

The Civil Liability of Professionals: Major Legislative Changes

By Jules Brière, André Laurin, Isabelle Chouinard and Valérie Boucher

Several members of Quebec's 45 professional orders practise their profession in conjunction with one or more other professionals belonging to the same order. Most of the time, these associations are structured as general partnerships. Indeed, general partnerships are the preferred legal vehicle for Quebec professionals, allowing them to pool their knowledge, resources and activities and share the profits resulting therefrom, but also requiring them to share any resulting losses. One of the attributes of a general partnership is the solidary liability of the partners.¹

On June 21, 2001, the Quebec legislature changed the rules applicable to professional liability by passing *An Act to amend the Professional Code and other legislative provisions as regards the carrying on of professional activities within a partnership or company* (Bill 169) (hereinafter referred to as "Bill 169"). **The primary purpose of Bill 169 is to allow professionals to carry on their activities within legal structures in which they are not personally liable for the professional fault or negligent act committed by another professional with whom they are associated or by the servant or mandatary of that other professional.**

The new legislative provisions do not directly authorize the practice of a profession through such legal vehicles. Instead, they leave it to each professional order to pass a regulation allowing its members to do so and to determine the applicable terms, conditions and restrictions of such a practice.² Once such a regulation has been passed and brought into force, the members of the professional order will have **two additional types of legal vehicles** to choose from in structuring the practice of their profession: **a limited liability partnership ("LLP") and a joint-stock company.** To date, **no professional order has passed a regulation** in this regard and, consequently, the terms and conditions of the exercise of a profession within an LLP or a joint-stock company have not yet been established. Thus, at present, professionals (other than engineers)³ may not use these vehicles.

What is a Limited Liability Partnership?

General partnerships, as we currently know them, are governed by articles 2186 and following of the *Civil Code of Québec*. The Quebec legislature has chosen not to amend the provisions of the *Civil Code of Québec* and has merely stated that "subject to the provisions of this chapter, a limited liability partnership is governed by the rules concerning general partnerships contained in the *Civil Code of Québec*."⁴ Therefore, LLPs will function just like the general partnerships with which we are familiar except that, notably, a partner will no longer be personally liable for the professional fault or negligence of one of his partners or of the servant or mandatary of that partner, unless he supervised or directed them. A partner's liability in that regard will be limited to his investment in the LLP.

¹ Article 2221 of the *Civil Code of Québec*.

² Section 6 of Bill 169 amending section 94 of the *Professional Code*.

³ Under the *Engineers Act* (R.S.Q., c. I-9), engineers were already authorized to carry on their activities within joint-stock companies, and those who carried on their professional activities within such a company on June 21, 2001 will be entitled to continue to do so until the Ordre des ingénieurs passes the new regulations. From then on, they will have to comply with the new rules (section 28.1 of the *Engineers Act*).

⁴ Section 9 of Bill 169 enacting new section 187.12 of the *Professional Code*.





Isabelle Chouinard practises administrative law at *Lavery, de Billy's* Quebec City office. She works closely with Mr. Brière on behalf of various professional orders.

Jules Brière specializes in administrative law and practises at *Lavery, de Billy's* Quebec City office. He has drafted many Bills on behalf of the Government of Quebec and has represented and advised certain professional orders, including the Ordre des ingénieurs. He is currently an advisor to the Quebec Bar on the legal issues relating to the multidisciplinary practice of professions.



What is a Joint-stock Company?

A joint-stock company as referred to in Bill 169 can be a company constituted under Part 1A of the *Companies Act* (Quebec) or a corporation constituted under the *Canada Business Corporations Act*. A joint-stock company for professionals will function in accordance with the rules set forth in the act pursuant to which it has been constituted and will have shareholders and a board of directors.

However, the regulations passed by each professional order may (1) determine standards with regard to the name of the joint-stock company, (2) fix the proportion of voting shares that must be held by members of the order, (3) fix the proportion or number of directors of the company who must be members of the order, (4) determine the conditions, procedures and restrictions governing the transfer of shares or shares of certain classes, and the exercise of the voting rights of a shareholder whose right to engage in professional activities has been restricted or suspended or who is no longer a member of the order, and (5) define the professions, trades, industries, businesses, offices or duties incompatible with the status of employee, shareholder or director of the joint-stock company.⁵

What is Limited Liability?

The limitation of liability contemplated in Bill 169 is intended to release a professional from all liability for the fault or negligent act committed by another professional or by the other professional's servant or mandatary in the course of their professional activities.⁶

Thus, if a partner of an LLP commits a fault or a negligent act, the personal assets of the other partners of the LLP who have not committed the fault or act in question will not be affected; they may be held liable only up to the amount of their interest in the partnership. However, under no circumstances will a professional escape liability for his own professional fault or negligence, whether such fault or negligent act is committed in the exercise of his profession or while supervising or directing a person who committed a fault or a negligent act.⁷ Moreover, as can be understood from new section 187.12 of the *Professional Code* mentioned hereinabove,⁸ **a professional practising within an LLP will continue to be liable for the obligations of the partnership arising from a source other than professional fault**, such as the partnership's contractual obligations (leases and other contracts). Thus, the partners of a general partnership and of

an LLP are solidarily liable for unpaid wages as well as for deductions at source and sales taxes which have not been collected or remitted to the tax authorities.

Under the current framework applicable to joint-stock companies, the company has legal personality and, consequently, its shareholders are not personally liable for any of the company's debts, including the company's contractual indebtedness towards landlords or suppliers. **Thus, professionals who become shareholders of joint-stock companies will be able to limit their personal liability in all respects, except as regards their own professional fault**, whether such fault is committed personally or while supervising or directing a person who committed a fault. However, **professionals who act as directors** of joint-stock companies will assume the liability prescribed at law, including liability for unpaid wages⁹ and for deductions at source and sales taxes which have not been collected or remitted to the tax authorities.¹⁰

⁵ Section 6 of Bill 169 amending section 94 of the *Professional Code*.

⁶ Section 9 of Bill 169 enacting new sections 187.14 and 187.17 of the *Professional Code*.

⁷ New section 187.19 of the *Professional Code* specifically provides so as regards professionals who practise their profession within a joint-stock company.

⁸ Also see new section 187.16 of the *Professional Code*.

⁹ Subsection 96(1) of the *Companies Act* (Quebec) and section 119 of the *Canada Business Corporations Act*.

¹⁰ Section 227.1 of the *Income Tax Act*, section 323 of the *Excise Tax Act* and section 24.0.1 of the *Act respecting the Ministère du Revenu* (Quebec).



Valérie Boucher is a member of *Lavery, de Billy*'s business law team at its Montreal office and works closely with the firm's tax experts. She specializes in corporate and commercial law, including the organization and reorganization of businesses.

André Laurin is a member of *Lavery, de Billy*'s business law team at its Montreal office and advises businesses with respect to mergers and acquisitions, financing and a variety of commercial transactions. In addition, he is chair of the Quebec Bar's committee on multidisciplinary and a member of the committee regarding the incorporation of professionals.



Finally, it should be noted that new sections 93(g) and 187.11 of the *Professional Code* stipulate that each professional order will be required to impose upon its members who carry on their professional activities within an LLP or a joint-stock company the obligation to **furnish and maintain security** against their professional liability; various types of coverage will be possible. This provision is obviously intended to protect the public.

No Retroactivity

As regards limitation of liability, it is important to note that Bill 169 does not have any **retroactive effect**; accordingly, professionals who have formed a general partnership and decide to continue their activities within an LLP or a joint-stock company will remain liable for the faults of their partners committed up to the date of such a change in the legal structure of their partnership.

How is the Transfer from a General Partnership to a Joint-Stock Company Effected?

Given that continuing a general partnership as an LLP is relatively simple to do—provided one complies with the specific obligations imposed by Bill 169 and, if applicable, the regulations, in particular as regards security against professional liability—and given that such a transfer will not give rise to any tax consequences, we prefer postponing the examination of this possibility to a later time, once the professional orders have passed the

necessary regulations. **The transfer of professional activities from a general partnership to a joint-stock company is much more complex** because it involves the creation of a new legal entity to which rights and obligations are transferred. Such a transfer of rights and obligations results in various legal and fiscal consequences.

Firstly, since the joint-stock company is a new legal person, it will be required to register with the tax authorities and the various labour relations authorities, such as the Canada Employment Insurance Commission and the Régie des rentes du Québec. Secondly, at the time of the change, the property of the general partnership or the units held by each partner of the general partnership—depending on the method chosen to carry out the change—will have to be evaluated. **The professionals will certainly want to ensure that no undesirable tax consequences result from the transfer.**

At that time, it will also be appropriate for professionals who had previously constituted management companies or companies providing technical services to examine whether it is necessary to maintain such a legal structure or whether it would be preferable to merge all of their activities, both professional and non-professional, into a single joint-stock company.

Conclusion

As can be anticipated from this bulletin, Bill 169 will definitely shake up the practice of professions in Quebec. All Quebec professionals will undoubtedly want to avail themselves of the advantages provided by Bill 169 as regards the limitation of professional liability. They will also want to assess the potential benefits of a joint-stock company as compared to the current general partnership structure. Similarly, future members of Quebec's professional orders will have to examine which legal vehicle they wish to adopt in order to carry on their professional activities.

We will keep abreast of the decisions of Quebec's various professional orders to authorize or not their members to use the additional legal vehicles for the practise of their profession (LLP and joint-stock company) and to practise within multidisciplinary firms and, if applicable, of the terms and conditions which will be attached to such an authorization.

Jules Brière
André Laurin
Isabelle Chouinard
Valérie Boucher

You may contact any of the following members of the Business Law group with regard to this bulletin.

at our Montréal office

Diane Bellavance
Fabienne Benoit
Pascale Blanchet
Michel Blouin
Valérie Boucher
Serge Bourque
René Branchaud
Patrick Buchholz
Martin Cabanes
Pierre Cadotte
Pierre Caron
André Champagne
Andrea Daniels
Pierre Denis
Richard F. Dolan
Georges Dubé
David Eramian
Réal Favreau
Brian Forget
Michèle Gamache

Marie-Andrée Gravel
Benjamin David Gross
Martin Joyal
Isabelle Lamarre
André Laurin
Alexandra Lee
Larry Markowitz
Jean Martel
Nicole Messier
Charles Nieto
Philip Nolan
André Paquette
Luc Pariseau
Jacques Paul-Hus
Johanne L. Rémillard
Stéphanie Séguin
Michel Servant
Eric Stevenson
Marc Talbot
Sébastien Vézina

at our Québec City office

Michel C. Bernier
Martin J. Edwards
Nicolas Gagné
Jacques Gingras
Claude Lacroix
Louis X. Lavoie
Simon Lemay
Marie-Élaine Racine
Jean-Philippe Riverin
Louis Rochette
Jean-Pierre Roy
François Vallières
Sophie Verville

at our Laval office

Michel M. Dagenais
Claire Gonneville

Montréal

Suite 4000
1 Place Ville Marie
Montréal, Québec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City

Suite 500
925 chemin Saint-Louis
Québec, Québec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval

Suite 500
3080 boul. Le Carrefour
Laval, Québec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa

Suite 1810
360, Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Web Site

www.laverydebilly.com

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