



## **UNIFORM LAW CONFERENCE OF CANADA**

### **REFORM OF GENERAL PARTNERSHIP LAW - JOINT-VENTURES**

#### **DRAFT - ROADMAP**

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## Summary

[1] In the Canadian context, one fundamental question arises: Is it really necessary to reform partnership law? Can needs be met through other strategies or other forms of business organization? If there is a need, what objectives would the reform or harmonization project achieve?

[2] In Canada, the law applicable to general partnerships has never undergone fundamental reform. To date, reforms have resulted in the creation of new forms of business association such as the limited partnership<sup>1</sup> and, in many jurisdictions, the professional limited liability company<sup>2</sup>.

[3] In 2005, the Uniform Law Conference considered how to reform general partnership law in Canada, and the usefulness of such reform. It should be noted that civil law and common law treat this matter differently. At the time, this fact resulted in a Report and a Text explaining the debate around the legal nature and relevance of a reform or harmonization respectively.

[4] Now, 14 years later, the issue is back on the agenda again. To this end, the question arises: Is it appropriate to resume work at the stage where it was left off? Or should one start over again?

[5] In our opinion, it would be relevant to rely on this work to revisit the general issues and the debate around this theme. However, we believe that it would be necessary to delve a bit deeper and to ask: Do the issues around this theme remain the same today? Do the difficulties of the rule of law or the drivers for reform and harmonization proposed in 2005 remain unchanged today?

[6] Today it is very difficult to respond to these questions, nevertheless we have attempted to create a road map which enables us to establish a route around these questions, and to estimate a timeline.

[7] We have divided our draft roadmap into two parts: the first part will revisit the work undertaken in 2005 and its conclusions, drawing on the texts developed by the Conference at that time. The second part will present a project comprising the stages and deadlines around the problem: an update is planned following an analysis of Canadian and Quebec law (laws and jurisprudence), in the light of the national law applicable in all Canadian provinces, comparative law and private international law.

[8] Note that the committee currently comprises the following members (in alphabetical order) – other experts will be added:

- Maya Cachecho - University of Montreal
- Clark Dalton - ULCC
- Peter Lown - ULCC
- Paul Martel - Blake, Cassels & Graydon S.E.N.C.R.L
- Rebecca Warner – Gov AB

## **Part 1- Overview of Previous Work: The Context for Harmonization and Rationale for Reform**

### **1. The Context for Harmonization<sup>3</sup>**

[9] Partnership law is one of the simplest and oldest types of business association. To operate a partnership, two or more people must agree to do business with each other with the objective of obtaining a profit<sup>4</sup>. Even though the concept is a simple one, ever since its inception the jurisdictions of civil and common law have defined this form of commercial company differently. Both the UK 1890 Partnership Act and the United States 1914 Uniform Partnership Act envisioned the general partnership as a consortium. According to this conception, a partnership is the result of a simple grouping of the individual partners who compose it: it is not an entity which is separate and distinct from its associates. In the absence of all other legal rights to do so, the general partnership is not an entity entitled to own property, enter into contracts, sue in its own name or continue after withdrawal, death or dissociation of the general partnership from one of its partners. These are just the set of rights and responsibilities of associates.

#### **The debate over the legal nature of the partnership form of business organization is not new**

[10] In fact, common law jurisdictions in Canada have not really adopted the conception of the general partnership as being a group, but have devised a procedural law which allows this type of company, endowed with a registered trade name, to take legal action in its own name<sup>5</sup>; this procedural law also provides for enforcement on assets held in the name of the general partnership<sup>6</sup>, as well as the registration of interests in personal property under the trade name of the general partnership and their enforceability<sup>7</sup>.

### **2. Rationale for Reform**

[11] Both in the *RUPA* (United States) and in the Law Commission's draft law, the jurists gradually abandoned the notion of a grouping to define a general partnership, opting rather for it having its own legal personality<sup>8</sup>. However, in both cases, the reforms have not led to a complete abandonment of the characteristics linked to the status of a general partnership. Both the US and UK have maintained this status for tax purposes<sup>9</sup>.

#### **What is the rationale for reforming partnership law and its implications in the Canadian context?**

[12] Looking at United States and the United Kingdom law, **two practical issues have been detected** in this regard:

[13] Firstly, when considered as a group of partners, whenever a general partnership undergoes a change in its composition (for example, due to a death or retirement), it disappears, either through the creation of a new general partnership to take over the business, or by its liquidation. The decision to make a general partnership a separate legal entity facilitates continuation of the business in the event of a change in its composition, thus avoiding liquidation of the business<sup>10</sup>.

[14] On the other hand, the attraction of keeping its status as a grouping consists in avoiding the problems caused by the ownership of assets, in particular buildings<sup>11</sup>. As a general partnership has no legal personality, it cannot own property. However, the assets are the joint property of all the partners. There are difficulties associated with registering the rights of the partnership in title registers and determining the rights to the property of the partnership, or the rights that are enforceable against them when the composition of the general partnership changes. As a legal entity, a general partnership could hold title to property. However, this legal entity would not help to better determine whether the assets belong to the general partnership or to the business separately from its partners ».

[15] It would also be pertinent to remember here the minutes summarizing the mandate of the working group following the work of the Conference in 2006:

**«UNIFORM LAW CONFERENCE OF CANADA  
EDMONTON, ALBERTA  
AUGUST 20 – 24, 2006  
CIVIL SECTION MINUTES**

**REFORM OF GENERAL PARTNERSHIP LAW:  
THE AGGREGATE vs. ENTITY DEBATE—STUDY PAPER**

Presenter: Professor Heather D. Heavin, College of Law University of Saskatchewan

Professor Heavin's paper reviews proposed reforms of general partnership law in both the United States and the United Kingdom. In 1994, NCCUSL adopted the *Revised Uniform Partnership Act* (RUPA), which substantially revised the 1914 *Uniform Partnership Act*. Further amendments were made to RUPA in 1997, including provisions pertaining to limited liability partnerships (RUPLA). Both RUPA and RUPLA have been adopted by some U.S. States. In 2003, the U.K. Law Commission and the Scottish Law Commission authored a report on partnership law, which report included a revised *Partnership Act* (Draft Bill). The reforms proposed in this joint report have not yet been implemented. Both the existing U.K. statutes and the 1914 U.S. *Uniform Act* take the aggregate approach to partnership, *i.e.*, the partnership is a mere aggregation of individual partners and is not an entity separate and distinct from the partners. Both RUPA and the U.K. law reform Bill take the approach of abandoning the aggregate view in favour of giving separate legal status to a partnership (other than for tax purposes). The motivation behind these reforms was to provide for continuity of the partnership after changes in membership and to allow for the partnership to hold title to property (which is a particular issue in the UK).

Professor Heavin reviews the current law in Canada, which takes the aggregate approach to partnerships, and summarizes the tax treatment of partnerships in Canada, the U.S. and the U.K. She notes that both the existing partnership legislation and partnership agreements themselves deal with many of the issues or concerns that arise from the aggregate model of partnership (*i.e.*, the disadvantages to creditors and others). Professor Heavin notes that if Canadian jurisdictions were to change to an entity model, the tax policy applicable to partnerships would have to be negotiated with the federal and provincial governments. A change to entity status also raises the question of whether partners would automatically obtain limited liability status in the same way as shareholders in a corporation. It also raises questions about liability of partners to creditors.

The Report concludes that there is a good deal of uniformity between the provinces under the current statutory regimes and that the aggregate approach to partnership also promotes freedom of contract. Professor Heavin raises the question whether lack of separate legal personality for partnerships has actually created any problem in Canadian jurisdictions, and whether there were any real problems with operating partnership that need to be addressed. In her view, the desire to provide continuity at

will does not justify any reform in Canadian law. The only other possible reason for reform would be if there are other problems, such as the inability of partnerships to hold real property.

In discussion it was noted that Québec had reformed its general law of partnership in the 1990s.

**RESOLVED:**

**THAT** a Working Group be established to prepare, in accordance with the directions of the Conference, a study paper examining the merits of the options set out in the Report, and containing legislative recommendations for consideration at the 2007 meeting ».

## **Part 2 - Operational Planning: Preliminary Questions, Strategies, Steps and Timing**

### **1. Preliminary Questions and Proposed Strategy**

[16] In principle we are in agreement with Professor Heavin's conclusions.

[17] However, for this current mandate, we are in favor of checking the state and basis of current law in order to be aware of the difficulties and challenges being experienced today in practice. This audit will allow us to determine how to achieve harmonization in Canada in this area. This harmonization is, in our view, essential to ensure legal predictability. In fact, when rules differ from one province to another a certain legal unpredictability is created, especially for creditors. For this practical need, it would be necessary to start by reflecting on the challenges of private international law in this matter. What would be the applicable law, for example, when the dispute involves actors or assets located in more than one jurisdiction? The issues arising from identifying the applicable law are important to determine to ensure the confidence of entrepreneurs, creditors and other actors involved in the conduct of business in all Canadian provinces. In the same vein, we of course recommend that the work of the Committee be carried out in the light of comparative law (*common law* and *civil law* jurisdictions (to be determined)).

[18] Concerning the mandate, we recommend further specifying the mandate of the Committee, envisaging three elements:

1. **An update of the general issues related to this theme, and a list of the practical ones** experienced in each province. This will lead to a reflection on possible legal solutions that could improve the law and facilitate the proper functioning of companies across Canada.
2. **An extension of the mandate to also cover limited partnerships** which have grown considerably in recent years, and which are facing the same difficulties and challenges. These types of companies deserve, in fact, the same reflections and harmonization solutions. For the sake of efficiency, and for the same reasons, we even suggest an extension to **cover all types of partnership**.
3. **A broadening of the mandate to cover Join- Ventures**, which are now very important in the business world but not based on clear and harmonized legislation in this area.

[19] All will be clarified in Step 1 of the work to be carried out by the members of the Committee, which will be formed very soon.

## **2. Steps:**

### **Step 1:**

- Creation of the Committee.
- Summary of the steps completed and documents produced previously
- Specification of the mandate (as mentioned in page 7 of this document).

### **Step 2:**

- Summary of current partnership law in all Canadian provinces (together with limited partnership and joint-ventures, depending on the mandate adopted by the members of the Committee).
- Summary of the principles encompassing the contract, mandate and status of the group which has been assembled to form our current organization.
- A list of the difficulties and challenges experienced by the provinces (particularly with regard to liability vis-à-vis third parties and partners, as well as tax implications).
- Analysis of the drivers and justifications for reform and harmonization, in the light of Canadian and comparative law.
- Analysis of all the data obtained, with a view to harmonization.

### **Step 3:**

- Drafting of the Uniform law

### 3. Timetable and Deadlines over 3 years (2021-2024):

		Aug. 2021	Sep. Dec.21	- Jan. - Apr.22	May - Juin 22	Sep 22 - Juin 23	Sept.23 - Aug. 24
<b>23-26 Aug. Draft of the road map, Uniform Law Conference of Canada</b>							
<b>Creation of the team of experts Summary of the stages crossed and documents produced</b>							
<b>Report</b>							
<b>State of Canadian law Data Statement of Canadian and Quebec issues Identification of specific issues Hypotheses</b>							
<b>In-depth analysis of Canadian data and laws Report</b>							
<b>Drafting of the uniform law</b>							



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<sup>1</sup> In Alberta, British Columbia, Manitoba, Saskatchewan and the Yukon, limited partnerships are covered by partnership legislation. In New Brunswick, Newfoundland and Labrador, Nova Scotia, the Northwest Territories and Ontario, limited liability companies are regulated by separate partnership laws. Although the UK's Partnership Act of 1890 has been passed by most provinces and territories, the UK's 1907 Limited Partnership Act has not.

<sup>2</sup> Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario and Saskatchewan allow the creation of limited liability companies (LLCs). Legal regulations for LLCs are set out in the partnership laws of these provinces. In jurisdictions where LLCs are permitted, partners of a qualifying profession are not liable for acts of negligence on the part of co-partners, but remain personally liable for trade debts and obligations of the partnership.

<sup>3</sup> This part is taken in its entirety (with some minor modifications) from the Minutes and Report on Partnership Law Reform - Debate on the Legal Nature of Partnerships prepared by the conference and presented at the Edmonton Alberta meeting, August 2006. Professor Heaven's report examines proposed reforms to general partnership law.

<sup>4</sup> *PA de la Sask.*, art. 3; *LSNCO*, art. 2; *PA de la C.-B.*, art. 2.

<sup>5</sup> *Queens' Bench Rules of Court* (Sask.), articles 51 et 52; *Règles de procédure civile de l'Ontario*, art. 8.01; *Supreme Court Civil Rules* (C.-B.), règle 7(1).

<sup>6</sup> *PA de la Sask.*, par. 25(1); *LSNCO*, par. 26(1); *PA de la C.-B.*; *Règles de procédure civile de l'Ontario*, art. 8.06.

<sup>7</sup> *Personal Property Security Regulations*, P-6.2, Reg. 1, art. 11; *Loi sur les sûretés mobilières*, R.R.O. 1990, Règlement 912, par. 16(4); *Personal Property Security Regulations*, Reg. 227/2002 de la C.-B., alinéa 8f).

<sup>8</sup> Partie V du Law Commission Report; *Projet de loi préliminaire*, par. 1(3); *RUPA*, alinéa 201a).

<sup>9</sup> See UPA Revision Subcommittee on Partnerships and Unincorporated Business Organizations, Section of Business Law, American Bar Association, "Should the Uniform Partnership Act be Revised?" 43 *Bus. Law.* 121 (1987) at p. 124; by. 3.53, Law Commission Report, see Inland Revenue statement which has been interpreted by the Commission as a commitment to maintain the tax treatment of partners as a group.

<sup>10</sup> The NCCUSL has found several advantages in the RUPA, including the continuation of the general partnership due to the changes in the rules regarding the dissolution of the partnership. See art. RUPA 701 and 801. The Law Commission, at para 3.2 of its report, made it clear that "continuity" was one of the major goals of the reform. The other objectives identified are: (1) to ensure that the general partnership remains a flexible, informal and private business tool; (2) ensure that mutual trust and good faith remain essential elements of the relationship between partners; and (3) provide a modern version of the law that governs partnerships based on logical and straightforward concepts, easily accessible to advisors and clients alike.

<sup>11</sup> The NCCUSL specified that the creation of a homogeneous entity would allow a separate body to place itself between the partners and the assets of the general partnership and that, therefore, the company could sue in its own name, both in claim and defense, and property could be acquired in its name. See comment at: [http://www.nccusl.org/nccusl/uniformact\\_why/uniformacts-why-upa.asp](http://www.nccusl.org/nccusl/uniformact_why/uniformacts-why-upa.asp). Part V Law Commission Report discusses the difficulties surrounding property ownership, including the transfer between old and new partnerships.