

**DATE PREPARED:** December 21, 2007

**TITLE:** *Business Corporations Act* amendment to enable the restoration of a dissolved Unlimited Liability Company

**ISSUE:** This briefing note discusses amending the *Business Corporations Act* (BCA) to specifically provide for the restoration of an Unlimited Liability Company (ULC) after dissolution has taken place. The proposal is in response to a problem that came to light during the corporate registry's implementation of the ULC framework and subsequent identification by the Financial and Corporate Sector Policy Branch staff that restoration of a ULC was not covered by the Act.

### **BACKGROUND/DISCUSSION:**

Amendments to the BCA as set out in the 2007 *Financial Statutes Amendment Act*, provide for a structure to enable the creation of Unlimited Liability Companies (ULCs), and were brought into force on October 29, 2007. However, while the amendments cover the creation, naming, amalgamation, continuance, and transformation of ULCs, they do not specifically address the issue of restoration of a ULC that has been dissolved. Two problems have come to light because of this.

#### **Shareholder Liability**

Existing restoration provisions in the BCA are problematic when applied to ULCs. Currently, the Act states that a company that is restored is restored with the same status as it had upon dissolution – that is, a ULC is restored as a ULC rather than as a limited company. This introduces a significant question concerning fairness to shareholders, as the ULC framework is built upon voluntary assumption of unlimited liability by those choosing to become shareholders. s.13

s.13

The impact of restoration on various parties will vary with each ULC's particular circumstances, for example: the number of shareholders, the assets held by the ULC (if any), whether the ULC is being restored by a "related person" or by a creditor, and the purpose of the restoration. In all cases, though, the restoration framework requires the revival of shareholder liability. s.13

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The other two jurisdictions in Canada that have ULC legislation – Nova Scotia and Alberta – make no specific provisions for the restoration of ULCs. Alberta's revival provisions provide for revival both by application to the Registrar, where the Registrar may impose "reasonable terms" on the revival and by the court, where the court has broad power to provide such directions. The Nova Scotia legislation requires a court application to restore a company to the register.

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### **Company Name upon Restoration**

There is also an issue respecting the application of the names provisions upon restoration of a ULC. If the ULC wants to restore with a numbered name rather than its previous name held at the time of dissolution, the restoration section of the Act requires the words "B.C. Ltd." to follow the incorporation number of the company. This is inconsistent with the ULC naming rule, which requires a ULC with a numbered name to have the words "B.C. Unlimited Liability Company" after the incorporation number.

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**OPTIONS:**

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**RECOMMENDATION:** s.13

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APPROVED / NOT APPROVED (If appropriate)

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Carole Taylor  
Minister

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Date

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## ADVICE TO MINISTER

<b>CONFIDENTIAL</b> <b>DRAFT ISSUES NOTE</b>	<b>Unlimited Liability Corporations</b>
<b>Ministry of Finance</b>	
<b>Date: October 22 , 2007</b>	
<b>Minister Responsible: Carole Taylor</b>	

### KEY FACTS REGARDING THE ISSUE:

An ~~a~~amendment~~s~~ to the Business Corporations Act that will allow the incorporation of unlimited liability companies (ULCs) in British Columbia ~~are~~~~is~~ coming into force on October 29, 2007.

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This corporate structure has been requested by the legal community and others for several years and was the subject of Ministry of Finance consultations in 2005. It is designed to encourage U.S. investment in British Columbia.

Both Nova Scotia and Alberta have similar legislation permitting unlimited liability companies. Nova Scotia's legislation has accommodated the formation of ULCs for close to a century; passed their legislation in (YEAR) Alberta's legislation was more recently amended in May 2005 to allow the formation of -ULCs, beginning in (YEAR).

The Business Corporations Act sets out the organization and governance of companies in British Columbia. It was introduced in 2004 to replace the Company Act and enhance British Columbia's business environment. The amendments allowing ULCs were introduced in March 2007 under Bill 14, the Financial Statutes Amendment Act.

### ADVICE AND RECOMMENDED RESPONSE:

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<b>CONFIDENTIAL</b> <b>DRAFT ISSUES NOTE</b>	<b>Unlimited Liability Corporations</b>
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<b>CONFIDENTIAL</b> <b>DRAFT ISSUES NOTE</b>  <b>Ministry of Finance</b> <b>Date: October 22, 2007</b> <b>Minister Responsible: Carole Taylor</b>	<b>Unlimited Liability Corporations</b>
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## ADVICE TO MINISTER

<b>CONFIDENTIAL</b> <b>PAB-FIN ISSUES NOTE</b>	<b>Canada/US Tax Treaty</b> <b>Implications for Unlimited</b> <b>Liability Companies</b>
<b>Ministry of Finance</b> <b>Date: November 30, 2007</b> <b>Minister Responsible: Carole Taylor</b>	

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Clark Wilson LLC, a Vancouver law firm, posted an update on their website and that has attracted a media enquiry on the issue:

On September 21, 2007, the United States and Canada released the fifth Protocol to the Canada-United States Income Tax Convention. Among the changes made there are changes affecting the taxation of ULCs. Specifically, ULCs that are treated as flow-through or disregarded entities in the United States will be denied treaty benefits, which will make them considerably less attractive to U.S. investors in Canada. The change affecting ULCs come into effect two years after the treaty is ratified.

ULCs are allowed under the laws of Nova Scotia, Alberta and, effective October 29, 2007, in BC. ULCs are treated as is any other corporation in Canada but can be a preferred vehicle for US investors to take advantage of US tax law. They are similar to a partnership, where income or losses flow through to the partners for tax purposes. ULC's can be used to overcome a disadvantage in the U.S. tax system that can result in double taxation on Canadian Income.

International tax treaties are the responsibility of the Federal Government and are not within the scope of Province. A new protocol under the Treaty includes new provisions for the treatment of dividends and interest from ULCs that will come into effect on January 1, 2010.

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