law of voidable transactions would apply.

#### **12.4.1 Recommendation(s)**

The LLP Committee should consider reviewing the issue of placing special statutory restrictions on property distributions in the event of a liability claim or having the general law of voidable transactions apply.

### **12.5 Option: Statutory Provision that LLP Partners' Liability Limited to Their Interest in the LLP?**

The ULCC adopts a specific provision stating that an LLP partners' liability is limited to their interest in the LLP.

#### ***Specific Provision that a LLP Partners' Liability is Limited to Their Interest in the LLP***

##### **Pros**

- makes explicit the underlying assumption that an LLP only protects a partner's non-partnership property;
- clarifies application of LLP and avoids confusion that require judicial interpretation to clarify;

##### **Cons**

- overly regulates;
- not needed, implication clear that an LLP provide protection only to the extent of a partner's interest in partnership;

#### ***Jurisdictions having Statutory Provision that LLP Partners' Liability Limited to Their Interest in the LLP?***

**Ontario:** No;

**Alberta:** No;

**ULCC:** Yes, section 2(1);

**UPA (US):** No;

**UK:** No.

#### ***Implications for BC***

Neither Alberta nor Ontario has an explicit statutory provision that LLP partners' liability is limited to their interest in the LLP. Neither does the UK Bill, nor the UPA.

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<sup>11</sup> Bill 85 was given Royal Assent in July 1999 and is expected to be in force in 2001.

## 12.5.1 Recommendation(s)

The LLP Committee should consider adopting the ULCC model to have an explicit statutory provision to clarify that an LLP partners' liability is limited to their interest in the LLP.

## 12.6 Option: Ordinary Change in Membership in LLP a Dissolution or Ongoing Partnership for the Purposes of Claims Against the LLP?

In Canada, partnerships are viewed generally as relationships of members, not as separate legal entities. Changes in the membership of the partnership may be technically dissolution of the old partnership and the creation of a new partnership. This is important when an action or claim is made against the partnership property, because in the time between when the action or claim is made and enforced, the partnership may have changed members and technically be a new membership without a legal obligation for the claim or action.

### *Change in Membership in LLP a Dissolution for the Purposes of Claims Against the LLP?*

#### **Pros**

- follows strict interpretation of partnership law;
- conforms to the theory that a partnership is not a separate legal entity like a company but a relationship of partners that change from time to time;

#### **Cons**

- unfair to creditors and public;
- strictly technical interpretation contrary to commercial and business practice;

### *Change in Membership in LLP No Effect to an Ongoing Partnership for the Purposes of Claims Against the LLP?*

#### **Pros**

- accords with commercial and business practice;
- fair to creditors and the public;
- ensures stability;

#### **Cons**

- imposes a corporate "separate entity" on partnerships more appropriate with companies and may cause confusion with creditors and the public
- when partnership is dissolved, may cause confusion if "entity theory" applied to claims;

### *Jurisdictions: Ordinary Change in Membership in LLP an Ongoing Partnership for the Purposes of Claims Against the LLP?*

**Ontario:** No;

**Alberta:** No;

**ULCC:** Yes (sections 6 and 7);

**UPA (US):** Yes, (section 201);

**UK:** Yes (sections 8 and 9).

### ***Implications for BC***

Neither Alberta nor Ontario has an explicit statutory provision that ordinary changes in membership in an LLP is an ongoing partnership for the purposes of claims against the LLP. The jurisdictions that do, ULCC, UPA and the UK, do so after having adopted the principle that the LLP is not a partnership per se, but a separate legal entity akin to a corporation.

#### **12.6.1 Recommendation(s)**

The LLP Committee should consider adopting the Alberta and Ontario approach unless it considers adopting the principle that a LLP is a separate legal entity. If so, then, for greater clarity, the LLP Committee should adopt the ULCC, UPA and UK models that provide that ordinary changes in membership in an LLP is an ongoing partnership for the purposes of claims against the LLP.

## **12.7 Option: Tax the LLP as a Partnership or as a Corporation?**

The UK Bill provides taxation of the LLP as a partnership for the purposes of income tax and capital gains, even though the LLP is created as a separate legal entity.

### ***Tax LLP as a Partnership?***

#### ***Pros***

- fair as it provides no tax advantage to LLPs compared with corporations, limited partnerships or general partnerships;
- clarifies relationship between taxation and limited liability to ensure no confusion;
- ensures individual partners are liable for income tax and capital gains;

#### ***Cons***

- unnecessarily imposes new rules and interpretations for those rules on already complex body of taxation law;
- law reform difficult to achieve in Canada since requires cooperation of provincial and federal government;

### ***Jurisdictions Requiring Registration***

**Ontario:** No;

**Alberta:** No;

**ULCC:** No;

**UPA (US):** No;

**UK:** Yes (section 10).

## *Implications for BC*

In Canada, taxation is both a federal and provincial matter. The UK Bill does not apply directly to Canada since the Bill is a national statute for the United Kingdom as a whole and not a federal state with division of powers like Canada. Specific provisions regarding Canadian federal income tax and capital gains may require an amendment to the federal *Income Tax Act*, which will take considerable time and effort, with a return that may not be worth the effort.

### **12.7.1 Recommendation(s)**

The LLP Committee should consider the taxation implications of LLPs but not adopt any legislative reform that would require extensive time and effort to effect amendments to both the federal and provincial law.

## **12.8 Option: Extra-Provincial LLPs should have Liability Determined by the Home Jurisdiction or the Host Jurisdiction?**

The majority of LLP legislation provide that LLPs should generally have liability issues determined by the home jurisdiction where the LLP was created, instead of the host jurisdiction where the LLP does business.

### *Liability Determined by Home Jurisdiction?*

#### **Pros**

- consistent with conflict of laws principles across different jurisdictions;
- does not duplicate regulation or impose an extra burden on LLPs;
- one set of legal rules is manageable for all extra-provincial LLPs;

#### **Cons**

- laws of home and host jurisdiction may be in conflict or may change in future to conflict;
- laws of host jurisdiction may provide greater protection to public than home jurisdiction;

### ***Jurisdictions where Home Jurisdiction Law Apply regarding Liability***

**Ontario:** Yes (section 44.4);

**Alberta:** Yes (section 8, new Part 2.1, section 79.996(1));

**ULCC:** Yes (section 8);

**UPA (US):** Yes (section 1101);

**UK:** Yes (section 10).

## *Implications for BC*

The trend in all relevant jurisdictions is to apply the law of the home jurisdiction of the LLP to determine questions of liability for an LLP operating extra-provincially. Statutory consistency across jurisdictions is a preferred law reform goal.

## 12.8.1 Recommendation(s)

The LLP Committee should consider adopting the rule that the law of the home jurisdiction of the LLP be applied to determine questions of liability for an LLP operating extra-provincially.

## 12.9 Option: Minimum LLP Insurance or not?

Some LLP legislation provides for minimum insurance to protect the public from losses arising out of misconduct by LLP partners.

### *Minimum Insurance Requirement*

#### *Pros*

- reduces risk of loss to public;
- increases trust in LLPs with insurance protection;
- reduces risk of loss of innocent partners' personal assets;

#### *Cons*

- insurance costs may be too high or subject to large fluctuations making cost untenable;
- requirement unfair to LLPs conducting business properly;
- minimums may be inadequate to cover losses;
- increases regulation and cost to businesses;

### *Jurisdictions Requiring Applying Minimum Insurance*

**Ontario:** Yes, set by Law Society of Upper Canada;

**Alberta:** Yes, set by Law Society of Alberta;

**ULCC:** Yes, set by regulator;

**UPA (US):** No;

**UK:** No.

### *Implications for BC*

Unlike in the United States, it is accepted in Canada that minimum insurance requirements are appropriate for self-regulating professions. The Law Society of Upper Canada has a minimum of \$1,000,000 per partner; the Law Society of Alberta will likely adopt a consistent minimum standard.

## 12.9.1 Recommendation(s)

The LLP Committee should consider supporting a requirement that BC lawyer LLPs have minimum insurance requirements set by the Law Society of British Columbia consistent with those set by the law societies in Alberta and Ontario.

## 13. Summary of LLP Legislation

### 13.1 Options, Implications and Recommendations

The LLP Committee is recommended to consider the following issues regarding LLP legislation for British Columbia.

#### 13.1.1 *Option: Apply LLPs to only self-governing professions or to any partnership?*

##### **Recommendation(s)**

The LLP Committee consider limiting the application of LLP legislation to self-governing professions, beginning with lawyers and accountants, with amendments to the B.C. *Partnership Act*.

#### 13.1.2 *Option: Registration or Not?*

##### **Recommendation(s)**

The LLP Committee adopt the Ontario model and not require registration of LLP per se but require name registration under the *Partnership Act* or a future unified *Business Names Act* as a condition to conducting business as an LLP.

#### 13.1.3 *Option: Full or Partial Shield from Liability?*

##### **Recommendation(s)**

The LLP Committee should consider adopting a full-shield for limiting liability, including imposing personal liability on partners who are negligent in discharging supervisory responsibilities.

#### 13.1.4 *Option: Special Restrictions on Property Distributions or Not in the Event of a Liability Claim?*

##### **Recommendation(s)**

The LLP Committee should consider reviewing the issue of placing special statutory restrictions on property distributions in the event of a liability claim or having the general law of voidable transactions apply.

#### 13.1.5 *Option: Statutory Provision that LLP Partners' Liability Limited to Their Interest in the LLP?*

##### **Recommendation(s)**

The LLP Committee should consider adopting the ULCC model to have an explicit statutory provision that LLP partners' liability is limited to their interest in the LLP.

#### 13.1.6 *Option: Ordinary Change in Membership in LLP a Dissolution or Ongoing Partnership for the Purposes of Claims Against the LLP?*

##### **Recommendation(s)**

The LLP Committee should consider adopting the Alberta and Ontario approach unless it considers adopting the principle that a LLP is a separate legal entity. If so, then, for greater clarity, the LLP Committee should adopt the ULCC, UPA and UK models that provide for ordinary changes in membership in an LLP as an ongoing partnership for the purposes of claims against the LLP.

**13.1.7 Option: Tax the LLP as a Partnership or a Corporation?**

**Recommendation(s)**

The LLP Committee should consider the taxation implications of LLPs but not adopt any legislative reform that would require extensive time and effort to effect amendments to both the federal and provincial law.

**13.1.8 Option: Extra-Provincial LLPs should have Liability Determined by the Host Jurisdiction or the Home Jurisdiction of the Extra-Provincial LLP?**

**Recommendation(s)**

The LLP Committee should consider adopting the rule that the law of the home jurisdiction of the LLP be applied to determine questions of liability for an LLP operating extra-provincially.

**13.1.9 Option: Minimum LLP Insurance or not?**

**Recommendation(s)**

Require BC lawyer LLPs to have minimum insurance requirements set by the Law Society of British Columbia consistent with those set by the law societies in Alberta and Ontario.

## 14. Sources Consulted

Alberta Law Reform Institute, Alberta Law Reform Institute website, 20 December 1999  
<http://www.law.ualberta.ca/alri/>.

Alberta Law Reform Institute, Limited Liability Partnerships and Other Hybrid Business Entities, Issues Paper No. 4 (Edmonton: The Institute, 1998).

American Bar Association, American Bar Association website, 20 December 1999  
<http://www.abanet.org>.

Bowes, Richard H., "Limited Liability Partnership," (August 1999) Uniform Law Conference of Canada website. 20 December 1999 <http://www.law.ualberta.ca/alri/ulc/99pro/ellp1.htm>.

British Columbia Government, [Ministry websites for Ministry of Finance and Corporate Relations, Small Business and Tourism, Attorney General] British Columbia Government website, 20 December 1999 <http://www.gov.bc.ca/>.

De Wit, Leon, "Interview with Leon De Wit Policy Director, Ministry of Finance and Corporate Relations British Columbia", December 16, 1999.

Federation of Law Societies, Federation of Law Societies website, 20 December 1999  
<http://flsc.org>.

---, "Annual Meeting Highlights: Report on MDPS," Federation of Law Societies website, 20 December 1999 <http://www.flsc.ca/PDFDocuments/ReportMDPAug99.pdf>

Law Council of Australia, "National Co-operation Project: Capping of Liability,"

Law Council of Australia website, 20 December 1999 <http://www.lawcouncil.asn.au/colpol.htm>.

Law Society of Alberta, Law Society of Alberta website, 20 December 1999  
<http://www.lawsocietyalberta.com/webresources.htm>.

Law Society of British Columbia, Law Society of British Columbia website, 20 December 1999  
<http://www.lsbcc.org>.

Law Society of England and Wales, [Concerns Regarding the Limited Liability Partnerships Bill - 1999]. Law Society of England and Wales website. 20 December 1999  
[http://www.lawsociety.org.uk/dcs/fourth\\_tier.asp?section\\_id=3063#5361](http://www.lawsociety.org.uk/dcs/fourth_tier.asp?section_id=3063#5361).

Law Society of Upper Canada, Law Society of Upper Canada website, 20 December 1999,  
<http://lsuc.on.ca>.

---, "Explanatory Information on Limited Liability Partnerships for Lawyers," Law Society of Upper Canada website, 20 December 1999, [http://www.lsuc.on.ca/services/llp\\_info\\_en.shtml](http://www.lsuc.on.ca/services/llp_info_en.shtml).

Law Society of Western Australia, "Position Paper: Flexible Practice Structures for Lawyers," (April 1999) Law Society of Western Australia website. 20 December 1999  
[http://www.lawsocietywa.asn.au/public\\_discuss.htm](http://www.lawsocietywa.asn.au/public_discuss.htm).

Legislative Assembly of British Columbia, "1999 Revised Statutes of British Columbia", Legislative Assembly of British Columbia website, 20 December 1999 <http://www.legis.bc.ca>.

Uniform Law Conference of Canada, "1999 Resolutions: Limited Liability Partnership Act", Uniform Law Conference of Canada website. 20 December 1999  
<http://www.law.ualberta.ca/alri/ulc/99pro/ecivres99.htm>.

Vogel, Barry. "Interview with Barry Vogel, Law Society of Alberta", December 15, 1999.

## 15. Statutes and Bills

### **Limited Liability Partnerships Bill (UK)**

United Kingdom, *Limited Liability Partnerships Bill*. House of Lords website, 20 December 1999  
<http://www.publications.parliament.uk/pa/ld199900/ldbills/006/en/00006x--.htm>.

----, "Explanatory Notes to LLP Bill". House of Lords website 20 December 1999  
<http://www.publications.parliament.uk/pa/ld199900/ldbills/006/en/00006x--.htm>.

### **Partnership Act (Alberta)**

Alberta Statutes and Regulations, *Partnership Act*, S.A. 1999, c. 27 (Bill 34) (Royal Assent May 27, 1999, unofficial version). Alberta Statutes and Regulations website, 20 December 1999  
<http://www.assembly.ab.ca>. (Click on Bills and Amendments).

### **Partnership Act (British Columbia)**

British Columbia Statutes, *Partnership Act*, R.S.B.C. 1996, c. 348 (unofficial version). British Columbia Statutes website, 20 December 1999 [http://www.qp.gov.bc.ca/bcstats/96348\\_01.htm#089](http://www.qp.gov.bc.ca/bcstats/96348_01.htm#089).

### **Partnership Act (Ontario)**

Ontario Statutes and Regulations, *Partnership Act*, R.S.O. 1990, c. P. 5 as amended by S.O. 1998, c. 2 and in force July 1998 (Unofficial version, current only to July 1, 1998). Ontario Statutes and Regulations website, 20 December 1999 <http://209.195.107.57/en/index.html>. (Click on Statutes of Ontario)

***Uniform Limited Liability Partnership Act (Uniform Law Conference of Canada)***

Uniform Law Conference of Canada, *Uniform Limited Liability Partnership Act*, Uniform Law Conference of Canada website, 20 December 1999  
<http://www.law.ualberta.ca/alri/ulc/99pro/ellpact.htm>.

***Uniform Partnership Act, 1997 (US)***

National Conference of Commissioners on Uniform State Laws, *Uniform Partnership Act (1997)*, National Conference of Commissioners on Uniform State Laws website, 20 December 1999  
[http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm). (Click on Final Acts).