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## FAX

Mr. Pat Hoy, MPP  
Chair, Standing Committee on  
Finance and Economic Affairs  
Legislative Assembly of Ontario  
Room 1405, Whitney Block  
Queen's Park  
Toronto, Ontario M7A 1A2

Dear Mr. Hoy:

**Re: Public Hearings on the 5-Year Review Committee Final  
Report: Reviewing the *Securities Act* (Ontario) —  
*Uniform Securities Transfer Act Initiative***

We are writing this letter to voice our strong support for one of the recommendations made by the 5-Year Review Committee in its 5-Year Review Committee Final Report (the “**Report**”) — namely, implementation of the proposed *Uniform Securities Transfer Act* (the “**USTA**”) and related amendments to the *Personal Property Security Act* (the “**PPSA**”) and the *Business Corporations Act* (the “**OBCA**”) (collectively, the “**USTA Initiative**”). In its Report, the Committee urged governments across Canada to ensure that the USTA legislation is adopted on a uniform basis as soon as possible (See Recommendation 5 [Paragraph 2.3 - pages 48 to 50] of the Report.)

### *What is the USTA?*

The USTA and the companion amendments to the PPSA and the OBCA are part of a separate branch of commercial law collectively governing the purchase, sale, pledge and holding of securities and interests in investment property. Unlike the other proposals addressed in the 5-Year Review Committee Final Report, the USTA is not securities regulatory law. Instead, it is “facilitative” or framework legislation that would promote legal certainty and reduce legal risk to capital market participants by putting securities transfers on a sound legal footing that reflects and responds to modern market practices. In the United States, this branch of commercial law is now governed by Revised Article 8 of the *Uniform Commercial Code* (“**Revised Article 8**”), which was drafted in 1994 and is now in force in all 50 states.

*Why Lawyers Support the USTA Initiative: Keeping Ontario Competitive*

A joint project of the Canadian Securities Administrators and the Uniform Law Conference of Canada, the USTA Initiative has broad support among the legal profession. For example, in a letter dated June 17, 2004, to the Ontario Securities Commission, a copy of which is attached, the Ontario Bar Association (“**OBA**”) strongly urged the adoption of the USTA by Ontario and other provinces, and a representative of the OBA will be appearing before your Standing Committee to the same end. The Corporate Law Subcommittee of the OBA also backs the USTA Initiative, and a number of major Bay Street law firms, including our own, have added their endorsements as well.

The corporate/commercial bar supports the USTA Initiative chiefly because the current state of the law in Canada is woefully inadequate to deal with sophisticated multi-jurisdictional transactions involving transfers or pledges of book-based securities, which now comprise the vast majority of publicly traded securities.<sup>1</sup> In our own corporate and finance practices over the years, we have encountered numerous transactions where after many fruitless hours of research and debate involving the best efforts of several major law firms, the uncertainty of the law forced the parties to take other less satisfactory forms of security, move the transaction to a friendlier jurisdiction in the U.S. (usually, New York) or abandon it altogether — all because Canadian counsel was unable to give legal opinions offering the high degree of certainty demanded by the underwriters.

If the USTA becomes law, such sad stories will be a thing of the past. Without it, Canada may one day become a marginalized backwater in the capital markets as business continues to flow south.

For the other reasons well articulated in the OBA letter, we consider it essential that the USTA and companion amendments be enacted at the earliest possible moment. Although the USTA Initiative may lack the high profile of some of the other recommendations in the Report, as lawyers involved in domestic and cross-border securities transactions every day, we strongly believe that carrying the USTA Initiative forward is vital to maintaining Ontario’s competitive position in the North American capital markets.

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<sup>1</sup> “Book-based securities” are securities that exist essentially in electronic form only and are settled through a “clearing agency” such as The Canadian Depository for Securities Limited (CDS). Typically in a public issue of securities, the issuer will issue only one “global” certificate, which is deposited with and “immobilized” by the clearing agency. Investment dealers, which are the “participants” in the clearing agency, can then transfer their positions electronically through the clearing agency without having to physically deal with paper certificates. Clients of the participant brokers in turn hold their positions through accounts with the brokers. This modern “indirect” or “tiered” holding system, which has evolved over the last thirty years, has largely supplanted the older paper-based system whereby holders of securities held actual physical certificates. That “direct” holding system is now mainly confined to private companies. To accurately reflect these modern realities, Revised Article 8 and the USTA employ a new property concept known as a “security entitlement” to describe the bundle of rights that the beneficial owner of a book-based security owns.

*Benefits Across Canada*

Implementing the USTA Initiative would offer many immediate benefits for Ontarians (and ultimately for all Canadians, if implemented across Canada). For example, enacting the USTA would:

- provide a sound legal foundation for modern securities holding and transfer practices, in particular the indirect or tiered holding system, which for publicly traded securities has largely replaced the older paper-based system on which the inadequate existing law is based;<sup>2</sup>
- provide the legal framework for the increased operational efficiencies of straight-through processing, which will save the Canadian securities industry an estimated \$140 million annually<sup>3</sup>;
- reduce transaction costs and legal uncertainty in multi-province transactions by achieving uniformity across Canada;
- enable counsel to deliver clean legal opinions on transactions involving indirectly held securities, a task that is now all but impossible given the high degree of uncertainty generated by the existing patchwork of incomplete legislation and confused common law;
- rationalize securities transfer law by making the USTA a separate statute rather than an appendage to the OBCA;
- facilitate the growing reality of cross-border transactions in securities and interests in investment property and promote Ontario as an investor-friendly jurisdiction with a familiar legal system by harmonizing Ontario law with Revised Article 8;
- control systemic risk;
- complement and reinforce clearing agency rules providing for finality of settlement;
- facilitate the use of publicly traded securities as collateral by providing clear rules relating to the creation and perfection of security interests in investment property and simple and easily applied “conflicts of laws” rules that can quickly determine which jurisdiction governs such matters in multi-jurisdictional transactions; and
- keep Ontario competitive in the world financial markets, particularly when measured against New York.

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<sup>2</sup> See footnote 1 above.

<sup>3</sup> Source: *STP/T+1 Value Proposition Survey*, Cap Gemini Ernst & Young, October 15, 2002 cited in Canadian Capital Markets Association, *Straight-Through Processing (STP) Is Everyone's Business* (November 2002), p. 1.

*The Need for Uniformity*

Implementing the USTA in Ontario will be the first step towards adopting truly uniform commercial legislation in this area across Canada. Complete uniformity from province to province has always been a desirable but rarely achieved goal for commercial legislation, but in this area it is especially imperative. We must break the bad Canadian habit of tinkering with the language of proposed uniform commercial legislation, whether to conform to local drafting protocols or to promote regionalist agendas or for other reasons of little importance to the business community, which wants the certainty that only uniformity can bring. Tinkering would destroy uniformity between provinces and undermine one of the major benefits of the USTA, namely its high degree of conformity with Revised Article 8, on which the USTA is closely modelled.

If Ontario moves first to adopt the USTA — as it should, as Canada's financial centre — the goal of word-for-word uniformity throughout the country will be greatly advanced. As the leader in the Canadian capital markets, Ontario has a duty to provide leadership to the other provinces and territories in this important area of commercial legislation, and doing so will make it more likely that others will follow in Ontario's footsteps and adopt the Ontario model verbatim for their own jurisdictions.

*Conclusion*

The USTA and the companion changes to the PPSA and the OBCA have been closely studied and thought through by many of Canada's leading academics and practitioners in the area. Their work is an outstanding achievement and, if implemented, will immediately replace the outdated and fragmented legal patchwork that now governs the transfer and pledge of investment securities in Canada with a coherent and unified structure modelled on one that is generally acknowledged to be the world's best.

We, therefore, respectfully urge the Standing Committee and the Ontario Legislature to give the USTA Initiative the highest possible priority.

Yours sincerely,



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Wayne D. Gray  
Partner, Corporate Commercial

Encl.