

# The New Alberta Unlimited Liability Corporations

On May 17, 2005, the *Business Corporations Act* (Alberta) (the “ABCA”) was amended to permit the incorporation of unlimited liability corporations (“ULCs”) in Alberta.

An Alberta ULC (an “ABULC”) is a corporation whose shareholders have unlimited liability for any liability, act or default of the corporation. The liability of the shareholders is joint and several in nature, making an ABULC more like a partnership than a conventional corporation. This is a significant departure from a conventional or limited liability corporation, whose shareholders are not generally liable for its obligations.

Until this amendment to the ABCA became effective, the only other jurisdiction in Canada to provide for ULCs was Nova Scotia.

## **Why Use a ULC?**

When it was discovered a number of years ago that ULCs’ partnership-like characteristics created certain advantages under U.S. tax law for U.S. residents who own investments in Canada, many U.S. resident corporations and other entities began to use Nova Scotia ULCs (known as “NSULCs”) to invest or do business in Canada.

NSULCs are generally treated as “hybrid” entities for Canada–U.S. tax planning purposes. That is, they are generally subject to taxation in Canada on the same basis as any other Canadian corporation, but under U.S. income tax law they are treated for many purposes as partnerships or “disregarded” entities. This allows for the “flow-through” of certain income and expenses to U.S. shareholders, thus avoiding some of the double taxation that would otherwise have existed and simplifying various aspects of doing business in Canada from a U.S. point of view. It is anticipated that ABULCs and NSULCs will be treated in the same fashion for U.S. taxation purposes.

## **Creation of ABULCs and Shareholder Liability**

Under the new legislation, an ABULC may be incorporated in Alberta or may be continued into Alberta from another jurisdiction. An existing Alberta limited liability corporation may also be converted into an ABULC either by amending its articles or by amalgamating.

The liability of the shareholders of an ABULC continues to be unlimited and joint and several for all actions that are commenced before the dissolution of the ABULC and for all actions brought within two years of its dissolution. Any shareholder, including a past shareholder, may be held responsible for the full amount of any claim against the ABULC that originated before the dissolution, regardless of the amount received by the shareholder on the distribution of the ABULC’s assets.

However, even though the shareholders of an ABULC are jointly and severally liable for any liability, act or default of the ABULC, depending on the facts and circumstances, this liability can be avoided by interposing an appropriate limited liability entity, such as a U.S. “C-Corporation” or “S-Corporation” or a limited partnership, between the ABULC and the U.S. resident. The determination of which type of limited liability entity to interpose between the ULC and the U.S. resident requires careful tax planning.

## Advantages of ABULCs over NSULCs

There are a number of advantages to incorporating an ABULC rather than an NSULC. The most immediate advantage is that the government filing fee for incorporating an ABULC is the same as that for an Alberta limited liability corporation, namely \$100 plus GST, with no annual renewal fee. In Nova Scotia, the filing fees for incorporating an NSULC are currently \$6,000, with an annual renewal fee of \$2,000.

In addition, under the ABCA, both long-form amalgamations and short-form amalgamations are permitted, and there is no court approval required in either case. In Nova Scotia, amalgamations must be long-form and be approved by the court, adding costs and potentially delaying time sensitive transactions.

Further, the ABCA permits a corporation to declare dividends if the board of directors has reasonable grounds for believing that the liquidity and solvency tests set out in the ABCA have been met. Dividends declared by a Nova Scotia company, on the other hand, must only be paid out of the company's "profits".

Finally, unlike Nova Scotia's *Companies Act*, which is based on the antiquated U.K. *Companies Act*, the ABCA is a modern corporate statute that incorporates many of the best corporate law practices of the U.S. and Canada. This means that corporate law instincts developed elsewhere can generally be relied upon when dealing with an ABULC. Experience has shown that this helps to reduce legal costs.

## Conclusion

The new legislation permitting ABULCs provides U.S. residents who carry on business in Canada with a more practical and less costly tax planning mechanism, and should facilitate cross-border transactions with U.S. residents.

Gowlings is one of Canada's leading national law firms, with over 700 professionals located in Canada's major commercial centres. We have assisted many clients with structuring their corporations to best suit their unique needs. Please contact either your Gowlings lawyer or one of the professionals listed below to discuss whether an ABULC may be relevant to your business.

Tom Cumming	(403) 298-1938	<a href="mailto:tom.cumming@gowlings.com">tom.cumming@gowlings.com</a>
Jeffrey E. Dyck	(403) 298-1052	<a href="mailto:jeffrey.dyck@gowlings.com">jeffrey.dyck@gowlings.com</a>
Brian J. Hughson	(403) 292-9814	<a href="mailto:brian.hughson@gowlings.com">brian.hughson@gowlings.com</a>
John N. Iredale, Q.C.	(403) 298-1850	<a href="mailto:john.iredale@gowlings.com">john.iredale@gowlings.com</a>
Alan Jochelson,	(403) 298-1837	<a href="mailto:alan.jochelson@gowlings.com">alan.jochelson@gowlings.com</a>
Robert D. McCue	(403) 298-1070	<a href="mailto:robert.mccue@gowlings.com">robert.mccue@gowlings.com</a>
Alan Rautenberg	(403) 298-1857	<a href="mailto:alan.rautenberg@gowlings.com">alan.rautenberg@gowlings.com</a>

[www.gowlings.com](http://www.gowlings.com)

This publication contains material of general interest only and is not intended to provide legal advice or to replace consultation with a legal professional on any particular matter.