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CIVIL LAW SECTION

REPORT ON FORMS OF BUSINESS ASSOCIATIONS IN CANADA

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I. Introduction

[1.] What follows is our report on the various forms of business associations that exist today in Canada. This report is divided in four main parts:

(a) a short synopsis of the key commercial and tax law features of each of the forms of business associations available in Canada;

(b) an overview of the availability of the various legal forms throughout Canada;

(c) a final synopsis as to which existing or prospective forms of business have issues that would make them candidates for possible uniform legislation; and

(d) a suggested strategy for subsequent uniform legislative projects.

II. Overview of the Forms of Business Associations

[2.] The forms of business association that exist today in Canada are divided, in the first instance, between corporate and non-corporate forms. Non-corporate forms, in turn, divide into those with one owner and those that have multiple owners. The sole proprietorship or division applies where there is a single owner.[1] If there is more than one owner, the non-corporate forms of business vehicles in Canada divide into various forms of partnership, a legal joint venture (JV), a co-ownership arrangement or a business trust.

[3.] There are three different types of domestic partnerships that exist in common law Canada. These consist of the general partnership (GP), the limited partnership (LP) and the limited liability partnership (LLP). In Québec, there are four types of partnerships including the three just mentioned and a fourth one called the "undeclared partnership". Unlike the GP and LP, the undeclared partnership has no name common to the partners allowing it to be identified by third parties, nor can it sue or be sued under a common name. The undeclared partnership also differs from the GP and LP in that it is not required to file a declaration of registration with the enterprise registrar under the ***Act Respecting the Legal Publicity of Sole Proprietorships, Partnerships and Legal Persons*** (Legal Publicity Act). This type of partnership includes the following business associations: (i) JVs; (ii) enterprises in which the partners intend to keep their association anonymous; (iii) enterprises in which the partners do not expressly intend to form a partnership but conduct themselves in such a way that a court could ***ex post*** recognize a partnership; and (iv) enterprises which could be qualified as either a GP or LP but in which the partners have failed to file the requisite declaration of registration under the Legal Publicity Act.

[4.] One of the hybrid vehicles that we recognize in Canada is the limited liability company (LLC). However, no Canadian legislation allows for the formation of an LLC.

[5.] Corporate forms are created by statute or under the authority of a statute. Crown corporations, for example, are created by special act, whereas general business corporations are created by the government, more specifically by the administrative branch of the government which acts under the authority of a statute, such as the ***Canada Business Corporations Act***[2] (CBCA) and the ***Ontario Business Corporations Act***[3] (OBCA). Once incorporated, the business corporation is recognized as a legal person by the statute under which it is formed.[4] Nevertheless, it is possible to split corporate forms into various main categories.

[6.] First, there is the basic distinction between business corporations and not-for-profit corporations. Since the subject matter of this report is forms of business associations, non-profit corporations will not be discussed further.

[7.] As well, there exist at both the federal and provincial levels various corporate statutes that are used for the formation of corporations that carry on specific types of businesses. For example, if a corporation is formed to carry on business as a cooperative, an insurer or a trust company, there is specific federal and provincial legislation for these types of corporations. A bank can only be formed under federal bank legislation. A credit union or ***caisse populaire*** may be formed under provincial law, whereas cooperative credit associations may be formed under federal legislation.[5] Again, since the focus of this report is on forms of business associations of general application, industry specific incorporation statutes will not be discussed further.

[8.] With respect to general or residual business corporations, there are three distinct legal categories. One is the professional corporation, which is available in some provinces but is not available federally or in other provinces. Second, there is the unlimited company[6] (ULC), which is now unique to Nova Scotia although, on March 10, 2005, Bill 16 was introduced into the Alberta Legislature which includes provisions for an Alberta ULC. Third, there is the general business corporation, which is available in all provinces, territories and federally.

III. Key Commercial and Tax Law[7] Features of the Various Forms of Business Associations Available in Canada

A. Non-Corporate Business Forms

1. Sole Proprietorship and Corporate Division

(a) Sole Proprietorship

(i) Commercial Features

- Not a separate legal person
- No document needs to be filed in any public registry to create a proprietorship
- If a business name (rather than the proprietor's own name) is used, a business registration is required. In Québec, the sole proprietor who does not use his or her given name and surname in his or her business name must file a declaration of registration with the enterprise registrar
- Unlimited personal liability for all debts and obligations

(ii) Tax Features

- Income or loss of a proprietorship is generally fully included in, or deducted from, the proprietor's income along with all other sources of income
- No potential for double taxation
- Proprietor does not file a separate federal or provincial tax return for the proprietorship
- Proprietor is able to deduct losses from other sources of income and carry such losses back to be applied against earlier taxation years

- Provincial corporation capital tax (PCT) and federal large corporations tax (LCT) are not exigible on individuals or other non-corporate business vehicles

- While there is no potential for double taxation as there is in the case of income flowed through a corporation, there is also no opportunity for deferral of tax on retained earnings as there is in the case of a Canadian-controlled private corporation carrying on an active business in Canada

- The $500,000 lifetime capital gains exemption is not available unless the proprietorship is first transferred to a qualified small business corporation and the other rules applicable to the capital gains exemption are met

(b) Corporate Division

(i) Commercial Features

- Generally, the commercial features of a division parallel the commercial features discussed above for a proprietorship

- In a division, the risk of unlimited liability falls on a corporation that itself provides for limited liability protection

(ii) Tax Features

- Since Canada does not provide for the filing of consolidated corporate returns, the only way to achieve consolidation of income and deductible losses in a corporate group is to use one corporation instead of separate corporations or to carry out some form of reorganization. Otherwise, the capital and non-capital losses of one business cannot be offset against the taxable profits of the other business, resulting in the two corporations paying more tax than they would if combined into a single corporation

2. Partnership

(a) General Partnership

(i) Commercial Features

- A partnership is not a legal person at common law or in the Québec civil law system.[8] In Canadian common law provinces and territories, a partnership cannot, therefore, acquire or hold a registered interest in real property. Where real property is one of the assets of a partnership, a legal entity such as a corporation must be interposed to acquire and hold the property in trust for the partnership. Under Québec law, a partnership apparently can hold a registered interest in real property under its declared name[9]

- By definition, a partnership must be composed of at least two persons carrying on business in common with a view to profit. If the number of partners falls below two, then the partnership automatically ceases to exist as such. If its operations are recharacterized as an investment, not as a business, it can no longer constitute a partnership. In Québec, should a single partner become the beneficial owner of all of the shares of a partnership, the partnership does not automatically dissolve provided that at least one other partner joins the partnership within 120 days

- More than any other vehicle for carrying on business, a GP entails significant commercial risks for the partners. First, partners of a common law GP suffer unlimited joint and several liability for all debts and obligations of the partnership.[10] Second, despite whatever internal constraints may be imposed on members of the GP, each partner is an agent of the other partners. Therefore, unless a third party transacting business with the GP is actually aware of a restriction on the authority of a particular partner, the third party is not bound by any such restriction. In Québec, partners of a GP are solidarily liable for the obligations contracted for the use or operation of an enterprise. Each partner is a mandatory of the partnership in respect of third parties in good faith and binds the partnership by every act performed in its name in the ordinary course of its business

- In the common law jurisdictions, unless the partnership agreement provides otherwise, a partnership automatically terminates on the death, bankruptcy or withdrawal of any partner. Under Québec law, while the law recognizes that a partner ceases to be a partner in these circumstances, the partnership does not automatically terminate

- According to the terms of the partnership agreement, the transfer of an interest in a partnership generally requires approval of all or some majority of the other partners

- No formalities are required to establish a GP. No written partnership agreement is required although it may be commercially desirable to have one

- In the common law jurisdictions, a business name registration is generally required if the partnership name differs from those of its partners. In Québec, every GP doing business in Québec must file a declaration of registration with the enterprise registrar. The declaration contains, ***inter alia***, the partnership's name and domicile, the name and domicile of each partner, and the object pursued by the partnership

- In the common law jurisdictions, there are no mandatory formalities for dissolution except the cancellation of any business name registration. In Québec, there are specific formalities, such as the filing of a notice of the dissolution, a notice of the appointment of a liquidator and a notice of closure, after the liquidation. These notices must be filed with the enterprise registrar

- Unless the partnership agreement otherwise requires, a partnership is not subject to a number of mandatory rules imposed on all corporations even those that are partnerships in the guise of a corporation. For example, a partnership does not require directors, annual meetings, financial statements, auditors or periodic public filings. Every registered enterprise doing business in Québec must file an annual declaration with the enterprise registrar

(ii) Tax Features

- A partnership is not a taxpayer. Partners file their own tax returns. Income, loss, taxable capital gains and allowable capital losses are calculated at the partnership level for tax purposes and then allocated to the partners. There is no potential for double taxation

- Aside from the rules for determining taxable income and loss, most of the advantages of a sole proprietorship, including the amount of losses and the inapplicability of PCT and LCT, also apply to a partnership

- Since the partnership income or loss must be calculated at the partnership level, a partnership offers less flexibility than vehicles such as a JV or co-ownership arrangement in which income or loss is only calculated at the owner's level. For example, partners must decide collectively how much capital cost allowance (CCA) to claim in a taxation year on depreciable capital property. All partners receive their aliquot share of expense whether they can use it or not

(b) Limited Partnership

(i) Commercial Features

- Since a LP is a species of partnership, many of the commercial law features of a GP also apply to the LP

- The only commercial law advantage of an LP is the shield from liability that it affords limited partners. The liability shield is much less impregnable in the case of a LP than it is in the case of a corporation. Nevertheless, the combination of favourable tax characteristics of a partnership and limited liability make the LP attractive to investors such as investment funds and other large dollar investors

- Since the LP is generally a pure investment vehicle and the limited partners can control the amount of capital that they have at risk, the admission of limited partners and the transfer of interests in an LP tends, in practice, to be more permissive than in the case of a GP. The same concerns do not arise with respect to liabilities, acts and omissions of other partners as apply in the case of a GP. Since an LP is generally used as an investment vehicle rather than in a business controlled by owner-operators, it is antithetical to impose restrictions on the injection of fresh capital and the transferability of units. In Québec, the law allows the LP to make a public offering of its shares but expressly forbids it for a GP

- In common law jurisdictions, greater formalities must generally be followed in the formation, change, extra-provincial operation and dissolution of an LP than apply to a GP. In Québec, the formalities for the formation and dissolution of an LP are the same. The general partners must keep a register containing the name and domicile of each special partner and any information concerning their contribution to the common stock

- In the common law jurisdictions, an LP must have a written agreement. In Québec, there is no requirement that the agreement be in writing, although the partners presumably will set out their agreement in writing for practical reasons. Unlike a GP, the formation of an LP requires the filing of a declaration under the provincial legislation governing the formation of the LP. Registration of a LP is a time-limited and, therefore, requires periodic renewal. In Québec, every LP doing business in Québec, like every GP, must file a declaration of registration with the enterprise registrar. The declaration contains, ***inter alia***, the partnership's name and domicile, the name and domicile of each partner, distinguishing the general partners from the special partners known at the time the contract is entered into, and specifying the partner who furnishes the greatest contribution

- Liability of a limited partner is capped at that partner's agreed contribution unless the limited partner takes part in the control of the business or, in some jurisdictions, participates in management, in which case, his or her liability becomes unlimited. An LP must have one or more general partners who bear the full residual liability of the LP

- As in the case of the sole proprietorship, name restrictions apply to an LP. It can use the words "limited partnership", but it cannot use the word "limited" without the word "partnership"

(ii) Tax Features

- Since a LP is a species of partnership, the tax treatment of GPs generally applies to LPs

(c) Limited Liability Partnership

(i) Commercial Features

- Exclusively used by lawyers, accountants and other professionals

- Affords a non-negligent partner, but not the firm, liability protection for the negligent acts or omissions that another partner, employee, agent or representative of the LLP commits on behalf of the LLP. It does not relieve a partner from loss arising from his or her own negligence or the negligence of someone under his or her supervision. Nor does it protect the partners from ordinary trade debts of the LLP

- An LLP, unlike a GP, necessitates the creation of a partnership agreement and registration of the firm name. In Québec, a LLP, like a GP, must file a declaration of registration with the enterprise registrar. The declaration contains, ***inter alia***, the partnership's name and domicile, the name and domicile of each partner, and the object pursued by the partnership

(ii) Tax Features

- The taxation applicable a GP applies equally to an LLP

3. Joint Venture and Co-ownership

(a) Joint Venture

(i) Commercial Features

- Uncertain legal status

- In common law jurisdictions, a JV is always subject to recharacterization as a GP. In Québec, the JV may be characterized as a GP, as an undeclared partnership or as an innominate contract (***contrat innommé)***

- Outside Quebec, the liability of members of a JV is co-extensive with joint and several liability of partners in a GP. In Québec, the partner of a JV is solidarily liable if he or she revealed that he or she was acting as mandatory of the other partners and if the obligations were contracted for the use or operation of an enterprise

- JV contract and absence of specific legal rules provides flexibility in formation and operation. In Québec, the rules of the ***Civil Code of Québec*** (C.c.Q.) with respect to GPs and to undeclared partnerships can be applied to JV

(ii) Tax Features

- Income or loss calculated at the owner's level not at the JV level
- A JV does not file a separate tax return
- Unlike in a partnership, members of a JV may optimize CCA claims free of tax planning considerations of the other members
- A JV is not ***per se*** subject to PCT or LCT[11]

(b) Co-Ownership

(i) Commercial Features

- Widely used in capital-intensive investments, not in active businesses
- Due to legal uncertainty in common law jurisdictions, there is some risk of recharacterization as a GP. In Québec, there is less legal uncertainty because of the specific provisions rules in the C.c.Q. dealing with co-ownership
- Absence of legislation means that freedom of contract reigns, maximizing private ordering

(ii) Tax Features

- The tax rules applicable to a JV also apply to a co-ownership arrangement

4. Business Trust

(i) Commercial Features

- In Canadian common law jurisdictions, there is still uncertainty as to the liability of beneficiaries.[12] Such uncertainty imposes practical impediments to institutional investors; especially pension funds and banks taking trust units as security. In Quebec trust law, the question of liability of beneficiaries is much clearer than in other Canadian jurisdictions. Liability of the beneficiary may be summarised as follows:

1) A beneficiary is solidarily liable with the trustee and settlor for acts performed in fraud of the rights of the creditors of the settlor or of the trust patrimony

2) A beneficiary is liable for the acts of the trustee; however, this is limited to the extent the beneficiary has benefited from the act. This liability is limited to the trust "patrimony"[13] which is similar to the liability of shareholders of a corporation

- In Canadian common law jurisdictions, there is also uncertainty as to the liability of trustees. In terms of contractual liability in Québec trust law, the C.c.Q. is clear.[14] In matters of extra-contractual liability, the trustee can be personally liable for his or her civil fault. The C.c.Q. provisions relating to trusts and to the administration of property of others provide no special regime for extra-contractual liability. Therefore, the general regime of civil liability applies[15]

- In Canadian common law jurisdictions, there is an absence of governance legislation. In Québec, the C.c.Q. provides extensive legislative rules governing trusts and administration of property of others[16]

- In Canadian common law jurisdictions, a trust, like a partnership, is not a legal entity (except for tax purposes). Under Québec trust law, it is a "patrimony appropriated to a purpose."[17] The trustee may conclude contracts or institute or defend legal proceedings in the name of the trust. Title to trust property is made up in the trustee's name

- In Canadian common law jurisdictions, unsecured creditors generally may not have direct claims against trust assets but may only be able to claim through the trustee. Under Québec trust law, where the trustee concludes a contract in the name of the trust, the trustee is not personally liable to the other contracting party, provided the trustee is acting within the limits of his or her powers.[18] If the trustee exceeds his or her powers, the trustee is personally liable. However, litigation brought against the trust usually cites the trustee, in his capacity as trustee, as defendant

(ii) Tax Features

- A commercial ***inter vivos*** trust can be used to avoid an element of double taxation that results from holding shares of a public corporation and the receipt of dividends on such shares

- A trust is allowed a deduction in computing its income for amounts paid or payable in the year to a beneficiary (which are then included in the beneficiary's income)

- The tax character of income (for example, taxable dividends, capital dividends, interest and capital gains) is retained when flowed out to beneficiaries

- Unlike corporations, business trusts are not subject to PCT or LCT

- A trust is a taxable entity

- An ***inter vivos*** trust is subject to tax at the top individual marginal rates

- Discretionary deductions such as CCA must be taken at the trust level and not by the beneficiaries

- Losses of a trust cannot be flowed out or otherwise deducted by beneficiaries

- The small business deduction is not available to a trust

- Generally, a trust cannot flow investment tax credits out to beneficiaries

- The 21-year deemed disposition rule applies to ***inter vivos*** trusts (except mutual fund trusts)

- To qualify as a mutual fund trust, several restrictions apply. These relate to the nature of the investment undertaking, public distribution of units, retraction values, residency of the trust and non-residency of beneficiaries

- There is no rollover available on the transfer of assets to an ***inter vivos*** trust

B. Corporations

1. Business Corporation

(i) Commercial Features

- Generally, there is no personal liability beyond the investment that a shareholder makes in a corporation. Courts only lift the corporate veil in exceptional or flagrant circumstances, such as where it is used as an instrument for an illegal, fraudulent or improper purpose or express wrong-doing[19]

- Perpetual existence

- A corporation is an extremely flexible vehicle because of its separate legal personality, the separation of ownership from management, the ease of creating and issuing various classes of shares and various other financing considerations

- Compared with a proprietorship or a GP formed without a partnership written agreement, a corporation is relatively expensive to incorporate, maintain and dissolve

- Incorporation requires the public filing of articles. Amending these articles also requires a public filing

- Once formed, the corporation is subject to several minimal compliance requirements. It must have a board of directors, prepare and circulate financial statements, appoint an auditor (or annually waive the appointment of an auditor) and hold an annual meeting of shareholders (or pass consent resolutions in lieu of an annual meeting)

- A corporation must file an annual return

- A corporation will generally be required to obtain an extra-provincial license or to register in each province or territory where it operates other than its province or territory of incorporation

- If a corporation has gross revenues in a financial period in excess of $15 million or assets as of the last day in respect of that financial period in excess of $10 million, or the value of the equity or debt obligations held directly or indirectly by persons not resident in Canada exceeds a book value of $200,000, the corporation must file a prescribed annual ownership return under the ***Corporations Returns Act***[20] with the Chief Statistician of Canada

(ii) Tax Factors

- Where the combined federal and provincial corporate tax rate is less than the rate applicable to the individual shareholders, there is a potential to defer tax by retaining earnings. This is especially attractive in the case of a Canadian controlled private corporation (CCPC) earning income from an active business (18.6% combined federal and Ontario rate on the first $300,000 of annual Canadian active business income)[21]

- Inter-corporate dividends generally flow tax-free except for Part IV tax

- Corporations are very useful in many estate planning and income splitting arrangements. For example, corporations can be employed or reorganized to freeze the value of shares and, therefore, future capital gains tax liability. In some cases, several members of the same family can be introduced as shareholders and, thereafter, dividends can be sprinkled amongst these shareholders, thereby effectively lowering the overall incidence of tax on the same amount of family income

- Employees may acquire shares of a CCPC without recognizing the taxable benefit until the shares are sold

- Each individual shareholder resident in Canada is entitled to a $500,000 one-time capital gains exemption (CGE) on the disposition of shares in a qualified small business corporation (QSBC) provided that certain conditions are met

- A corporation, other than a professional corporation, can minimize or defer the recognition of income by a judicious selection of its fiscal year end

- There is a deferral opportunity in expensing a bonus in a corporation's tax year by deferring payment to the owner-operator until the next taxation year provided that the payment is within 180 days of the end of the corporation's taxation year in which expensed.

- A CCPC is eligible for an enhanced investment tax credit (ITC) at the rate of 35% of the first $2 million of expenditures for scientific research and experimental development (SR&ED) and also for refundable ITCs under the ***Income Tax Act*** (Canada).[22] This contrasts with the general rate of 20% that applies to ITCs earned by non-CCPCs

- Depending on the type of corporation and the character of income received, taxation at the corporate level and taxation of dividends distributed to shareholders may result in some element of double taxation. Owner-managers can, in practice, usually avoid double taxation by having the corporation pay additional salaries or bonuses to reduce income to the level where double taxation does not apply

- PCT and LCT tax applies to corporations. Individuals, partnerships and business trusts do not pay PCT or LCT ***per se.*** However, the corporate members of these non-corporate vehicles are liable for these taxes

- If a corporation suffers a business or capital loss, its shareholders cannot make any direct use of the loss. If the shareholder instead operated a sole proprietorship or partnership, the losses would be fully deductible against other sources of income or, in the case of capital losses, capital gains. However, a loss on an investment in shares in, or loans to, a small business corporation is generally classified as a business investment loss, 50% of which is deductible by the shareholder from other income

2. Professional Corporation

(i) Commercial Features

- Generally, the commercial law features applicable to ordinary business corporations also apply to the professional corporation

- In Ontario, a professional corporation does not, however, shield the individual professional from a professional liability claim for acts of the shareholder or acts of employees or agents of the corporation. It does shield the shareholder from the claims of trade creditors and other creditors of the corporation. Under Québec law, a professional corporation shields the professional from a professional liability claim for the fault or negligence of other professionals or another professional's servant or mandatory of the corporation

- In Ontario, all issued and outstanding shares of a professional corporation must be legally and beneficially owned, directly or indirectly, by one or more members of the same profession. Likewise, all directors and officers of the professional corporation must be shareholders

- In Ontario, a professional corporation is restricted from carrying on any business other than a professional practice and ancillary activities, including investing surplus funds earned by the corporation

(ii) Tax Features

- Generally, the taxation of a professional corporation is the same as for an ordinary business corporation
- Thus, the primary advantage of a professional corporation lies in the ability to retain earnings at the low combined federal and provincial corporate income tax rate
- A secondary advantage is the ability to sell shares that qualify for a $500,000 lifetime CGE
- However, at least in Ontario, there are limited income and capital gains tax splitting opportunities in a professional corporation because all shares must be legally and beneficially owned by one or more members of the same profession

3. Unlimited Company

(i) Commercial Features

- In winding up of a NSULC, members face unlimited personal liability to the extent that debts and liabilities of the NSULC are not paid out of its assets
- No Canadian director residency requirements
- No statutory prohibition against incestuous share purchase transactions
- Conversion of a non-Nova Scotia corporation into an NSULC requires that the non-Nova Scotia corporation first

be continued into Nova Scotia as a company limited by shares and then that either the continued company be amalgamated with another Nova Scotia company to form an NSULC or there be a statutory arrangement whereby the continued company is converted into an NSULC

- Amalgamation or arrangement requires a court order
- Amalgamation triggers a taxation year end (which will accelerate the expiry of any non-capital tax loss carryforwards)
- \$4,000 incorporation tax
- \$2,000 annual tax for filing an annual report

(ii) Tax Features

- No Canadian tax advantages or disadvantages because a NSULC is taxed as any other Canadian corporation (except that US ownership disqualifies it for purposes of the small business tax credit, the \$500,000 lifetime CGE and the special ITC regime applicable to certain CCPCs)
- An NSULC is the only Canadian vehicle that is a “qualified entity” able to file a prescribed form electing how it wishes to be treated for US tax purposes: as a corporation; or for “disregarded treatment” (as a partnership, if it has two or more members, or as a branch, if it has only one member)
- If disregarded treatment applies, certain US tax advantages may result:[23]

  1) Allows flow-through of losses of the NSULC to be applied against profits of the US shareholders;

  2) enables Canadian shareholders to sell shares while, at the same time, treats the US purchaser as acquiring assets under US tax law;

3) facilitates the availability of foreign tax credits by US shareholders;

4) in cross-border leasing transactions, allows the Canadian lessee to make rental payments to an NSULC free of Canadian withholding tax while, at the same time, treats the US parent as lessor for purposes of US tax benefits available to lessors of certain types of equipment; and

5) US federal tax law disregards the spin-off of shares in the Canadian operating company held by an NSULC to the shareholders of the NSULC way of ***in specie*** dividend

IV. Availability of Various Legal Forms Throughout Canada

[9.] Non-corporate forms of business associations fall under provincial and territorial jurisdiction. Unlike for corporations, no federal law exists under which non-corporate forms of business associations may be formed. It is unclear whether this ***de facto*** exclusive jurisdiction in favour of the provinces is dictated by their exclusive jurisdiction in respect of property and civil rights under s. 92 of the ***Constitution Act, 1867***[24]. The federal government seems never to have challenged exclusive provincial occupation of the field.

[10.] The proprietorship as a legal form to carry on a business is available throughout Canada. Except with respect to regulation of business names used in a province or territory or, in Québec, with respect to publicity of sole proprietorships, there does not appear to be any provincial or territorial statutes that specifically address the sole proprietorship form. The same applies to the corporate division.

[11.] Provincial and territorial laws regulating the use and registration of business names appear to vary widely. Some jurisdictions bury the requirement in partnership legislation. Others, such as Ontario, Saskatchewan and Manitoba, have stand-alone business name registration statutes. Newfoundland and Labrador has no business name legislation. The prevailing statutory regimes appear to vary widely – although the substantive effects are similar. In Québec, the use and registration of business names are governed by the Legal Publicity Act and by the ***Charter of the French Language***.

[12.] Every province and territory has legislation providing for the formation of GPs and LPs. Again, there is no such legislation federally. In the common law provinces and territories, statutes governing GPs were modelled after the U.K. ***Partnership Act, 1890*** and still closely adhere to the original model. Thus, there is still a substantial degree of uniformity in GP law within common law Canada.

[13.] The same uniformity does not apply to the LP. Despite a common ancestry in the form of the U.K. ***Limited Partnerships Act, 1907***, provincial and territorial legislation is not uniform – particularly with respect to the central issue of whether and at what point limited partners lose the liability shield if they participate in, or control, management of the business. The formulations differ. Manitoba has the most tolerant regime. There, limited partners do not lose their liability protection by participating in, or controlling management of, the business. Ontario and each of the Atlantic provinces have a separate statute governing the formation and registration of LPs. In all other provinces and territories, the formation and registration of LPs is dealt with in the GP legislation.

[14.] In Québec, GPs, LPs and undeclared partnerships are governed by the C.c.Q.

[15.] LLPs cannot be formed federally or under the laws of any territory. Ontario, each of the western provinces (Manitoba to British Columbia), Nova Scotia, New Brunswick and Québec permit the formation of LLPs. Prince Edward Island and Newfoundland and Labrador still do not provide for the formation of the LLP. No jurisdiction has a separate statute dealing with the LLP. Instead, those provinces that permit the formation of an LLP have added provisions to their GP statutes and, where applicable, business names statutes. Again, no consistent pattern emerges. In Québec, LLPs are governed by the ***Professional Code***, by the specific professional orders' regulations and by the C.c.Q**.**

[16.] JVs, if they exist, are recognized by the common law and the civil law – although the Canadian jurisprudence on the JV is vapour thin.[25] No statutes exist in Canada governing the formation or commercial law characteristics of the JV. General contract law reigns.

[17.] In general terms, co-ownership arrangements are also governed solely by the common law, particularly contract law. Narrow exceptions apply in the case of co-owned ships registered or licensed under the ***Canada Shipping Act***[26] or intellectual property registered under the ***Patent Act***[27] or the ***Copyright Act***.[28] Likewise, each province and territory provides for partition legislation that can be invoked in the case of a dispute involving co-owned real property.[29] However, there is no general legislation in the Canadian common law provinces governing co-ownership interests akin to partnership legislation. In Québec, co-ownership arrangements are governed by the C.c.Q.

[18.] A tremendous gap exists in the case of business or commercial trust law in the Canadian common law provinces. While there is a rich reservoir of jurisprudence governing ***inter vivos***, testamentary and constructive trusts, there is, with limited exceptions, no separate statute governing the formation, governance and regulation of business or commercial trusts. This gap also presents a wonderful opportunity to devise a model statute. The sole exception to the general neglect of business trusts outside Quebec is that, within the past nine months, both Alberta and Ontario have enacted specific legislation designed to remove or lessen the concern that investors in publicly traded business trusts could face unlimited liability for the debts and obligations of the trust on its demise. Even here, the formulations under the two short provincial statutes show critical differences. While securities laws apply to business trusts that issue units, a gap exists in the internal governance of business trusts and in the legal relationship between business trusts and their unitholders.

[19.] In Quebec, business trusts are governed by the C.c.Q. The C.c.Q. defines separately the type of trust used for commercial purposes – "a trust for private purposes". In addition, it sets out how such a trust is formed, how it is administered and what the rights and obligations of the various parties are. Ordinarily, the beneficiary has no liability beyond the trust. However, if the beneficiary is involved in fraud, he or she will be solidarily liable for the loss suffered by the victim of the fraud.

[20.] As stated, no province or territory provides for the domestic formation of a LLC. However, several provinces such as Ontario, British Columbia, Alberta and Nova Scotia recognize an LLC formed under foreign law and allow it to operate and register in the province either under business name legislation or extra-provincial corporations licensing legislation. In Québec, every enterprise doing business in Québec, including an LLC, is subject to registration under the Legal Publicity Act.

[21.] General business corporations may be formed federally under the CBCA or under the general corporate legislation of a province or territory. While corporate statutes in Canada are not uniform, there has been a significant degree of convergence in these laws since the CBCA came into force in 1976. The corporate statutes of the Yukon Territory, Saskatchewan, Manitoba and New Brunswick most closely follow the federal model. The Alberta ***Business Corporations Act*** is also based on the federal model – although efforts have been made to improve on the CBCA model and Bill 16, introduced into the Alberta Legislature on March 10, 2005, is a further illustration of Alberta's progressiveness in the field of business law. The current Alberta statute served as the model for the Northwest Territories statute, of which the Nunavut statute is a clone.

[22.] The business corporations statutes of Ontario, Manitoba and Newfoundland and Labrador each more or less follows the federal model – although less closely than the other provinces listed above. The new British Columbia ***Business Corporations Act***[30] that came into force on March 29, 2004 departs from the federal model, combining elements both from the CBCA and the ***Company Act***,[31] the predecessor British Columbia incorporation statute of general application.

[23.] Quebec, Nova Scotia and Prince Edward Island each have companies statutes that are originally based on the English ***Companies Act***. In both Quebec and Nova Scotia, piece-meal amendments have been made to modernize the companies statutes and thereby close the gap that the CBCA opened.

[24.] The provinces that permit the formation of professional corporations include Ontario, British Columbia, Alberta, Quebec and New Brunswick. None of the territories has yet passed legislation that allows for the formation of professional corporations.

[25.] As stated, Nova Scotia is currently the only jurisdiction in Canada that permits the formation of ULCs. However, it appears that it will soon be joined by Alberta as a competitor for ULC incorporations.

V. Possible Projects for Uniform Legislation

A. Business Trusts

[26.] In the last few years, the business trust has become the hottest vehicle in Canadian capital markets.[32] However, its explosive growth has come despite a significant lacuna in the law. In contrast with the extensive legislation that governs corporations in Canada, there has been a total absence of business trust legislation in Canada, except in Québec with the provisions contained in the C.c.Q. By way of contrast, many US states have adopted comprehensive statutes governing the business trust. In the US, the leading business trust legislation may be found in Maryland, Delaware and Massachusetts.

[27.] Special legislation in this area could embody the following two concepts:

(a) it could be hybrid legislation, containing the best of US business or statutory trust legislation set against the backdrop of the CBCA; and

(b) it could be largely uniform legislation for the common law jurisdictions.

[28.] In Québec, the provisions of the C.c.Q., the ***jus commune***, are intended to provide protection for a large spectrum of actors in both the business and domestic spheres. The provisions dealing with trusts envisage a large category of trusts, including testamentary trusts, ***inter vivos*** trusts, charitable trusts, business succession trusts, investment trusts, mutual funds, etc. Special protection for investors is not required under the C.c.Q model as, in the absence of fraud on their part, the beneficiary/investors are not exposed to liability for the acts of the trust. Uniform legislation would be difficult to implement unless it addresses the need to recognize the institutions specific to Canada's two private law systems, more specifically, the radically different notions of ownership in common law and civil law. This project would represent an interesting challenge of legislative bijuralism.[33]

[29.] Given the absence of any comprehensive business trust legislation in Canada outside of Québec, the Uniform Law of Conference of Canada (ULCC) could make a significant contribution to both filling the gap in Canada's current legal landscape and doing so on a uniform basis. Hence, this paper will proceed to outline the contours of the main issues that such uniform legislation should address.

[30.] The marketplace for publicly traded securities in Canada is presently, and is likely to remain, dominated by business corporations. By far, the dominant model for business corporation legislation in Canada is the CBCA. Almost 50% of the 200 largest non-financial corporations in Canada are formed under the CBCA. The CBCA serves as a model for federal bank, insurance company, trust company and co-operative legislation and as the model for general business corporations statutes in Alberta, Ontario, Saskatchewan, Manitoba, New Brunswick, Newfoundland and Labrador, the Yukon Territory, Nunavut and the Northwest Territories. The CBCA was updated less than four years ago.

[31.] By modelling business trust legislation, as far as possible, after the CBCA, investors would be able to rely on approximately the same type of expectations regardless of whether the underlying issuer was a business corporation or a business trust. Currently, there is a high degree of ***de facto*** conformity to the CBCA because prevailing trust instruments are modelled on the CBCA or OBCA. However, investors should not have to rely exclusively on the idiosyncrasies of individual trust indentures for a determination of their rights and remedies.

[32.] Building on a solid CBCA foundation, provincial business trust legislation could then graft on the best features of the leading US business trust legislative jurisdictions.

[33.] Some critical issues that business trust legislation should address are as follows:

1. Statutory Recognition of the Separate Legal Personality of the Business Trust

(a) Recognition of Legal Personality

[34.] It would be highly desirable to recognize business trusts as distinct, legal entities. These are not expected to be any negative consequences under any significant tax laws (including the ***Canada-US Income Tax Convention, 1980***) if business trusts were recognized as distinct legal entities. In particular, the ***Income Tax Act*** (Canada) already treats trusts as separate taxpayers. The recognition of business trusts as distinct legal entities would be key to resolving a number of problematic legal issues surrounding the use of ***inter vivos*** mutual fund trusts as vehicles for owning an operating business. In Québec, however, this would contradict the basis of trust law – the existence of a patrimony independent of a person – and might signal a return to the pre-C.c.Q. era during which there was significant confusion as regards the nature of ownership in Québec trusts.

(b) Registration Requirement

[35.] There should be a registration requirement as there is in the case of business corporations. As well, there should be a way of instantly recognizing the business trust as a statutory creature - just as there is in the case of business corporations that have distinct legal element (e.g. “Inc.”, “Ltd.” or “Corp.”), limited partnerships that have a distinct legal element (e.g. “LP”), and limited liability partnerships that have a distinct legal element (e.g. “LLP”). Statutory business trusts should be treated in a manner that is analogous to these other statutory creatures (e.g. a trust or fund).

2. Limitation of Liability

(a) Beneficiary Liability

(i) Disqualification if Beneficiary Takes an Active Role

[36.] Investors in publicly traded vehicles do not, and should not, face the prospect of personal liability even if they play an active role in the direction or administration of the investment vehicle. Such qualification poses a significant barrier for financial institutions and pension funds that would otherwise be inclined to invest in a business trust. The arbitrary exclusion adversely affects the pricing and volume of trading in the securities of these issuers. It also adversely affects the rates of return for excluded institutional investors. Likewise, such qualification poses a significant obstacle for banks and other financial institutions that would otherwise be willing to extend credit on the strength of collateral consisting of units of a business trust. It is also difficult to define when a unitholder is taking an "active role". For a bank, pension fund or other institutional investor, any risk in this regard is anathema. Again, these artificial barriers affect access to, and the cost of, credit. Investors in publicly traded issuers should enjoy comparable immunity from personal liability regardless of the legal form of the underlying issuer. This is already the case in Quebec trusts. In the absence of fraud, a beneficiary/investor is not liable for the acts of the trust.

(ii) Reporting Issuer Qualification

[37.] At this time, legislation in relation to business trusts should be confined to reporting issuers and trusts, known as "subsidiary trusts", the majority of whose units are beneficially owned by reporting issuers. Subsidiary trusts are commonly used in income trust structures and should be subject to the same regime as the trust that is a reporting issuer.

3. Trustee Liability

(a) General Immunity

[38.] Business trust legislation should make it clear that a trustee of a business trust will only be liable in circumstances analogous to those in which a director of a corporation would be liable. These circumstances may, for example, include liability for employee wages, unpaid source deductions and certain environmental claims. In general, trustees should have a duty of loyalty and a duty of care analogous to those imposed by statute and common law on directors. This is already the case in Québec for contractual liability – once a trustee is acting within his or her powers, the trustee is not personally liable for the contractual obligations he or she has incurred on behalf of the trust. Extra-contractual liability, however, remains a problem in Québec. The trustee is subject to personal liability for any fault or negligence on his or her part. A trustee can, of course, be indemnified by the trust, but if the trust is insolvent, this indemnity is worthless.

(b) Trustee Indemnification out of Trust Assets

[39.] At common law, there are limitations on the ability of a trustee to enforce his or her right to indemnification out of trust assets. For example, a trustee may not be entitled to indemnification if the trustee acts in a manner contrary to the instrument establishing the trust or breaches his or her duty as trustee. Again, the law governing trustee indemnification should be analogous to that governing indemnification of directors and officers of a CBCA corporation. It is just as important to attract strong trustees as it is to attract strong directors of a business corporation. The law should encourage attracting strong candidates by ensuring that directors or trustees will be protected out of the assets of the trust for which he or she is a fiduciary.

(c) Trust Liability and Creditor Recourse Against Trust Assets

[40.] Currently, at common law, the status of the claims of unsecured trade and other creditors against the business trust is unclear.[34] A trade creditor or other unsecured creditor appears to have no claim against the trust assets ***per se***. The creditor only has a claim against the trustees. Creditors may have an indirect claim against trust assets through the doctrine of subrogation, specific performance or other legal theories. However, there is much uncertainty in Canadian common law on these points. The statutes should satisfactorily resolve these issues in a manner consistent with the expectations of creditors that have business dealings directly with the trust, trustees and unitholders. Thus, unsecured creditors should be able to look directly to the assets of the trust, should have no right to recover from beneficiaries directly and should only have recourse against trustees in circumstances analogous to those in which a creditor can look to directors (e.g. fraud, personal commission of a tort and oppression but not a duty of loyalty to creditors or breach of contract claim between the creditor and the trust).

[41.] In Quebec, an unsecured trade creditor may pursue the trustee of the business trust for liabilities or obligations arising from contract. Should the creditor be able to prove that the trustee acted outside his or her powers (as set out by the trust deed or by the C.c.Q.) or that the trustee engaged in fraud, then the trustee will be personally liable to the creditor. However, if the trustee acted within his or her powers and did not participate in fraud, the creditor's claim is limited to the assets of the trust.

4. Governance

[42.] In general, investors in business trusts expect, and should expect, to have rights and remedies that are analogous to those that would be enjoyed if the enterprise were operated through a business corporation. From the investor's standpoint, the only significant difference between a business corporation and a business trust should be the tax treatment of distributions (including business or investment income, interest, dividends, capital gains and return of capital) flowing through the trust into the hands of investors. As stated, the rights of unitholders of business trusts should parallel the rights of shareholders of business corporations. As much as possible, investors in the marketplace should have closely analogous expectations irrespective of the tax considerations that drive the choice of business vehicle.

[43.] Accordingly, unless adequately dealt with under securities laws, business trust legislation should adopt CBCA standards with respect to meetings of unitholders, notice and voting rights, election and replacement of trustees, appointment of auditors, unitholder proposals, functions of audit committees, financial statements, distributions, derivative actions, the oppression remedy, dissent and appraisal rights, dissolution, winding up, etc.[35]

5. Investor Protection

[44.] There is no principled basis for subjecting business trusts to different continuous disclosure or insider trading regimes than those that prevail for other investment vehicles. Investor protection should be neutral as to the choice of business vehicle.

6. Insolvency and Restructuring Legislation

[45.] Despite the possible application of the decision of Farley J. in ***Re. Lehndorff General Partner Ltd***.[36], the ***Bankruptcy and Insolvency Act***[37] (BIA) and the ***Companies' Creditors Arrangement Act*** [38](Canada) (CCAA) should, at the earliest possible moment, be amended to expressly extend to non-corporate business vehicles such as business trusts. Parliament should not wait until business trusts become insolvent before amending the BIA and the CCAA.

7. Other Issues

[46.] Like business corporation legislation, business trust legislation could enable business trusts to export themselves to the business trust legislation of sister Canadian jurisdictions and, at the same time, enable business trusts formed in sister jurisdictions to import themselves. Again, there is no good reason to tolerate less flexibility in the case of business trusts than exists for business corporations. If a business trust exports itself from one province, then a statutory appraisal remedy should be available to the unitholders of the business trust. Likewise, there should be statutory processes for easily merging or combining two or more business trusts analogous to prevailing laws applicable to combining business corporations. Compulsory and compelled acquisition rules should apply to take-overs of units in business trusts as they do for shares in business corporations.

B. Limited Partnerships

[47.] Unlike business trusts, legislation in relation to LPs is not starting from a clean slate. Instead of building from the ground up as in the case of business trust legislation in common law jurisdictions, improving the framework of LP legislation is a renovation project. However, many of the issues arising in connection with business trust legislation apply with equal force to LPs. LPs are often, but not exclusively, used as investment vehicles. With the notable exception of Manitoba, provincial LP legislation (including the C.c.Q.) provides that a limited partner who controls the business of the LP, or who participates in the management of the business of the LP, loses the liability shield otherwise available. Otherwise, the liability formula varies from province to province. The ***Partnerships Act*** (Manitoba) imposes no such qualification to obtain limited liability protection. As a result, many LPs used in publicly traded income trust structures choose a Manitoba LP even if there is no real connection to that Province. As in the case of the business trust, investors in publicly traded vehicles do not, and should not, face the prospect of personal liability even if they play an active role in the direction or administration of the investment vehicle. Such a qualification poses a significant barrier that adversely affects the pricing and volume of trading in the securities of these issuers. Thus, each province should consider amending its LP legislation so as to remove the qualification that a limited partner is only entitled to a liability shield if he or she does not control, or participate in managing, the business of the LP.

[48.] Other issues that LP legislation could treat on a uniform national basis are as follows:

(i) the LP as a separate legal person;

(ii) export continuances to other Canadian provinces or territories;

(iii) import continuances from other Canadian provinces and territories;

(iv) merger and take-over bid rules, including compulsory and compelled acquisitions;[39]

(v) continuous disclosure;

(vi) insider trading; and

(vii) insolvency and restructuring legislation.

C. Limited Liability Companies

[49.] The LLC is a true hybrid that has some of the attributes of a corporation and some of the attributes of a partnership or proprietorship. Currently, no Canadian jurisdiction allows for the formation of a LLC. Yet there clearly is a need, in Canadian law, for a hybrid vehicle that combines:

(i) the tax attributes of a partnership; and

(ii) the limited liability protection and separate personality ordinarily accorded shareholders of a business corporation.

It is possible to achieve the foregoing combined objectives through an LLC.[40]

[50.] To be sure to receive flow-through tax treatment, an LLC would have to be a partnership within the meaning of the ***Income Tax Act*** (Canada). This is mission critical. Without the requisite income tax characterization, there would be almost no point to creating a new business vehicle. The ***Interpretation Act***[41] (Canada) permits a partnership to be separate legal person. In some jurisdictions – such as Scotland, many US states and the continental European countries – partnerships are legal persons.

[51.] However, there is nothing inherent in the tax treatment accorded a partnership that requires that the partnership be denied separate legal personality or that the partners be denied limited liability protection. For instance, it would be possible for a member of an LLC to have liability capped at the amount invested in an LLC in a manner analogous to a shareholder's investment in a corporation or a limited partner's investment in an LP.

[52.] If permitted in Canada, an LLC would quickly gain wide acceptance. It could foreseeably supplant the use of both GPs and LPs. One of LLC's main uses would be in businesses that have outgrown the small business deduction and where double taxation of income flowed through the partnership becomes a real financial burden.

D. Extra-Provincial Licences

[53.] One fruitful area for uniformity of legislation in Canada would be extra-provincial licensing requirements. Currently, the requirements range from an exemption in the Ontario statute for corporations formed under federal law or the laws of another Canadian province or territory to laws that are often more onerous than those in the home jurisdiction. For instance, until 2003, British Columbia required an extra-provincial corporation to publicly file its internal by-laws even though these were not publicly filed in the corporation's home jurisdiction. Alberta requires certain significant shareholders to be listed even though, for instance, neither the CBCA nor the OBCA require public disclosure of shareholders.

[54.] It should be possible for the provinces and territories to adopt consistent coverage, information and filing requirements. In one model, a corporation or other business entity could fill out a single form, check those boxes where it wants an extra-provincial licence and pay an additional filing fee for each province and territory in which it wants to register. The home jurisdiction would remit the completed forms and fees to those other provinces and territories that the corporation or other business entity selects. Business could be spared the expense of retaining law firms in each jurisdiction.

[55.] An even better model would see the provincial and federal governments share a common database. The extra-provincial licensing requirements could, conceivably, be abolished. If someone in New Brunswick wants to search an Alberta business entity conducting business in Manitoba or any other Canadian jurisdiction, that should be possible. The costs of establishing and maintaining the database would be covered either through registration or, better yet, search fees.

[56.] The long-term savings to the Canadian business community from the implementation of either of these models could be enormous.

E. Business Names

[57.] Many of the same comments made with respect to extra-provincial licenses could also be made in connection with business name registrations. Again, it should be possible for the provinces and territories to either adopt a common information form or to share a common database. A business name database could be rich enough to list all the provinces and territories in which a particular business name is registered. Again, the cost of establishing and maintaining the national database could be defrayed through a combination of search and registration fees.

F. Limited Liability Partnerships

[58.] Many law firms and accounting firms having two or more members operate pursuant to an LLP. Currently, LLPs are allowed in Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Québec. Many of the large national accounting firms and law firms operate in one or more provinces or territories. There would be a commercial advantage in treating LLPs in a uniform manner across Canada. In that way, members and creditors of LLPs would enjoy clear, consistent treatment and could develop reliable expectations. The particular areas that would require attention to achieve uniformity would be the following:

(i) the liability of a non-negligent partner of an LLP for the negligent acts or omissions that another partner, employee, agent or representative of the LLP commits in the course of the partnership business;

(ii) the liability of a partner in an LLP for his or her own negligence and the negligence of a person under that partner's direct supervision or control;

(iii) the liability of partners of an LLP in respect of ordinary trade debts of the LLP as opposed to liability to clients for negligence;

(iv) consistent name treatment; and

(v) consistent registration requirements.

G. General Partnerships

[59.] An overhaul of the statute law governing LPs, LLCs and LLPs leads inevitably back to the collateral examination of GPs.

[60.] In the case of GPs, there is a great deal of uniformity in common law Canada since provincial and territorial GP statutes are based on common British sources that have not undergone substantial revision since the late 19th century.

[61.] Hence, there has been a great deal of stability in GP law. Nevertheless, it would be useful to update GP law. For instance, consideration should be given to amending the law so that in Canada, as in most US states, a GP is a separate legal person. Again, providing that a GP is a separate legal person would not adversely affect its income tax treatment. In Québec, this question was debated in the reform process that culminated in the adoption of the new C.c.Q. Finally, the Québec National Assembly decided to expressly exclude the status of legal person for partnerships. However, as mentioned above, the C.c.Q. recognizes that partnerships have several attributes of a legal person.[42] A question to be asked is whether the Québec National Assembly would agree to reopen this debate.

H. Professional Incorporations

[62.] Ontario, Alberta, British Columbia, New Brunswick and Québec allow professionals to incorporate. There are differences between the various models used for professional corporations. Again, given that professionals who operate through a professional corporation may carry on business in multiple jurisdictions across Canada, substantially uniform laws on the incorporation, organization and liability of members would be desirable.

[63.] The issues that would require harmonization in order to achieve uniformity would be as follows:

(i) provision for a federal professional corporation so that shareholders could choose an incorporation statute that was jurisdiction neutral and equally accessible to all those who live across Canada (note that professional corporations in Québec may be constituted under the CBCA or a provincial statute such as the OBCA or the Québec ***Companies Act***);

(ii) consistent treatment of the professional liability of a shareholder of the corporation for the acts of employees or agents of the corporation. A fundamental policy question is whether the rules on professional liability for members of a professional corporation in certain provinces should continue to be more stringent than those applicable to non-negligent partners of an LLP;[43]

(iii) treating trade and other creditors of the professional corporation in a manner consistent with creditors of any other business corporation;

(iv) rationalizing the rules controlling the identity of shareholders of a professional corporation so as to enable income-splitting arrangements amongst family members through non-voting share provisions; and

(v) adopting a consistent means of designating a professional corporation amongst all provinces and territories.

I. Unlimited Companies

[64.] As stated, the ULC has certain US tax advantages unavailable to an ordinary business corporation. Currently, the only jurisdiction in Canada that permits formation of ULCs is Nova Scotia although, as stated, Alberta has recently introduced changes to its corporate statute that would allow the creation and import of ULCs into that Province. The total volume of ULC formation is, however, miniscule.

[65.] In calendar 2002, only 647 ULCs were formed in Canada (all, of course, in Nova Scotia).[44] The total volume of ULCs would not justify every province competing for these few incorporations. The first choice, therefore, would be to permit their formation under the CBCA.

[66.] If the CBCA were used as a vehicle for forming ULCs, provincial ULC legislation would be largely unnecessary. Foreign investors would not have to involve two sets of lawyers for jurisdiction shopping reasons. A federal ULC could be incorporated by lawyers practicing anywhere in Canada and its registered office could be chosen for business, not legal, reasons. Major commercial transactions involving a ULC (such as acquisitions, divestitures, reorganizations and debt financings) would not necessitate legal opinions from Nova Scotia counsel just because the ULC is incorporated there.

[67.] In the absence of federal legislation, the next best choice would be to allow Ontario ULCs because Ontario is the financial capital of the country and because ULCs are typically used in large dollar transactions or investments. Relying on Nova Scotia or Alberta as the exclusive jurisdictions for the formation of ULCs perpetuates inefficiency.

VI. Suggested Implementation Strategy

[68.] Many factors must be weighed in prioritizing possible candidates for uniform legislation. These include the commercial importance of the proposed legislation, the amount of time and effort that would be required to devise legislation, the prospects for uniformity, the availability of human and financial resources.

[69.] At the top of the list of possible projects, we place business trust legislation. Business trusts have enormous economic significance, and yet there is a complete vacuum in the Canadian common law provinces on business trusts law. In comparison, Québec law provides extensive rules with respect to trusts and administration of property of others. These rules offer a starting point for a legislative project on business trusts. There are also US laws which provide rich material to work with on such a project. The economic significance of business trusts would warrant immediate attention to this neglected area. The timing is right, and the field is open.

[70.] The second priority area would be LPs, LLCs and GPs. Ideally, these would be treated as a package. Alternatively, they would be considered in the order mentioned. Again, LPs are important business investment vehicles. Much of the work that goes into the formation of business trust legislation would have immediate application to LPs which are also used as publicly traded investment vehicles.

[71.] No jurisdiction in Canada currently allows the formation of an LLC. However, if an LLC that can combine the tax characteristics of a partnership with the limited liability features of a corporation were permitted, it would quickly become well used and might in short order supplant LPs and GPs.

[72.] The work in relation to LPs and LLCs would naturally lead to a reconsideration of at least some of the rules for GPs including, in particular, the issue of whether partnerships including GPs should be statutorily recognized as enjoying separate legal personality.

[73.] The third priority would, ideally, consist of combined re-examination of extra-provincial licensing requirements and business name registration laws. There is tremendous potential for efficiency gains through uniform legislation. The sheer volume of extra-provincial licences and business name registrations would, therefore, suggest a uniform national approach or, better yet, a uniform national database. A uniform approach would allow one-stop filing, reduce paperwork and eliminate the need for lawyers to process routine filings.

[74.] The fourth priority would consist of LLPs and professional corporations. These are, respectively, the non-corporate and corporate vehicles whereby professionals can practice. There is need both for recognition of LLPs and professional corporations across Canada, consistent inter-jurisdictional treatment of the same business associations and consistency as between LLPs and professional corporations in the areas of liability for professional negligence.

[75.] Here, laws governing the commercial features of the business vehicle intersects with provincial regulation of the professions. Nevertheless, the ULCC could perform a useful role in separating and analyzing the issues and developing a consensus approach.

[76.] One option that would not make a worthwhile project for the ULCC would be ULCs. These are too few in number to justify numerous jurisdictions entering the field. The logical choice would be to permit either federal ULCs or, as a distant second choice, Ontario ULCs. There would be fast diminishing returns were other provinces to enter the field.

Forms of Business Associations and Relevant Statutes

Form of Business Association	Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland and Labrador
Sole proprietorship	***Partnership Act*** s.110 (1)[1]	***Partnership Act*** s.88[1]	***The Business Names Registration Act*** s.2(1)(a)[1]	***Partnerships and Business Names Registration Act***[1]	Currently, Newfoundland and Labrador does not have legislation governing a business name registry.
Corporate Division	As above	As above	As above	As above	As above
GP	***Partnership Act***	***Partnership Act***	***The Partnership Act*** ***The Business Names Registration Act*** s..2(1)(b)	***Partnership Act*** ***Partnerships and Business Names Registration Act*** s.3(1)	***Partnership Act***
LP	***Partnership Act*** (see Part 2)	***Partnership Act*** (see Part 3)	***The Partnership Act*** (see Part II) ***The Business Names Registration Act*** s.2(1)(b)	***Limited Partnership Act*** ***Partnership Act*** (see s.46, applies to the extent not inconsistent with the ***Limited Partnership Act***)	***Limited Partnership Act***
LLP	***Partnership Act*** (see Part 3)	***Partnership Act*** (see Part 6)	***The Partnership Act*** (see Part III) ***The Business Names Registration Act*** s.2(1)(b)	***Partnership Act*** (see Part III) ***Partnerships and Business Names Registration Act*** s.8.1	n/a
JV	Common law	Common law	Common law	Common law	Common law
Co-ownership	Contract law	Contract law	Contract law	Contract law	Contract law
Business Trust	***Income Trusts Liability Act (confers limited liability to beneficiaries "as a beneficiary")***	n/a	n/a	n/a	n/a
Business Corporation	***Business Corporations Act*** (ABCA)	***Business Corporations Act, 2002*** (BCBCA)	***The Corporations Act*** (MCA)	***Business Corporations Act*** (NBBCA)	***Corporations Act*** (NLCA)
Professional Corporation	ABCA (s.7(2) requires evidence of approval of articles by the appropriate governing body)	***Partnership Act*** (s.97 provides that a "professional partnership" may be registered as a limited liability partnership)	MCA (s.15(3) if the profession's governing Act permits professional practise by corporation)	NBBCA (s.13(3)(d) if the profession's governing Act permits professional practise by corporation)	NLCA ***(no specific reference; however, see for example, Optometry Act, s. 16)***
ULC	n/a	n/a	n/a	n/a	n/a

[1] ***Individuals operating under a name other than their own will require registration of that name***.

Form of Business Association	**Northwest Territories**	**Nova Scotia**	**Nunavut**	**Ontario**	**Prince Edward Island**
Sole proprietorship	***Partnership Act*** s.48[1]	***Partnerships and Business Names Registration Act*** (s.2(ab) defines a "partnership" to include an individual operating under another name) [1]	***Partnership Act,*** s.48[1]	***Business Names Act*** s. 1(2)[1]	***Partnership Act***, s.53[1]
Corporate Division	As above	As above	As above	As above	As above
GP	***Partnership Act***	***Partnership Act*** ***Partnerships and Business Names Registration Act*** s.3(1)	***Partnership Act***	***Partnerships Act*** ***Business Names Act*** s. 2(3)	***Partnership Act***
LP	***Partnership Act*** (see Part II)	***Limited Partnerships Act*** ***Partnership Act*** (applies to the extent not inconsistent with the ***Limited Partnership Act,*** see s.3)	***Partnership Act*** (see Part II)	***Limited Partnerships Act*** ***Partnerships Act*** (s. 46, applies to the extent not inconsistent with the ***Limited Partnerships Act***)	***Limited Partnerships Act***
LLP	n/a	***Partnership Act*** (see Part II) ***Partnerships and Business Names Registration Act*** s.7A	n/a	***Partnerships Act*** (see s.44.1) ***Business Names Act***	n/a
JV	Common law	Common law	Common law	Common law	Common law
Co-ownership	Contract law	Contract law	Contract law	Contract law	Contract law
Business Trust	n/a	n/a	n/a	***Trust Beneficiaries' Liability Act*** (confers limited liability to beneficiaries "as beneficiaries")	n/a
Business Corporation	***Business Corporations Act*** (NWTBCA)	***Companies Act*** (NSCA)	***Business Corporations Act*** (NBCA)	***Business Corporations Act*** (OBCA) ***Business Names Act***	***Companies Act*** (PEICA)
Professional Corporation	NWTBCA (no specific reference; however, see for example ***Dental Profession Act,*** s. 25)	NSCA (no specific reference; however, see for example ***Optometry Act,*** s. 18)	NBCA (no specific reference; however, see for example ***Dental Profession Act (Nunavut)*** s. 25)	OBCA (see s.3.2)	PEICA (no specific reference; however, see for example ***Medical Act*** s. 21)
ULC	n/a	NSCA (s.12)	n/a	n/a	n/a

[1] ***Individuals operating under a name other than their own will require registration of that name***.

Form of Business Association	**Quebec**	**Saskatchewan**	**Yukon**	**Federal**
Sole proprietorship	***An Act Respecting the Legal Publicity of Sole Proprietorships, Partnerships and Legal Persons*** (Legal Publicity Act), s. 2(1) [1]	***The Business Names Registration Act,*** s. 2(c)(i) [1]	***Partnership and Business Names Act***, s. 87(1)[1]	n/a
Corporate Division	As above	As above	As above	n/a
GP	C.c.Q. and Legal Publicity Act	***The Partnership Act*** ***The Business Names Registration Act***	***Partnership and Business Names Act***	n/a
LP	C.c.Q. and Legal Publicity Act	***The Partnership Act*** (see Part II) ***The Business Names Registration Act***	***Partnership and Business Names Act*** (see Part 3)	n/a
LLP	***Professional Code***, Professional Orders' Regulations and C.c.Q.	***The Partnership Act*** (see Part IV)	n/a	n/a
JV	C.c.Q.	Common law	Common law	n/a
Co-ownership	C.c.Q.	Contract law	Contract law	n/a
Business Trust	C.c.Q.	n/a	n/a	n/a
Business Corporation	***Companies Act*** and C.c.Q.	***The Business Corporations Act*** (SBCA)	***Business Corporations Act*** (YBCA)	***Canada Business Corporations Act*** (CBCA)
Professional Corporation	***Professional Code***, Professional Orders' Regulations and C.c.Q.	SBCA (no specific reference; however, see for example ***The Medical Profession Act, 1981*** s. 37.1)	YBCA, s. 9(2)	n/a
ULC	n/a	n/a	n/a	n/a

[1] ***An individual operating under a name other than his or her own name will require registration of that name***.

Notes

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[1] A division may be thought of as the corporate equivalent of a sole proprietorship, as a single corporation may operate one or more functionally separate businesses without forming wholly owned subsidiaries.

[2] R.S.C. 1985, c. C-44.

[3] R.S.O. 1990, c. B-15.

[4] For example, CBCA, s. 15(1); OBCA, s. 15.

[5] See the ***Corporative Credit Associations Act***, S.C. 1991, c. 48.

[6] Nova Scotia unlimited companies are often colloquially, but inaccurately, referred to as unlimited liability companies, abbreviated as ULCs or NSULCs.

[7] This paper is only intended to convey a general impression of the tax factors that influence the choice of business form and, therefore, has been condensed and simplified. Nor has the tax commentary in this paper been reviewed by a tax practitioner. No part of this paper should be relied on to provide legal advice.

[8] In Québec, the law recognizes that a partnership has some characteristics of a legal person that distinguishes it from its partners. “Thus it has a name, an autonomous existence separate from that of its partners, a head office, rights and obligations (debts and commitments), a specific activity and assets (a patrimony). It may sue and may be sued under its declared name. Its partners hold shares but do not own the partnership’s assets”. ***The Principal Juridical Forms of Enterprises in Quebec***, Québec, Les Publications du Québec, 2000, p. 9. Similarly, a partnership is recognized as a separate person under some federal and provincial legislation outside Quebec. See, for example, the definition of “entity” in s. 2(1) of the CBCA.

[9] In Québec, the nature of the partnership’s ownership interest is still debated in the case law and in doctrinal studies.

[10] Under the civil law, the partners of a GP have solidary liability for all debts and obligations of the GP. The ***Private Law Dictionary*** defines the expression “solidary liability as: “Civil liability of several debtors, each of whom is held answerable to a single creditor for the entire debt”. Centre de recherche en droit privé et comparé du Québec/Quebec Research Centre of Private & Comparative Law, ***Private Law Dictionary***, Cowansville, Éditions Yvon Blais, 2003. Thus, solidary liability under the civil law is equivalent to joint and several liability at common law.

[11] Corporate members of the JV are subject to PCT and LCT.

[12] Alberta and Ontario have enacted legislation that that limits the liability of unitholders of publicly traded trusts. The legislation does not apply to business trusts that are not publicly traded.

[13] The concept of "patrimony" is defined in the ***Private Law Dictionary*** as a: " Universality of rights and obligations having a pecuniary value in which rights answer for obligations […] The patrimony is formed of present property and obligations and has the vocation to receive future property and obligations". In civil law, the concept of "property" is defined as "any right having an economic value." It includes real rights and personal rights.

[14] See articles 1319 to 1323 C.c.Q.

[15] Art. 1457 C.c.Q.

[16] Art. 1260 to 1298 C.c.Q. for trusts and art. 1299 to 1370 C.c.Q. for administration of property of others.

[17] In civil law, ownership cannot be divided into legal ownership and equitable ownership. This caused problems under the ***Civil Code of Lower Canada*** (1866), to the extent that the Supreme Court of Canada issued conflicting rulings on the nature of ownership of Québec trusts. When the C.c.Q. was finally adopted in 1991, the problem of ownership of trust property was resolved in an imaginative and unique manner. The concept of the "patrimony" (see ***supra*** note 13) was altered to allow for the existence of the patrimony independently of the person. This meant that a person could dedicate or appropriate assets to a particular purpose (charity, wealth protection, etc). This patrimony would hold assets (and liabilities), but no one would have any real rights in these assets (no ownership). Instead, a trustee would be appointed to administer the assets contained in the patrimony. The trustee would have no real rights (ownership) in the trust assets but would have control and exclusive administration of the patrimony, the title to the property is made up in his or her name, and the trustee exercises of all rights pertaining to the patrimony. In other words, the trustee exercises all rights of the owner of the property, except that he or she is not the owner. In Quebec trust law, no person is the owner of the property in the trust patrimony. In this regard, much of the doctrine on Québec trusts refuses to refer to trust property as being "masterless property" since the trustee is the "master".

[18] Art. 1319 C.c.Q.

[19] For a recent judicial statement, see ***642947 Ontario Ltd***. v. ***Fleisher*** (2001), 209 D.L.R. (4th) 182 (Ont. C.A.).

[20] R.S.C. 1985, c. C-43.

[21] Provincial thresholds may vary. Also, claw-back provisions can apply, the details of which are beyond the scope of this paper.

[22] R.S.C. 1985, c. 1 (5th Supplement), as am.

[23] Again, the summary of US tax advantages has not been specifically reviewed by a US tax practitioner, is intended only to convey general information and should not be relied on for specific advice.

[24] (U.K.) 30431 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[25] The leading Canadian case is still ***CMHC v. Graham*** (1973), 43 D.L.R. (3d) 686 S.C. (N.S.S.C. ***per*** Jones J.). See also Melanie A. Shishler "The ***Graham*** Decision Revisited: The Fading Promise of the Joint Venture as a Distinct Legal Concept" (1998), 31 Can. Bus. L.J. 118.

[26] R.S.C. 1985, c. 5-9.

[27] R.S.C. 1985, c. P-4.

[28] R.S.C. 1985, c. C-4.

[29] Such as the ***Partition Act***, R.S.O. 1990, c. p. 4.

[30] S.B.C. 2002, c. 57.

[31] R.S.B.C. 1996, c. 62.

[32] A recent estimate says that the 200 publicly traded business trusts in Canada have aggregate assets approaching $200 billion. See Andrew Willis "Trusts Have Arrived: Academia Paying Heed" Globe and Mail, April 5, 2005, p. B17.

[33] The federal government has taken steps in that direction. See: ***The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism***, http://canada.justice.gc.ca/en/dept/pub/hfl/table.html

[34] See David A. Steele and Andrew G. Spence "Enforcement Against the Assets of A Business Trust by an Unsecured Creditor" (1998), 31 Can. Bus. L.J. 72.

[35] Securities laws address some of these issues (e.g. notices and financial statements) but not others. In practice, trust indentures or trust declarations provide for the remaining matters (but these lack a statutory base).

[36] (1993), 17 C.B.R. (3d) 24.

[37] R.S.C. 1985, c. B-3.

[38] R.S.C. 1985, c. C-36.

[39] Securities laws are incomplete because their application depends on a bid being made to security holders located within the province. Merger and take-over bid rules imposed at the LP level would ensure a minimum rule applies to limited parties wherever they are located.

[40] In this paper, the concept of LLC is used for convenience but could be called something else. A Canadian LLC would differ from a US LLC in several respects, ***viz***. (i) a Canadian LLC would be a partnership, not a hybrid; (ii) as a partnership, it would have to conform to the requirement of having two or more partners; and (iii) as a partnership, it would have to carry on a business and not be a purely investment vehicle.

[41] R.S.C. 1985, c. I-21.

[42] See ***supra*** note 8.

[43] In Québec, the professional liability contained in the ***Professional Code*** is the same for members of all LLPs and of professional corporations. However, there are significant differences in the treatment of liability issues in Ontario depending on whether the professional practice is carried on through an LLP or a professional corporation.

[44] The last year in which the authors have the relevant statistics.