Partnerships and Unincorporated Business Organizations

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INSIGHT PAPER – PARTNERSHIPS AND UNINCORPORATED BUSINESS ORGANIZATIONS

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1. INTRODUCTION

The importance of choosing the right business structure for any type of business venture cannot be ignored or denied. Many issues need to be taken into consideration when advising clients on what structure will be best for them to accomplish their goals and business needs. This paper discusses five types of for-profit unincorporated business organizations; general partnerships, limited partnerships, limited liability partnerships, limited liability companies, and unlimited liability companies. Each type of organization is described in terms of its overall structure, formation, advantages, disadvantages, governance and strategic considerations for choosing a particular organizational structure. The wide range of business circumstances and other factors which might influence the choice or attractiveness of any particular form of organization will be discussed more fully in the presentation.

2. PARTNERSHIPS

2.1 History and Structural Overview

Roman law and other ancient legal systems included the concept of partnership law as a well established institution however; partnership law in the common law world developed much more slowly. The first legislation dealing with partnerships in the common law was the British *Partnership Act* adopted in 1890.[1] All of the Canadian common law provinces adopted this legislation as well as adding their own provisions for various elements of partnership law including the regulation of limited partnerships.[2]

Partnerships in Alberta are governed by the *Partnership Act* (the "***Act***").[3] The rules of common law and equity still apply however, to the extent that they are not inconsistent with the *Act*.[4]

The *Act* provides a type of code to govern and define the relationship between the partners in a partnership as well as the rights of partners against third parties. Some basic principles of partnerships, unless modified by agreement, include: the partnership is not a separate legal entity from its individual partners; for the purposes of the business of the partnership, each partner is an agent for the firm and of each other; partners are entitled to share equally in profits of the firm but must share equally in the losses; and, no partner is entitled to special remuneration for acting on behalf of the partnership. Section 4 of the *Act* provides a list of indicia of a general partnership.

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[1] *Partnership Act,* 1890, 53 & 54 Vct. C. 39.
[2] A. Harris *et al., Cases, Materials, and Notes on Partnerships and Canadian Business Corporations,* 4th ed. (Toronto: Thomson Carswell, 2004) at 4-5.
[3] *Partnership Act,* R.S.A. 2000, c. P-3.
[4] *Ibid,* section 105.

2.2 **Formation**

Section 1(g) of the *Act* defines a partnership as, "the relationship that subsists between persons carrying on a business in common with a view to profit."[5] A business includes every trade, occupation and profession.[6]

Various factors indicate the existence of a partnership. Important considerations include the true intentions of the parties and any formal or informal agreements or arrangements between them. The parties must all agree to enter the partnership with a view to obtaining a profit, by carrying on a business, in order to be considered a partnership under the *Act.*[7] Joint ownership of property and sharing in the returns does not constitute a partnership under the *Act* however; receipt of profits from a business is *prima facie* proof of the existence of a partnership.

As a general rule of partnership law, no new partners can be admitted to the organization without the consent of all partners.[8] This aspect however, like many general rules of partnership law, may be modified by agreement between the partners.

2.3 **Advantages**

General partnerships allow for the greatest flexibility for members to establish their economic relationships with each other however they consider fit and reasonable and all partners may exercise control in the management of the partnership. The relative lack of costs or expense in order to initiate a general partnership makes it a common choice of business organization. It is often selected or used by owner operated businesses who may not yet have sought any significant degree of business legal advice.

2.4 **Disadvantages**

Due to the fact that a general partnership is not a separate legal entity from its members, and all members participate to the fullest extent without any limitations on their liability, ordinary partnerships expose members of the partnership to the greatest personal liability. Ordinary or general partnerships are, by their nature, a "flat" organizational structure which can create significant issues in terms of day to day decision making, defined lines of communication and reporting and the like. They do not, typically, have the hierarchical authority more commonly found in corporate structures.

2.5 **Governance Issues**

Sections 22 to 48 of the *Act* address the mutual rights and duties of the partners in a firm. The rules in these sections may be varied by agreement of the partners therefore; a written partnership agreement is of utmost importance.

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[5] *Ibid,* note 3.
[6] *Ibid,* section 1 (c).
[7] *Ibid,* section 4.
[8] L. Hepburn, *Limited Partnerships,* looseleaf (Toronto, ON: Carswell, 2009) at 2-29.

When read collectively, the rules governing the relations between the partners of the firm are based on principles of "equality, consensualism, utmost good faith and the personal character of the partnership contract."[9]

As between the partnership and third parties, every partner is considered an agent of the other partners and of the firm and any actions of one of the partners will be binding on the firm unless the partner acting had no authority to do so.[10] Care must therefore be taken in advising partnerships of this type to appropriately limit authority where it is desirable but also to take all steps which are reasonably available to avoid issues of "ostensible" authority which may unintentionally create inter-party issues of liability.

Significant liability falls on the partners of a general partnership. Each partner is liable jointly with the others to the full extent of their personal assets for all of the debts and obligations of the firm while they are a partner. A partner who retires does not cease to be liable for partnership debts or other obligations incurred before their retirement however, this liability may be discharged by agreement among the retiring partner, the newly constituted firm, and the creditors. The firm and each partner is also jointly and severally liable for any penalty, injury or other loss caused to a non-partner by a wrongful act of omission of one of the partners of the firm acting in the ordinary course of business of the firm.[11]

2.6 **Transferring of Interest and Dissolution**

If a partner's share in a firm is assigned, the assignee is only entitled to receive the share of the profits that the assigning partner would have been entitled. The assignment does not give the assignee the right to interfere in the management or administration of the partnership, to require accounts of the partnership, or to inspect the books of the partnership. When the partnership is dissolved, the assignee is entitled to the profits that the assigning partner would have been and to an account from the date of dissolution regarding the assignee's share in the profits.[12]

(a) Dissolution

Sections 36 to 48 of the *Act* govern the dissolution of partnerships.[13] Subject to express agreement by the partners, a partnership is dissolved at the end of a fixed term, if one is stated, at the end of a common venture or undertaking, or by one partner giving notice to the others to dissolve the partnership. The death of one of the partners dissolves a partnership as well as assignment of one or more of the partners interest's to the partner's creditors. Bankruptcy of a partner also triggers dissolution of the partnership. In many cases the events described above are not, in the overall partnership's view, events which they desire to cause dissolution. Accordingly the term or events of termination or dissolution in connection with any particular partnership should be carefully considered and adequately dealt with in the partnership agreement. Dissolution of the partnership may be ordered by the Court if applied for by a partner or the partnership may be dissolved by an

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[9] *Ibid,* note 2 at 24.
[10] *Ibid,* note 3 sections 6-8.
[11] *Ibid,* sections 11, 13, 15.
[12] *Ibid,* note 3 section 35.
[13] *Ibid,* note 3.

event that makes it illegal to continue the business of the partnership or for the members to carry on the business.[14]

3. LIMITED PARTNERSHIPS

3.1 History and Overview

The concept of a limited partnership, like that of a general partnership, has a long standing history under the civil law but not the common law. New York first adopted a *Limited Partnerships Act* in 1822 and Ontario followed suit in 1849. The United Kingdom did not pass a *Limited Partnerships Act* until 1907.[15] This *Act* did not have a significant impact however due to the *Salomon v. Salomon*[16] decision by the House of Lords. This decision made it equally advantageous for small companies to incorporate or to function as a limited partnership.[17] Part 2 of the *Act*[18] governs limited partnerships in Alberta.

The rules of common law and equity apply to limited partnerships, just as general partnerships, unless the rules are inconsistent with the *Act.*[19] The *Act* simply states, "a limited partnership shall consist of, (a) one or more persons who are general partners; and, (b) one or more persons who are limited partners."[20]

A limited partnership has all of the same characteristics of a general partnership other than the fact that only the general partner is liable for all of the obligations of the firm. The limited partners are only liable for amounts they agree to contribute. General partners are subject to all of the liabilities of a partner as they would be in a general firm.

3.2 Formation

To ensure proper formation of a limited partnership, the applicable provisions of the *Act* must be strictly complied with. A certificate must be filed with the Alberta Corporate Registry to establish a limited partnership. The *Act* requires a significant amount of information in order to file the limited partnership certificate. Section 52(3) of the *Act* lists the required information.[21] Information required includes: the firm name; the names and residential addresses of each partner; the designations of limited and general partners; the character of the business; the term of the partnership's existence; rights regarding assignment; and other information.[22]

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[14] *Ibid.*
[15] *Ibid,* note 2 at 41.
[16] *Salomon v. Salomon,* [1897] A.C. 22, L.J. Ch. 35 (H.L).
[17] *Ibid,* note 2 at 41.
[18] *Ibid,* note 3.
[19] *Ibid.*
[20] *Ibid* section 51(2) (a) and (b).
[21] *Ibid,* note 3.
[22] *Ibid.*

3.3 **Governance Issues**

General partners have the responsibility of the management and control of the limited partnership's business. They generally have the same rights and powers as partners in a general partnership.

Limited partners are not subject to all of the liabilities of the firm. They are only liable in respect of the amount of money or property they have contributed to the firm and their interest is further limited to personal property.[23] Limited partners may become liable as general partners however, if they exercise control in the management of the business as stated in Section 64.[24]

Only a few Canadian cases address what is meant by control of the business and the outcomes are somewhat conflicting. *Haughton Graphics Ltd. v. Zivot* remains one of the leading cases in this regard. In that case, two limited partners held themselves out to be president and vice president of the limited partnership. Zivot, one of the limited partners, held himself out as the directing mind of the limited partnership and he was also the controlling shareholder of the general partner. The court held the two limited partners liable as general partners and stated that Section 64 of the *Act*[25] applied, "to a person who, in addition to being an officer, director, senior employee, or other directing mind of the corporate general partner, seeks also to take advantage of personal limited liability as a limited partner in a limited partnership….s. [64] applies only if two conditions are met, [o]ne is that the person be a limited partner and the second is that he take part in the control of the business of the limited partnership."[26]

In the 1992 British Columbia Court of Appeal case *Nordile Holdings Ltd. v. Breckenridge*,[27] the court took a somewhat different approach to whether or not a limited partner acting as an officer of director of a general partner can maintain their limited liability. In this case, the limited partners were not found liable as general partners even though they also admitted to participating in the control and management of the business and they were the directors, officers and minority shareholders of the general partner. The judge in that case held that when the limited partner defendants were acting as directors and officers of the general partner corporation, they could not also be acting in the management and control of the limited partnership and were therefore shielded from personal liability.

3.4 **Transferring of Interest and Dissolution**

A limited partner may assign their interest and their interest, if held personally, devolves on death. The executor or administrator of a limited partner has all of the rights and powers of the limited partner for the purposes of settling the estate of the deceased and whatever power the deceased had in order to "constitute the deceased's assignee a substituted limited partner."[28] Further, the estate of the deceased limited partner is liable for the deceased's liabilities as a limited partner.[29] Again these are usually unintended and unwanted results for a business being operated as a limited partnership

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[23] *Ibid,* sections 55 to 57.
[24] *Ibid,* note 3.
[25] *Ibid.*
[26] *Haughton Graphics v. Zivot,* (1986) 33 B.L.R. 125 (Ont. H.C.J.), aff'd 38 B.L.R. xxxiii (C.A.).
[27] *Nordile Holdings Ltd. v. Breckenridge,* (1992), 66 B.C.L.R. (2d) 183.
[28] *Ibid,* note 3 section 68(1) (b)
[29] *Ibid,* section 68 (2).

and accordingly the terms of the limited partnership agreement should be carefully crafted and consider these and other issues which are similar.

(a) Dissolution

The retirement, death or mental incompetence of the general partner dissolves the limited partnership unless the remaining general partners agree to continue the firm pursuant to a stated right to do so under the firm's certificate of registration or with the consent of the remaining partners.[30]

3.5 **Advantages and Disadvantages of General and Limited Partnerships**

Each and every form of business association has both advantages and disadvantages. Issues for consideration include; liabilities, perpetual existence, the number of people involved in the business venture, borrowing requirements, the availability of government funding, estate planning, the level of anticipated or desired employee participation, costs, and flexibility and taxation issues.

General partnerships have the advantage of being relatively easy and affordable to establish. They may also confer a greater degree of flexibility among their members to structure their relations between themselves. The main disadvantage to ordinary partnerships however is the unlimited liability that each partner, as a co-owner of the partnership, carries. A limited partnership limits this liability by placing unlimited liability on the general partner only. The unlimited liability aspects of a partnership may be avoided however by inserting a limited company as a partner instead of an individual. This may also be used in the case of a general partner in limited partnerships where a corporation may be used to hold the position of general partner instead of an individual.

It is often considered a disadvantage of partnerships that, unless there is an agreement to the contrary, the partnership ends with the death of only one of the partners, in contrast to a corporation which enjoys perpetual existence. This may become an important consideration in estate planning as well.

3.6 **Strategic Considerations**

Reasons to consider setting up a limited partnership also include cost and flexibility. Registration fees and change fees for partnerships may be lower than for corporations. Some authors suggest that the opposite may be true however, therefore; cost benefit analysis should be done on a case by case basis. The agreements can also be altered more simply than that of a corporation.

If the use of an incorporated organization is unavailable or not efficient for taxation reasons, partnerships, whether general or limited, are often used instead. Whether to choose a general partnership or a limited partnership depends on what is more important to the partners, limiting liability or exercising control in the management of the firm.[31]

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[30] *Ibid,* section 66(1) and 68.
[31] G. Myers & P. Westaway, "Deal Structures Overview: How, Why, and when You Use Partnerships and Limited Partnerships." Lang Michener LLP.

With regard to borrowing money, lenders will always look at the ability of the borrower to repay their loans. New or smaller corporations with few assets may find it difficult to secure loans from banks and other lending institutions. Partnerships may be at an advantage in instances such as these as members will be personally liable for the loans which will provide the lender with more assets as collateral. This is often a very important issue for professional partnerships which may have very considerable assets, revenue and debt load. It is not uncommon for professional partnership agreements to be devoted principally to issues such as contribution of cash or capital and liability for debt if either during the term a partner was with the firm or thereafter and before and after dissolution.

Partnerships may also be chosen over incorporation for tax purposes. A corporation, being a distinct legal entity from its shareholders, is taxed at a corporate level and then its shareholders are also taxed on their profits, in some circumstances, leading to a type of double taxation. Profits from a partnership however, are taxed in the hands of the partners only, as the partnership itself is not seen as a separate legal entity.[32]

4. LIMITED LIABILITY PARTNERSHIPS

4.1 History and Structural Overview

Limited liability partnerships (LLPs) were first recognized in the United States in the 1980's. The legislation evolved in various states with the common goal of, "restrict[ing] liability to the partner(s) directly at fault or vicariously liable for the acts of persons under his or her supervision."[33]

Canadian LLP legislation was first enacted in Ontario in 1998 and Alberta followed suit a year later. Rules specific to LLPs are found under Part 3 of the Alberta *Act*.[34]

Members of certain professions may carry on business as an LLP. In this type of organization, where one partner is negligent, others are shielded from personal liability in connection with these negligent acts. The core purpose of LLPs is to balance the interest of claimants with those of innocent professional partners. They allow for claimants to have access to assets held jointly by LLPs such as insurance but ensure personal responsibility and liability for matters over which the particular partner, as a professional, was personally involved in or directly supervising.

4.2 Formation

Alberta LLPs may register with the Registrar of Corporations to carry on business in this structure so long as their profession has statutory authority to carry on business through a Professional Corporation.[35] This section does not apply if the governing body of the specific profession has passed a rule or law forbidding the profession from practicing as a LLP under the *Act*.[36] A limited partnership, as discussed above and defined in Part 2 of the *Act,* cannot be registered as an LLP.[37]

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[32] *Ibid.*
[33] *Ibid,* note 2 at 51.
[34] *Ibid,* note 3.
[35] *Ibid,* section 81.
[36] *Ibid,* section 82(2).
[37] *Ibid,* section 82(3).

The registration of an existing general partnership as an Alberta LLP does not cause the partnership to be dissolved. The partnership carries on in the same manner as before the registration. The firm must notify all of its clients of the change however.[38] All Alberta LLPs are required to file periodic reports and pay the prescribed fees set out in the regulations to the *Act.*[39]

The Alberta *Partnership Regulations* require that all Alberta LLPs must have "limited liability partnership" or the abbreviation, "LLP" in their name.[40] Only members of an eligible profession may carry on business as an LLP. The *Act* defines an eligible profession as, "profession or discipline that is regulated by an Act of Alberta that specifically authorizes members of the profession or discipline to carry on business through a corporation that has the words "Professional Corporation" or the abbreviation "P.C." as part of its name."[41]

4.3 **Advantages**

A LLP minimizes personal liability exposure while still maintaining a partnership structure. A LLP is suggested as an advantageous business structure if the business must carry substantial uninsurable risk.

4.4 **Disadvantages**

One disadvantage of LLPs, like all partnership structures, is the lack of perpetual existence without express agreement by the partners.

4.5 **Assignment and Dissolution**

The rules and requirements regarding assignment and dissolution apply to LLPs in the same fashion as general partnerships and limited partnerships.

4.6 **Strategic Considerations**

From a historical perspective, legislation has prevented certain professions, such as doctors, lawyers and dentists, from incorporating to carry on their business. Although these rules have been relaxed to some extent, the same fiduciary, ethical, and professional obligations still apply to these professions, should they choose to incorporate. For this reason, many professionals may choose to carry on business as a LLP, or continue their existing business as a LLP, as it confers limited liability on the members but maintains the tax benefits of a partnership.[42] Of course, the issues relating to decision making in a "flat" organizational structure and liability in connection with financial matters such as capital, debt of the partnership and so on will still be regulated, in most cases, by a well drafted and thorough partnership agreement

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[38] *Ibid,* sections 84 and 85.
[39] *Ibid,* section 89.
[40] *Partnership Regulation,* Alta. Reg. 276/99 (now Alta. Reg. 105/2009).
[41] *Ibid,* note 3 section 81.
[42] *Ibid,* note 33.

5. LIMITED LIABILITY COMPANIES

5.1 History and Structural Overview

The concept of a limited liability company (LLC) arose by combining elements of partnerships with elements of a corporation. LLCs are taxed like a partnership and allow for maximum amounts of direct investor control much like a partnership but provide a shield from liability similar a corporation.[43]

As a creature of American statute, the limited liability company (LLC) has been in existence for just over 30 years. The first state to pass LLC legislation was Wyoming in 1977. It took some time for the use of LLCs to catch on however, mainly due to the fact that it was uncertain how they would be treated from a taxation standpoint.[44]

The IRS released Revenue Ruling 88-76 in 1988 which stated that LLCs would be taxed in the same manner as partnerships. Once this ruling was passed, the majority of states in the United States began drafting their own LLC legislation and LLCs are now one of the most common forms of unincorporated business organizations used in the United States.[45]

5.2 Formation

Anyone wishing to establish a LLC must file a certificate of formation with the appropriate state office. In addition to this certificate, some states require the filing of other documents including; annual reports, statements of authority, and certificates of cancellation if the LLC is dissolved.[46]

An LLC can be established with as few as one member. Once filing the certificate of formation, the LLC has a permanent existence and is considered a separate entity from its founder or founders.[47]

5.3 Advantages

As stated above, the LLC combines some of the advantages of a partnership with the advantages of incorporation. LLCs protect investors from liability in a similar fashion to corporations. It should be mentioned however that courts in the United States have also begun to pierce the LLC veil in a similar fashion to piercing the corporate veil.[48]

LLCs may also be advantageous for tax reasons. The earnings of a LLC are treated in a manner similar to the earnings of a partnership for purposes of taxation. This largely avoids the possibility of double taxation whereby the company pays taxes initially and then the individual shareholder is

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[43] L. Harris, *Mastering Corporations and Other Business Entities,* (Durham, North Carolina: Carolina Academic Press, 2009) at 77.
[44] *Ibid,* at 79.
[45] *Ibid,* at 80.
[46] *Ibid,* at 81.
[47] *Ibid.*
[48] *Ibid.*

taxed on the same earnings at a personal level. The profits and losses of a LLC generally pass straight through to the investor.[49]

A third, and perhaps most significant advantage of LLCs, is the amount of flexibility they provide for investors to organize their economic relations in a mutually agreeable manner. The founders of a LLC may play a role in the management of the LLC if they wish, or they may hire someone to do it for them or use a combination of both styles. Further, the founders of the LLC may establish different levels of ownership interest and a LLC may be used for broad purposes from business ventures to charities.[50]

5.4 Disadvantages

The most significant downside to LLCs is their limited history. As the concept only began developing in the late 1970's, there is limited established law in the area and case precedents are not well established.[51]

5.5 Governance Issues

The internal governance of the LLC is determined by the particular LLC's operating agreement which is akin to a partnership agreement. The LLC and its members are bound by the operation agreement and some states require that an agreement be in place before an LLC can be registered.[52]

The LLC may be member managed or professional managers can be hired. Various levels and types of voting power are also allowed under the LLC legislation of some states.[53]

The members of a LLC have several duties to one another, the most important being; the fiduciary duty of loyalty, the fiduciary duty of care, and the contractual obligation of good faith and fair dealing.[54]

The duty of loyalty encompasses the duty to avoid conflicts of interest, avoid competing with the LLC, and the requirement to disclose opportunities afforded to the LLC. The duty of care requires all managers and/or members to exercise reasonable care and good faith in the dealings of the LLC similar to what a prudent person in that position would take. Both of these fiduciary duties may be modified, but not abolished all together, by agreement among the members of the LLC. The contractual obligation of good faith and fair dealing is a mandatory obligation which cannot be modified by contract.[55]

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[49] *Ibid,* at 78.
[50] *Ibid.*
[51] *Ibid,* at 79.
[52] *Ibid,* at 82.
[53] *Ibid,* at 84.
[54] *Ibid,* at 85.
[55] *Ibid,* at 86-88.

5.6 **<u>Transferability and Dissolution</u>**

Dissolution provisions for LLCs vary by state. Often, they are similar to that of a partnership. Departure of a member does not automatically cause dissolution of the LLC. It may be continued by consent of the remaining members. A LLC may also be dissolved by court order, pursuant to the operating agreement, or if a super-majority of the members approve the dissolution.[56]

5.7 **<u>Strategic Considerations</u>**

Currently, LLCs are only a creature of American statute and cannot be formed under Canadian laws. LLCs may now be extra-provincially registered however, and may carry on business in Canada.

Some authors suggest that LLC's may be useful for Canadians who wish to embark on cross-border transactions as they allow foreign investors to participate in the management of the company while maintaining limited liability.[57] It should be noted however that the Canada Revenue Agency treats LLCs as corporations for taxation purposes.[58]

6. UNLIMITED LIABILITY CORPORATIONS

6.1 **<u>History and Structural Overview</u>**

Unlimited liability corporations (ULCs) existed at common law and were passed into Canadian law at Confederation. In the past, they were rarely used however and, to date, have only been incorporated into legislation in Alberta, Nova Scotia, and British Columbia.

Alberta passed amendments to its *Business Corporations Act* (BCA)[59] in 2005 to govern ULCs. Part 2.1 of the BCA now prescribes the rules that govern ULCs in Alberta. In a ULC every shareholder has joint and several unlimited liability.

6.2 **<u>Formation</u>**

To register as a ULC, the ULC must supply all the required information for articles of incorporation described under Section 6 of the BCA as well as the information required under Section 15.3. Section 15.3 requires that, "the articles of incorporation, amalgamation, amendment, continuance or conversion of an unlimited liability corporation shall contain an express statement that the liability of each of the shareholders of the unlimited liability corporation for any liability, act or default of the unlimited liability corporation is unlimited in extent and joint and several in nature."[60] ULCs must identify themselves as such in their name, their articles, and any other constating documents. The rules of continuance and amalgamation apply to ULCs and shareholders are jointly and several liable for actions against extra-provincial ULCs that continue into Alberta or that are formed by amalgamation. If a ULC converts to a limited company, the unlimited liability status of the shareholders continues for acts prior to the conversion date.

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[56] *Ibid,* at 96-97.
[57] *Ibid,* note 8 at 6.1-2 to 6.1-3.
[58] *Ibid,*. at 6.1-4.
[59] *Business Corporations Act,* R.S.A. 2000, c. B-9.
[60] *Ibid.*

6.3 **Advantages**

Until very recently, significant tax advantages arose from ULCs. ULCs are most often used by American companies to hold their assets in Canada in a tax efficient manner. Limited liability Canadian corporations are considered a taxable entity in the United States but unlimited liability companies were taxable for Canadian purposes only and considered a flow through entity for American tax purposes. This avoids double taxation of American companies who do business in Canada. There are also financing, transfer pricing, and capital gains treatment advantages.

The U.S. introduced new taxation rules as of January 1, 2010 which will no longer allow ULCs to qualify for these tax benefits however. Payments from ULCs to their American counterparts will now be subject to a 25% withholding tax. Cross border businesses that have investments in Canada through ULCs should seek competent and thorough U.S. and Canadian tax advice in order to determine the most efficient business structure in the future.[61]

6.4 **Disadvantages**

The obvious disadvantage of ULCs is the unlimited liability that shareholders may be exposed to. Depending on the facts and circumstances of the particular ULC however, some of this liability may be avoided by inserting a U.S. "C-Corporation" or "S-Corporation" or a limited partnership between the ULC and the U.S. resident.[62] The choice of limited liability entity requires careful tax planning and is beyond the scope of this paper.

6.5 **Governance Issues**

Other than the provisions specific to ULCs in Part 2.1 of the BCA, all other provisions of the BCA apply to ULCs.

Former shareholders of a ULC continue to be subject to unlimited liability for up to two years following their departure for events that occurred while they were a shareholder.[63]

6.6 **Transferability and Dissolution**

Since the BCA applies to ULCs in the same way as other corporations other than the specific sections discussed above, a ULC may be liquidated, dissolved, or sold like any other corporation. The rules regarding amalgamation and continuance are also applied to ULCs in the same manner as other corporations.

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[61] "ULCs to lost US treaty benefits after 2009", Lexology online: http://www.lexology.com/library/detail.aspx?g=31c88aec-662c-4c15-8207-cecd21270610.
[62] "The New Alberta Limited Liability Corporations", online: http://gowlings.com/news/TheNewAlbertaUnlimitedLIabilityCorporations.pdf.
[63] *Ibid,* note 59 section 15.2(2).

6.7 **Strategic Considerations**

Given the new rules surrounding tax treatment of ULCs in the United States, new business structure strategies may need to be considered. Before the rule change, the Canadian ULC was treated as a corporation under Canadian tax law and "disregarded" under U.S. tax law. As of January 1, 2010, payments such as dividends, interest, and royalties, made by a Canadian ULC to an American recipient will be subject to a 25% withholding tax. Suggestions to avoid this include requesting that the ULC be treated as a corporation for U.S. tax purposes or converting the ULC to a limited liability corporation under applicable Canadian corporate law.[64]

7. CONCLUSION

The considerations involved in choosing the right business association for any business venture are vast and complex. They must be considered on a case by case basis. This paper provides only a brief overview of some key types of business organizations.

In the case of virtually all of the different types of organizations it is apparent that careful thought should be given to the degree which inter-party agreements (partnership agreements, management agreements, unanimous shareholders agreements, etc) may lawfully and appropriately modify certain aspects and the results of certain facts or circumstances as they apply to each type. Issues such as management, liability on dissolution, borrowing, replacement of managers, general partners and similar parties with authority, transfers of jurisdiction or conversion and other related aspects are all proper considerations which should be addressed and regulated by such agreements. Finally, a prudent practitioner should also obtain the best possible tax advice since, as noted above, many of these types of business organizations have been spawned by or are most often selected in connection with tax driven businesses or transactions.

Subject to the foregoing, one or more of these less common forms of business organization can, with the appropriate advice and supported by the appropriate agreements offer considerable benefits to their investors and should be considered wherever appropriate.

[64] *Ibid,* note 14.

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