

# Business Law Bulletin

## Recent Changes to the Alberta *Business Corporations Act*

For the first time in many years the Alberta *Business Corporation Act* (the “ABCA”) has been revised. The amendments, which came into effect May 17, 2005\*, update and improve the ABCA in a number of ways, but the most significant amendments allow for the incorporation in Alberta of unlimited liability corporations (“ULCs”) and for the reduction of the number of Canadian directors on Alberta corporation boards. These important changes have made the ABCA “competitive” with legislation in other Canadian jurisdictions. Following is an overview of some of the key amendments to the ABCA.

### *Canadian Director Requirement Reduced*

The required number of Canadian resident directors for an Alberta corporation has been reduced from one half to one quarter of the members of the Board of Directors of a corporation. This change brings the ABCA in line with the *Canadian Business Corporations Act* (the “CBCA”) and will be beneficial to corporations with a larger number of directors.

### *Unlimited Liability Corporations (“ULCs”)*

The ABCA has been amended to allow for the incorporation of ULCs in Alberta. The key distinguishing feature of a ULC is that its shareholders are potentially liable for all liabilities of the ULC and are not afforded the limited liability they would enjoy if they were shareholders of a ‘corporation’.

ULC’s are the favoured corporate structure for U.S. businesses acquiring and operating businesses in Canada. This is because the U.S. tax rules generally allow for a full flow through of income and losses from the Canadian ULC to its American owner.

Prior to the amendments to the ABCA, Nova Scotia was the only jurisdiction in Canada that allowed for the incorporation of ULC’s and a large percentage of cross border deals were structured using Nova Scotia ULC’s.

Alberta ULC’s should be eligible for the same preferential U.S. tax treatment as Nova Scotia ULC’s and should become a popular if not preferred vehicle for in bound investment from the U.S.

Now Alberta based businesses have the choice to use Alberta ULCs instead of Nova Scotia ULCs, and thereby avoid the expense of Nova Scotia fees plus extra-provincial Alberta fees. Additionally, businesses in Alberta and in other provinces may prefer to use an Alberta ULC because:

- The ABCA is modelled after the CBCA, which is a modern business-based statute familiar to most solicitors in Canada and consistent with many

American corporate statutes. By way of contrast, the Nova Scotia ***Company Act***, is an older ‘memorandum and articles’ statute, based on English corporate law from the last century, and is widely considered to be difficult to use and not generally reflective of modern corporate practice. The general provisions which apply to all corporations incorporated under the ABCA will apply to the Alberta ULCs, together with a few additional provisions which are particular to ULCs, such as: a) the requirement to use the ULC identifier in the name of the corporation; b) providing special disclosures in the articles regarding joint liability of shareholders, and c) insertion of warnings on share certificates.

- The cost advantages of Alberta ULCs are significant. The cost of incorporation of an Alberta ULC is \$100.00, as opposed to the \$6,000.00 in Nova Scotia. Moreover, Nova Scotia ULCs must also pay an annual renewal fee of \$2,000.00. Alberta ULCs will only be charged the normal fees that other Alberta corporations are charged.
- The ABCA allows for both short form and long form amalgamations without court approval, whereas Nova Scotia only permits long form amalgamations requiring court approval.
- The ABCA codifies directors’ duty of care and conflict of interest obligations, thereby providing clarity and certainty for directors of ABCA corporations. However, under the Nova Scotia legislation, little guidance is given to directors and they must primarily

rely on the requirements of the common law regarding fiduciary and other duties of care of corporate directors.

- The ABCA permits dividends to be declared to shareholders if the solvency tests set out in the ABCA are met, whereas Nova Scotia only allows for dividends to be paid out of “profits”, which is not a precise legal or financial term.

The liability of a shareholder of an Alberta ULC is greater than the liability of a shareholder of a Nova Scotia ULC.

The ABCA provides that:

“The liability of each of the shareholders of a corporation incorporated under this Act as an unlimited liability corporation for any liability, act or default of the unlimited liability corporation is unlimited in extent and joint and several in nature.”

The difference in the nature of the unlimited liability of a Nova Scotia ULC as compared to the unlimited liability of an Alberta ULC derives firstly from the basic difference of a Memorandum of Association company incorporated under the **Companies Act** of Nova Scotia (which in turn is based on the **Companies Act** of England of 1862) and the nature of a corporation incorporated under the ABCA (which has all of the powers of a natural person unless limited by the Articles of Incorporation, and which follows the approach of the CBCA). Secondly, the liability provisions contained in the ABCA for an unlimited liability corporation are intended to result in an Alberta ULC being treated under the US Internal Revenue Code

as a “disregarded entity or partnership” for US Federal income tax purposes.

The liability of directors of an unlimited liability corporation under the ABCA are the same liabilities as exist for a limited liability corporation incorporated under that Act, and are substantially similar to the liabilities which exist under the CBCA and other statutes that are modelled on the CBCA. While the ABCA does provide for liability of the Board of Directors of an ABCA corporation for up to 6 months of unpaid wages owing to employees, an almost identical statutory liability exists under the **Employment Standards Code** (of Alberta) and under similar legislation in other provinces. While the Board of Directors of a Nova Scotia ULC may not be liable under the **Companies Act** of Nova Scotia for the unpaid wages and salaries of its employees under that Act, those Directors may be liable for unpaid wages and salaries under employment standards legislation in the provinces and territories where the employees reside.

Based on the advantages of Alberta ULCs, we will likely see many businesses incorporating ULCs in Alberta. For those businesses interested in the advantages of Alberta ULCs and which have already been incorporated under the ABCA or the legislation of another jurisdiction, including those already incorporated as ULCs in Nova Scotia, the Act provides for:

- the continuance into Alberta of an extra-provincial ULC as an Alberta ULC;
- the continuance into Alberta of an extra-provincial limited corporation as an Alberta ULC;

- the amalgamation of an Alberta corporation with an Alberta ULC to form a ULC; and
- the conversion of an Alberta corporation from a limited corporation to a ULC.

If you are interested in incorporating an Alberta ULC or require any further information on Alberta ULCs or the ABCA please contact one of the lawyers listed below and we would be pleased to assist you.

\* The ABCA was revised by the ***Business Corporations Amendment Act***, 2005 which came into force on May 17, 2005.

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## ***For more information, please contact:***

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