



**ONTARIO
BAR ASSOCIATION**
A Branch of the CANADIAN BAR ASSOCIATION

Ontario Bar Association

submission on

**On Bill 152, Ministry of Government Services
Consumer Protection and Service Modernization
Act, 2006**

to the

Standing Committee on Social Policy

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About the Ontario Bar Association

Established in 1907, the OBA is a branch of the Canadian Bar Association. It is the largest voluntary legal association in Ontario and represents 17,000 lawyers, justices, law professors, and law students.

The OBA is a member-driven association. As ‘the voice of the legal profession’, the OBA is the largest legal association in Ontario, representing lawyers through its 35 Sections whose membership is based on areas of expertise. The Sections infrastructure at the OBA furthers the educational, advocacy and professional needs of lawyers. No other legal organization in Canada has the scope or depth of expertise in influencing legislative reform and contributing to legal education.

The OBA is governed by an elected Council (221 members) and Executive (20 members). Both Council and Executive represent lawyers from across the province and from all practice areas.

The OBA Council meets quarterly and the OBA Executive meets monthly to discuss issues and initiatives that reflect the interests of Ontario lawyers and the justice system.

Executive Summary

The OBA submission on Bill 152 is broken down into three distinct parts dealing with changes to the Business Corporations Act, Land Titles Act and Land Registration Reform Act.

Part 1 - Amendments to the *Land Titles Act*, Ontario and the *Land Registration Reform Act*

The Ontario Bar Association supports the principles of the proposed amendments to the Land Titles Act and the Land Registration Reform Act as they relate to mortgage and title fraud, but it is critical that the proposed legislation be clarified to ensure that the land registration system in Ontario is not destroyed in the process.

Part 2 - Amendments to the *Business Corporations Act*

Unlimited Corporations

The purpose of the submission on Unlimited Corporations (ULC's) is two-fold. First, it argues that Ontario should, change the *Business Corporations Act*¹ so that direct inbound foreign investment can be channelled through an Ontario unlimited corporation.² Second, this submission discusses the modest changes that would be required to the *OBCA* to accomplish this purpose.

Director Residency

Part two of the OBA's submission on changes to the Business Corporations Act deals with Director Residency. The OBA recommends that the residency requirement for directors of OBCA corporations be eliminated.

¹ R.S.O. 1990, c. B.16 [hereinafter the "OBCA"].

² An unlimited corporation under the OBCA or the *Business Corporations Act*, R. S.A. 2000, c. B-9 [hereinafter the "ABCA"] or an unlimited company under the *Company Act*, R.S.N.S. 1989, c. 81 [hereinafter the "NSCA"] are sometimes hereinafter interchangeably referred to as a "ULC".



Part 1 - Bill 152

Amendments to the *Land Titles Act*, Ontario and the *Land Registration Reform Act*

Bill 152

Amendments to the *Land Titles Act*, Ontario and the *Land Registration Reform Act*

The Ontario Bar Association supports the principles of the proposed amendments to the Land Titles Act and the Land Registration Reform Act as they relate to mortgage and title fraud, but it is critical that the proposed legislation be clarified to ensure that the land registration system in Ontario is not destroyed in the process.

I. Executive Summary

- The legislation attempts to fix consequences of title and mortgage fraud created by the *Household Realty* case so that a homeowner does not lose title to their home under the *Land Titles Act* because of a fraud.
- The legislation proposes extended opportunities for compensation from the Land Titles Assurance Fund for innocent owners and lenders. This is a significant and fundamental change in approach to title and mortgage fraud.
- The land registration system in Ontario is one of the finest in the world – the Province of Ontario in the last few years has invested millions of dollars in modernizing the system. It is based on the same principle as found in many other land registration systems in the world including most of those in the western provinces in Canada, Australia, New Zealand and other common law jurisdictions. The principle that the “person shown on the register as the registered owner” can pass on good title to subsequent owners or lenders must be preserved or the system itself has little value.
- The *Land Registration Reform Act* requires better protection for innocent but duped users of the system as it relates to the right of the Director of Land Registration to suspend authorization to access the electronic registration system.

II. The *Land Titles Act*

1. The definition of “fraudulent person”

The definition of “fraudulent person” needs to be clarified. We assume that the definition in subparagraph (c) intends that if a person has acquired registered title to property and becomes the registered owner thereof, the registered owner will not be considered a fraudulent person under the Act for any further dealing with the land. We assume the clause is intended to address impersonation of a registered owner in the execution of a subsequent instrument. That interpretation, however, depends on the meaning of “registered owner” and it is open to interpretation from the language of the proposed subsection that if a



person has acquired title from a forger or fraudulent person, that person's deed is void and as a result, the grantee can never be considered to be the registered owner of the property for a subsequent dealing even if the parcel register shows that person as registered owner. That would have the result that the entire chain of title would always be subject to reconsideration of validity and destroy the mirror principle fundamental to deferred indefeasibility, which we do not believe is the intention of the legislation. All of the sections of the Act that permit a registered owner to transfer or charge land would be negated.

Recommendation

We recommend that subparagraph (c) of the definition of fraudulent person be revised to read as follows:

“the person holds oneself out in the instrument to be, but is not the person shown on the parcel register as the registered owner of the estate or interest in land affected by the instrument.”

In this way, as with traditional deferred indefeasibility, once a person is shown on the parcel register as the owner, the person can deal with the property and would not be a fraudulent person as defined. It is the impersonation of the person named on the parcel register that causes the document to be fraudulent, not the quality of the person's title. Note that this concept is also discussed below in relation to Section 78(4.2).

2. The definition of “fraudulent instrument”

The definition of “fraudulent instrument” needs to be expanded to include discharges or transfers of charge given by a fraudulent person. This deals with another type of mortgage or title fraud where a fraudulent person registers a discharge of a mortgage or a discharge of a construction lien and then arranges new mortgage financing. Section 48 of the Construction Lien Act provides that once a lien is discharged, it cannot be registered on title again. This provision makes it clear that the construction lien continues to be valid notwithstanding the registration of the fraudulent instrument or the discharge of the lien.

Recommendation

We recommend that subparagraph (e) be added to the definition of fraudulent instrument as follows:

“that is a discharge or transfer of a charge or a construction lien given by a fraudulent person. The remedies afforded by this Act are unaffected by Section 48 of the Construction Lien Act, R.S.O. 1990 c. C30, as amended.”

3. The new exception to the validation of title under Section 78(4.1) of the *Land Titles Act*

The key section in the proposed amendment is the amendment to Section 78 of the *Land Titles Act* by providing in subsection (4.1) that subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19th, 2006. The legislation appears to recognize that in accordance with the *Household Realty* case, if a document is registered and certified by the Land Registrar before that date, and the grantee has no knowledge of the fraud, the document is valid. This amendment provides that if the instrument is fraudulent, subsection (4) will not apply to validate that fraudulent document regardless of the innocence of the grantee. In this regard, the OBA submits the need to revise subsection 78(4.2) as follows:



- (a) Consistent with the above concept is the necessity to ensure that Section 78(4.1) is not interpreted to defeat the traditional reliance on the right of a registered owner to deal with the land. Traditionally, deferred indefeasibility provides that so long as the registered owner deals with the land, the recipient acquires a valid interest in the property, regardless of the effectiveness of the document by which the grantor acquired registered ownership. The exception in subsection (4.2) should be clear that Section 78(4) applies to any instrument signed by the person shown to be the registered owner of the property on the parcel register.

Recommendation

We recommend that the proposed Section 78(4.2) be amended to provide as follows:

“Nothing in subsection (4.1) invalidates

- (a) the effect of a registered instrument that is not a fraudulent instrument described in that subsection or an instrument signed by the person shown on the register as the registered owner, including instruments registered subsequent thereto.”
- (b) There is at least one situation where the proposed result of invalidity should not automatically apply. In the typical value fraud mortgage flip transaction, the property will have been innocently sold *bona fide* to fraudsters who then, in a series of transactions, create an artificial value for the property which is used to obtain mortgage funds from a lender. The fraudsters then abandon the property since they have already enjoyed the benefit of the fraud and have no interest in the property.

In that case, the only party with any legitimate claim to the property is the chargee/mortgagee who has lent on the security of the property, albeit at a value much higher than the fair market value of the property. Under the legislation, assuming the mortgage was given by a fraudulent person as defined, that mortgage would be a fraudulent instrument and would be void. The mortgagee would have acquired no interest in the lands and of course, there would be no owner with any interest or concern for the land since the last real owners were the fraudsters, presumably taking title under fictitious names to steal funds from the lender.

It is our position that in those cases where there is no innocent owner claiming that the mortgagee’s mortgage is invalid because it was fraudulent, there should be an assumption that the mortgage is valid so that the mortgagee can enforce the mortgage and sell the property under power of sale.

Recommendation

We recommend that the proposed Section 78(4.2) be amended to provide the following:

“Nothing in subsection (4.1) invalidates

- (b) the right of a chargee or mortgagee to enforce its charge/mortgage of land where the registered owner has not registered a caution at any time prior to the registration of a transfer by the chargee that the mortgage is a fraudulent instrument.”



In this way, an innocent owner can object to the validity of the mortgage, as in many of the title fraud cases, in which case the mortgage would be void and unenforceable, but where no objection is taken, typical of value frauds, the mortgagee should have the right to proceed with the enforcement of the mortgage.

- (c) This legislation assumes that there is only one owner of the property involved in a fraud. It is not uncommon however for land to be owned by more than one person, either as joint tenants or tenants in common, and in many cases as spouses. One of the two owners may deal with the property (usually by charging it) and execute a mortgage having an impostor forge the signature of or use a forged power of attorney for the other co-owner. In that case, one of the two registered owners has, in fact, signed a document and is not a fraudulent person as defined (although in actual fact is the fraudster), but the other co-owner has not executed the document. The document has, in fact, been executed by one registered owner together with a fraudulent person, probably in co-operation with the first registered owner.

The Ontario Bar Association is of the opinion that as it relates to the registered owner who has in fact signed the document, the charge should be valid and bind the interest of that registered owner in the land. The Ontario Bar Association, in keeping with the philosophy of the proposed amendments, agrees that the charge should be invalid as against the interest of the registered owner in the land whose interest was mortgaged by an impostor. It is inequitable, however, that the registered owner who is typically the fraudster should benefit from the fraudulent transaction and then remain the owner of his interest in the land free and clear of the charge that he or she created and benefited from.

The position is justified in law. Co-owners can transfer or charge their undivided interests in land. When one joint owner deals with his or her interest in land separately, the law holds that the joint tenancy is severed and that the owners become owners as tenants in common. When the registered owner along with an impostor deals with the land, the impostor's interest should be unaffected but the registered owner's action severs the joint tenancy and creates a charge on the interest in the land of the registered owner who executed the document.

Recommendation

We recommend that the proposed legislation be amended to clarify that a fraudulent instrument can also be an instrument that is not void as against any co-owner who has executed an instrument and that the document is good and valid as against the interest of such registered owner.

In this way, the defrauded co-owner has no obligation to the lender; however, the other registered owner and their interest in the land is subject to the charge.

We recommend that subsection (4.2) be further amended to add subsection (c) as follows:

“Nothing in subsection (4.1) invalidates

- (c) any fraudulent instrument to the extent of the estate or interest in land granted by a registered owner.”

This provision, however, in no way defeats the intent and purpose of the *Family Law Act* where there may be a spousal interest that would have otherwise required consent. An innocent spouse would always have the right to defeat the mortgage under the provisions of that Act and regardless of the provisions of Bill 152.

In summary, we recommend that Section 78(4.2) be revised as follows:



“Nothing in subsection (4.1) invalidates

- (a) the effect of the registered instrument that is not a fraudulent instrument described in that subsection or an instrument signed by the person shown on the register as the registered owner, including instruments registered subsequent thereto, or
- (b) the right of a chargee or mortgagee to enforce its charge/mortgage of land where the registered owner has registered a caution at any time prior to the registration of a transfer by the chargee that the mortgage is a fraudulent instrument.
- (c) any fraudulent instrument to the extent of the estate or interest in land granted by a registered owner.

III. **Land** Titles Assurance Fund

Subsection (16) is intended to expand the rights of parties who are entitled to apply to the Land Titles Assurance Fund by giving innocent persons who have demonstrated the requisite due diligence, the right to apply to the fund. However, that right does not exist if the person is restricted from recovering compensation by any other provision of the part.

Section 57(1) of the Act, however, only permits a person to apply to the fund if they have been wrongfully deprived of land or of some estate or interest therein. The section has generally been interpreted to provide that if a person did not acquire an interest in land, e.g. through a forged document, then they have not been wrongfully deprived of an interest and therefore have no right to apply to the fund since they never obtained an interest in land to begin with.

Recommendation

Section 57(1) of the Act should be amended to provide as follows:

“A person wrongfully deprived of land or of some estate or interest therein, by reason of the land being brought under this Act or by reason of some other person being registered as owner through fraud or by reason of any misdescription, omission or other error in a certificate of ownership or charge, or in an entry on the register, or a person sustaining a loss as a result of the rectification of the register in accordance with this section is entitled to recover what is just, by way of compensation or damages, from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error.”

In this way, the innocent person who has not been deprived of an interest in land as it has traditionally been interpreted has the jurisdictional right to apply to the Fund since they sustained a loss as a result of the rectification of the register.

IV. *The Land Registration Reform Act*

The Ontario Bar Association supports the draft legislation giving the Director of Land Registration the right to suspend the authorization of an electronic document submitter on the grounds indicated.



However, the Ontario Bar Association is very concerned that an innocent but duped user of the system can have their rights immediately suspended without the opportunity of a speedy determination whether this person poses an ongoing threat to titles, or is on the other hand, a dupe in a one-off or isolated fraudulent transaction.

The Ontario Bar Association recommends the following:

1. In subsection 23.2(1), there should be a very short period of time following suspension that the Director of Land Registration must notify the submitter that he or she proposes to revoke the authorization. We recommend that the Director of Land Registration must notify the submitter “within 2 Business Days of suspension that he or she has been suspended and that he or she proposes to revoke the authorization”.
2. Subsection 23.2(5) should provide that “if the electronic document submitter requests a hearing in accordance with subsection (2), the Director of Land Registration shall hold the hearing within 5 business days following receipt of notice requesting a hearing”.
3. It is the OBA’s view that a document submitter should have the right to have their conduct considered immediately in order to avoid risk of harm to the document submitter’s livelihood and ongoing clients dependent on the service provided by the submitter.
4. Subsection 23.2(6) should provide that the hearing with the consent of the document submitter shall be a written hearing but otherwise, the Director of Land Registration shall conduct an oral hearing of the issue. Given that the consequences of revocation of one’s access to the system can be severe, natural justice and the right to an oral hearing must be accorded the submitter.
5. Subsection 23.2(9) should be revised to provide that after the hearing, the Director of Land Registration may withdraw the suspension or may by order revoke the authorization. The proposed legislation only permits reinstatement after revocation, not after suspension. There appears to be no provision in the Section that gives the Director of Land Registration a right to withdraw a suspension. At best, the suspension continues until there has been an order revoking and reinstatement can only occur under Section 23.3 “after the authorization of an electronic document submitter is revoked”. The Director of Land Registration, if there has been a suspension, and after reviewing the matter, should have the right to withdraw suspension in appropriate circumstances at any time including before a revocation hearing and the Director should not therefore be obliged to proceed with a revocation hearing in such case.
6. Similarly in Section 23.3(3), we recommend that the Director of Land Registrations may, at any time that it is appropriate to do so, reinstate the applicant’s authorization. It should be clear that that right of reinstatement can apply before or after any determination of the revocation of authorization rights.

Part 2 - Bill 152 – Schedule B

Amendments to the *Business Corporations Act* (Ontario)

OBA Submission on OBCA Amendments

Schedule B Provision	OBCA Provision	Comment
1(1)	1(1)	Add a definition of “entity” meaning “a body corporate, a partnership, a trust, a joint venture or other unincorporated association or organization”. Entity is used in the new s. 136(1). An identical definition was added to the CBCA in 2001.
	14(5)	Repeal as it is disconnected from the former filing requirement repealed in 1994.
	23(6)	Repeal s. 23(6) of the Act, so that a shareholder may purchase shares in a corporation in exchange for property consisting of a promise to pay.
7	29(9), (10) and (11)	Comment deferred until amendments to the OBCR are available.
	92	See extended discussion on proposed Ontario unlimited liability corporation regime in Schedule B1.
8	31(3)(b)(ii)	To more closely conform to CBCA drafting, substitute “all shares holders of which have the right” for “all shares where the holders have the right”.
14(1)	99(1)	Where a proposal is submitted on behalf of a beneficial owner, the corporation should be entitled to request proof that the person meets the requirements of s. 99(1). This provision would be modelled s. 137(1.4) of the CBCA (introduced in 2001) or the new s. 146.1 of the OBCA.
14(2)	99(3)	Substitute the words “attach to it a statement by the person in support of the proposal and the name and address of the person” for “attach to it a statement in support of the proposal by the person and the name and address of the person”.
14(3)	99(5)(b.1)	Delete the words “in a significant way”. Add an amendment to the OBCR, so that the management information circular for each annual meeting of shareholders discloses the next ensuing proposal submission deadline.
	104(1)	Clarify that ss. 123(2) and 149(6) do not apply where all of the shareholders have signed a resolution in lieu of a meeting before a written statement of a director or representations in



		writing of an auditor is submitted.
19(2)	118(3)	See extended discussion of the resident Canadian director requirements in Schedule B2.
	119(2)	Delete so that, as under the CBCA, first directors are not trapped, unable to validly resign as directors (a problem for office incorporators).
	129(1)	Clarify s. 129(1), so that the conflicted director can sign a resolution in writing of the directors for conformity, without invalidating the resolution.
	123(2)	Clarify that, where a director is to be removed or replaced, his or her right to notice of a meeting of shareholders and right to circulate a written statement only applies to actual meetings of shareholders, not to a consent resolution of the shareholders in lieu of an actual meeting passed pursuant to s. 104(1).
23(1)	132(5)	To ensure that a conflicted director is not disenfranchised for more than is warranted, substitute “shall not attend those parts of the meeting” for “shall not attend any part of a meeting”.
25	135(4)	In the process of recasting s. 135(4) of the OBCA, the reference to s. 134(1) in current s. 135(4) has been lost. Replacement s. 135(4) is modelled on s. 123(4) of the CBCA but it omits a further provision modelled on s. 123(5) of the CBCA. The OBCA should ensure that a director can place good faith reliance on financial statements, interim or other financial reports, reports or advice of officers or employees and professional reports for the purposes of discharging the director’s duties of loyalty and care under s. 134(1) of the OBCA. Currently, s. 134(4) of the OBCA applies to the whole of s. 134, meaning that the proposed replacement provision narrows the application of the good faith reliance defence in that respect. The omission of s. 134(1) in proposed s. 135(4) and the omission of a counterpart of s. 123(5) of the CBCA introduce significant uncertainty and may make s. 135(4) a retrograde amendment.



Appendix 1 – Proposed Amendments to the *Land Titles Act*

<i>Land Titles Act</i> Bill 152 Provision	<i>Land Titles Act</i> OBA Provision	Comment
15(1) Section 1 of the <i>Land Titles Act</i> amended- definition of “fraudulent person”	15(1) Section 1 of the <i>Land Titles Act</i> amended-definition of “fraudulent person”	Subparagraph (c) revised to read as follows: “the person holds oneself out in the instrument to be, but is not <u>the person shown on the parcel register as the registered owner of the estate or interest in the land affected by the instrument.</u> ”
15(1) Section 1 of the <i>Land Titles Act</i> amended- definition of “fraudulent instrument”	15(1) Section 1 of the <i>Land Titles Act</i> amended- definition of “fraudulent instrument”	Subparagraph (e) be added to the definition of fraudulent instrument as follows: (e) “that is a discharge or transfer of a charge or a construction lien given by a fraudulent person. The remedies afforded by this <i>Act</i> are unaffected by Section 48 of the <i>Construction Lien Act</i> , R.S.O., 1990, cC30, as amended”.
15(4) re amendment to Section 78 by adding Subsection 4.2	15(4) re amendment to Section 78 by adding Subsection 4.2”	Subsection 78 (4.1) amended to read as follows: “Nothing is Subsection (4.1) invalidates (a) the effect of the registered instrument that is not a fraudulent instrument described in that subsection <u>or an instrument signed by the person shown on the register as the registered owner</u> , including instruments registered subsequent thereto”, or (b) “ <u>the right of a chargee or mortgagee to enforce its charge/mortgage of land where the registered owner has registered a caution at any time prior to the registration of a transfer by the chargee that the mortgage is a fraudulent instrument</u> ”. (c) “ <u>any fraudulent instrument to the extent of the estate or interest in land granted by a registered owner.</u> ”
Subsection 16	Subsection 16 amended by adding an amendment to Section 57(1) of the <i>Land Titles Act</i>	Subsection 57(1) should be amended to provide as follows: “A person wrongfully deprived of land or of some estate or interest therein, by reason of the land being brought under this <i>Act</i> or by reason of some other person being registered as owner through fraud or by reason of any misdescription, omission or other error in a certificate of ownership or charge, or in an entry on the register, <u>or a person sustaining a loss as a result of the rectification of the register in accordance with this section</u> is entitled to recover what is just, by way of compensation or damages, from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error.”



Appendix 2 – Proposed Amendments to the *Land Registration Reform Act*

<i>Land Registration Reform Act</i> Bill 152 Provision	<i>Land Registration Reform Act</i> OBA Provision	Comment
14(4) regarding 23.2(1)	14(4) addition to amendment to 23.2(1)	Subsection 23.2(1) should be amended to provide as follows: 23.2(1)(c) “The Director of the Land Registration must notify the submitter within 2 Business Days of suspension that he or she has been suspended and that he or she proposes to revoke the authorization.”
14(4) regarding 23.2(5)	14(4) regarding proposed amendment to 23.2(5)	Subsection 23.2(5) be amended to read as follows: “if the electronic document submitter requests a hearing in accordance with subsection (2), the Director of the Land Registration shall hold the hearing <u>within 5 business days</u> following receipt of notice requesting a hearing.”
14(4) regarding 23.2(6)	14(4) regarding amendment to 23.2(6)	Subsection 23.2(6) shall be amended to read as follows: “the hearing, with the consent of the document submitter shall be a written hearing, but otherwise, the Director of Land Registration shall conduct an oral hearing of the issue.”
14(4) regarding 23.2(9)	14(4) regarding amendment to 23.2(9)	Subsection 23.2(9) shall be amended so that it reads as follows: “after the hearing, the Director of Land Registration may <u>withdraw the suspension</u> , or may by order revoke the authorization of the electronic document submitter.”
14(4) regarding 23.3(3)	14(4) regarding amendment to 23.3(3)	Subsection 23.3(3) amended so that it reads as follows: “ the Director of Land Registration may <u>at any time</u> that it is appropriate to do so, reinstate the applicant’s authorization.”



Appendix 3

Extended Submission for an Ontario Unlimited Liability Corporations

The purpose of this submission is two-fold. First, it argues that Ontario should, change the *Business Corporations Act*³ so that direct inbound foreign investment can be channelled through an Ontario unlimited corporation.⁴ Second, this submission discusses the modest changes that would be required to the *OBCA* to accomplish this purpose.

I. EXECUTIVE SUMMARY

- The flow-through treatment of unlimited companies has proven extremely attractive for direct inbound investment from U.S. investors.
- There is no loss of Canadian tax revenue from allowing ULCs to be used as vehicles for direct foreign investment into Canada.
- An Ontario ULC would offer a number of advantages for foreign investors in comparison to the Nova Scotia ULC and Alberta ULC, particularly in removing an additional layer of complexity and expense.
- An avoidable layer of complexity and expense should not be considered an acceptable cost of doing business in Canada.
- Ontario, as the financial engine of the country, should signal that it welcomes foreign investment and strives to create an efficient corporate regime to facilitate it.
- Adopting ULC legislation should form an integral part of the drive to keep Ontario's commercial laws competitive by global standards.

II. ULC AS AN ELEMENT OF ONTARIO'S COMMERCIAL LAW COMPETITIVE STRATEGY

With increasing globalization, it is no longer enough for our legislators to assess their commercial law infrastructure in terms of sister provinces. Rather, Ontario's legal infrastructure is now being assessed in terms of those prevailing in the world financial centres, primarily, New York, London and Frankfurt.

Ontario is blessed with some natural competitive advantages. These include its stable political and economic environment, its governance by the rule of law, its sound financial institutions, an educated workforce, its linguistic and multi-ethnic diversity and a strong commercial law bench and bar.

³ R.S.O. 1990, c. B.16 [hereinafter the "OBCA"].

⁴ An unlimited corporation under the OBCA or the *Business Corporations Act*, R. S.A. 2000, c. B-9 [hereinafter the "ABCA"] or an unlimited company under the *Company Act*, R.S.N.S. 1989, c. 81 [hereinafter the "NSCA"] are sometimes hereinafter interchangeably referred to as a "ULC".



A ULC regime in Ontario is an integral part of the steps that ought to be taken to rebuild Ontario's commercial law competitiveness. As stated, ULCs provide U.S. investors with favourable U.S. tax treatment and have become the vehicle of choice for large-dollar direct U.S. investment into Canada. There is no loss of Canadian tax revenue from allowing the formation of ULCs. There is no reason why Ontario could not offer U.S. investors an Ontario ULC so as to simplify their life and signal that Ontario is open for business.

It is easy to overlook the significance of commercial laws, but they are crucial to our financial and commercial infrastructure. They are important not only to Ontarians but also to all Canadians. For better or worse, Ontario will remain the leading financial and commercial jurisdiction within the country and the principal entry point for foreign investment and trade.

Our legislators should be doing everything they can to keep Ontario competitive by international standards. Adopting ULC legislation would be an excellent step on the path to enhancing Ontario's reputation for global competitiveness.

III. BACKGROUND

1. Why the ULC is Attractive to Direct Inbound U.S. Investment

Like the *Income Tax Act*,⁵ the U.S. *Internal Revenue Code*⁶ treats partnerships and branches as flow-through vehicles for tax purposes. This means that income, though calculated at the partnership level, is taxed in the hands of the partners or owners regardless of whether the profits are paid out by the partnership or branch. On the other hand, if the entity were treated as a corporation, then under the U.S. Code, it would, as in Canada, be taxed as a separate taxpayer. The U.S. tax treatment of corporations and partnerships is consistent with the treatment of these entities for commercial law purposes. Corporations are treated in law as distinct legal entities whereas, at common law, partnerships are treated as relationships, not legal entities.⁷

Income flowing through a corporation is generally subject to the imposition of two levels of tax: once at the corporate level; and a second at the shareholder level. Under the U.S. Code, there is less than perfect integration of income flowed through a corporation unless an S-corp is used.⁸ Otherwise stated, the U.S. Code levies an element of double taxation unless a flow-through vehicle is used.

Prior to January 1, 1997, the U.S. Internal Revenue Service⁹ applied various tests to determine whether an entity would be treated for the purposes of the U.S. Code as a corporation or a non-corporate entity (a partnership or branch operation).

⁵ R.S.C. 1989, c. 1 (5th Supplement) [hereinafter the "ITA"].

⁶ The U.S. Internal Revenue Code is hereinafter referred to as the "U.S. Code".

⁷ Except in Scotland and as otherwise expressly provided by specific statute.

⁸ An S-corp derives its name from the subchapter of the U.S. Code that provides for its tax treatment.

⁹ The U.S. Internal Revenue Service is hereinafter referred to as the "IRS".

Effective January 1, 1997, the IRS promulgated and brought into force the *Simplification of Entity Classification Rules*, commonly known as the "check-the-box" regulations.¹⁰ The new Regulations allowed a "qualified entity" to file a prescribed form electing how it wished to be treated for U.S. tax purposes: (a) as a corporation; or (b) for "disregarded treatment" (as a partnership, if it has two or more members, or as a branch, if it has only one member). The main focus of the change was to simplify life for the U.S. limited liability company,¹¹ a true hybrid that has some of the attributes of a corporation and some of the attributes of a partnership or proprietorship. The LLC has no counterpart in Canadian law. The LLC was a relatively new phenomenon in the U.S., the first LLC statute having only been passed in Wyoming in 1977. However, once the flow-through tax treatment of the LLC under the U.S. Code was accepted, the LLC form of vehicle took flight and, particularly in the early 1990s onwards, was made available in other U.S. states.¹²

Consistent with the treatment accorded the LLC, the Regulations permit any Canadian "corporation or company formed under any federal or provincial law which provides that liability of all of the members of such corporation or company will be unlimited" to qualify as a partnership or a "disregarded entity" regardless of what other corporate characteristics it may have.¹³

Currently, only an unlimited company formed under the Nova Scotia *Companies Act*¹⁴ or an unlimited liability corporation formed under the Alberta *Business Corporations Act*¹⁵ is eligible to elect "disregarded entity" treatment under the U.S. Code.

2. Some Practical Uses that Foreign Investors Have Made of ULCs

The flow-through treatment of the ULC has proved extremely attractive for direct inbound investment from U.S. investors and from non-U.S. foreign investors who invest in Canada *via* the U.S. For example, a German, U.K. or Japanese investor can either invest directly into Canada from its home jurisdiction (in which case the ULC is not a viable option) or can invest into the U.S. and have its U.S. subsidiary make the direct investment in Canada (in which case the ULC becomes an option). These alternative investment structures are depicted in Figure 1 below.

¹⁰ The *Simplification of Entity Classification Rules* are hereinafter referred to as the "Regulations".

¹¹ The limited liability company is hereinafter referred to as an "LLC".

¹² Florida was the only other state to enact LLC laws before 1989. The explosion in LLC state laws came in the early 1990s.

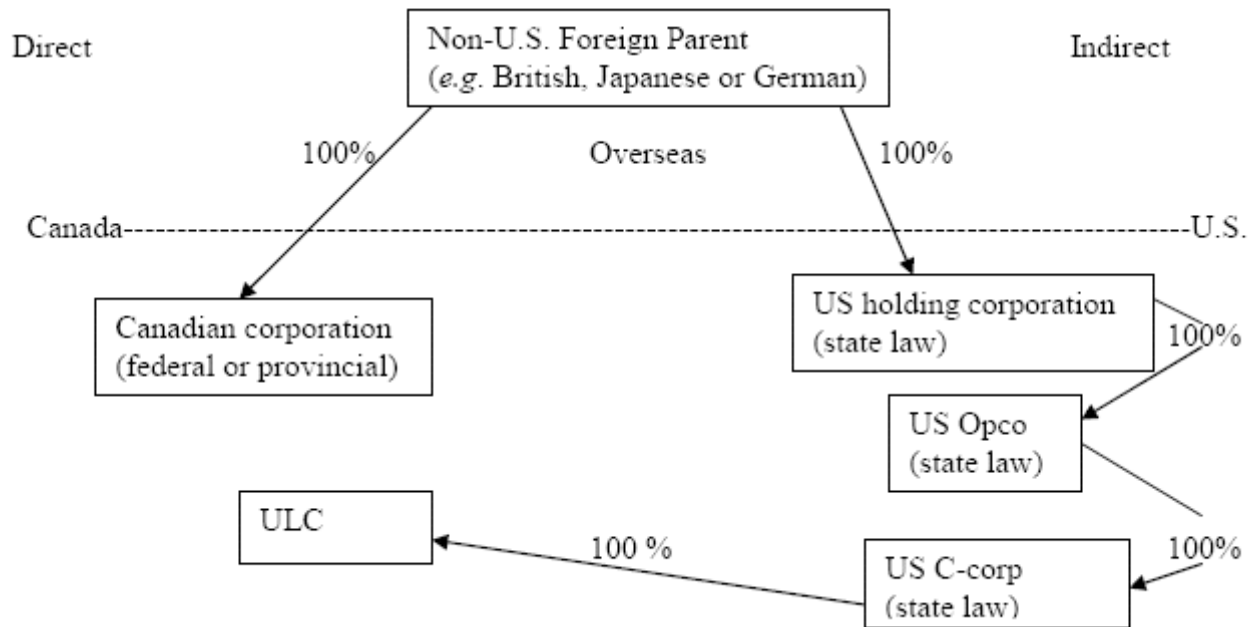
¹³ Regulations, para. 7(b)(8)(ii)(b).

¹⁴ NSCA, *supra*, note 4.

¹⁵ ABCA, *supra*, note 4.

Figure 1

Alternative Structures for Non-U.S. Investment into Canada



Notes:

1. In the direct non-U.S. investment, there is no advantage, but some disadvantage, to use a ULC (e.g. unlimited liability and costs).
2. In indirect non-U.S. investment, the above structure facilitates: (a) flow-through U.S. tax treatment of the ULC; (b) limited liability shield for U.S. Opco; and (c) consolidation of financial reporting.
3. In the above example, an LLC could be used if it elected to be taxed as a corporation or as a “disregarded entity”. U.S. tax and tax treaty issues will determine LLC’s election.
4. The C-corp traps the ULC’s unlimited liability at the C-corp level, protecting the assets of US Opco.



During the past decade or so, U.S. tax practitioners have found several practical uses for the ULC which have made it by far the vehicle of choice for large-dollar direct investment from the U.S. into Canada. Although not exhaustive nor necessarily current, examples of U.S. tax advantages in using the ULC to date include the following:¹⁶

- (a) Losses realized by the ULC may be applied against the profits of the U.S. shareholder; otherwise, losses sustained by a Canadian subsidiary corporation are not deductible against U.S. taxable income.
- (b) If a U.S. purchaser acquires all the shares of a ULC from a Canadian vendor, the Canadian vendor will be taxed under the ITA on the basis of a sale of shares whereas the U.S. purchaser will be taxed under the U.S. Code on the basis that it has acquired assets. A share sale may be attractive to the Canadian vendor so that he or she may first access the \$500,000 lifetime capital gains exemption or the 50% inclusion rate for capital gains not qualifying for the exemption. Under U.S. tax law, the result could be, for example, a step-up in the basis (in U.S. tax parlance) of the underlying assets, allowing the U.S. investor to enjoy larger tax depreciation deductions than would otherwise have been available. If the Canadian target company is not a ULC, it is possible to export the target company to Nova Scotia or Alberta and have it converted into a ULC. In take-overs of Canadian companies, the ULC effectively allows the Canadian vendor and the foreign purchaser some of the best of both the Canadian and U.S. tax worlds.
- (c) The U.S. Code limits the availability of foreign tax credits where a foreign subsidiary is a certain number of tiers (or layers) below the U.S. corporation in the organization chart. Since it is disregarded, use of the ULC eliminates one tier from the analysis and, therefore, moves the U.S. corporation one step closer to the foreign tax credit.
- (d) Unlike U.S. corporations, U.S. individuals can generally not claim the underlying Canadian income tax paid by a Canadian corporation as a foreign tax credit. A ULC can be used to enable the U.S. individual (usually *via* an S-corporation) to claim the underlying income tax as a foreign tax credit.
- (e) A ULC can be used to defer (until the after-tax income is paid to the U.S. parent as a dividend)¹⁷ non-resident withholding taxes that would otherwise be exigible on lease payments to a non-resident lessor. If a ULC is used as the lessor, no Canadian withholding tax applies. The ITA treats the ULC as a Canadian corporation and the payment from lessee to lessor as purely domestic. At the same time, the ULC is disregarded for purposes of the U.S. Code. Under the U.S. Code, the U.S. shareholder of the ULC receives the same tax treatment it would have obtained had the lessor been a U.S. taxpayer. The ULC, therefore, opens the door for inbound leases from the U.S. and provides Canadian lessees with access to the U.S. leasing

¹⁶ The discussion of U.S. tax treatment is illustrative only. Readers are cautioned to obtain qualified U.S. tax advice in every case. McMillan Binch Mendelsohn LLP does not purport to provide U.S. tax advice.

¹⁷ If the ULC pays a dividend to its U.S. parent, Canadian withholding taxes apply.



market. The result is lower lease rates for Canadian lessees able to conclude cross-border leasing transactions that take advantage of U.S. tax benefits available to lessors of certain types of equipment.

- (f) If a Canadian resident wishes to emigrate to the U.S., double taxation can result. In most cases, the ITA imposes a so-called departure tax on the emigrant. The departure tax includes the capital gain that results from the deemed disposition of the emigrant's property and its deemed reacquisition at fair market value.¹⁸ Thus, a Canadian taxpayer pays tax as if he or she had sold the property at FMV even though there is no sale and, therefore, no actual proceeds of disposition with which to pay tax. Later, when the taxpayer, who is now a U.S. resident, disposes of the same assets, the U.S. Code will treat the basis of the assets to be their initial adjusted cost base¹⁹ rather than the FMV at the time of departure. In effect, the IRS will ignore the Canadian tax paid on the difference between FMV at the time of departure and the ACB. This unfavourable result can be avoided by having the Canadian resident transfer his or her assets by way of tax-deferred rollover into a ULC. The U.S. Code allows the taxpayer to treat the assets as having a basis equal to FMV on the deemed disposition, thus minimizing future U.S. capital gains tax.
- (g) The U.S. Code will disregard for tax purposes a spin-off of a ULC to the shareholders of a Canadian corporation by way of dividend *in specie*.

The ULC thus has the unique advantage of constituting a corporation for Canadian tax purposes while, at the same time, being eligible for treatment as a partnership or branch for U.S. tax purposes. It is this difference in characterization under Canadian and U.S. tax law (or tax law arbitrage) that has proven to be extremely useful. The key point is that creative U.S. tax counsel will continue to find practical uses for the ULC. The foregoing are only examples of some applications that have been used to date.

3. Absence of Any Canadian Tax Disadvantage to Allowing Foreign Investment Through a ULC

An NSULC is a “company” under the NSCA.²⁰ Similarly, an ABULC is a “corporation” under the ABCA.²¹ Regardless of what treatment the ULC may receive under the U.S. Code, it is still treated as a “Canadian corporation” under the ITA. Thus, there is no difference whatsoever between the Canadian tax treatment of the ULC and the Canadian tax treatment of a corporation under the OBCA, ABCA or the *Canada Business Corporations Act*,²² or a company limited by shares under the NSCA. The tax advantages to the ULC are all U.S. tax advantages. Thus, there

¹⁸ Fair market value is hereinafter referred to as "FMV".

¹⁹ Adjusted cost base is hereinafter referred to as "ACB".

²⁰ NSCA, s. 2(1)(c).

²¹ ABCA, s. 1(1)(l) (definition of “corporation”) and (kk) (definition of “unlimited liability corporation”).

²² R.S.C. 1985, c. C-44, as amended [hereinafter, the “CBCA”].

is no loss of Canadian tax revenue from the continuance and perpetuation of the ULC as a vehicle for direct foreign investment into Canada.

4. Nova Scotia and Alberta as the Only Jurisdictions in Canada that Allow Formation of a ULC

The concepts of "company limited by shares", "company limited by guarantee" and "unlimited company" originated in the English *Companies Act*. Like a number of other jurisdictions in Canada, Nova Scotia modelled its early corporate law on the English statute.²³ Other jurisdictions in Canada, such as Alberta (until 1981) and British Columbia (until March 29, 2004) also followed the U.K. statute as their model but did not permit, or eliminated the possibility of, forming unlimited companies, which were correctly seen to be commercially unattractive.

Unlike a number of other jurisdictions in Canada (namely, the federal jurisdiction, Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Newfoundland and Labrador, Yukon, Nunavut and the Northwest Territories), Nova Scotia has never implemented a wholesale reform of its corporate legislation. Thus, the possibility of creating an NSULC was never removed from the NSCA.

Until recently, use of the NSULC remained largely dormant. However, in the past 15 years or so, the enormous potential U.S. tax advantages of the ULC led to its emergence as the preferred vehicle for large-dollar direct U.S. investment into Canada. What was once considered an inconspicuous weed has quickly grown into a mighty oak.

On May 17, 2005, Alberta amended the ABCA to permit the formation of unlimited liability corporations,²⁴ thereby ending the Nova Scotia monopoly. The ABULC regime differs significantly from a non-tax standpoint from the NSULC. Most notably, the liability of shareholders of an ABULC for the debts and obligations of the corporation is broader than the liability imposed on shareholders of an NSULC.

5. Significance of the ULC

Although no statistical data is available, there is widespread anecdotal recognition that ULCs play a significant role in the Canadian economy. Many of the largest and most significant investments in Canada in the past 15 years have been made through the ULC. The larger the dollar-value of the transaction, the more the incremental tax savings can make up for the relatively fixed additional costs of using a ULC. The widespread consensus among many leading Ontario corporate lawyers is that U.S. and other foreign investors are compelled to establish and operate NSULCs or ABULCs for purely jurisdiction-shopping reasons. Never is there a compelling non-tax reason for the use of a ULC. If the investors want the favourable U.S. tax treatment, there simply is no other choice.

²³ The *UK Companies Act*, 1862 was a consolidation of several statutes and, as noted by Sir Francis Palmer, is "The *Magna Carta* of co-operative enterprise" as quoted in G. Morse et al., eds. *Palmer's Company Law*, 25th ed., Vol. 1 (London: Sweet & Maxwell, 1992) at para. 1.110.

²⁴ Hereinafter referred to as "ABULC".



IV. ARGUMENTS AND ISSUES

1. Apart from the Favourable US Tax Treatment, Foreign Investors are Not Otherwise Well-Served by Being Forced to Use the Nova Scotia Statute

Aside from the NSULC, the NSCA has two other features that can be attractive to foreign investors. First, there is no requirement under the NSCA for any Canadian resident directors on the board or on any committee of the board.²⁵ Thus, there is no need for foreign investors to find any Canadian directors. Directors can be selected for their personal merit, not to satisfy statutory compliance concerns. Second, unlike under the CBCA and the corporate laws of all provinces and territories other than British Columbia, the NSCA does not contain any statutory restriction precluding a subsidiary from holding shares in its parent.²⁶ Nor does the NSCA expressly prohibit a direct or indirect subsidiary from owning shares in an NSULC. In certain exchangeable share transactions and other take-overs, it is often important that the subsidiary hold shares in its parent. These perceived advantages are applicable to all companies formed under the NSCA. They are not unique to the NSULC.

The first of these perceived advantages is not unique to Nova Scotia. The corporate statutes in all three territories and all provinces other than Ontario, Alberta, Saskatchewan, Manitoba and Newfoundland and Labrador permit the corporation to dispense with any resident Canadian directors.²⁷ Indeed, the incorporation statutes in New Brunswick and the Yukon Territory are probably more frequently used for this purpose than the NSCA. The New Brunswick and Yukon statutes have the advantage of modernity, closely following the CBCA model (prior to its reform in November 2001). The CBCA, which has served as the model for the OBCA and many other provincial and territorial statutes, is, in turn, modelled on certain U.S. statutes including, in particular, those of New York and Delaware and the *Model Business Corporation Act*.²⁸ The CBCA and the OBCA thus use terminology and concepts familiar to U.S. investors and their counsel. As a pure corporate statute, the OBCA is a much better fit for U.S. investors than the NSCA. Also, the unanimous shareholder declaration and the unanimous shareholder agreement permit all board powers and liabilities to be transferred from the board of an OBCA corporation to its shareholders. Thus, a foreign investor can achieve under the OBCA the functional equivalent of a board without any Canadian resident representation.

British Columbia also permits incestuous share purchase transactions that are either upstream (where the B.C. corporation acquires shares in its parent or other upper-tier holding company) or downstream (where a subsidiary or other lower-tier subsidiary of the B.C. corporation

²⁵ See W.D. Gray: "Shopping for that Perfect ... Corporate Statute" in *Return of the Six-Minute Business Lawyer* (Toronto: Law Society of Upper Canada, Department of Continuing Legal Education, 2000) [hereinafter, "Jurisdiction Shopping"].

²⁶ CBCA, s. 30(1). Recently, the CBCA and its regulations were changed to permit a limited exception where a subsidiary of a distributing corporation is used to complete certain cross-border share-for-share acquisitions. See CBCA, s. 31(3), (4), (5) and (6) and the *Canada Business Corporations Regulations*, Part 3 (Corporate Interrelationships), ss. 35-8.

²⁷ Jurisdiction Shopping, *supra* note 25, at 2-20. In its new *Business Corporations Act*, S.B.C. 2002, c.57 [hereinafter, the "BCBCA"] British Columbia did not include the former provisions of its *Company Act*, R.S.B.C. 1996, c. 62 (hereafter, the "BCCA") requiring a majority of resident Canadian directors and at least one British Columbia resident director.

²⁸ R.W.V. Dickerson, L. Getz and J.C. Howard, *Proposals for a New Business Corporations Law for Canada: Commentary and Draft Act*, Vol. 1 (Ottawa: Information Canada, 1971) [hereinafter, the "Dickerson Report"].

acquires shares in the B.C. corporation).²⁹ As a pure corporate statute, the BCBCA³⁰ is superior to the NSCA. The British Columbia statute was introduced on March 30, 2004 and is the newest Canadian corporate statute. The NSCA has never undergone thorough reform.

The NSCA presents several disadvantages for foreign investors:

- (a) As a general observation, the NSCA is an idiosyncratic statute, little of which is modelled on the CBCA. It is not one with which U.S. investors and their counsel would generally be familiar.
- (b) Much of the NSCA looks archaic,³¹ and its subject matters, language and organization often appear obscure at least to the uninitiated.³²
- (c) Conversion of a corporation formed under the laws of another Canadian jurisdiction into a NSULC is not straightforward. A corporation formed under the laws of another Canadian jurisdiction can only be imported into Nova Scotia as a company limited by shares. A second company must exist or be incorporated under the NSCA – generally as a “company limited by shares” to save the stiff incorporation tax for an NSULC. The imported company limited by shares can then be amalgamated with the existing or new NSULC to form an amalgamated company that may be either a NSULC or a company limited by shares. Apart from the added expense and complexity entailed in converting a corporation formed elsewhere into a NSULC, the amalgamation triggers a year-end for each amalgamating company for purposes of the ITA. Unless timed to coincide with a financial year-end, the amalgamation will require the preparation of extra sets of financial statements and may, for example, accelerate the expiration of non-capital loss carryforwards.³³
- (d) The unanimous shareholder agreement, which is the primary tool for the private ordering of closely-held or non-offering corporations under the OBCA and the CBCA, has no statutory recognition in the NSCA.³⁴

²⁹ Jurisdiction Shopping, *supra* note 25 at 2-12.

³⁰ BCBCA, *supra*, note 27.

³¹ Examples of archaic sets of provisions are those concerning par value shares, the liability of contributories and the use of the memorandum of association as the method of incorporation.

³² For example, s. 26(17) of the NSCA sets out confusing rules for calculating paid-up capital and s. 51(1) which specifies changes that may be made to the memorandum of association without stating whether these amendments are exhaustive or merely inclusive.

³³ Note, however, that in an *ex parte* unreported decision made on September 2, 2004, Moir J. held, in *Re: E.L. Management Incorporated* (2004), 3 B.L.R. (4th) 324 (N.S.S.C.), that the arrangement provisions of the NSCA could also be used to convert a company limited by shares into an unlimited company. While use of the arrangement provision still requires a court order, it avoids triggering an additional year end for tax purposes. Arrangements will doubtless become the preferred method of converting a NSCA company limited by shares into an NSULC otherwise than at fiscal year-ends.

³⁴ OBCA, s. 108(2)-(6); CBCA, s. 146. See also Jurisdiction Shopping, *supra* note 25 at 2-2.



- (e) Any limitations on the authority of the board of a NSULC must be set out in publicly filed articles of association.³⁵ Shareholders and management may be reluctant to disclose such matters in the public record.
- (f) It is difficult to do leveraged-buyout transactions³⁶ under the NSCA because there is no exemption for share purchase financial assistance provided by a wholly-owned subsidiary in favour of its parent. Nor is there a safe harbour provision for good faith lenders.³⁷ The CBCA has abolished the prohibition against share purchase financial assistance.³⁸ The OBCA currently contains an exemption where a wholly-owned subsidiary provides upstream financial assistance to its parent.³⁹ However, Bill 152⁴⁰ will abolish the last vestige of the financial assistance rules.
- (g) Court orders are required to approve amalgamations, adding to the expense, for example, of converting a corporation formed under the laws of another jurisdiction into an NSULC.⁴¹
- (h) In the absence of unanimous approval, a special resolution under the NSCA requires approval at two separate shareholder meetings held not less than 14 days apart, a process that is expensive, time-consuming and cumbersome for public companies and private companies having large numbers of shareholders.⁴² A special resolution is required, for example, to approve an amalgamation, an export continuance or an alteration of the share provisions set out in the memorandum and articles of association of a NSULC. However, the NSLC rarely has more than a few shareholders.
- (i) Arrangements, reorganizations and minority squeeze-out procedures under the NSCA are much less explicit than the arrangement provisions of the CBCA and the OBCA.⁴³
- (j) The conditions attached to preferred shares must be set out *verbatim* in the share certificates representing these shares.⁴⁴ It is not enough to incorporate these share conditions by reference.

³⁵ NSCA, Sch. 1, Table A, s. 147.

³⁶ The leveraged-buyout transaction is hereinafter referred to as an “LBO”.

³⁷ Jurisdiction Shopping, *supra* note 25 at 2-2.

³⁸ Bill S-11.

³⁹ OBCA, s. 20(3)(c). Even if the upstream exemption does not apply, s. 20(2) of the OBCA only requires that the OBCA corporation provide post-transaction notice of the financial assistance to its shareholders.

⁴⁰ Bill 152, *An Act to Modernize Various Acts Administered by or Affecting the Ministry of Government Services*, which passed second reading in the Ontario Legislature on November 16, 2006 [hereinafter referred to as “Bill 152”].

⁴¹ NSCA, s. 134(5).

⁴² NSCA, s. 87(1) and (2).

⁴³ Jurisdiction Shopping, *supra* note 25 at 2-2.



- (k) There are no rules to protect *bona fide* transferees of shares in a NSULC for value without notice from adverse claims.⁴⁵ The NSCA is, therefore, out of step with the prevailing North American security transfer regime, the best Canadian examples of which will soon be found in the *Securities Transfer Act* (Ontario)⁴⁶ and the *Securities Transfer Act* (Alberta).⁴⁷
- (l) Unlimited liability is determined on the winding-up of the NSULC.⁴⁸ However, the NSCA does not define what constitutes a “winding-up” for purposes of triggering shareholder liability, thus creating ambiguity and uncertainty in a matter of critical concern to investors. AS a practical matter, members investing in an NSULC should generally proceed on the footing that unlimited liability will crystallize on the liquidation or bankruptcy of the NSULC.
- (m) To be registered under the Nova Scotia *Corporations Registration Act*⁴⁹ and to maintain its registration, a company incorporated under the NSCA must have a “recognized agent” resident in Nova Scotia,⁵⁰ file an annual statement of agent⁵¹ and pay an annual fee.⁵²
- (n) Companies incorporated under the NSCA are required to have a registered office in Nova Scotia.⁵³ The registered office is frequently located at the office of the lawyer who has been involved in the incorporation of the company.
- (o) At \$6,000, the incorporation tax for an NSULC under the NSCA is by far the highest in Canada. It is 20 times the incorporation fee under the under the OBCA (\$300 if filed electronically) and 30 times the equivalent fee under the CBCA (\$200 if filed electronically).
- (p) At \$2,000, the annual tax for filing an annual statement for an NSULC under the NSCA is 100 times more than the fee charged for an electronic filing of an annual return under the CBCA (\$20). No fees are charged for filing an annual return under the *Corporations Information Act* (Ontario).⁵⁴

⁴⁴ NSCA, s. 50(4).

⁴⁵ Jurisdiction Shopping, *supra* note 25 at 2-2.

⁴⁶ S.O. 2006, c. 8 [hereinafter referred to as the “Ontario STA”].

⁴⁷ S.A. 2006, c. S-4.5 [hereinafter referred to as the “Alberta STA”].

⁴⁸ NSCA, s. 135.

⁴⁹ *Corporations Registration Act*, R.S.N.S. 1989, c. 101.

⁵⁰ CRA s. 9.

⁵¹ CRA s. 10

⁵² CRA s. 12

⁵³ NSCA s. 29

⁵⁴ R.S.O. 1990, c. C-39.



The conclusion that must be drawn, therefore, is that the tax advantages in using the NSULC override the numerous technical deficiencies and incremental costs of the NSCA. These tax advantages are also what prompted the Nova Scotia Government to capitalize on its former monopoly on the formation of ULCs in Canada.

2. Why Foreign Investors Would Prefer an Ontario ULC to an ABULC

Compared with an NSULC, an ABULC has several disadvantages that, collectively, have made the ABULC still less favoured than the NSULC. Perhaps, the main commercial law differentiation is the broader liability regime imposed on shareholders of an ABULC than is imposed on shareholders of an NSULC. An Ontario ULC could offer the same tax advantages as the ABULC but with the following non-tax advantages:

- (a) In general terms, Ontario should follow the Nova Scotia shareholder liability regime for a ULC. Shareholders would only be liable when the ULC is wound-up or liquidated and there are insufficient assets to satisfy its obligations. Unlike the ABCA, there would be no joint and several liability.⁵⁵ Former shareholders would not be liable if they ceased to be shareholders one year prior to the winding-up or the liquidation.
- (b) An Ontario ULC and its contractual counter-party could contract out of the shareholder liability regime as under the NSCA but unlike under the ABCA.
- (c) Unlike the ABCA,⁵⁶ the OBCA should remove the residency requirement for all OBCA corporations, particularly for ULCs formed under the OBCA. If a residency requirement is retained for limited corporations, consideration should be given to eliminating it at least for Ontario ULCs.
- (d) Unlike the ABCA,⁵⁷ creditors of an Ontario ULC should have no direct remedy against shareholders. Shareholders would only be liable for a deficiency upon a winding-up or liquidation.

3. Industry Canada Has Shown No Interest in a Federal ULC Regime

In November 2001, Industry Canada finally completed its Phase II reform of the CBCA which consummated more than seven years of work.⁵⁸

To date, Industry Canada has given no sign that it will implement a federal ULC regime. A federal regime would have the distinct advantage of being available to foreign investors wherever in Canada

⁵⁵ ABCA, s. 15.2(1).

⁵⁶ ABCA, s. 105(3).

⁵⁷ ABCA, s. 15.2(1).

⁵⁸ R.C. 2001, c. 14 (formerly, Bill S-11, entitled “*An Act to Amend the Canada Business Corporations Act and the Canada Cooperatives Act and to Amend Other Acts in Consequence*” was proclaimed into force on November 24, 2001 (S1/2001-114)).

they choose to operate. All corporate lawyers in Canada are qualified to incorporate, advise on and give opinions in relation to federal corporations. There is no assurance that a federal ULC regime will ever materialize.

There is probably an insufficient volume of potential ULC incorporations to justify having every province and territory introduce its own statute. The heaviest users of the ULC are based in Ontario. Outside Ontario, there would be diminishing returns from a proliferation of provincial and territorial ULC legislation. Ontario legislation is likely to pre-empt the need for any further legislation in Canada whether federal, provincial or territorial.

4. If Ontario Allowed the Formation of ULCs, there would be Compelling Reasons Why U.S. Investors Would Favour the Ontario ULC

Compared to an NSULC, an Ontario ULC would offer the following advantages for a U.S. investor:

- (a) It would simplify the operational affairs of the Canadian subsidiary. For instance, often, a Canadian holding company will be formed as an NSULC. However, the place of operations of the primary operating company may be in a different Canadian jurisdiction and its incorporation may be under a different Canadian statute (for example, the CBCA or the OBCA). The take-over, financing or reorganization that prompted the use of the ULC would rarely be run from Nova Scotia. Aside from the NSULC, the U.S. investor may have no other reason to be conducting business in Nova Scotia.
- (b) The necessity of having a NSULC almost inevitably forces the parties to double the number of sets of lawyers used in transactions such as acquisitions, divestitures, corporate reorganizations, share offerings and debt financings. Nova Scotia counsel must be involved if a NSULC is involved in the transaction. Only Nova Scotia counsel can advise a NSULC on corporate law matters and prepare or approve corporate documents involving the NSULC. Typically, third party legal opinions are required on these transactions. If a NSULC is involved, an Ontario lawyer cannot opine on its existence, corporate capacity and due authorization. Thus, various aspects of the transaction must be allocated between the various jurisdictions involved. Since Ontario is the financial centre of the country and the ULC is often used in large-dollar transactions, a typical transaction would see each side retain counsel in Ontario and Nova Scotia. The role of Nova Scotia counsel is typically confined to the corporate law and opinion matters involving the NSULC. The rest of the transaction is handled entirely in Ontario. Two sets of lawyers are needed where otherwise one set would suffice. The cumbersome legal structure imposes unnecessary cost, inconvenience and delay on the foreign investor. Additional complexity and layers of lawyers add significantly to overall transaction costs.



- (c) In contrast to the NSCA, the OBCA is a modern, almost state of the art, corporate statute. It uses concepts and terminology already familiar to U.S. investors and their advisors as the OBCA in an indirect derivative of U.S. corporate statutes.⁵⁹
- (d) The OBCA protects the wages of all employees wherever located.⁶⁰ The OBCA imposes personal liability on the directors for the entire payroll of the OBCA corporation, including vacation pay. The NSCA does not protect the wages of employees. Indeed, no employment standards or other statute in Nova Scotia protects the wages of employees, even the wages of Nova Scotia resident employees.⁶¹ Ironically, therefore, formation under the OBCA would better protect the wages of Nova Scotia and other Atlantic Canadian workers than formation under the NSCA.⁶²
- (e) The OBCA has also reformed and, in Bill 152, proposes to repeal what remains of its financial assistance provisions so that they no longer pose an impediment to share purchase or other financial assistance transactions. Currently, the OBCA financial assistance provisions contain an express exemption for the LBO.⁶³
- (f) Some corporate procedures are much simpler under the OBCA than under the NSCA. Examples include amalgamations, shareholder meetings, arrangements, reorganizations and minority squeeze-outs.

Ontario should take a page from leading corporate law jurisdictions in the U.S. such as Delaware, New York and Nevada. The OBCA should continually strive to make itself competitive and attractive to investors, including foreign investors. Foreign investors should not be forced to structure their transactions through jurisdictions that otherwise have little or no connection to the Canadian operations or the place where the acquisition, divestiture, financing or corporate reorganization is run. Foreign investors should not be forced to adopt unnecessarily complex corporate structures, use archaic corporate statutes, retain extra sets of lawyers and incur additional transaction costs if these can all be avoided. Ontario could offer an attractive alternative to the NSULC and ABULC and thereby send a strong signal that Ontario is the best point of entry for foreign capital.

5. It is Not Necessary to Create a Separate Statute for an Ontario ULC Regime. A Set of Amendments to the OBCA Would Suffice

Like the UK statute upon which it is based, the NSCA sets out the rules governing the NSULC within the same statute that provides for ordinary companies, that is companies limited by shares. The ABCA does the same, providing for the formation of limited corporations and ABULCs in the

⁵⁹ See note 28.

⁶⁰ OBCA, s. 131.

⁶¹ Jurisdiction Shopping, *supra* note 25 at 2-2.

⁶² See, for example, *Proulx v. Sahalien Goldfields Inc.* (2001) 55 O.R. (3d) 775 (C.A.) where it was held that the OBCA protected the claims of employees working in West Africa.

⁶³ OBCA, s. 20(3)(c).

same statute. There is, therefore, no need to create a separate statute and duplicate many of the rules that would apply to both unlimited corporations and limited corporations. The number and scope of amendments that would have to be made to the OBCA are few. Ontario can easily provide for unlimited corporations through amendments to the OBCA.

V. RECOMMENDATIONS

The fundamental recommendation is that Ontario should permit the formation of ULCs. The remaining discussion focuses on the mechanics of implementing Ontario ULC legislation.

A few essential amendments would have to be made to the OBCA to provide for the ULC. Some other amendments are optional but would enhance its attractiveness to foreign investors. Finally, there are some provisions of the NSCA or ABCA that should not be replicated in the OBCA.

1. Essential Amendments

- (a) Like the ABCA,⁶⁴ the OBCA would have to make a distinction between ordinary “limited corporations”, the only type now permitted, and the newly-permitted “unlimited liability corporations” or ULC. The concept of “corporation” would then include both types.
- (b) Subsection 92(1) of the OBCA states that shareholders of the corporation enjoy limited liability subject to certain enumerated exceptions. The members of an NSULC do not become liable for the residual liabilities of the NSULC except upon winding-up of the NSULC.⁶⁵ The same concepts would have to be imported into the OBCA for ULCs. However, to provide added certainty for investors, the circumstances in which shareholder liability arises should be clear. In particular, liability should arise if, but only if, the ULC is liquidated or dissolved under the OBCA (whether voluntarily or involuntarily), it makes a voluntary assignment into bankruptcy under the *Bankruptcy and Insolvency Act*⁶⁶ it is petitioned into bankruptcy under the BIA (an involuntary bankruptcy) or it is made subject to a winding-up order under the *Winding-Up and Restructuring Act*.⁶⁷ Liability should not arise merely because the ULC seeks to reorganize its business and financial affairs by way of a proposal under Part III of the BIA, a plan of arrangement under the *Companies’ Creditors Arrangement Act*,⁶⁸ a plan of arrangement under the *Winding-Up and Restructuring Act* or an arrangement or reorganization under the OBCA. Liquidation should be differentiated from a financial reconstruction designed to salvage and resurrect the business of a corporation.

⁶⁴ ABCA, s. 1(1)(kk) definition of “unlimited liability corporation” and s. 15.1 definition of “limited corporation”.

⁶⁵ NSCA, s. 135.

⁶⁶ R.S.C. 1985, c. B-3 (hereinafter, the “BIA”).

⁶⁷ R.S.C. 1985, c. W-11.

⁶⁸ R.S.C. 1985, c. C-36.



- (c) To protect the public, third parties dealing with a corporation would have to have an easy way of knowing whether the corporation with which they are dealing is a limited or an unlimited corporation. If a person deals with a corporation in the mistaken belief that he or she is dealing with an unlimited corporation whereas he or she is in fact dealing with a limited corporation, that person could be unfairly prejudiced. Currently, “limited”, “incorporated” or “corporation”, or their respective abbreviations, must be included in the corporate name of an OBCA corporation.⁶⁹ Like the ABCA,⁷⁰ the OBCA should provide a different legal element to differentiate unlimited corporations from limited corporations. For instance, as under the ABCA,⁷¹ the term “unlimited liability corporation” or the abbreviation, “ULC”, should be earmarked for the ULC.⁷² Existing OBCA corporations would then not have to change their corporate names. No Ontario ULC yet exists, so there is no prejudice or inconvenience. Under the NSCA, an NSULC cannot use the legal elements “limited” or “incorporated” or abbreviations thereof in a name.⁷³ In addition to the legal element, “company”, an NSULC is permitted to use “corporation” or its abbreviation in its corporate name.
- (d) A method for converting a limited corporation into a ULC, and *vice versa*, must be introduced into the OBCA. However, the method need not follow the method used in the NSCA for converting a company limited by shares into a NSULC. The requirement of a statutory amalgamation is problematic. An amalgamation automatically triggers a financial year-end for tax purposes for each of the amalgamating companies and carries with it the consequent acceleration of any non-capital loss carryforwards.⁷⁴ Instead of an amalgamation, a limited corporation might, as under the ABCA, be converted into a ULC by certificate and articles of amendment, requiring a two-thirds favourable vote of each class of shares. Since the corporation would have to change its name in any event, the additional requirement for articles of amendment imposes no material added burden on the corporation. Alternatively, the conversion might be effected by certificate and articles of continuance. As under the ABCA, a limited corporation could continue as a ULC or *vice versa*.
- (e) Where a limited corporation converts into a ULC or the reverse, all of the shareholders should have a dissent and appraisal right so that they can opt-out of the

⁶⁹ OBCA, s. 10(1).

⁷⁰ ABCA, ss. 15.4(1) and (2).

⁷¹ *Ibid.*

⁷² Many partnerships and proprietorships use “company” or “co.”. Thus, these words should not be used to denote the ULC.

⁷³ The naming convention represents the practice of the Nova Scotia Registrar of Joint Stock Companies. The NSCA is silent as to what names are prescribed for the NSULC and what names are prohibited. The legal elements “limited”, “incorporated” and abbreviations thereof are prescribed for companies limited by shares and companies limited by guarantee. Thus, the public policy of avoiding overlap in the legal elements permitted to the NSULC and the other types of companies is implemented through administrative practice rather than through the NSCA itself.

⁷⁴ See, however, the *E.L. Management* decision, *supra*, note 33.



corporation and receive fair value for their shares without incurring the risk of personal liability.

2. Desirable but Optional Amendments

- (a) Since the shareholders of a ULC have unlimited liability, creditors do not have the same legitimate concern if the corporation holds shares in its parent as applies where the shareholders are immune from liability. Both the subsidiary and the parent would ultimately be liable to any creditors. Thus, the prohibition against subsidiaries owning shares in a parent could be made inapplicable to a ULC,⁷⁵ removing one more disincentive to incorporating the ULC under the OBCA.
- (b) Consideration should also be given to exempting the ULC from the requirement to satisfy various solvency tests set out in the OBCA⁷⁶ before completing certain transactions that have the effect of depleting assets required to satisfy claims of creditors. For example, currently, an OBCA corporation is precluded from declaring or paying dividends (other than stock dividends, which, by their nature, do not result in any dissipation of underlying assets) unless, following the declaration and payment, the corporation will still be able to pay its liabilities as they become due and the realizable value of the assets of the corporation will still exceed its liabilities and stated capital of all classes.⁷⁷ The purpose of the rule is to ensure that creditors are not prejudiced by the declaration and payment of dividends to shareholders. Again, the same concern does not exist when the shareholders of the company have unlimited liability. Even if the company is insolvent, the shareholders ultimately remain liable for the debt. The same analysis can be made to the application of the solvency tests where the ULC purchases or otherwise acquires its own issued shares, redeems its shares, enters into a contract to repurchase its shares or reduces its stated capital. Since the shareholders of the ULC ultimately remain liable, the legitimate concern about the dissipation of corporate assets prejudicing the rights of creditors is reduced, if not eliminated.
- (c) As is the case under the ABCA, it would be worthwhile to require the ULC to set out a notice or warning in share certificates representing shares in the ULC (whether issued from treasury to a subscriber or representing shares transferred to a purchaser or other transferee) that he or she may incur personal liability to the creditors of the ULC upon registration of his or her interest in the ULC. Also, before the shares are registered in the name of the subscriber or transferee, he or she should have the statutory right to obtain the most current financial statements of the ULC so that he or she can assess the risk entailed in unlimited liability. Contrary to the ABCA, there are no comparable protective provisions under the NSCA.

⁷⁵ OBCA, s. 28(1).

⁷⁶ OBCA, s. 30(2) (purchase of issued shares), s. 31(3) (purchase of issued shares), s. 32(2) (share redemption), s. 34(4) (reduction of stated capital), s. 38(3) (dividends), s. 185(30) (purchase of shares under dissent remedy) and s. 248(6) (purchase of shares under oppression remedy).

⁷⁷ OBCA, s. 38(3).



- (d) As stated above, the whole rationale for allowing the ULC as a form of corporation is create an attractive vehicle for foreign investors. The ULC has no current appeal to purely domestic investors. Thus, consideration should be given to exempting the ULC from the requirement that it have any resident Canadian directors on its board⁷⁸ or on any board committees.⁷⁹ In part, the change would respond to the new Canadian residency requirements under the CBCA. Under the CBCA, the usual Canadian residency requirement⁸⁰ has been reduced from a majority to not less than 25%. If the main reason for continuing to insist on a Canadian resident component on the board is so that there is at least one Canadian resident who can be liable for certain statutory liabilities such as unpaid employee wages or withholding taxes, then certain realities should be understood. First, more than half of all Canadian jurisdictions no longer have any Canadian residency requirement. Five provinces (Quebec, Nova Scotia, New Brunswick, Prince Edward Island and British Columbia) and all three territories do not impose any such requirement.⁸¹ Second, through the unanimous shareholder agreement or declaration in lieu of unanimous shareholder agreement, all of the duties and liabilities of the members of the board can be transposed to the shareholders.⁸² Thus, the board of an OBCA corporation can already be relieved of these liabilities. Third, the shareholders of a ULC would, *ex hypothesi*, have unlimited liability for the debts of the ULC on winding-up. Generally, shareholders are not liable for the debts of their company, which is one reason why liability is imposed on directors.
- (e) Since the ULC will generally be owned entirely by U.S. investors, the normal rule requiring that the financial statements be prepared in accordance with Canadian generally accepted accounting principles⁸³ could be relaxed so as to permit their preparation in accordance with U.S. GAAP.⁸⁴ The ITA will continue to require that financial statements be prepared in accordance with Canadian GAAP for tax purposes.⁸⁵ Thus, there is no harm in allowing U.S. shareholders to receive financial statements in a manner that suits them.
- (f) There is no prejudice to third parties if a limited corporation is converted into a ULC. The only possible prejudice is where a third party, thinking it is dealing with a ULC and that it can look to the shareholders for any shortfall upon insolvency of the ULC, continues dealing with the corporation on that basis and only finds out later

⁷⁸ OBCA, s. 118(3). Bill 152 proposes to reduce the residency requirement from a majority to 25% but not eliminate the requirement.

⁷⁹ OBCA, s. 127(2). Bill 152 proposes to repeal the Canadian residency requirement for all board committees and the office of managing director.

⁸⁰ CBCA, s. 105(3.1).

⁸¹ Jurisdiction Shopping, *supra* note 25, at 2-2.

⁸² OBCA, s. 108(5).

⁸³ Generally accepted accounting principles, whether Canadian or U.S., are hereinafter referred to as "GAAP".

⁸⁴ General Regulations made under the *Business Corporations Act*, R.R.O. 1990, Reg. 62, s. 40.

⁸⁵ ITA, s. 181 (3)(b)(i).



that the corporation has been converted into a limited corporation. The solution would be to deny the directors and shareholders of the corporation limited liability protection unless they bring to the attention of parties dealing opposite to the corporation that they are no longer dealing with a ULC or unless personal liability is excluded in the contract between the ULC and the opposite contracting party. The appropriate rules already exist under s.10 (5) of the OBCA and s. 2 (6) of the *Business Names Act*.⁸⁶ Unless a director or officer of a corporation brings to the attention of the opposite party that he or she is operating on behalf of a limited corporation, limited liability protection will be unavailable.⁸⁷ The same principle should apply to unannounced or secretive conversions of ULCs into limited corporations. An amalgamation that does not result in a name change does not drive home to the opposite party that there has been a conversion of a NSULC into a company limited by shares. What drives the point home is the legal element in the corporate name.

3. Undesirable Amendments

There are certain provisions of the NSCA that can be discarded if Ontario were to permit the formation of ULCs.

- (a) As discussed, the cumbersome method of converting a company limited by shares into a ULC need not be imported as part of the OBCA. There should be a corporate name change, either articles of amendment or articles of continuance and notice to shareholders and creditors.
- (b) The NSCA still permits the flexibility of having partly-paid shares or shares issued in whole or in part in exchange for a promise to pay.⁸⁸ The OBCA abolished partly-paid shares and consideration in the form of the subscriber's promise to pay in 1971. The abolition of partly-paid shares facilitates the treatment of shares in a corporation as a species of negotiable instrument. It removes the concern that, by becoming a registered shareholder, the subscriber or purchaser of the shares may become liable for the unpaid portion of the original subscription price. Allowing partly paid shares, however, might seriously undermine the overall marketability of shares in Ontario corporations. A case could be made for allowing a ULC to issue partly paid shares or shares issued in exchange for a promise to pay. The ULC is not used as a vehicle for public investment. It is entirely a closely-held business or investment vehicle.

⁸⁶ R.S.O. 1990, c. B.17 [hereinafter, the "BNA"].

⁸⁷ See the long line of Ontario cases which includes: *Truster v. Tri-Lux Fine Homes Ltd.* (1998) 18 R.P.R. (3.1) 1, 39 C.L.R. (2d) 6 (Ont. C.A.), *Pennelly Ltd. v. 449483 Ontario Ltd.* (1986) 20 C.L.R. 145 (Ont. H.C.J.), *Joel Theatrical Rigging Contractors (1980) Ltd. v. Szilva* (1989) 23 A.C.W.S. (3d) 389 (Ont. Dist. Ct.), *Watfield International Enterprises Inc. v. 655293 Ontario Ltd.* (1995) 21 B.C.R. (2d) 158 (Ont. Gen. Div.), *573521 Ontario Inc. v. Waldman* (1996) 31 C.L.R. (2d) 305 (Ont. Gen. Div.), *Clow Darling Ltd. v. 1013983 Ontario Inc.* (1997) 36 B.L.R. (2d) 137 (Ont. Gen. Div.), *Partners Catering Inc. v. Aboya* (1998) 84 A.C.W.S. (3d) 489 (Ont. Gen. Div.) and *Commercial Tire Supply Ltd. v. Tunney*, 2000 Carswell Ont. 4811 (S.C.J.).

⁸⁸ NSCA, s. 109(2).



- (c) The NSCA still allows a corporation the option of using par value shares or non-par value shares. The OBCA abolished the concept of par value shares in 1971. It was found to be misleading to investors.⁸⁹ There is no need for the OBCA to reintroduce the concept of par value shares even if they were limited to the ULC.
- (d) There is no need to adopt the NSCA rule requiring that amalgamations be approved by court order. The ULC should put third parties on notice that they are dealing with a ULC. As stated, both s. 10(5) of the OBCA and s. 2(6) of the BNA already so provide. A court order (which in practice is almost invariably granted *ex parte*) does not furnish meaningful notice to any third parties.
- (e) While the NSCA allows classes of shares to be created by resolution that need not be filed until after issuance of the shares, the concept would be too foreign to the OBCA to be adopted. Under the OBCA, a class of shares can only be created by articles of amendment, articles of amalgamation, articles of arrangement, articles of reorganization or articles of continuance. The shares can only be issued once they have been created. These procedures have not proven onerous. Indeed, the “no creation until filed” requirement eliminates the potential problem of what happens if the amendments to a corporation’s share capital are never filed. The number of unimportant distinctions between limited corporations and ULCs should be minimized.
- (f) While there may be value in requiring that share certificates of a ULC contain a notice warning the subscriber or transferee that registration carries the risk of unlimited personal liability, there is no point in adopting the NSCA requirement that the preferred share conditions be set out in their entirety in share certificates.

4. Bill 152 is the Appropriate Statutory Vehicle for Introducing the Ontario ULC

As discussed, the sole rationale for introducing the ULC into Ontario is to facilitate direct foreign investment into not only Ontario but all of Canada. The Ontario ULC would offer a number of advantages for foreign investors in comparison to the NSULC and the ABULC. Apart from the technical advantages that the OBCA would afford to foreign investors, an Ontario ULC would primarily serve to give foreign investors an alternative to channelling their investments through Nova Scotia or Alberta. An Ontario ULC regime will not prevent foreign investors from continuing to use the NSULC or the ABULC if that is their choice. However, an avoidable layer of additional complexity and expense should not be considered an acceptable cost of doing business in Canada. If complexity and cost can be eliminated, they should be. Ontario, as the financial capital of the country, should signal that it welcomes foreign investment and strives to create an efficient, straightforward corporate regime to facilitate it. Allowing for the ULC in Ontario is entirely consistent with the philosophy inherent in business law modernization.

⁸⁹ *Dickerson Report*, para 98-100.



Appendix 4

Extended Submission on Directors Residency Rules

What Bill 152 Would Do

Bill 152 proposes to reduce the usual residency requirement for directors of OBCA corporations from a majority (51%) to 25% of directors. Unless OBCA corporations comply with the Canadian content rule, any action taken at their board meetings is invalid.

The OBA's Recommendation

The OBA recommends, instead, that the residency requirement for directors of OBCA corporations be eliminated.

Further, to implement the OBA's recommendation would require the following further changes to Bill 152:

5. repeal s. 118(3) in addition to ss. 126(6), 126(7) and 127(2);
6. delete the definitions of "non-resident corporation" and "resident Canadian" from s. 1(1); and
7. delete s. 26 of R.R.O. 1990, reg. 62 (the "OBCR").

Rationale for Eliminating the Board Residency Requirement Rather than Reducing it to 25%

- VI. **THERE IS NO CONCRETE EVIDENCE THAT PROVINCIAL STATUTES HAVE BEEN MORE DIFFICULT TO ENFORCE AGAINST CORPORATIONS CONDUCTING BUSINESS IN ONTARIO WHEN THOSE CORPORATIONS ARE WITHOUT CANADIAN RESIDENT DIRECTORS. NOR IS THERE ANY EVIDENCE OF EXPERIENCE WITH ENFORCEMENT DIFFICULTIES IN THOSE JURISDICTIONS THAT HAVE NOT HAD, OR HAVE ELIMINATED, THE RESIDENCY REQUIREMENT. FOR EXAMPLE, BRITISH COLUMBIA ELIMINATED THE BOTH THE REQUIREMENT THAT A BOARD BE COMPRISED OF A MAJORITY OF RESIDENT CANADIAN DIRECTORS AND AT LEAST ONE BRITISH COLUMBIA RESIDENT DIRECTORS ON MARCH 30, 2004. IF THERE WERE AN ENFORCEMENT PROBLEM IN BRITISH COLUMBIA, ONE WOULD HAVE EXPECTED TO HEAR ABOUT IT AND TO SEE A MOVEMENT TO RESTORE THE RESIDENCY REQUIREMENTS.**
- VII. **IN ANY EVENT, AS A LEGAL MATTER, CORPORATIONS CAN LAWFULLY OPERATE IN ONTARIO WITHOUT ANY RESIDENT DIRECTORS BY, FOR EXAMPLE, INCORPORATING IN NEW BRUNSWICK, BRITISH COLUMBIA OR ANOTHER JURISDICTION THAT IMPOSES NO RESIDENCY REQUIREMENT.**
- VIII. **IN ADDITION, CORPORATIONS CAN LAWFULLY OPERATE IN ONTARIO AND INSULATE THEIR DIRECTORS FROM LIABILITY BY IMPOSING A UNANIMOUS SHAREHOLDER DECLARATION ("USD"), WHERE THERE IS ONLY ONE SHAREHOLDER, OR A UNANIMOUS SHAREHOLDER AGREEMENT ("USA"), WHERE THERE IS MORE THAN ONE**



SHAREHOLDER, THAT REMOVES ALL BOARD LIABILITIES AND TRANSFERS THESE TO A NON-RESIDENT SHAREHOLDER.

- IX. THERE IS ALSO NO REQUIREMENT THAT A CORPORATION APPOINT DIRECTORS WHO WOULD BE ABLE TO RESPOND TO ANY JUDGMENT THAT MIGHT BE OBTAINED AGAINST THEM.**
- X. IT IS MISLEADING TO THINK THAT THE RESIDENCY REQUIREMENT PROTECTS ONTARIANS OR THE ONTARIO ECONOMY. REALISTICALLY, RESIDENT DIRECTORS OF FOREIGN-CONTROLLED OBCA CORPORATIONS CANNOT ACT INDEPENDENTLY OF SHAREHOLDER DIRECTION. FROM A LEGAL PERSPECTIVE, THE ABILITY TO OPERATE IN ONTARIO A CORPORATION FORMED IN NEW BRUNSWICK (OR ANOTHER JURISDICTION THAT DOES NOT IMPOSE RESIDENCY REQUIREMENTS) AND THE RIGHT OF SHAREHOLDERS TO TAKE AWAY BOARD POWERS AND LIABILITIES THROUGH A USA MEANS THAT THE RESIDENCY RULE PROTECTS NO ONE AND MAY OPERATE TO DECEIVE ANYONE WHO THINKS OTHERWISE.**
- XI. ACCORDINGLY, 8 CANADIAN JURISDICTIONS NOW NO LONGER IMPOSE ANY BOARD RESIDENCY REQUIREMENTS. THESE ARE: BRITISH COLUMBIA (WHICH CHANGED ITS RULE IN 2004); QUEBEC; NEW BRUNSWICK; PRINCE EDWARD ISLAND; NOVA SCOTIA; YUKON; NORTHWEST TERRITORIES; AND NUNAVUT. INDEED, MANY OBCA CORPORATIONS HAVE, IN RECENT YEARS, BEEN EXPORTED DUE TO BOARD RESIDENCY CONSIDERATIONS – WITH THE YUKON, NEW BRUNSWICK, NOVA SCOTIA AND, MORE RECENTLY, BRITISH COLUMBIA BEING FAVOURED JURISDICTIONS. ATTACHED IS A LIST OF OBCA OFFERING CORPORATIONS THAT HAVE RECENTLY OBTAINED THE APPROVAL OF THE ONTARIO SECURITIES COMMISSION TO EXPORT THEMSELVES OUT OF ONTARIO AND INTO ANOTHER JURISDICTION.**
- XII. ELIMINATING THE RESIDENCY REQUIREMENT WOULD ENABLE OFFERING CORPORATIONS TO MORE EASILY COMPLY WITH NATIONAL AND U.S. INDEPENDENT DIRECTOR RULES, PARTICULARLY WITH RESPECT TO INTER-LISTED CORPORATIONS (*I.E.* CORPORATIONS LISTED ON THE TSX AND ONE OF THE U.S. EXCHANGES SUCH AS THE NEW YORK STOCK EXCHANGE, THE AMERICAN STOCK EXCHANGE OR TRADED THROUGH THE NASDAQ INTER-DEALER NETWORK).**
- XIII. A RESIDENCY REQUIREMENT FORCES CORPORATIONS TO CHOOSE DIRECTORS PARTLY ON THE BASIS OF THEIR CITIZENSHIP OR RESIDENCY. IN MANY CASES, CANADIAN INDIVIDUALS WHO ARE CALLED UPON TO ACT AS NOMINEE DIRECTORS OF AN OBCA CORPORATION ARE RETICENT TO DO SO BECAUSE OF THE**



ENORMOUS EXPOSURE THAT THEY AUTOMATICALLY INCUR TO MYRIAD STATUTORY LIABILITIES – OFTEN LIABILITIES OVER WHICH THEY HAVE LITTLE CONTROL SUCH AS UNPAID EMPLOYEE WAGES AND VARIOUS WITHHOLDING TAXES.

- XIV. ELIMINATION OF THE RESIDENCY REQUIREMENT WOULD FACILITATE THE GLOBAL REACH OF ONTARIO CORPORATIONS THAT MAY NEED NON-RESIDENT BOARD REPRESENTATION IF THEY MAKE ACQUISITIONS OR OTHERWISE EXPAND THEIR PRODUCTS INTO GEOGRAPHIC MARKETS.**
- XV. THE RESIDENCY REQUIREMENT IS A VESTIGE OF THE 1970S PROTECTIONIST MENTALITY BUT HAS LITTLE PLACE IN THE GLOBALLY COMPETITIVE ENVIRONMENT IN WHICH ONTARIO NOW OPERATES. THE RESIDENCY REQUIREMENT IS ANTITHETICAL TO GOOD GOVERNANCE. IMAGINE A LAW THAT REQUIRED A BUSINESS TO CHOOSE 25% OF ITS PERSONNEL FROM A TALENT POOL REPRESENTING 0.005 OF POTENTIAL CANDIDATES. NOW IMAGINE THAT THOSE EMPLOYEES REPRESENTED THE TOP LAYER OF THE CORPORATION. THAT IS WHAT BILL 152 PROPOSES TO DO WITH RESPECT TO THE MAJORITY RESIDENCY DIRECTOR RULE. ELIMINATING THESE RESIDENCY REQUIREMENTS WILL ENABLE SHAREHOLDERS TO CHOOSE THE BEST DIRECTORS FOR THEIR CORPORATION BASED ON QUALIFICATION, NOT CITIZENSHIP STATUS OR PLACE OF RESIDENCE.**

Consents from Ontario Securities Commission
to OBCA offering corporations
pursuant to subsection 4(b) of the Regulation made
under the Business Corporations Act (Ontario)
to continue into another jurisdiction

Offering corporation	Date of consent	To Continue under
2006		
Atlas Cromwell Ltd.	April 18, 2006	<i>Business Corporations Act (BC)</i>
Au Martinique Silver Inc.	July 7, 2006	<i>Canada Business Corporations Act</i>
Aura Gold Inc.	April 11, 2006	<i>Canada Business Corporations Act</i>
Band-Ore Resources Ltd.	August 25, 2006	<i>Business Corporations Act (BC)</i>
Barrick Gold Corporation	April 21, 2006	<i>Business Corporations Act (Alberta)</i>
Caterpillar Financial Services Limited	March 10, 2006	<i>Canada Business Corporations Act</i>
Chrysalis Capital II Corporation	July 18, 2006	<i>Canada Business Corporations Act</i>
Croesus Gold Inc.	November 3, 2006	<i>Business Corporations Act (BC)</i>
The Descartes Systems Group Inc.	June 27, 2006	<i>Canada Business Corporations Act</i>
Gerdau Ameristeel Corporation	April 28, 2006	<i>Canada Business Corporations Act</i>
Gold Port Resources Ltd.	July 11, 2006	<i>Business Corporations Act (BC)</i>
Imperial PlasTech Inc.	August 11, 2006	<i>Business Corporations Act (BC)</i>
Live Reel Media Corporation	October 20, 2006	<i>Canada Business Corporations Act</i>
Lonsdale Public Ventures Inc.	February 28, 2006	<i>Canada Business Corporations Act</i>
Lynden Ventures Ltd.	January 31, 2006	<i>Business Corporations Act (BC)</i>
MP Western Properties Inc.	June 6, 2006	<i>Canada Business Corporations Act</i>
Phoscan Chemical Corp.	October 6, 2006	<i>Canada Business Corporations Act</i>
Resource Equity Ltd.	October 17, 2006	<i>Delaware General Corporation Law</i>
ROC Pref Corp.	September 26, 2006	<i>Business Corporations Act (BC)</i>
ROC Pref II Corp.	September 26, 2006	<i>Business Corporations Act (BC)</i>
ROC Pref III Corp.	September 26, 2006	<i>Business Corporations Act (BC)</i>
Romarco Minerals Inc.	June 13, 2006	<i>Business Corporations Act (BC)</i>
Ur-Energy Inc.	June 9, 2006	<i>Canada Business Corporations Act</i>
ZENON Environmental Inc.	April 28, 2006	<i>Business Corporations Act (BC)</i>

2005		
Atlantic Power Corporation	June 28, 2005	<i>Business Corporations Act (BC)</i>
Biovail Corporation	June 28, 2005	<i>Canada Business Corporations Act</i>
Capital First Venture Fund Inc.	October 7, 2005	<i>Canada Business Corporations Act</i>
Dejour Enterprises Ltd.	August 5, 2005	<i>Business Corporations Act (BC)</i>
E2 Venture Fund Inc.	October 7, 2005	<i>Canada Business Corporations Act</i>
Galantas Gold Corporation	April 19, 2005	<i>Canada Business Corporations Act</i>
Glencairn Gold Corporation	May 17, 2005	<i>Canada Business Corporations Act</i>
HudBay Minerals Inc.	September 30, 2005	<i>Canada Business Corporations Act</i>
Jonpol Explorations Limited	March 15, 2005	<i>Business Corporations Act (BC)</i>
King Products Inc.	May 17, 2005	<i>Business Corporations Act (BC)</i>
Lorus Therapeutics Inc.	September 30, 2005	<i>Canada Business Corporations Act</i>
Magindustries Corp.	August 23, 2005	<i>Canada Business Corporations Act</i>
Medical Facilities Corporation	May 6, 2005	<i>Business Corporations Act (BC)</i>
MOSAID Technologies Incorporated	February 1, 2005	<i>Canada Business Corporations Act</i>
New Generation Biotech (Balanced) Fund Inc.	October 7, 2005	<i>Canada Business Corporations Act</i>
New Millennium Venture Fund Inc.	October 7, 2005	<i>Canada Business Corporations Act</i>
Open Text Corporation	December 23, 2005	<i>Canada Business Corporations Act</i>
Oppenheimer Holdings Inc.	April 26, 2005	<i>Canada Business Corporations Act</i>
Southern Cross Resources Inc.	March 11, 2005	<i>Canada Business Corporations Act</i>
Venture Partners Balanced Fund Inc.	October 7, 2005	<i>Canada Business Corporations Act</i>
World Heart Corporation	August 5, 2006	<i>Canada Business Corporations Act</i>
2004		
ATI Technologies Inc.	November 30, 2004	<i>Canada Business Corporations Act</i>
Banro Corporation	March 12, 2004	<i>Canada Business Corporations Act</i>
BRC Development Corporation	July 27, 2004	<i>Canada Business Corporations Act</i>
Coubran Resources Ltd.	February 24, 2004	<i>Canada Business Corporations Act</i>
Denison Energy Inc.	March 5, 2004	<i>Canada Business Corporations Act</i>

Goldpark China Limited	June 1, 2004	<i>Business Corporations Act (BC)</i>
Holmer Gold Mines Limited	December 21, 2004	<i>Business Corporations Act (BC)</i>
Hub International Limited	April 30, 2004	<i>Canada Business Corporations Act</i>
MDC Partners Inc.	May 13, 2004	<i>Canada Business Corporations Act</i>
Northway Explorations Limited	August 27, 2004	<i>Canada Business Corporations Act</i>
PL Internet Inc.	April 16, 2004	<i>Canada Business Corporations Act</i>
Points International Ltd.	August 17, 2004	<i>Canada Business Corporations Act</i>
Simberi Gold Corporation	June 4, 2004	<i>Business Corporations Act (Yukon)</i>
Trizec Hahn Corporation	December 17, 2004	<i>Business Corporations Act (NB)</i>
Vision Global Solutions Inc.	June 25, 2004	<i>Nevada Revised Statutes</i>
VoiceIQ Inc.	December 17, 2004	<i>Business Corporations Act (Alberta)</i>
Wellington Cove Explorations Ltd.	June 8, 2004	<i>Canada Business Corporations Act</i>
WFI Industries Ltd.	September 8, 2004	<i>Canada Business Corporations Act</i>
2003		
407 International Inc.	October 3, 2003	<i>Canada Business Corporations Act</i>
724 Solutions Inc.	April 11, 2003	<i>Canada Business Corporations Act</i>
AFM Hospitality Corporation	August 22, 2003	<i>Canada Business Corporations Act</i>
Apollo Gold Corporation	May 23, 2003	<i>Business Corporations Act (Yukon)</i>
Canada West Capital Inc.	October 31, 2003	<i>Canada Business Corporations Act</i>
Gold Summit Corporation	August 29, 2003	<i>Canada Business Corporations Act</i>
Thistletown Capital Inc.	June 17, 2003	<i>Business Corporations Act (Alberta)</i>
WebEngine Corporation	October 31, 2003	<i>Canada Business Corporations Act</i>
2000		
CopperQuest Inc.	April 11, 2000	<i>Business Corporations Act (Alberta)</i>
Galaxy Online Inc.	January 14, 2000	<i>Business Corporations Act (Yukon)</i>
Inter-Rock Minerals Inc.	April 28, 2000	<i>Companies Act (Barbados)</i>
Kyrgoil Corporation	August 18, 2000	<i>International Business Companies Ordinance (British Virgin Islands)</i>
Old Canada Investment Corporation Limited	November 21, 2000	<i>Canada Business Corporations Act</i>