

**PROPOSAL**

**FOR**

**ONTARIO BUSINESS LAW REFORM**

February 15, 2005

**McMILLAN BINCH LLP**

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*Date* February 15, 2005

The Honourable Jim Watson, MPP  
Minister of Consumer and Business Services  
250 Yonge Street, 35<sup>th</sup> Floor  
Toronto, ON M5B 2N5

Dear Minister Watson:

**Re: Ontario Business Law Reform Initiative**

As acknowledged at our meeting of January 18, 2005, the long-overdue modernization of Ontario's business laws is of critical importance to ensuring that our Province remains competitive when business leaders decide where to locate in the North American markets.

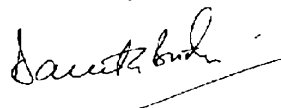
In accordance with your advice to us, we are pleased to provide the attached *Proposal for Ontario Business Law Reform* for your consideration. Enclosed also are several additional documents which may serve to provide further context. When you and your Cabinet colleagues meet in the near future to shape the legislative agenda for the coming year, we urge you to give this initiative the attention it deserves.

While American states and other Canadian jurisdictions are making it their business to provide a competitive legislative regime for the business and financial sectors, taking care in particular to reflect the realities of e-commerce and the modern marketplace, Ontario is lagging behind with an outdated regime. It has not been "leading edge" since 1983.

We would be pleased to work with you and your colleagues to advance this important initiative. This effort is a *pro bono* undertaking on our part to advance the competitiveness of the Province and to ensure that Ontario is recognized globally as a top tier corporate commercial jurisdiction.

Your Government has a record of working to keep Ontario ahead of the curve on many fronts. We strongly encourage you to adopt business law reform as one of them.

Yours truly,



David G. Butler



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## **PROPOSAL FOR ONTARIO BUSINESS LAW REFORM**

Ontario's commercial law is in urgent need of immediate reform to maintain the Province's competitive position globally and especially in the North American financial and business sectors. McMillan Binch LLP is helping spearhead an initiative supported by stakeholders from the business and legal communities to move this reform forward.

### **PHASE I**

Phase I of this Initiative proposes an omnibus reform of Ontario's corporate commercial law. Phase I is the most important of the three Phases. It consists of:

- enacting the proposed *Uniform Securities Transfer Act* (USTA) and concurrently adopting the Hague PRIMA Convention<sup>1</sup>;
- amending the Ontario *Business Corporations Act* (OBCA); and
- amending the *Personal Property Security Act* (PPSA).

The need for many of these Phase I reforms has been well documented and widely discussed.

These legislative amendments proposed in the reforms have been selected for the following compelling reasons:

- they will replace an outdated patchwork of law that no longer reflects market realities;
- they are crucial to Canada's capital markets and are interlinked;
- they all fall under aegis of the Ministry of Consumer and Business Services (MCBS), with the exception only of the Hague PRIMA Convention;
- they are already well advanced; and
- they should command wide support in the financial and business communities.

Although it is difficult (if not impossible) to quantify the value that these reforms will bring to Ontario, cumulatively, they are likely to make a significant positive impact on the Ontario economy once implemented.

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<sup>1</sup> This is an international convention establishing that the law governing transfers of securities is the "place of the relevant intermediary".

## **BENEFITS OF THE USTA**

The USTA is the centerpiece of the Phase I reform. Modelled on the highly successful revisions to Article 8 (Revised Article 8) of the American *Uniform Commercial Code* (now in effect in every state of the U.S.), the USTA will modernize and streamline Ontario's law governing the transfer or pledge of securities.

The USTA should be implemented 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. Without the USTA, Canada is well on its way to one day becoming a marginalized backwater in the capital markets as business continues to flow south, primarily to New York and Chicago.

As the centre of the Canadian capital markets, Ontario should provide leadership in this important area of commercial legislation. Doing so will increase the likelihood that the other provinces and territories will adopt the Ontario model verbatim for their own jurisdictions – a critical objective.

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

- control systemic risk;
- keep Ontario competitive in the world financial markets, particularly when measured against New York;
- 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;
- reduce transaction costs and legal uncertainty in multi-province transactions if enacted uniformly across Canada;
- 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;
- complement and reinforce clearing agency rules providing for finality of settlement;
- 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 which relies on the inadequate existing law;
- enable parties to receive clean legal opinions on transactions involving indirectly held securities, a result that is now all but impossible given the high degree of uncertainty

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generated by the existing patchwork of incomplete legislation and confused common law; and

- 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 “conflict of laws” rules that can quickly determine which jurisdiction governs such matters in multi-jurisdictional transactions.

## **BENEFITS OF OBCA REFORM**

In 2001, the federal government enacted a wholesale reform of the *Canada Business Corporations Act* (CBCA). As a result, the CBCA leapt ahead of the OBCA in a number of key areas. These include:

- residency requirements for directors;
- financial assistance;
- indemnification and insurance for directors and officers;
- shareholder proposals; and
- unanimous shareholder agreements.

Ontario has fallen behind nearly every other Canadian jurisdiction in many of these areas. For example, Ontario is one of the last remaining jurisdictions in Canada that still generally requires that a majority of board members and board committee members be resident Canadians. This requirement is a significant deterrent for public companies (especially inter-listed companies) and subsidiaries of foreign corporations using Ontario as the incorporation jurisdiction of choice. It is also an incentive for those companies to export themselves out of Ontario. Other provinces and territories including, most recently, British Columbia, have removed this requirement.

Reform of the OBCA would give Ontario the opportunity to regain its status as the leading corporate law jurisdiction in Canada, adopting the current best practices from the CBCA, British Columbia, Nova Scotia, New Brunswick, Delaware, New York and other important corporate law jurisdictions.

For example, the OBCA could be amended to:

<b>Amendment</b>	<b>Purpose</b>
<b>SECURITIES</b>	
Harmonize Part VI (Investment Securities) with the USTA (including the repeal of ss. 68-91).	Securities transfers are not the subject of corporate law and should be in a separate statute.

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Amendment	Purpose
Provide corporations with the option to dematerialize their securities (i.e. dispense with security certificates).	Done in New York and most other U.S. jurisdictions. Paper certificates are problematic (production, handling, storage, loss, theft, mutilation, etc.) and should be optional.
<b>GOVERNANCE</b>	
Remove board and committee Canadian residency requirements.	Eliminates an unnecessary impediment and cost for many OBCA corporations, especially inter-listed companies, other public companies and those companies that are subsidiaries of foreign companies or that desire international board representation. The freedom to choose from a wider pool of directorial talent is consistent with excellence in corporate governance.
Adopt the CBCA's improved conflict of interest rules for directors and officers (D&O).	Enhances corporate governance standards.
Adopt the CBCA's improved good faith reliance liability standards (expert reports and audited financial statements).	Enhances corporate governance standards.
Require that the audit committee of an offering corporation be composed of not less than 3 directors, each of whom is independent.	Conforms to evolving standards post-Enron and <i>Sarbanes-Oxley</i> and enhances corporate governance standards.
Adopt the CBCA's improved D&O indemnification and insurance provisions.	Self-explanatory.
Consider allowing corporations to limit D&O liability through charter provisions.	Adopts prevalent U.S. practice.
<b>PUBLIC COMPANIES – SHAREHOLDER RIGHTS ENHANCEMENTS</b>	
Adopt the CBCA's rules on electronic shareholder communications.	Self-explanatory. Reliance on the <i>Electronic Commerce Act</i> (Ontario) does not suffice.
Adopt the CBCA's improved rules on shareholder proposals.	Primary mechanism for shareholder voice in the affairs of offering corporations.
Conform OBCA shareholder voting entitlements to National Instrument 54-101.	Harmonizes with securities legislation.

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Amendment	Purpose
Adopt the CBCA's improved regime on proxy solicitation including exemptions for targeted solicitations to less than 16 shareholders and solicitations by public broadcast.	Promotes shareholder democracy.
Adopt the CBCA's rules for virtual shareholder meetings.	Self-explanatory.
<b>PRIVATE COMPANIES</b>	
Adopt and enhance the unanimous shareholder agreement (USA) regime in the OBCA.	The USA is the primary means for the private ordering of small and medium-size businesses.
Allow non-offering corporations to dispense with the appointment of a board through a USA.	Remove an empty (and arguably misleading) formality.
Allow greater flexibility in share provisions for non-offering corporations.	Allows greater freedom of contract and reduces legal expense.
Consider providing a table of standard USA provisions that shareholders of small and medium-sized businesses may elect to adopt.	Minimize the cost and inconvenience of hiring a lawyer to draft the boilerplate of the USA for small and medium-sized companies that cannot afford it.
Consider adopting the CBCA squeeze-out transaction regime for non-offering corporations.	Reverse some adverse case law.
For professional corporations, consider reducing the ownership requirement from 100% of all shares to 100% of the voting shares.	Allows income-splitting amongst family members without affecting control or sacrificing professional responsibility for errors and omissions.
<b>OTHER</b>	
Repeal what is left of s. 20 on financial assistance.	Post-transaction notice to shareholders adds to expense and does not protect creditors; CBCA has repealed corresponding provision.
Allow lower-tier corporations to own shares in upper-tier corporations.	Increases corporate flexibility. Creditors and shareholders can be protected by providing solvency tests and by stipulating that shares held by subsidiary cannot vote.

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The goal should be to elevate Ontario to, and maintain it at, the top-tier of corporate-commercial law jurisdictions by global standards, combining the reputation of Delaware in corporate law and that of New York in commercial law.

### **BENEFITS OF PPSA REFORM**

In 1998, the Canadian Bar Association – Ontario (now, the OBA) made a submission to the MCBS suggesting a number of substantive and technical improvements to the PPSA. The submission proposed:

- more closely harmonizing the PPSA with the legislation in other Canadian jurisdictions;
- reversing or clarifying some adverse case law; and
- fine-tuning the statute.

Although some of the suggested changes were adopted in 2000, some suggestions remain to be implemented.

For example, the PPSA could:

<b>Amendment</b>	<b>Purpose</b>
Conform the PPSA to the USTA, including, in particular, integration of the security entitlement concept and the methods for perfecting a security entitlement.	Self-explanatory.
Provide that a lease having a term of 1 year constitutes a security interest.	Adds certainty and completeness to the PPSA and conforms it to other Canadian and U.S. jurisdictions; avoids the need to determine whether a lease is a “true” lease before deciding whether to register it under the PPSA.
Provide that a licence (such as government licences and quotas) constitutes intangible personal property and, therefore, may be taken as collateral for financing.	Clarifies the adverse or conflicting case law on licences in Ontario.
Allow business debtors to waive the requirement that the secured party deliver a copy of the financing statement and a financing change statement made under the PPSA.	Reduces unnecessary expense that is generally charged back to the borrower.
Provide a more reliable and accessible method for determining business debtor names.	Institute reliance on government on-line databases of business debtor names in lieu of microfiche copies of constating documents.

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Amendment	Purpose
Provide that as against third party assignees anti-assignment provisions in accounts and chattel paper are unenforceable.	Enhances securitizations and access to credit that rely on such collateral. This is consistent with the law in other Canadian and U.S. jurisdictions.

## SUBSEQUENT PHASES

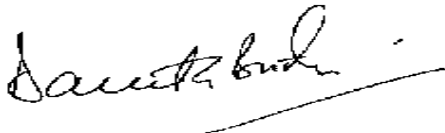
Phase II reform of Ontario’s commercial law infrastructure would focus on non-corporate business vehicles. These include the business trust (including real estate investment trusts), limited partnerships and general partnerships. Discussions of these matters are in their infancy compared with the subject matters that comprise Phase I.

Phase III reform would focus on not-for-profit corporate legislation. At that point, some experience will likely have been gained with Bill C-21 (*Canada Not-for-Profit Corporations Act*), and an assessment can be made as to whether it will serve as a useful model for legislative reform in Ontario in this sector.

## CONSUMER IMPACT

While Phases I, II and III would support the business community as a whole, there are no evident negative impacts on consumer rights. One potential significant consumer benefit is that implementation of the USTA will facilitate the use of publicly traded securities as collateral in consumer loans which should reduce consumer borrowing costs. Otherwise, these commercial law reform initiatives are consumer-neutral.

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## **APPENDIX 1**

Endorsements of business law reform  
relating to the *Uniform Securities Transfer Act*

# UNIFORM SECURITIES TRANSFER ACT (USTA)

## Why is the USTA important to Canada?

**Excerpts of remarks, letters, submissions, statements, etc. on the importance of commercial legislation like the USTA for the financial system:**

“... provincial and territorial legislatures need to make the *Uniform Securities Transfer Act* a priority. Such an act would provide a sounder legal basis for the holding and transfer of rights in securities that are held in book-entry form, and would replace the current patchwork of legal rules in this area...”

*David Dodge*, Governor of the Bank of Canada,  
“Financial System Efficiency: A Canadian Imperative”  
remarks made to a joint meeting of the Empire Club of Canada  
and the Canadian Club of Toronto (December 9, 2004)

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“ my experience with financial crisis has convinced me that the greatest risk to the liquidity of our financial markets is the potential for disturbances to the clearance and settlement processes for financial transactions ... [in assessing the adequacy of the clearance and settlement system] the most important set of concerns relates to the legal and institutional foundations of book-entry settlement systems, ...”.

*Alan Greenspan*,  
Remarks at the Financial Markets Conference  
of the Federal Reserve Bank of Atlanta (March 3, 1995)

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“Despite the quieting effect of investor protection funds, there is a present need to reform the law in this area. Existing law allows an unacceptable degree of uncertainty. There has been substantial concern in the U.S., where uncertainty in the existing law has caused lenders to restrict credit in critical situations. ... In addition to the need to improve existing Canadian law, the pending reform of UCC Article 8 presents an obvious occasion for similar reform in Canada. The need for compatibility between Canadian and U.S. law has been recognized for many years, and is stronger today than ever before.”

*Alberta Law Reform Institute*  
Report No. 67 Transfers of Investment Securities, p. 4 (June 1993)

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## Uniform Securities Transfer Act (USTA)

“Securities market participants and Canadian financial services industries as a whole urgently need modern uniform legislation like the USTA to improve the efficiency and legal soundness of the Canadian securities settlement system. The Canadian securities settlement system handles an enormous quantity and value of transactions on a daily basis. Issuers, investors and financial institutions rely heavily on the system. It is vital to the continued growth and evolution of the Canadian capital markets – and to their competitiveness with international markets – that the system be supported by a modern legal foundation that produces predictable results, especially in situations involving cross-border transactions.”

*Canadian Securities Administrators, Press Release,  
“Securities Regulators Propose Uniform Securities Transfer Act”  
(June 24, 2004)*

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“We strongly encourage the [Ontario Securities] Commission and the [Canadian Securities Administrators] to continue developing securities transfer legislation modelled on revised Article 8 of the UCC in the U.S. and we urge governments across Canada to ensure that such legislation is adopted on a uniform basis as soon as possible.”

*Five-Year Review Committee  
– Final Report dated March 21, 2003 [Crawford Report],  
recommendation 5, OSC Bulletin, June 6, 2003, Vol. 26, Issue 23 (Supp-2), at 50,  
in the discussion on Book-Based Settlement and the Indirect Holding System.*

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“Those witnesses who addressed this issue were unanimous in their support for the Crawford Report recommendation. They made a compelling case that Ontario law in this area has fallen behind the U.S. and European jurisdictions and needs to be modernized.

The Standing Committee sees this as an opportunity for Ontario, not only to improve the investment environment for Ontario investors, but also to play a leading role in establishing uniform legislation across Canada.

Recommendation 3: The [Ontario] government should introduce securities transfer legislation modeled on revised Article 8 of the Uniform Commercial Code in the United States.”

*Report of the Ontario Standing Committee  
on Finance and Economic Affairs,  
tabled with the Ontario Legislature on October 18, 2004*

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“...we strongly support the reports’ recommendation that a USTA be put in place. The Canadian securities settlement system handles an enormous quantity of transactions on a daily basis, and it is critical for the economy that the system operate efficiently.

## Uniform Securities Transfer Act (USTA)

With technology, the holding and transfer of these securities is now done electronically, and the system isn't based on the physical exchange of papers—share certificates—any more. Unfortunately, our legislative regime still is. It's stuck in an earlier era, and it's based on paper certificates. It doesn't reflect modern practice, and it's out of step with the United States particularly, which has modernized its laws to deal with the electronic transfer environment. Indeed, I would suggest we are in danger of losing business to neighbouring states such as New York because of the antiquated state of our laws. So we urge the committee to support the Crawford report's recommendation that a *Uniform Securities Transfer Act* be implemented as soon as possible.

This is not “sexy” legislation, but I would suggest to you that it's really important, for the province to remain pre-eminent in the commercial world, to update our commercial laws for this—I thought I'd throw that word in just to get your attention on a relatively dry topic.”

*Warren Law,*  
Senior Vice President and General Counsel,  
Canadian Bankers Association,  
at public hearings of the Ontario Legislative Assembly's  
Standing Committee on Finance and Economic Affairs  
(August 18, 2004)

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“... the USTA initiative is at least as important as the higher profile recommendations that are contained in the [Five-Year Review Committee's Final Report]. There are a number of reasons why this is so, but I think the most significant is this: Without this legislation, Ontario's capital markets are at risk of losing millions, even billions, of dollars of business to the US, especially New York. Why? Because New York and every other state has uniform legislation that recognizes modern commercial practices in the securities industry and provides a sound legal framework that allows parties to predict the legal results of their actions with confidence, and we do not. ... It is no exaggeration to say that without this legislation our competitive position in the North American capital markets will be progressively eroded as business flows south. I see signs of this erosion almost every day in my practice. ...”

*Robert Scavone,*  
partner with the Toronto law firm McMillan Binch,  
speaking on behalf of the Toronto Opinion Group,  
at public hearings of the Ontario Legislative Assembly's  
Standing Committee on Finance and Economic Affairs (August 19, 2004)

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“We have received a copy of the letter written by Wayne Gray and Robert Scavone of the law firm of McMillan Binch voicing their strong support for the USTA Initiative and the adoption of uniform USTA legislation across Canada as soon as possible. We endorse their comments.

Our firm is involved on a daily basis in large commercial transactions involving the granting of security, including security over book-based securities. We can confirm that the uncertainty in

## Uniform Securities Transfer Act (USTA)

Ontario law, as well as in similar laws elsewhere in Canada, often does raise serious issues in connection with the implementation of such transactions, thereby placing Ontarians, and Canadians generally, at a competitive disadvantage, particularly in comparison to their US counterparts.

We therefore wish to respectfully urge the Standing Committee and the Ontario legislature to give the USTA Initiative the highest possible priority.”

*William A. Scott,*  
partner with the Toronto law firm of Stikeman Elliott,  
in a letter to the Chair of the Ontario Legislative Assembly’s  
Standing Committee on Finance and Economic Affairs,  
entered as an exhibit in the Committee’s public hearings on August 19, 2004

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“I am a corporate lawyer practising at a Bay Street law firm. I’m here speaking on behalf of the Ontario Bar Association, my law firm and as a concerned citizen.

I’m speaking about only one issue, and that is the recommendation made on page 50 of the report, which urges all provincial governments in Canada to adopt a *Uniform Securities Transfer Act*. Canadian securities administrators published on their Web site in June of this year, subsequent to the preparation of the report, a draft *Uniform Securities Transfer Act*. The Ontario Bar Association and my firm strongly urge the Ontario government and each government in Canada to adopt that legislation in that form....

When it’s adopted, please adopt it in a way so that it’s uniform across the country. In other words, adopt the version of the USTA that’s on the Web site of the Canadian Securities Administrators, because there are no policy choices to make here. This isn’t sexy stuff. It’s just a bunch of backroom law to govern stuff that’s really basic. There aren’t real choices to make with this, and the language should be the same across every province. It’s not controversial; this is motherhood and apple pie.

This is like fixing the potholes in our roads which cause people’s cars and trucks to break down and have to be fixed, or which cause people to choose different routes or to go to different cities because they don’t like the potholes in our roads. Unlike the potholes in our roads, this is a lot easier to fix. It doesn’t cost money to fix it. You just have to pass this set of laws, and it will go a long way toward fixing it...

In summary then, our laws are badly out of date. This is costing Canadian businesses money. The solution is easy—it doesn’t cost anything—and that is to adopt the USTA now.”

*R. John Cameron,*  
partner with the Toronto law firm of Torys LLP,  
speaking on behalf of the Ontario Bar Association  
at public hearings of the Ontario Legislative Assembly’s  
Standing Committee on Finance and Economic Affairs (August 19, 2004)

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## Uniform Securities Transfer Act (USTA)

“To enable Canadian market participants to remain competitive within the context of North American and global markets, the USTA should be as harmonized as possible with Revised Article 8 of the Uniform Commercial Code. Uniformity is particularly important in this area, given the increasingly global nature of capital markets and the economic importance of maintaining a modern legal infrastructure in Canada. I understand that the CSA Task Force’s objective is, after consultations are complete, for the USTA to be enacted in Alberta, British Columbia, Ontario and other common law provinces without substantial amendment, which would achieve a level of uniformity among the provinces comparable to that existing among the 50 U.S. states that have enacted Revised Article 8. To that end, our Department of Justice has taken a flexible approach to normal drafting protocols in preparing the current draft USTA. As the Minister responsible for securities regulation, I would encourage other governments to exercise best efforts to assist in achieving this objective.”

Memo from *Greg Melchin*,  
Alberta Minister of Revenue to CSA  
(May 2, 2002)

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“The fundamental requirement is to modernize national and local laws to bring them into line with modern commercial practices, as indicated in the recommendations set forth above. This is a matter of urgency, but there is strong tendency to ignore even well-known defects in the legal infrastructure until after a financial crisis occurs. Nevertheless, because the legal system underpins the entire clearing and settlement framework that this report urges should be reformed, legal reform cannot be left for later, not least because legal reform is often a difficult and slow moving enterprise.”

*Group of Thirty Study Group Report,*  
*Global Clearing and Settlement: A Plan of Action,*  
(G30 Report) January 2003, Group of Thirty, Washington DC

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“The legal uncertainties associated with the current laws have been well documented. Canadians and others dealing in Canada are at a competitive disadvantage compared to those dealing in the United States and other jurisdictions. Adoption of the proposed USTA would make laws in Canada consistent with those in the U.S. and remove the competitive disadvantage to Canadian businesses.”

*The Toronto Board of Trade*  
letter to the Chair,  
Management Board of Cabinet of the Ontario Legislature,  
November 12, 2004

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“If Canada is to hope for an efficient, world-class and world-competitive securities market, all provinces and territories must commit to enacting the USTA, and its conforming amendments to

## Uniform Securities Transfer Act (USTA)

business corporations and personal property legislation, on a word-for-word basis. Having uniform securities settlement legislation across all jurisdictions in Canada that is also harmonized with the rules in place across the United States will significantly enhance the efficiency of the North American capital markets. It would be a travesty to not implement the rules in this manner given the opportunity to do so, and the absence of policy reasons not to.”

*Hon. Thomas A. Hockin,*  
President and CEO, The Investment Funds Institute of Canada,  
(July 30, 2004)

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“We agree that current Canadian law fails to deal adequately with modern securities market practices and is out of date. Not only does this result in ambiguity in the settlement system, it creates risk for creditors of Canadian entities and puts Canadian entities at a disadvantage when dealing internationally (because creditors cannot get clean opinions on taking a pledge of indirectly held securities). The current system would not allow Canada to have the benefit of other initiatives to try to have some consistency in how indirectly held securities are treated worldwide (e.g. Hague PRIMA Convention)...Uniformity will make the entire system more efficient and less costly. It will also reduce the risk involved in trying to make a transaction fit within different legal regimes that could potentially apply to the transaction....

In conclusion, we believe that the USTA will significantly improve the competitive position of Canadians who are engaging in cross-border transactions and non-Canadians who wish to deal in Canada. We believe this legislation is necessary in order to eliminate the inability of the current legal system to deal with holding, transferring and pledging securities.”

*David R. Allgood,*  
Executive Vice President and General Counsel,  
RBC Financial Group (July 21, 2004)

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“The current Canadian legal framework supporting the book-based securities holding system is a rather precarious hodge-podge of federal and provincial legislation, which is too fragile and outdated to serve the required purpose – to provide a sound legal footing for the trading, pledging and settlement of book-based securities by clearinghouses, financial intermediaries and their clients. There is a critical need for a modern legal foundation that will produce consistent, reliable answers to the kinds of issues that arise in a variety of circumstances in a sophisticated technological environment that typically involves a number of inter-related parties.

The concerns surrounding the validity and priority of claims to book-based securities become even more acute with cross-border transactions, and it is in those situations that the inadequacies of the current Canadian legal infrastructure are brought into high relief. All too often this results in delays due to the extra effort (and expense) associated with identifying, minimizing and apportioning a legal risk that need not and should not exist. We see no value in the current state of legal uncertainty in this area, nor do our international counterparties. The laudable effort of the USTA Task Force to achieve uniformity is a goal that benefits all parties by providing clear,

## Uniform Securities Transfer Act (USTA)

predictable rules that will allow them to frame contracts and relationships with the confidence that their intent will be respected....

We look forward to the future progress of this important initiative, and strongly support the adoption of the final form of this legislation on a uniform basis by all governments across Canada.”

*W. David Wilson, Vice-Chairman,  
Scotiabank and Chairman & CEO,  
Scotia Capital (July 8, 2004)*

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“Canadian laws regulating the transfer of securities held through clearing systems, or otherwise in uncertificated form, are badly out of date. There are many legal uncertainties associated with the current laws. These areas of uncertainty are serious enough that they inhibit the ability of Canadians to easily obtain financing (or enter into other transactions) on the security of certain types of collateral. In this regard, Canadians and others dealing in Canada are at a competitive disadvantage compared to Americans and others dealing in the United States and in other jurisdictions. The proposed USTA would bring Canadian laws into conformity with U.S. laws in this area, and would remove this competitive disadvantage.

In this regard, it is very important that each province adopt the same version of the USTA. There are no legitimate policy reasons for the laws in this area to differ from province to province.

The related amendments to the provincial Personal Property Security Act are a key piece of this law reform. These amendments have been carefully studied, and are supported, by the PPSA Working Group of the Uniform Law Conference of Canada. This Working Group included many of Canada’s leading architects and practitioners involved with Canadian PPSA legislation. The review by this Group should provide comfort to legislators about this most important aspect of the USTA.

We urge Ontario and each other province in Canada to adopt this legislation quickly, and in a completely uniform manner, to eliminate this competitive disadvantage for Canadians.”

*Jonathan Speigel, President, Ontario Bar Association  
and A. Paul Mahaffy, Chair, OBA Business Law Section  
(June 17, 2004)*

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“I am writing to express the strong support of the Investment Dealers Association of Canada (the IDA) for the *Uniform Securities Transfer Act* and consequential amendments to related legislation (collectively, the USTA) that has been developed by the USTA Task Force of the Canadian Securities Administrators. The matters addressed by the USTA are of great and immediate interest to the capital markets in Canada and we encourage the prompt enactment of the USTA to provide an effective legal basis for securities holding and transfer that is consistent with modern practice and in line with laws governing these activities in other major markets.

## Uniform Securities Transfer Act (USTA)

As a national securities self-regulatory organization the IDA oversees the business conduct and financial solvency of 200 securities dealers and 24,000 licensed brokers representing over 97% of the securities industry in Canada. Our mandate is to protect investors and enhance the efficiency and effectiveness of our capital markets. The Canadian securities settlement system is a key component.

We wish to emphasize how important it is that the proposed USTA is enacted, not only for the reasons discussed above, but also because of the firm legal foundation it will provide to other important industry initiatives, including those relating to straight through processing.”

*Joseph J. Oliver,*  
President and Chief Executive Officer,  
Investment Dealers Association of Canada  
(April 29, 2004)

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“As the operator of Canada’s two national stock exchanges, TSX Group believes that the law should provide clear guidance and support for business relationships that prevail in the securities industry and should clarify the property rights that exist whenever securities are bought, sold or used as collateral in Canada. TSX Group anticipates that the USTA will provide an effective legal basis for securities ownership and transfer that is consistent with modern practice and consistent with the laws governing these activities in other industrialized countries, most notably the United States. The prompt enactment of this proposed legislation is important to the global competitiveness of Canada’s capital markets.

The USTA’s modern, transparent legal foundation will produce predictable results which will add certainty to all transactions whether cross-border or domestic in nature. The current legal framework of securities transfer legislation is an untenable patchwork of laws that may result in the avoidance of Canadian markets by offshore investors. In contrast, the proposed USTA will provide certainty and result in efficiencies that domestic and offshore investors and intermediaries will find greatly superior.

While the adoption of the USTA will provide the necessary update to the legal framework that supports the Canadian securities settlement system, it must be implemented in a uniform fashion across Canada in order to provide the legal certainty that participants in the Canadian capital markets deserve. If there are even subtle or technical differences permitted in the USTA as between the provinces, the CSA’s goal of certainty and efficiency will have been defeated. It is vital that the USTA remains a truly uniform body of law that governs the transfer of all securities in the Canadian marketplace.”

*Barbara G. Stymiest, FCA,*  
Chief Executive Officer,  
TSX Group (April 23, 2004)

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## Uniform Securities Transfer Act (USTA)

“This letter is written to express the International Swaps and Derivative’s Association’s strong support for the *Uniform Securities Transfer Act* and consequential amendments to related legislation published for comment by the USTA Task Force of the Canadian Securities Administrators.

The International Swaps and Derivatives Association, Inc. (ISDA) is the global trade association representing participants in the privately negotiated derivatives industry. ISDA was chartered in 1985, and today numbers over 600 member institutions from 46 countries on six continents. ISDA’s members include most of the world’s major institutions who deal in and leading end-users of privately negotiated derivatives, as well as associated service providers and consultants....One of ISDA’s key objectives is to promote legal certainty for cross-border financial transactions in or involving derivatives markets. ISDA and its members devote considerable resources to acquiring and updating legal opinions from a wide range of jurisdictions on netting, set-off and financial collateral arrangements and to promoting changes in laws to enhance the effectiveness of these types of arrangements. ISDA also pays close attention to developments affecting the international regulatory environment for derivatives. Our Collateral Law Reform Group, which was founded in early 1999, has participated in every significant European and international financial law reform consultation affecting collateral arrangements since 1999.

It is therefore with great interest that ISDA members have reviewed the USTA, as well as the Task Force’s August 1, 2003 consultation paper (the “Paper”). The issues addressed in these materials are of fundamental and pressing concern to the financial markets, including, of course, the market for privately negotiated derivative transactions.

As the Task Force clearly appreciates, the current Canadian legal regime, both federal and provincial, regarding the transfer of securities is out of step with modern securities transfer systems. The resulting legal uncertainty is adversely affecting the competitive position of Canadian participants and is adding significant costs for Canadians with respect to their participation in these important financial markets. As other countries modernize their laws Canadian participants will face further competitive disadvantages. It is critical that Canadian legislators act quickly to implement reform....

To reiterate, we believe that Canada’s current regulatory regime significantly disadvantages both Canadians seeking to engage in cross-border financial transactions and non-Canadians who would, but for the uncertainty and risk resulting from the traditional approach of the current Canadian regime, deal more advantageously with Canadian counterparties. Ongoing international developments, such as revisions to the Basel Rules governing international banking, will require the ability to be increasingly precise in the assessment of risk. The current lack of certainty in the Canadian legal landscape will make it increasingly difficult for Canadian counterparties to fully and competitively participate in these markets both domestically and internationally. By harmonizing the Canadian regulatory environment with the world’s most modernized regimes, the USTA represents a substantial, and critical, step towards minimizing the legal risk posed by the Canadian regulatory environment.”

*Robert G. Pickel,*  
Executive Director and Chief Executive Officer,  
International Swaps and Derivatives Association, Inc.  
(December 10, 2003)

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## Uniform Securities Transfer Act (USTA)

“[The Canadian Depository for Securities Limited (“CDS”)] has been supporting this project from the time of the original Alberta Law Reform Institute study in 1993. We continue to view the completion of this project as the single most important legal initiative for the Canadian securities industry which will bring Canadian securities transfer legislation into line with similar laws of most other industrialized countries.”

*Toomas Marley, Vice -President,  
Legal and Corporate Secretary,  
The Canadian Depository for Securities Limited  
(March 12, 2004)*

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“Effectively updating the law regarding the transfer and holding of securities (and interests in securities) in Canada requires enactment of identical *Uniform Securities Transfer Acts* (USTAs) by each province and territory....This is critical to maintaining the competitiveness of Canadian capital markets—and the related jobs and tax base—in an increasingly global marketplace through: (1) avoiding legal uncertainty in Canadian securities markets, (2) better controlling systemic risk and (3) ensuring finality of settlement. The USTA applies the finality principle of traditional negotiable instruments law while now clearly confirming finality within the book-entry (automated/electronic) settlement system. This will help bring our securities markets into the twenty-first century. CDS strongly supports the substantive and policy objectives reflected in, and emphasizes the following principles regarding, the USTA initiatives:

- ▶ Improved clarity and certainty through a sound legal foundation for existing securities holding, transfer and pledging practices—this applies particularly to the indirect system providing for securities holding via intermediaries
- ▶ Critical need for word-for-word consistency in the USTA and related amendments enacted in all relevant Canadian jurisdictions
- ▶ Greater harmonization with best practices globally, including in the U.S., our closest trading partner (CDS settles one quarter of the securities transactions it processes with the U.S.)
- ▶ Need for expeditious implementation—the USTA initiative deals with a narrow area (albeit one of considerable importance) that does not require the extensive review and comment period that may be associated with the Ontario *Securities Act*.”

*The Canadian Depository for Securities Limited,  
“Why Implementing the USTA and Related Amendments—  
Expediently and Unchanged—Is Important for Canadians”,  
submission to the Standing Committee on Finance and Economic Affairs  
of the Legislative Assembly of Ontario (August 19, 2004)*

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## Uniform Securities Transfer Act (USTA)

“The purpose of this letter is to express The Canadian Bankers Association’s strong support for the *Uniform Securities Transfer Act* and consequential amendments to related legislation (collectively, the “USTA”) that are currently being developed by the USTA Task Force of the Canadian Securities Administrators. The USTA initiative is of great interest to the Canadian capital markets and to our Members....

The Canadian securities settlement system handles an enormous quantity and value of transactions on a daily basis. Issuers, investors and financial institutions rely heavily on this system. It is vital to the continued growth and evolution of the Canadian capital markets-and to their international competitiveness-that the system be supported by a sound, modern legal framework.

Technological change has led to an increasing reliance on intermediaries to hold and deal with securities, but the laws concerning the holding and transfer of security interests remain rooted in the old paper-based system of certificated holdings. The adoption of the USTA by Canadian provinces will bring the legal infrastructure up to date. It will establish a legal framework that will be uniform across Canada and will be harmonized with existing similar legislation in the United States....

We believe that the USTA initiative should be a priority of governments across Canada, and that the prompt passage of the legislation is important to the global competitiveness of Canada’s capital markets....”

*Raymond J. Protti,*  
President & Chief Executive Officer,  
Canadian Bankers Association  
(June 26, 2003)

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“We have reviewed the preliminary draft documents and summary materials dated March 14, 2003 prepared by the Canadian Securities Administrators (“CSA”) *Uniform Securities Transfer Act* (“USTA”) Task Force. On behalf of Synergy Asset Management (“Synergy”),

I am writing to communicate our strong support for this important initiative and to commend the CSA Task Force members on their collaborative efforts to develop a harmonized solution for our Canadian marketplace....

Synergy is the manager and portfolio advisor to Synergy Mutual Funds which are distributed through registered dealers in all provinces and territories of Canada. Founded in 1997, Synergy now has \$1.4 billion in assets under administration....

The landscape in which securities transactions occur in Canada and abroad has changed dramatically over the years. Not only has the volume of trading increased, but so too has the globalization of securities markets. The indirect holding and book entry settlement systems have clearly replaced the direct holding system as the favoured approach for market participants. While this has been a somewhat natural evolution, it is unlikely to change. In fact, the indirect holding and book entry settlement systems will only become more important as the industry

## Uniform Securities Transfer Act (USTA)

moves toward Straight Through Processing and other initiatives designed to increase efficiency, minimize risk, reduce trade processing costs and improve service within the securities industry.

We agree that there are risks in our existing settlements system. These risks can be reduced by establishing a clear legal foundation of property-transfer rules for the settlement of securities transactions. Establishing a single statute that embodies globally recognized standards would be beneficial to Canadians as well as international market participants who do business in Canada.

We applaud the coordinated effort by the CSA on this project. Like many others, this is a national issue that warrants harmonized legislation and a consistent and uniform approach across the country. Harmonization of legislation is critical to the Canadian mutual fund industry and is something that can only enhance the vibrancy of the Canadian capital markets....”

*James E. Ross,*  
Vice President, Services & Corporate Secretary,  
Synergy Asset Management  
(June 30, 2003)

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“We are writing to express our strong support for the *Uniform Securities Transfer Act* and consequential amendments to related legislation (collectively, the “USTA”) currently being developed by the USTA Task Force of the Canadian Securities Administrators. The matters addressed by the USTA are of great and immediate interest to the capital markets in Canada....

Efficiency requirements led some time ago to a significant reliance on intermediaries to facilitate the holding of and dealing with securities. Adoption of the USTA will ensure an effective legal infrastructure to support this evolution, as well as further developments into the future. It is essential that Canadian legislation in this area be uniform within Canada and harmonized with existing similar legislation in the United States, and we particularly applaud the focus of the Task Force on these aspects....

Other industry initiatives, such as those dealing with straight-through-processing, not to mention continuing product and technological evolution and international competition, make enactment of the necessary legislation at the earliest possible time very important.”

*Gerry J. O'Mahoney,*  
Chief Operating Officer,  
TD Waterhouse Canada Inc.  
(May 22, 2003)

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## **APPENDIX 2**

“Ontario’s Corporate Laws Suffering  
Benign Neglect, Experts Say”

# 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."

*Special to The Globe and Mail.*

MCMILLAN BINCH LLP

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**NOTES**

[www.mcmillanbinch.com/businesslawreform](http://www.mcmillanbinch.com/businesslawreform)