Reset

Limited Liability Partnerships

Discussion Report

New Nouveau Brunswick

Service New Brunswick
Services Nouveau-Brunswick

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Executive Summary

This Report has been prepared to facilitate discussions with interested stakeholders and the general public regarding limited liability partnerships (LLPs). Service New Brunswick has been charged with the responsibility to seek public input in order to provide policy recommendations to government.

Section 1 sets out the two basic policy issues of the Report for discussion and feedback. First – Should New Brunswick enact limited liability partnership legislation? Second – If so, what particular legislative provisions should govern the creation, operation and registration of LLPs?

Section 2 discusses the unique characteristics of a limited liability partnership from that of a general partnership. The key difference is that in a negligence action against the LLP, a plaintiff can enforce a judgment against only the partnership assets and the personal assets of the negligent partner. The plaintiff will no longer be able to go after the personal assets of the non-negligent partner. This type of legislation is called the "partial shield" model, as it provides a shield to the partners in relation to the negligence of another partner. The partners continue to be personally liable for all other debts and obligations of the LLP. The negligent partner will continue to be personally liable for his or her own negligence.

Some jurisdictions have further broadened the shield so that a partner is not personally liable for any debts and liabilities of the partnership. The partners' shield is similar to the shield provided under corporate law to shareholders of a corporation. This type of legislation is called the "full shield" model. It should be noted the negligent partner will continue to be personally liable for his or her own negligence.

Sections 3, 4 and 5 of the Report set out the development of LLP legislation in United States, Canada and other jurisdictions. The push for LLP legislation has emanated from professional groups such as accountants and lawyers that have traditionally practised in general partnerships. Partners have become increasingly concerned over their personal exposure to clients and third parties and their ability to insure their professional risks. They question why a partner who is not involved in a negligent act should continue to be personally liable for the negligence of another partner. Alberta, Ontario, Saskatchewan and most, if not all, states in the United States have enacted LLP legislation to address in part such concerns.

Section 6 discusses whether New Brunswick should enact LLP legislation. Is there an apparent need for such legislation in New Brunswick? LLP legislation will have the affect of changing the risk allocation between the partners in a partnership and those that deal with the partnership. At a minimum, the plaintiff will no longer be able to go after the personal assets of the non-negligent partner, but will have only the partnership assets and the personal assets of the negligent partner to go after. Is this shift in risk allocation required for today's environment?

Section 7 sets out major policy issues that need to be resolved for any LLP legislative package for New Brunswick. Certain issues may be viewed as more fundamental, while others may be more ancillary. The intent is to discuss and solicit feedback on important policy issues that relate to the creation, operation and registration of LLPs.

Section 7.1 discusses whether New Brunswick should limit the availability of LLPs to certain types of activities or professions or permit LLPs to carry on any business activity.

Sections 7.2 to 7.5 examine what type of liability shield should exist for a partner in a LLP. What will be the characteristics of the shield in relation to the actions of another partner? Will the shield be only in relation to negligence of another partner or be more inclusive? Will a shield exist on a similar basis in relation to actions by an employee of the partnership? Should a partner's personal liability for the negligence of an employee be dependent on whether the partner supervises that employee? Should the supervisory connection be sufficient to make the partner liable in all cases even if the partner performed those functions competently?

These Sections further discuss whether New Brunswick should follow a partial shield or full shield model approach. Which approach is best for New Brunswick? Under the later model, a partner is not normally personally liable for any debt and liabilities of the LLP. Under either model, the negligent partner will continue to be personally liable for his or her own negligence. Under either model, the partnership's assets are available to satisfy a debt or liability of the partnership. Are provisions necessary to restrict the distribution of partnership property to partners and if so, are exceptions needed?

Sections 7.6 to 7.8 deal with the major issue whether mandatory insurance should be required for LLPs as a counterbalance to allowing certain professional groups to practice as LLPs. Insurance is perceived to act as an offset given the plaintiff will no longer be able to go after the personal assets of the non-negligent partner. If insurance is required, what professional groups will be subject to the mandatory requirement? What will be the specific characteristics of mandatory insurance and will it be the same for each type of professional LLP? Who will make that determination?

Sections 7.9 to 7.13 focus on registration related issues. How will LLPs be created in New Brunswick and how will extra-provincial LLPs operate in New Brunswick? What circumstances, if any, will partners not be able to receive the protection of the shield? What happens when a LLP is not in compliance with the registration requirements? Will the effect of the shield in New Brunswick of an extra-provincial LLP be identical to a New Brunswick LLP? How will an existing partnership become a LLP and will it be required to give notice to its existing clients? What system will be put in place to disclose who are the partners in any LLP operating in New Brunswick? What will be the requirement for "LLP" to be in the name of an LLP that operates in New Brunswick?

Section 7.14 requests feedback to identify other issues that should be considered in relation to LLPs.

The Report attempts to cover the major public policy topics that relate to LLPs. Public input on these and any related issues is important in order to bring forward policy recommendation to government. Additional copies of the Report are available on request and is available also at www.snb.ca

We encourage interested parties to provide their feedback by June 30, 2002. Comments can be sent to:

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Corporate Affairs Branch
Attention: Charles S. McAllister
PO Box 1998
Fredericton, NB E3B 5G4

Tel.: (506) 453-3860
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You may provide your response to this Discussion Report by:

① **Sending Back the Report and any additional comments**

This Report has been prepared so you can provide your response directly in the Report.
Please identify yourself so we may contact you for further information, if necessary.

Name _____
Name of organization _____
_____
Address _____
_____
_____
Phone # _____
e-mail address _____

② **Sending Back a Concise Survey Response Form with any additional comments**

A concise survey response form is available for download at www.snb.ca. This Form can be printed out and completed. Alternatively, you may complete the Response Form on-line.

1. Introduction

This Discussion Report has been prepared by the Corporate Affairs Branch of Service New Brunswick in order to facilitate discussions with interested stakeholders and the public regarding limited liability partnerships (LLPs). Two basic issues are dealt with in this report:

1. Should New Brunswick enact LLP legislation?

2. If legislation is to be enacted, what legislative provisions should there be to govern the creation and operation of LLPs in New Brunswick?

2. What is a limited liability partnership?

New Brunswick has legislation governing general partnerships. The Partnership Act has provisions regarding the nature of a partnership, the legal relation of partners to each other and to third parties and the dissolution of a partnership. The Act is very similar to those in other Canadian jurisdictions. A partnership is not a legal entity separate from its partners. Along with the assets of the partnership being available to satisfy debts and liabilities of the partnership, each partner is liable to the full extent of his personal assets for debts and liabilities of the partnership business as provided in the Partnership Act.[1]

The distinguishing characteristic of a LLP from a general partnership is that in an action regarding the negligence or wrongful act of a partner, a plaintiff can enforce a judgment against only the partnership assets and the personal assets of the negligent partner[2]. The personal assets of the non-negligent partners are not available to satisfy the judgment. LLP legislation with this characteristic is referred to as the "partial shield" model. Such legislation also addresses the issue as to whether a partner will be personally liable for the actions of an employee of partnership.

Some jurisdictions have further broadened the "shield" so that the personal assets of partners are not available to satisfy ordinary trade debts and liabilities of the partnership. The assets of the partnership will still be available to satisfy a judgment against the partnership. This type of LLP legislation is referred to as the "full shield" model.

3. United States Initiatives

The first jurisdiction to enact LLP legislation in North America was Texas in 1995. As of 2001, most, if not all, states in the United States have enacted LLP legislation, with at least one-half enacting "full shield" LLP legislation. The push to enact has emanated from professionals (accountants and lawyers) and their respective associations. In particular, accountants have been concerned over their liability exposure to third parties, a perceived insurance crisis in insuring their

professional risks and their inability (in some jurisdictions) to practice in a corporate form of organization (as opposed to a partnership form). LLPs are a means to reduce such concerns.

It is our understanding that all the major accounting firms and many law firms in the United States are now organized as LLPs.

4. Canadian Initiatives

With the flurry of legislative enactment in the United States, stakeholder groups in Canada became interested in the potential benefits of LLP legislation. This section delineates the major Canadian initiatives to date on this subject.

4.1 Standing Senate Committee on Banking, Trade and Commerce

On March 1998, the Senate Committee released a report entitled "Joint and Several Liability and Professional Defendants". Alongside other recommendations, the Committee urged "the provincial and territorial governments to take the necessary steps to provide for the creation of limited liability partnerships and/or corporations by professionals who wish to practice within such structures".[3]

The Committee very much focussed on auditor's liability. The accounting profession maintained before the Committee that auditors were facing a liability crisis brought on, for the most part, by the application of the rule of joint and several liability (as co-defendants in a legal suit). Along with responding to these concerns in its recommendations, the Committee stated as follows:

> *In Canada, professionals such as lawyers and accountants must practise largely in a partnership structure. As a result, such professionals are faced with liability at two levels – as co-defendants and as partners. Liability at the partnership level is joint and several amongst the partners and exposes the assets of the partnership and those of the individual partners to the liability of the firm. Each partner in a firm is jointly and severally liable with the other partners if a claim for damages based on negligence is made against any of the firm's partners. The personal assets of a partner can be used to satisfy a judgment against a firm even if the partner is not actually responsible for the loss…*
>
> *Many jurisdictions have concluded that it is appropriate for professional firms to limit their liability. In the United States, in particular, the move to professional corporations, limited liability companies and limited liability partnerships is well advanced, with most states having enacted legislation to permit professionals to operate within these frameworks. …*

One of the most popular structures for limiting liability is the limited liability partnership (LLP). Limited liability partnerships allow firms to retain their partnership structure while protecting the personal assets of partners who have no involvement in a negligence action. The firm is liable for the acts committed by its members in the ordinary course of the firm's business, but individual members, while continuing to maintain responsibility for their own acts and for those over which they have a direct supervisory role or knowledge, will not be liable for each other's acts. …

Although limiting liability at the partnership level is not within the jurisdiction of Parliament, the Committee believes it is an issue worthy of comment in this report. The Committee has benefited from the testimony of Ms. Alison Manzer, who first appeared before the Committee in October 1996 with the delegation from the Canadian Bar Association. At that time, Ms. Manzer described the evolution of liability amongst professional partners as follows:

> *The traditional professions of law, medicine and accounting have historically attached responsibility and care beyond that of the provider of other services and consequently face liability for the results of their professional advice and business activities beyond that generally imposed on the businessperson. These consequences were based on a client relationship, and the importance of the services to the client who often required special protection.*
>
> *Joint and several liability for members of professional firms emerged at the time when professionals had responsibility only to their clients. Professional responsibility has evolved by the imposition of tort liability, elimination of contributory negligence bars to a plaintiff's action and expanded recognition of responsibility to persons other than clients. Professionals now face potential liability from a variety of sources, including third parties, knowingly or unknowingly relying on the professional work. In addition, the size of awards has increased dramatically.*
>
> *The issue is whether liability of this nature, based on a unique relationship with a learned professional, remains valid. Most occupational groups now recognized as professional do not face the liability issues of the traditional professions. They are often permitted to practice in an incorporated or other limited liability business structure, thus restricting individual liability to their direct professional activity. They are not exposed to liability for the activities of their partners.*[4]

The Committee concluded that professionals should be able to practice in LLPs and urged provincial and territorial governments to enact legislation. The Committee stated the following:

> *The Committee questions whether there remain good and sufficient reasons for requiring certain professionals to practise within a traditional partnership structure. Why should partners who are not involved in a negligent act be personally exposed to liability arising from the activities of their negligent partners? Why must the traditional professions such as law, accounting and medicine continue to face exposure to personal liability for the activities of their negligent partners while other professionals can limit their exposure through incorporation or some other limited liability structure? To avoid facing the possibility of losing their personal assets to satisfy a judgment against their firm or a negligent partner, professionals will often take steps to limit their personal liability by making themselves judgment-proof. Why should some professionals feel compelled to take these steps to protect their personal assets?*
>
> *The CICA expressed its enthusiasm for limited liability partnerships as a means of protecting the personal assets of partners who are not involved in a claim before the courts. It pointed out that*
>
> > *[T]he one area that will help somewhat in the joint and several issue is that lawyers for plaintiffs use the threat of going to a partner's personal assets as one of the bargaining chips in getting settlements. … There is no question that lawyers for plaintiffs have threatened that they will go right through the partnership into a partner's personal assets…*
>
> *The Committee believes that structures such as limited liability partnerships should be available to professionals who wish to limit their personal liability. It wishes to stress that within the confines of these structures, professionals should continue to maintain responsibility for their own actions and for the actions of others over which they have a direct supervisory role or knowledge.* [5]

4.2 Ontario, Alberta and Saskatchewan

Ontario was the first Canadian jurisdiction to enact LLP legislation in 1998. Alberta and Saskatchewan have enacted LLP legislation in 1999 and 2001 respectively.

4.3 Alberta Law Reform Institute

The Alberta Law Reform Institute issued a Final Report on Limited Liability Partnerships in April 1999. It was preceded by an Issues Paper (March 1998) as well as a Summary Report (December 1998).

The Final Report is perhaps the definitive Canadian discussion document on limited liability partnerships. It is an invaluable resource in understanding LLPs and related policy issues/options for consideration. The Final Report is available on the Internet.[6]

4.4 Uniform Law Conference of Canada

The Uniform Law Conference of Canada is devoted to harmonizing the Canadian statute law where harmony is beneficial. It prepares uniform or model statutes that it recommends be considered for enactment.

In August 1999, the Conference produced a LLP Model Act. This does not necessarily mean the Conference "endorsed" all provisions in the Model Act. The Conference has made it available as a model that could be followed. The Model Act and discussion report are available on the Internet.[7]

5. Other Jurisdictions' Initiatives

It is our understanding other jurisdictions have examined or have enacted provisions that deal with LLPs. We have not embarked on a comparison of these initiatives.

We note Great Britain enacted LLP legislation in 2000. Their legislation treats the LLP as a separate legal entity apart from its partners. This is a significant difference to Canadian and United States initiatives that continue the concept the LLP is only a variation of a partnership and thus, not a separate legal entity. Due to this, Great Britain's legislation must address policy issues that arise due to the approach – termination of the old partnership, transfer of assets to the LLP, accounting and taxation matters, etc.

Sections 6 and 7 of the Report discuss LLP policy issues in the context of the Canadian and United States legislative environment.

6. Should New Brunswick Enact LLP Legislation?

For some stakeholder groups, in particular accountants and lawyers, real or perceived benefits exist to be able to practice as a LLP. This is tied into the historical reasons for the development of LLPs including concern over their liability exposure to clients and third parties, the escalation in the dollar amount of

judgments, the imposition of joint and several liability on co-defendants and a perceived insurance crisis in insuring their professional risks. In today's insurance environment, some risk may not be insurable or costs to insure are considered prohibitive. These concerns will not all be eliminated by the enactment of LLP legislation. Nevertheless, the Senate Committee viewed such legislation as one means to mitigate these concerns.

LLP legislation has the affect of changing the risk allocation from the status quo situation. With a partial shield LLP model, the plaintiff will no longer be able to go after the personal assets of the non-negligent partner, but will have only the partnership assets and the personal assets of the negligent partner to go after. One may ask whether the assets of a partnership will be sufficient to cover a judgment? What happens if the judgment is not covered by any insurance policy that the firm may have or is required to have or if the judgment exceeds such insurance amount? With a full shield LLP model, the liability shield for partners is broadened so that the partner's personal assets will not be available to satisfy any debts and liabilities of the partnership.

One may conclude that if benefits exist for professionals to practice as LLPs, then a corresponding disadvantage must exist for clients of the LLPs. Certainly, there is a change in the risk allocation between the parties. But aside from the effect on individual cases, one may very well debate the true macroeconomic impact of having or not having LLP legislation. Does the current legal situation create impediments to the efficient and effective delivery of professional services to the business community and the public? Will LLP legislation improve the situation so that not only is there a benefit to the professional but a global benefit to the public?

We are not aware of any relevant empirical studies that have analysed the risk allocation impact of LLPs nor the economic consequences of LLP legislation. For example, are all plaintiffs really disadvantaged or are only "large judgment" plaintiffs disadvantaged by not being able to go after the personal assets of the non-negligent partner. Are large judgment plaintiffs always "sophisticated" in knowledge of the risk and in ability to absorb financial losses themselves? Will the reduction of a partner's personal liability exposure impact the costing structure of professional fees?

In any LLP model, the plaintiff against a negligent partner is no worse off than if the partner was practising alone as a sole proprietor or as a corporation. Likewise, ordinary trade creditors of the LLP are no worse off than they would be if they were dealing with a corporation. In New Brunswick, many professionals are able to practice within a corporation, thus taking advantage of the limited liability characteristics of a corporation. Many professionals who have this option still continue to operate in a partnership due to other beneficial attributes of a partnership (management structure, taxation structure, etc.). Many jurisdictions

have imposed mandatory insurance requirements on LLPs that practice a profession to counterbalance risk allocation concerns.

Proponents for LLPs raise what they believe is a basic question of fairness. As mentioned in the Alberta Law Reform Institute Report:

> *It is argued that it is unfair and contrary to the public interest that professionals are required to practise in firms in which the personal assets of every owner are answerable for all claims against the firm. It is particularly unfair and counterproductive, it is argued, that the personal assets of a member of a professional firm should be answerable for malpractice claims that arose out of an engagement in which that particular individual has no personal involvement. Professionals, the argument continues, should be able to practise in firms whose members would be shielded from personal liability of other members, employees or representatives of the firm. Only those members of the firm who are personally implicated in the wrongful acts or omissions should be subject to personal liability for the firm's malpractice liability.* [8]

Aside from the direct benefits to certain stakeholders and the change to risk allocation, it is difficult to forecast with certainty the economic impact of having or not having LLP legislation in New Brunswick. Is it useful to be in sync with the trend towards LLPs? Will it result a better business environment for New Brunswick? Will it attract businesses to create New Brunswick LLPs instead of LLPs in their home jurisdiction?

Presently, Alberta, Ontario, and Saskatchewan are the only Canadian jurisdictions that have enacted LLP legislation. It is foreseeable some other provinces will follow, but we can only speculate as to when.

At this point in time, we wish to obtain feedback on whether New Brunswick should enact LLP legislation. Certain stakeholders may wish to review the entire Report prior to giving feedback in this section.

1. Should New Brunswick enact LLP legislation?

☐ Yes ☐ No

Reason for response _____

_____

_____

Any qualifications to your response or other comments_____

_____

_____

2. If New Brunswick decides to enact LLP legislation, what type of priority should government put on its enactment?

☐ High ☐ Medium ☐ Low

Reason for response _____
_____
_____

7 Major Policy Issues

7.1 Who Can Use LLPs?

The impetus for the creation of LLPs has been certain professional groups – accountants and lawyers. Initially, LLP statutes in the United States limited the use of LLPs to self-governing groups. Ontario, Alberta and Saskatchewan have limited the use of LLPs to one or more traditional professional groups (e.g. accountants, doctors, lawyers, etc.). It would seem those provinces will add professional groups as they demonstrate a need for the liability protection afforded by a LLP.

On the other hand, the Uniform Law Conference of Canada and the Alberta Law Reform Institute saw no compelling reason for limiting the availability of LLPs to certain types of activities or professions. Certainly, there are fewer public policy issues surrounding a LLP that operate a business than practice a profession. In the United States, most states permit LLPs to carry on any business activity.

3. Should provisions limit the availability of LLPs to certain activities and professions?

☐ Yes ☐ No
Reason for response _____
_____

If yes, what activities and professions should be able to use LLPs?_____
_____
_____

Reason for response _____
_____
_____

If a decision is made that professionals are able to practise in LLPs, there may be differences of opinion whether the governing Acts of such professions presently would permit it. Ontario legislative provisions state that a LLP cannot practice a profession unless the governing Act of the profession expressly permits a LLP to practice the profession. Complementary amendments to the governing Acts of the relevant professional associations were required. Alberta and Saskatchewan chose to identify eligible professions and to indicate they are able to practice as a LLP unless the governing body passes a rule or by-law prohibiting its members from practising as a LLP. Both approaches have their advantages and disadvantages.

4. Do you favour one legislative approach over the other?

☐ Yes ☐ No

If so, indicate which approach and why? _____

_____

_____

If there is another approach you wish to suggest, please specify.

_____

_____

5. There is a trend for different professionals such as accountants and lawyers to join together in multi-disciplinary firms to provide services to clients. Are there particular issues that any LLP legislation would have to address for any multi-disciplinary LLP?

☐ Yes ☐ No

Reason for response _____

_____

7.2 Partner's Liability for Another Partner's Actions

In a general partnership, a partner's personal assets are available to satisfy a judgment against the partnership. In a LLP, a partner's personal assets will not be available to satisfy a judgment against the partnership concerning the negligence of another partner. Under both scenarios, the partnership's assets and the personal assets of the negligent partner are available to satisfy the judgment against the partnership.

In New Brunswick, along with being able to practise as a sole proprietor or in a general partnership, many professionals are able to practice through a corporation (e.g. chartered accountants, doctors, lawyers, etc.). The governing Acts of such professions address the liability of its members who practice through a corporation[9]. As a minimum, the negligent member who practices through a

corporation will be personally liable. In most cases, the non-negligent member in the corporation will not be personally liable.

Historically, the LLP evolved as an initiative to eliminate the innocent partner's liability for the negligent acts and omissions of another partner. The Ontario Act maintains this focus, creating a "shield" from liability for the negligent acts or omissions of another partner.

The trend in the United States is to broaden the shield, so as to cover as well actions relating to malpractice and misconduct by another partner. This trend may have evolved over concerns that the negligence benchmark would continue to lead to disputes and litigation whether the actions by the partner were negligent or not. A claimant may argue a partner's actions constituted "malpractice" or "misconduct" instead of negligence so as to be able to make the other partners liable as well.

Alberta has followed the broader approach, excluding liability in relation to "negligence, wrongful act or omission, malpractice or misconduct". This shield results in a partner not being liable for the theft, fraudulent acts, misappropriation of trust funds, malpractice and other misconduct by another partner. In all cases, the assets of the partnership and the personal assets of the offending partner are available to satisfy a judgment.

6. Should a partner's exclusion from liability for the actions of another partner be based on:

☐ the negligent act or omission of the other partner (Ontario approach)
☐ the negligence, wrongful act, malpractice or misconduct of the other partner (Alberta approach)

Reason for response _____
_____
_____

If there is a different approach you wish to suggest, please specify _____
_____
_____

7.3 Partner's Liability for an Employee's Actions

A partnership is responsible for the actions and omissions of its employees and agents (hereafter referred to as "employee") that happen in the normal course of its business activities. This is similar to the responsibility a corporation has for its employees and agents. In either case, the partnership's assets or the corporation's assets are available to satisfy a judgment against the partnership or corporation.

In a general partnership, the personal assets of a partner are available to satisfy a judgment against a partnership for the acts and omissions of its employees. The "partner" within a corporation does not have this exposure.

It would seem most LLP statutes in the United States create a shield for a partner in relation to acts or omissions of employees except where there is a direct supervisory connection. That is, the partner will continue to be personally liable in relation to employees that they directly supervise. Ontario and Alberta follow this general approach.

Creating a shield for a partner in relation to acts or omissions of employees is somewhat a logical extension of whether a partner should be liable for the acts or omissions of another partner. Should a partner be liable for the negligence of an employee that the partner may have had no contact with? Why should the partner's personal assets be available whereas such exposure would not exist if the partnership were a corporation?

The above arguments seem to have swayed most jurisdictions to provide a shield to a partner in relation to the acts or omissions of an employee on a similar basis to what they have done vis-à-vis a partner's liability for another partner's acts and omissions. Nevertheless, most have created an exception to the shield in relation to employees a partner directly supervises.

The approach of having partners liable for those that they directly supervise is not without debate as to its merits. The Alberta Law Reform Institute Report discussed this issue:

> *The liability of supervisors is a more interesting question. As mentioned earlier in this chapter, LLP statutes … frequently impose what amounts to vicarious liability on supervising partners. The Ontario statute, for example, provides as follows.*
>
> > *[The liability shield] does not affect the liability of a partner in a limited liability partnership for the partner's own negligence or the negligence of a person under the partner's direct supervision or control.*
>
> *Given that professionals are going to be permitted to practise in limited liability firms, we do not agree that it is appropriate or useful to impose vicarious liability on partners merely because they happen to be supervising the person who is actually guilty of a negligent or otherwise wrongful act or omission. In fact, we think it may be counterproductive to do so.*
>
> *We continue to have the concern about imposing vicarious liability on supervising partners that we expressed in the issues paper:*

> *… Given that direct supervisors are personally responsible for the sins of their subordinates, who would want to be a supervisor? To a certain extent, there could be a divergence of interest between the firm, as a collective, and its individual members. The firm, as a collective, would have an incentive to adequately monitor and supervise. But individual members of the firm would have a disincentive to assume those roles.*
>
> *Individual members of the LLP would have an incentive to avoid supervisory responsibilities and to know as little as possible about what other members of the firm are doing, so as to minimize the potential for guilt (and personal liability) by association…*
>
> *We believe that it will be more efficacious to impose liability on members of limited liability firms who are negligent in discharging supervisory responsibilities or who are negligent in failing to supervise the persons who are actually doing the work. This is the approach taken in some US states.*[10]

In Ontario, once the supervisory connection has been established, that supervising partner will be held liable. In Alberta and most United States jurisdictions, the additional requirement is that the particular supervising partner failed to provide such adequate and competent supervision as would normally be required in those circumstances.

7. Should there be a shield to a partner of a LLP so that the partner is not normally liable for the acts or omissions of employees and agents?

☐ Yes (Alberta and Ontario approach)
☐ No
Reason for response _____
_____
_____
Other suggested approach or comment _____
_____
_____

In most jurisdictions that provide a shield so that a partner is not liable for the acts or omissions of employees and agents, an exception is created to continue to make a partner liable where the partner is directly supervising the employee or agent. At least two variations on this exist.

Should the supervising partner be held liable for the acts and omissions of employees and agents

☐ based strictly on the fact the partner has supervised the employee or agent (Ontario approach)
☐ based on the fact the partner has supervised the employee or agent and has failed to provide such adequate and competent supervision as would normally be expected of a partner in those circumstances (Alberta approach)

Reason for response _____
_____
_____
Other suggested approach or other comment _____
_____
_____

Under either scenario, where provisions make a partner liable for the acts or omissions of an employee, an issue arises as to the scope of the acts or omissions that bring about liability. This is somewhat analogous to Question #6 on whether the focus is on negligent acts or a broader scope of acts which include negligence, malpractice or misconduct (which may include fraudulent acts, theft and misappropriation of trust funds).

8. Should the supervising partner's liability be in relation to

☐ negligent acts or omissions of the employee

☐ the negligence, wrongful act, malpractice or misconduct of the employee

Reason for response _____

_____

Other suggested approach or comment _____

_____

7.4 Partial or Full Liability Shield

The partial shield model refers to LLP legislation that shields the non-negligent partner from liability created by a negligent partner or employee/agent, but leaves the partner liable for all other type of debts and liabilities of the partnership. Sections 7.2 and 7.3 addressed the above characteristics of partial shield LLPs. The shield is basically in relation to professional malpractice, i.e. the negligence or "torts" of the partnership while carrying on its practice.

Under the full shield model, the shield is broadened to cover all debts and liabilities of the partnership. The partner's shield is similar to the shield a shareholder has in regards to the debts and liabilities of the corporation. Creditors of the partnership would only be able to go after the partnership assets, not the personal assets of the partners.

The argument for a full shield LLP model is that it makes a clearer and simpler demarcation line as to when limited liability for a partner accrues. It puts the LLP on the same footing as a corporation as to its limited liability characteristics.

An example of making a clearer demarcation line is in relation to a claim against a partnership that can "on the facts" be based either in negligence or breach of a contract to provide professional services. If the claim is proceeded with based on breach of contract, all partners in a partial shield LLP will be held liable for the breach even though they played no role in the breach of contract. If the claim is proceeded with on the basis of negligence, the non-negligent partners would not be personally liable for the negligence of another partner. Under the partial shield model, partners will have uncertainty as to whether the shield is effective in all cases relating to the delivery of professional services.

As to putting the LLP on the same footing as a corporation, proponents argue that a plaintiff or creditor of a full shield LLP is no worse than when dealing with a corporation. Further, in many circumstances, partners have acquired the benefit of limited liability with trade creditors in any event. Partnerships very often create management corporations to manage the administrative operation of the partnership (e.g. rent, supplies). A trade creditor's contractual dealing may be with the management corporation not with the partnership per se.

Under either model, the shield does not relieve the personal liability a negligent partner has. That is, the partnership's assets and the personal assets of the negligent partner will be available to satisfy a judgment against the partnership for a partner's negligence. As to an employee's negligence, one would look to the partnership's assets and to that employee's personal assets.

In the United States, half the jurisdictions are partial shield, half are full shield with the more recent trend towards the full shield approach. Ontario and Alberta have enacted LLP legislation with a partial shield approach. The Alberta Law Reform Institute favoured a full shield approach. The Model Act and the Saskatchewan Act are full shield approaches.

9. Which approach should New Brunswick follow for LLP legislation?

☐ partial shield model
☐ full shield model
Reason for response _____
_____
_____
Other suggestions _____
_____

The full shield model equates partners as shareholders and attempts to put them on the same liability level - i.e. limited. Partners however are also managers of the partnership, similar to directors of a corporation. Various pieces of legislation in New Brunswick, Canada and other jurisdictions impose statutory liabilities on directors (E.g. Canada Pension, unemployment insurance and environmental legislation). One would argue that a partner who is a manager of a partnership should have no less statutory responsibility than a director of a corporation. Issues arise as to whether one can differentiate partners so to attach "director" liability on some partners and not on other partners. We note the Model Act and the Saskatchewan Act make all partners of a full shield LLP liable for any partnership obligations which they would be liable if the partnership were a corporation of which they were directors.

10. If New Brunswick follows a full shield LLP approach, should all partners be liable for partnership obligations for which they would be liable if the partnership were a corporation of which they were directors?

☐ Yes ☐ No
Reason for response _____
_____
Other suggestions _____
_____

7.5 Distribution of Partnership Property to Partners

An issue arises as to the extent a LLP should be able to distribute its property to its partners. Corporate law statutes, including the New Brunswick Business Corporations Act, generally restrict the ability of a corporation to distribute its property to its shareholders (owners). For example, dividends may not be paid to shareholders if the corporation would be unable to pay its liabilities as they come due. These restrictions have evolved in order to protect creditors, including employees of the corporation. The test is usually a dual liquidity-solvency test.

A partnership does not legally operate completely like a corporation. In relation to distribution of profits to partners and return of capital contributions, differences exist. For example, partners often draw against the partnership property in order to be paid a "salary". Partnership legislation generally does not prohibit or restrict distributions. The exception is on the winding up of the partnership where the debts and liabilities of the partnership must be paid prior to paying a partner.

Any distributions to a partner that may act to favour the partner over and above a general creditor of the partnership is subject to a jurisdiction's general laws regarding fraudulent preferences and fraudulent conveyances. Historically, this has been viewed as providing satisfactory protection to a creditor, given partners are personally liable for the debts and liabilities of the partnership.

With LLP legislation, one may take the position some restrictions similar to corporate legislation should be in place to further protect claimants and creditors of the LLP. The concern may be greater with the full shield model given a partner will no longer be personally liable for any debts and liabilities of the partnership.

Ontario, Alberta and most LLP legislation in the United States do not contain provisions that restrict distributions to any greater extent than in a general partnership. The Model Act and the Saskatchewan Act, being full shield approaches, do contain restrictions on distributions based on a liquidity-solvency test. Nevertheless, they provide an exception to permit a partner to be paid reasonable compensation for services rendered. This would be analogous to an employee of a corporation being paid a reasonable salary amount even though the employee may as well be a shareholder/owner of the corporation. The exception permits the partnership to pay a "salary" amount to a partner for services rendered.

11. In relation to provisions to restrict the ability of a LLP to make distributions of its property to partners, should such provisions apply

- ☐ to a full shield LLP
- ☐ to a partial shield LLP
- ☐ to both types of LLPs
- ☐ to neither type of LLP

Reason for response _____
_____
_____
Other suggestions or comments _____
_____
_____

If there are to be restrictions on the ability of a LLP to make distributions of its property to partners, should there be an exception to permit a partner to be paid reasonable compensation for services rendered?

- ☐ Yes (Model Act and Saskatchewan approach)
- ☐ No

Reason for response _____
_____
_____
Other suggestions _____
_____

7.6 Mandatory Insurance – A Requirement for Professionals?

Most, if not all, jurisdictions in Canada and the United States that have enacted LLP legislation have required professionals to have mandatory insurance. This is viewed as a counterbalance to allowing professionals to practice in a LLP. It reduces concern over the changes to the risk allocation between the partnership and its clients, given the client will no longer be able to go after the personal assets of the non-negligent partners. As well, LLP legislation will usually reduce the partner's liability for an employee's actions.

The mandatory insurance issue does not seem to arise for LLPs that carry on general commercial activities. This may be due to the fact the "owners" could always incorporate a corporation. Historically, many jurisdictions have prohibited or restricted professionals from practicing in a corporation.

One concern is whether LLP legislation will lessen the quality of professional services given a partner's risk exposure is reduced with the shield. The Alberta Law Reform Institute Report concluded as follows:

> *While it is possible that limited liability for malpractice liabilities will have some negative effect on professional firms' incentives to take care, we believe this effect would be minimal. For the great majority of engagements, we do not believe that limited liability would make any difference to the firm members' incentives to take care in the provision of the relevant professional services.* [11]

One may question why LLPs that practice a profession should be singled out so as to require mandatory insurance. After all, the member of the public will always have a right of action against the negligent practitioner – whether he or she practices as a sole proprietor, a partner or employee in a partnership or an employee in a corporation. As well, the corporation or the partnership's assets would be available to satisfy a judgment. One may however question what assets really exist in the corporation or partnership that practices a profession to satisfy a judgment. This same question can be raised for all corporations and partnerships that carry on a business.

Mandatory insurance can, however, be viewed as a safeguard provision for the claimant against a negligent act or omission committed by a LPP member (whether partner, employee or agent). With LLP legislation, the claimant has lost the potential to go against the personal assets of the non-negligent partner. This may reduce the incentive to the partnership to settle a claim. It may reduce the ability to recover the judgment amount if the assets of the partnership and the personal assets of the negligent partner are not sufficient to satisfy the judgment.

To date, LLP legislation in the Ontario, Alberta and most, if not all, states in the United States require some type of mandatory insurance (or equivalent requirement) for LLPs that carry on a profession.[12] An equivalent requirement may be some form of bonding, escrow or capitalization requirement. It is our understanding the vast majority of jurisdictions focus on mandatory insurance as the most workable solution to address any public policy concerns in this area. Saskatchewan's legislation is permissive, leaving it to the governing Act/by-laws of any eligible profession to determine whether mandatory insurance will be a requirement or not.

12. Should LLPs or members within a LLP that practice a profession be required to have mandatory insurance?

☐ Yes ☐ No

Reason for response _____

_____

Other suggestion or comment _____

_____

It should be noted any mandatory insurance will not only have to cover the partner as to his or her own acts or omissions, but subject to the policy options in Section 7.3, the acts and omissions of employees and agents that the partner is directly supervising.

One may ask what happens in the situation where a LLP is required to have mandatory insurance but for some reason does not have such insurance. LLP legislation that has been examined does not clearly address this point. It would seem logical to argue that if a particular LLP fails to meet the mandatory insurance requirement, the partners in the LLP should not be able to take advantage of the shield provided by the legislation. That is, the LLP will be treated as an ordinary partnership with respect to rights or obligations acquired while it had no mandatory insurance in effect.

13. Where a LLP is required to have mandatory insurance but does not, should the LLP be treated as an ordinary partnership with respect to rights and obligations acquired while it had no insurance in effect?

☐ Yes
☐ No

Reason for response _____
_____
Other suggestion or comment _____
_____
_____

7.7 Mandatory Insurance – What Professional Groups?

If mandatory insurance is the desired approach, what professional groups should be required to have mandatory insurance in order to practice within a LLP? What benchmark will be used in making this determination? Although there are obvious groups that would be considered – accountants, doctors and lawyers – we have not seen a definitive list on a comparative jurisdictional basis.

Presently, Ontario permits chartered accountants and lawyers to practise as LLPs. Alberta has put in provisions to facilitate the use of LLPs by certified general accountants, certified management accountants, chartered accountants, chiropractors, dentists, doctors, lawyers and optometrists. In Saskatchewan, two professions – lawyers and chartered accountants – have allowed their members to practice through LLPs.

Many professional groups in New Brunswick require their members to have insurance. The exact terms of such insurance may or may not be in sync with any potential mandatory insurance requirement imposed for LLPs that practice a profession. We have not provided a list of professions that presently have

insurance requirements. We wish to obtain general feedback on whether – due to the unique characteristics of LLPs – mandatory insurance should be a requirement for certain "professional" LLPs.

14. If you favour mandatory insurance for LLPs, please indicate which of the following professionals should be required to have mandatory insurance in order to practice as a LLP

- ☐ accountants
- ☐ chiropractors
- ☐ dentists
- ☐ doctors
- ☐ engineers
- ☐ lawyers
- ☐ optometrists
- ☐ Other. Please specify _____

Comments, if any _____

_____

15. What benchmark should be used in determining which professionals should be required to have some form of mandatory insurance in order to be able to practice within a LLP? _____

_____

7.8 Mandatory Insurance – Determination of Minimum Insurance Requirements

If mandatory insurance is a requirement for certain professional groups, the issue is what will be the characteristics of such insurance and will it differ depending on the particular professional group. Secondly and perhaps more importantly, who will make these decisions?

The Alberta Law Reform Institute stated:

> *There is a question of who should be responsible for establishing the mandatory insurance requirements for professionals who wish to practice in limited liability firms. One perspective is that the government or some independent agency should set the levels of mandatory insurance. …This approach might be justified on the basis that since the legislature confers the privilege of limited liability practice, it is appropriate for the legislature, or at least for some independent government agency, to determine the conditions under which the privilege may be exercised.*
>
> *Where a profession is self-governing, however, establishing the levels of mandatory insurance for limited liability firms could be viewed as being much like the other regulatory functions that the legislature delegates to*

the relevant self-governing body. Presumably, one of the main reasons for delegating responsibility for the regulation of a profession or occupation to its members is a perception that they will have a comparative advantage over government departments or an independent agency in determining and enforcing appropriate standards. In the present context, the governing bodies of the relevant professions might be expected to have an advantage in obtaining and evaluating information that is relevant in determining the appropriate levels and types of mandatory liability insurance. This would include information about the magnitude and frequency of claims, their relationship, if any to firm size and area of practice, the availability and cost of liability insurance, and so on.

Another consideration is that determination of minimum insurance requirements for members of the relevant professions is currently left to the relevant self-governing bodies. …Thus, we conclude that it would be appropriate for the legislature to delegate the task of setting the level of mandatory minimum insurance requirements for limited liability professional firms to the relevant self-governing bodies. [13]

Leaving the determination of minimum insurance requirements to the governing body of a profession leaves room for differences of opinion of what should be the minimum requirement and other related issues. As well, minimum levels will likely vary among professions given the unique circumstances of each profession. These differences will likely occur no matter who determines the minimum requirement. These issues are also not unique to LLPs, given many professional bodies presently require their members to carry insurance.

Both Ontario and Alberta have deferred the determination of the minimum level of mandatory insurance to the relevant professional governing bodies.

16. Who should set the mandatory minimum level of insurance for a particular profession?

☐ the particular profession through its governing body
☐ other mechanism. Please specify and set out reasons. _____
_____
_____
_____
_____

7.9 Registration of New Brunwick LLPs

In setting up some type of public disclosure system to identify LLPs from general partnerships, one must determine what is the triggering event in order to

- create a LLP
- convert an existing general partnership into a limited partnership

– convert a LLP into a general partnership without LLP characteristics.

We have examined the approaches taken in the other Canadian jurisdictions as well as general approaches in the United States. New Brunswick would be consistent by amending where appropriate the Partnerships and Business Names Registration Act and the Partnership Act. The alternative would be to create a separate statute to govern all aspects of LLPs.

17. If LLP provisions are enacted in New Brunswick, do you favour one legislative approach over the other?

☐ prefer approach similar to other jurisdictions of amending existing relevant Acts

☐ prefer a separate statute

Reason for response _____

_____

The rest of this section discusses how LLPs would hook into a registration system for public disclosure of key information items about the LLP and to act as the triggering event for LLPs. We feel to move this discussion ahead a description of a potential registration system is needed. We have taken the liberty of describing an approach that is most similar to other jurisdictions. That is, New Brunswick would amend its Partnerships and Business Names Registration Act and Partnership Act.

A partnership would be able to acquire the characteristics of an LLP only by filing a designation to become a LLP under the Partnerships and Business Names Registration Act. The designation itself will be either a new form under the Act or as the case may be, an information item on existing forms under the Act. The designation is only effective from the date of the "filed" designation.

At present, partnerships are required to register their firm name under the Act if they carry on a trading, mining or manufacturing activity. Trading has been viewed to be associated with the sale of goods as opposed to the sale of services. It is our recommendation that any partnership that wishes to become a LLP must register under the Partnerships and Business Names Registration Act and file when applicable, its designation as an LLP.

It is not recommended that the internal procedural requirements for a partnership to become a LLP be set out. Such internal proceedings will be governed by the Partnership Act and the partnership agreement among the partners.

Once a partnership becomes a LLP, the partnership may wish to undesignate itself as an LLP. Although it may be difficult to determine why this may occur, provisions will be included to permit this. Again, it is not recommended that the internal procedural requirements for a partnership to undesignate itself be set out.

It should be noted the provisions of the Act relating to renewal, change of members and change of name would be applicable to LLPs as they are for other partnerships.

18. Do you have any issue with the proposed registration and designation processes for LLPs?

☐ Yes ☐ No

If yes, please specify _____
_____

One area that needs to be addressed is what happens when the LLP registration as a partnership is cancelled for non-compliance with the filing and renewal obligations of the Act. Cancellation of registrations will only occur when the Registrar under the Act takes the required steps to cancel. This requires notification in the Royal Gazette of the Registrar's intention to cancel.

In the case of a general partnership that has registered under the Act, the cancellation of its registration has no effect on the characteristics of the partnership –given the partnership is a creation of the common law and the Partnership Act.

Upon cancellation of the registration of a LLP, it is recommended any rights and obligations that are acquired or incurred by the partnership after its cancellation are acquired or incurred in its characteristic as a general partnership. Rights and obligations acquired or incurred by the partnership during its status as a LLP should continue to have the characteristics of a LLP notwithstanding the cancellation of the registration (or filing of an undesignation form). This approach is consistent with approaches taken in other Canadian jurisdictions.

19. Do you have any issue with the effect that a cancellation of the registration of a LLP will have?

☐ Yes ☐ No

If yes, please specify. _____
_____

7.10 Registration of Extra-Provincial LLPs

This section deals with the registration issues for extra-provincial limited liability partnerships (EPLLP) that carry on business in New Brunswick. This section complements the previous section on New Brunswick LLPs.

The EPLLP that carries on any business activity in New Brunswick would be required to register under the Partnerships and Business Names Registration Act and file some type of designation to indicate it is a LLP. The remaining provisions of the Act would then be applicable to EPLLPs as they are now for extra-provincial general partnerships (e.g. renewal, change of members, change of name).

20. Do you have any issue with the proposed registration and designation processes for extra-provincial LLPs?

☐ Yes ☐ No

If yes, please specify _____
_____
_____

We now focus on what will be the liability of the partners of an EPLLP properly registered to carry on business in New Brunswick. The emphasis is strictly in relation to rights and obligations acquired or incurred under New Brunswick law. An example may be in relation to professional services performed in New Brunswick for a New Brunswick resident.

In the normal course, where the New Brunswick resident has a negligence action against an EPLLP, the assets of the partnership will be available to satisfy a judgment. In relation to the partner's personal assets, this would initially depend on the LLP legislation in the firm's home jurisdiction. Such legislation could provide either a full or partial liability shield and be different than any resulting New Brunswick legislation. Basically, it is proposed the laws of the jurisdiction under which a LLP is formed would govern the liability of its partners for debts and liabilities of the partnership or any of its partners.

Jurisdictions seem to be unanimous in generally deferring to the laws of the "home" jurisdiction of the EPLLP, as it relates to the liability of partners for the debts and liabilities of the EPLLP**.** The Uniform Law Conference of Canada's Model Act follows this approach as well. This general deference approach is not unique to LLP legislation but exists in many areas of law including corporate legislation. It is in part based on mutual respect for and acceptance of each jurisdiction's laws, the comity of nations and conflicts of law principles.

21. When an EPLLP is properly registered in New Brunswick, should New Brunswick defer to the laws of the EPLLP's home jurisdiction as it relates to the scope of a partner's personal liability for the debts and liabilities of the LLP?

☐ Yes ☐ No

Reason for response _____
_____
_____
Any qualifications to response or other suggestions_____
_____
_____
_____

Notwithstanding jurisdictions unanimously deferring to the laws of the "home" jurisdiction of the EPLLP as it relates to the liability of partners, Alberta and Saskatchewan will treat the non-registered EPLLP as an ordinary partnership with respect to rights and obligations that are acquired or incurred by the partnership pursuant to those province's laws. This may be based on the view the partners of the EPLLP should not be able to take advantage of the liability shield unless there has been proper disclosure to their public through the registration process.

These types of provisions may have limited effectiveness. They may be effective within the enacting jurisdiction. It may be questionable the extent they will be given full legal effect in the home jurisdiction of the EPLLP or in other jurisdictions. For example, if a New Brunswick claimant pursued his or her action in or attempted to realize on a New Brunswick judgment in the EPLLP's home jurisdiction, it is debatable whether the home jurisdiction will enforce the provision in New Brunswick law which has the effect that the liability shield should not apply due to non-registration in New Brunswick. On the other hand, if the assets the New Brunswick claimant is going after are situated in New Brunswick, the New Brunswick claimant will likely derive benefit from the enactment of the provision.

22. Where an extra-provincial LLP carries on business in New Brunswick but fails to properly register in New Brunswick, should provisions treat the LLP as an ordinary partnership in New Brunswick with respect to rights or obligations acquired pursuant to New Brunswick laws?

☐ yes ☐ no
Reason for response _____
_____
Other suggestions _____
_____

Another area for discussion is to determine whether provisions should address the situation of a New Brunswick partner in an EPLLP that is properly registered under New Brunswick law. Where that New Brunswick partner for example practices law in New Brunswick, his or her liability exposure to clients in New Brunswick may be greater, equal or less than his counterpart who practices through a New Brunswick LLP. The partner liability provisions for a New Brunswick LLP and the other jurisdiction's EPLLP will likely differ, given the variations among jurisdictions as to full and partial shield approaches.

Under either scenario, the partner will continue to be liable for his or her negligence. But variations may exist as to whether the New Brunswick partner's shield is related to the negligence of another partner or the negligence and other wrongful acts of the other partner (the other partner could also be in New Brunswick). Likewise, the liability exposure in relation to employees may differ. One may wish to remain cognizant that the New Brunswick partner's liability may be similar or different from his or her counterparts that are able to practice within a corporation in New Brunswick.

Alberta and Saskatchewan have enacted provisions to address these issues. Basically, an Alberta/Saskatchewan partner in an EPLLP will have the same level of liability as his or her counterparts that practice in an Alberta/Saskatchewan LLP.

23. Should a New Brunswick partner of an extra-provincial LLP have any greater protection against personal liability in respect to his or her practice as a professional in New Brunswick than a partner in a New Brunswick LLP?

☐ Yes ☐ No (Alberta and Saskatchewan approach)
Reason for response _____
_____
Other suggestion _____
_____

7.11 Requirement of "LLP" in the name of an LLP

Legislation in Ontario, Alberta and Saskatchewan require limited liability partnerships to use the words "limited liability partnership", "société à responsabilité limitée", LLP or "s.r.l." in their name in order to identify to the public its special characteristic as a "limited liability" partnership. Most, if not all, states in the United States have a similar requirement.

The basis for the requirement is likely the perspective that given a LLP is a special form of partnership, such identifier should be attached to "alert" or "disclose" to the public that they are dealing with a "limited liability" partnership rather than a "general" partnership.

It would seem in the future LLPs may be more prevalent than general partnerships. If a member of the public wishes to understand the characteristic of the "entity" he or she will be dealing with, the means is becoming easier as many registries are accessible through the Internet. Is it reasonable to assume people will appreciate the difference between a LLP and a general partnership simply by having "LLP" in the name?

The real issue may be whether the liability shield which is inherent with a LLP is acceptable from a public interest standpoint. Nevertheless, it would seem jurisdictions have favoured a cautious approach by mandating the LLP identifier in the name of a LLP. This may be based on the analogy that jurisdictions, including New Brunswick, usually mandate a legal identifier for corporations - e.g. Ltd, Inc, etc. be in the name of the corporation. Likewise, legislation could set out that a LLP could not use a different operating name than its legal name (which has the LLP identifier in it). This would be stricter than what is imposed on corporations since they are permitted to use a business name which does not contain a legal identifier. Corporate legislation usually requires the full legal name of the corporation to be on all contracts, invoices and orders for goods and services by the corporation.

24. Should New Brunswick LLPs be required to have the identifier "LLP" in their name?

☐ Yes ☐ No

Reason for response _____

_____

Should a LLP be able to use a different operating name than its legal name

☐ Yes ☐ No

Reason for response _____

_____

_____

Any qualifications to your response _____

_____

_____

Notwithstanding the response to the above, it would seem to be misleading for a partnership or any other entity to have the words "limited liability partnership", "société à responsabilité limitée", "LLP" or "s.r.l." in its name if it is not a limited liability partnership. We recommend a prohibition in relative legislation and regulations to prohibit use of those terms in the name of a business unless it is a limited liability partnership.

25. Do you agree that there should be a prohibition on the use of the words "LLP" for non-LLP entities?

☐ Yes ☐ No

Reason for response _____

_____

It is our understanding some states in the United States require an extra-provincial LLP whose name does not contain the "LLP" identifier to add the "LLP" identifier when the name is being used in that particular state. Most jurisdictions do not impose such a requirement but defer to the decision of the home jurisdiction as to whether "LLP" is required to be in the name of the LLP. This is analogous to corporate law where New Brunswick generally requires a legal identifier in the name of its corporations but does not impose it on corporations from other jurisdictions when they carry on business in New Brunswick.

Issues arise for either corporations or LLPs that would be required to add a legal identifier in their legal name in order to carry on business in New Brunswick. Likewise, what will the legal consequences be if the corporation or LLP does not do it? A host of issues arise, and this may be why most jurisdictions defer to the home jurisdiction in this area.

26. Should an extra-provincial LLP whose name does not contain the "LLP" identifier in its name be required to add the "LLP" identifier to its name when used in New Brunswick?

☐ Yes ☐ No (Alberta, Ontario and Saskatchewan approach)

Reason for response _____

_____

_____

7.12 Conversion of an existing New Brunswick partnership to LLP

We agree with the position of the Alberta Law Reform Institute that when an existing partnership converts to an LLP, this should not affect the liability of members of the New Brunswick partnership for liability that arose before or that arises out of a contract entered into before the partnership became an LLP. This is reflected in Ontario, Alberta and Saskatchewan legislative provisions.

Notwithstanding the above, differences exist whether on conversion, notices of the conversion should be sent to clients and third parties. These differences are explained as follows:

> *Obviously the mere designation in the name that the partnership is a limited liability partnership will provide little practical information to persons dealing with the partnership. It is clear that the legislative intent, in Ontario, was that, having been alerted to the limited liability nature of the entity, creditors dealing with the firm could make specific inquiry as to the nature of the limitation of liability. Further, given that Ontario has a very limited protection for partners, broader notice appears to have been considered unnecessary. The matters for which limited liability status has been extended in Ontario are those which can be covered by negligence insurance, in any event.*
>
> *Some jurisdictions require specific information to be provided to existing creditors and clients of the firm when there is a change from an ordinary partnership to a limited liability partnership. The Alberta legislation requires that upon conversion to a limited liability partnership, the partnership shall, forthwith, send to all of its existing clients a notice advising of the registration as a limited liability partnership. The notice must include an explanation, in general terms, of the potential changes to the liability of the partners, as a result of the registration.*[14]

Whether differences in various jurisdictions are based on the extent of the liability shield, one can only speculate. One may as well take the position if the LPP structure is a satisfactory model for businesses to use, then notice of the conversion is strictly an administrative burden. It may be even without a

mandatory requirement, certain LLPs would notify their clients as an act of goodwill and to limit potential disputes in the future. There is a line of academic authority suggesting the liability shield will not be effective in relation to existing clients without proper notification of conversion.

If notice is to be given, will notice be mandated only for the clients of the LLP or will it also be mandated for creditors of the LLP? Ontario does not mandate notice in either case. Alberta and Saskatchewan require notice to clients. In relation to creditors, the argument in favour of notification becomes stronger if a full shield LLP model is enacted.

27. When a partnership converts to a LLP, should the approach be:

☐ that the LLP be required to send out a notice
- ☐ to clients
- ☐ to clients and creditors

☐ that there be no requirement to send out a notice to clients and creditors

Reason for response _____
_____
_____

If a requirement is imposed to provide a notice, what will be the consequences if the notice is not done or is poorly worded? Both the Alberta and Saskatchewan Acts are silent as to the legal consequences of not doing the notice or doing it poorly. It is foreseeable this may lead to litigation in appropriate cases. Alternatively, one may decide to indicate what will be the consequences of a failure to provide statutory notice, other than perhaps treating it as an offence under the Act. Should the LLP and its partners be able to take advantage of the shield in relation to clients and third parties who did not get sent notification of its conversion into a LLP?

28. Where a LLP fails to provide any statutory notice to clients and third parties, should the LLP be treated as an ordinary partnership (i.e. no shield) for those clients and third parties who should have, but did not get sent, the statutory notice?

☐ Yes ☐ No

Reason for response _____
_____
_____

Other suggestion _____
_____
_____

If the liability shield is affected by the failure to provide statutory notice, a number of matters would need to be addressed. It is felt asking for suggestions (see above) is the best way of exploring these issues. For example, will the shield be affected for only a certain period of time? Likewise, if the client is aware of the change to LLP status, there would be no reason for the client to benefit from the fact statutory notice was not given.

7.13 Disclosure of Names of the Partners

Where a partnership registers its firm name under the Partnerships and Business Names Registration Act, it must set out all the names of its partners and each partner must sign the form. Where a renewal document is filed every five years, the same requirement is imposed. As well, where a change in the members of the partnership occurs, all incoming and continuing partners must sign the form.

The above requirements are based on the perceived need for public disclosure of who the partners are of a partnership and to ensure each person being held out as a partner is actually aware of it and agrees "on the public record" that they are a partner in a particular partnership.

The current procedures have been criticized as being cumbersome where one has a large national or international partnership that wishes to register its partnership name. Some accounting partnerships have hundreds of partners. If LLP legislation is enacted, more situations will occur where the current procedures will be viewed as cumbersome or untenable from a red tape perspective. We suggest procedures be amended in a similar fashion to those in Ontario and some other Canadian jurisdictions.

In essence, where a partnership has more than five partners,

- a designated partner may sign the form on behalf of all partners
- the names of all the partners need not be set out on the form. In lieu of this, the designated partner is required to maintain a record showing information on the incoming, retiring and existing partners of the partnership. Such records are open to public inspection and upon request and without charge, a person will be provided a copy of the said records.
- where the designated partner does not maintain such records at a designated place of business in New Brunswick, the option will exist for the agent for service appointed under the Partnerships and Business Names Registration Act to have such records.

29. Do you agree with the above suggestion to streamline the registration procedure where there are a large number of partners in a partnership?

☐ Yes ☐ No

Reason for response _____

_____

Other comments _____

_____

7.13 Other Issues

The main purpose of this Report is to solicit feedback from interested stakeholders and the public. Although every effort has been taken to identify and discuss all major issues surrounding LLPs, other issues may exist.

30. Please identify any other issues that should be considered in relation to LLPs

_____

_____

_____

_____

_____

_____

_____

_____

_____

Footnotes

1. J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 1997, p. 25

2. The Report does a comparison between a general partnership and a LLP. In order not to add complexity, no reference is made to a limited partnership that is created under the New Brunswick Limited Partnership Act. A limited partnership has special characteristics by having general partners and limited partners. A limited partnership and a limited liability partnership are traditionally two very different "beasts". Jurisdictions to date have kept these concepts separate.

3. *Joint and Several Liability and Professional Defendants*, Report of the Standing Senate Committee on Banking, Trade and Commerce, March 1998, page V.

4. Senate Report, p. 57-61.

5. Senate Report, p. 61

6. See http://www.law.ualberta.ca/alri, go to "publications", to "Final Reports" and to "077 Limited Liability Partnerships (April 1999).

7. See http://www.ulcc.ca/en/home/Index.cfm? and
http://www.ulcc.ca/en/civil/index.cfm?sec=4&sub=4e

8. Alberta Law Reform Institute Report, p. 6

9. Law Society Act, SNB 1996, c. 89, s. 37(13);
Chartered Accountants Act 1998, SNB 1998, c. 53, s. 33(1)(2)
Medical Act, SNB 1981, c. 87, s. 64(1)(2)

10. Alberta Law Reform Institute Report, p. 109

11. Alberta Law Reform Institute Report, p. 101

12. Manzer, *A Practical Guide to Canadian Partnership Law*, p. 10-43

13. Alberta Law Reform Institute Report, p. 102 – 103

14. Manzer, p. 10-43

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