

Ontario's corporate laws suffering benign neglect, experts say

BY TERENCE BELFORD

Ontario is in danger of losing its paramount position as the jurisdiction of choice for companies looking to incorporate in Canada, senior corporate lawyers warn.

That could lead to a decline in business activity in that province, and with it a decline in the fortunes of Ontario's commercial and corporate lawyers.

The problem, they say, is decades of benign neglect by government.

"The whole legislative infrastructure in Ontario is disintegrating bit by bit," says Jennifer Babe, a partner at Miller Thomson LLP in Toronto and chairwoman of the commercial law strategy group of the Uniform Law Conference of Canada, which advises governments on laws needing change. "Laws governing business have just not kept pace with today's needs and climate," she says.

At the same time, other provinces have introduced legislation more attuned with corporate needs and

more welcoming to international business, say David Butler and Wayne Gray, senior partners at McMillan Binch LLP. They cite the example of Nova Scotia, which allows incorporation of unlimited-liability companies. Those companies confer considerable tax advantages on foreign investors.

Lawyers foresee devastating long-term implications for both the province and the Ontario bar. While companies will continue to do business in the province, they will incorporate in other provinces or even outside the country and structure transactions so they take place in other jurisdictions. New investment will go elsewhere. Ontario faces a return to the branch plant economy of the 1960s, they warn.

Taxes are paid where companies are incorporated and transaction fees are paid where the transaction legally takes place, so Ontario could lose untold millions in taxes and other fees, the lawyers say.

Mr. Butler and Mr. Gray are nearing the end of a six-week study of

Ontario's legal infrastructure. Their findings, which they will present to both the government and the profession this fall, represent a call to action, they say.

"Our initial conclusion is that Ontario is definitely falling behind the United States, especially New York, the most highly commercial jurisdiction in the world. It is also losing ground to other provinces like Nova Scotia, British Columbia and Alberta," Mr. Butler says.

"Business needs a legal framework which is easy to operate within, that is adequate to needs; Ontario is beginning to lose that framework."

The impact is already being felt, say the McMillan Binch lawyers, citing Nova Scotia's incorporation of firms with unlimited liability.

"We have seen at least 5,000 new incorporations here in the last five to 10 years, which would probably have gone to Ontario if that province allowed unlimited-liability companies," says Carl Holm, senior partner at Merrick Holm in Halifax.

While those unlimited-liability

companies do not always establish fully staffed head offices in Nova Scotia, they pay taxes there and Nova Scotia's financial gain is Ontario's loss, Mr. Holm suggests.

Mr. Butler and Mr. Gray offer a string of examples of what they feel are antiquated laws, including Ontario's bulk assets disposal legislation, its 2002 limitations act, the requirement under the Ontario Business Corporation Act that a majority of a company's directors be Canadian residents, the lack of specific legislation governing income trusts and the lack of uniform securities transfer legislation.

The Bulk Assets Disposal Act is an example of outmoded legislation, Mr. Butler says. Originally formed to prevent anyone from disposing of the assets of a corporation and then disappearing with the money, all provinces except Ontario, Newfoundland and New Brunswick have done away with it. The act adds unnecessary bureaucratic roadblocks to sales, he says.

"The paperwork is significant and unnecessary," Mr. Butler says.

"What lawyers do is hold the transaction in British Columbia, which did away with bulk assets laws 20 years ago but, again, that means paying for two sets of lawyers."

Ontario's 2002 Limitations Act is another example. Ms. Babe says she performed four transactions recently in British Columbia rather than Ontario to avoid the provisions of the Limitations Act, which prevents parties from agreeing to opt out of the two-year statutory window to launch a lawsuit over a contract disagreement.

John Cameron, a senior partner at Torys LLP in Toronto, says he can think of several recent out-of-province transactions at his firm — all designed to circumvent Ontario's Limitations Act.

The lack of modern legislation governing such things as income trusts and securities transfers means that Canadian lawyers are at a disadvantage when going head-to-head with U.S. lawyers, Mr. Butler and Mr. Gray contend.

The U.S. has clear legislation in both areas and that clarity provides

both comfort and security for corporations. Better to conduct transactions south of the border than face an uncertain legal infrastructure in Canada, the lawyers say.

"The current law regarding transfer of securities is based on a century-old concept when paper certificates changed hands," explains Eric Spink, an Edmonton sole practitioner and former vice-chairman of the Alberta Securities Commission. "Instead of coming under commercial law, it is covered by property law in various statutes. The problem is a lot of transactions fall between the cracks," he says.

"I was talking to a young lawyer the other day and she says she regularly gets calls from foreign banks asking how to go about taking certain kinds of derivative products as collateral. She says she puts the client on hold and then goes and bangs her head against the wall for a few minutes.

"If you don't have the laws, you can't do the transactions."

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