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Stranded in 1971: Our provincial elected representatives can fix the antiquated state of our commercial laws with the stroke of a pen. Let's get on with it

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Canadians accept that globalization and e-commerce have revolutionized capital and commercial markets and the businesses that compete in them. Yet we've been slow to eliminate a number of barriers to our own global competitiveness.

If you were asked to list those barriers, "outdated corporate laws" might not be high on your list -- even if you're a lawyer. The need to amend the Ontario Business Corporations Act (OBCA) or the Personal Property Security Act does not grab headlines. And your opposition MPP isn't going to win many votes by demanding that the government reform the law relating to the transfer and pledge of securities.

Yet good corporate laws -- laws that give business people the legal certainty they need to get the deal done -- are mission critical elements of the infrastructure that Canadian businesses need to keep competitive. For Ontario, this is particularly important: In North America, Toronto is the third-largest financial centre and the GTA is the fourth-largest economic basin. Without reforms Canada runs the risk of becoming a backwater in the North American capital markets.

Canada's business laws lag far behind those of our neighbours to the south, and the sorry state of these laws is a real competitive disadvantage. Much of our law is modelled on uniform legislation in the U.S. but while the originals are revised regularly to keep pace with evolving realities, our laws remain largely frozen in the '70s and early '80s. Most publicly traded securities are held electronically, yet our legislation still pretends that it's 1962 and that when you buy a share in Magna or Celestica you get a nicely engraved share certificate. Most provincial corporate legislation in Canada is based on a 1971 model act. After more than 25 years, federal corporate legislation underwent a major overhaul in 2001. But other than B.C., the provinces have not followed suit.

The OBCA still relies heavily on that 1971 model. For example, it mandates residency requirements for directors. This restriction handicaps domestic corporations that compete in world markets and foreign corporations whose Canadian operating subsidiaries are formed under the OBCA. It is antithetical to good governance. Imagine a law that required business to choose a majority of its personnel from a talent pool representing 1/2 of 1% of potential candidates. Now imagine that those employees represent the top layer of the corporation. That's what the majority resident Canadian director rule does.

Canada faces an alarming decline in its share of the direct foreign investment -- from 7.7% worldwide in 1980 to 3.1% in 2002. While it's hard to tell how much the antiquated state of our commercial laws has contributed to that decline, it certainly hasn't helped.

The irony is that this sad state of affairs could so easily be reversed. We can't change our weather, our geography or our dependency on natural resources. But our provincial elected representatives can change our commercial laws with the stroke of a pen.

So why haven't they?

It's partly a matter of culture and political will. We need to emulate some of our more competitive neighbours to the south (Delaware, New York and Illinois, for example) and build a culture in which legislators are willing to grapple systematically with unglamorous but crucial reforms. A major overhaul is long overdue.

The centrepiece for the important first phase of this overhaul is a uniform statute governing the transfer, pledge and holding of investment securities -- the Uniform Securities Transfer Act (USTA). This law would form the legal underpinning for the sophisticated securities settlement system that handles about \$100-billion to \$150-billion in transactions every day and has vital links to the even larger U.S. market. It would replace the 40-year old patchwork of inconsistent and incomplete rules in numerous federal and provincial corporate statutes and achieve the legal predictability that the capital markets demand. For securities trading, such laws are like plumbing and wiring. We take them for granted until a pipe bursts or a circuit overloads. Before that happens, let's rip out the lead pipes and knob and tube wiring that we now have and do a complete retrofit.

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Bank of Canada governor David Dodge and U.S. Federal Reserve chairman Alan Greenspan, among others, have strongly advocated modernizing legal rules in this area. One of the core benefits of such modernization is reducing systemic risk -- the risk that a collapse of one major trader in the highly interlinked securities marketplace could have a domino effect.

The USTA would provide a modern legal foundation to support existing market practices where publicly traded securities are now generally held and traded through a complex network of intermediaries, often in multiple jurisdictions. It would further transaction finality, increasing the reliance that can be placed on settled securities trades. It would facilitate the market for loans collateralized by a portfolio of investment securities. It would unlock straight-through processing, the streamlined settlement procedures that will save an estimated \$140-million a year. Most importantly, the USTA would put us on a par with the U.S. Modelled on the 1994 revisions (adopted uniformly by all 50 states) to Article 8 of the Uniform Commercial Code, the USTA would take its place beside the most advanced law of its kind worldwide.

Implementing this kind of reform should be a political no-brainer. It's not anti-consumer. It's mostly consumer-neutral, and some reforms, like those in the USTA, would enhance consumer access to credit and, presumably, would lower interest rates charged to consumers who can offer securities as collateral. It's non-partisan. It should not consume undue legislative time. And it costs government little. Many lawyers are happy to contribute, pro bono, their time and energy to improving our laws for the enduring benefit of all Canadians.

All that remains, therefore, is for our legislators to put commercial law reform on the political agenda this year and transform that law from an international embarrassment to a competitive advantage.

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