Service Nova Scotia
and Municipal Relations

SUMMARY OF RECOMMENDATIONS

NOVA SCOTIA *COMPANIES ACT* DISCUSSION PAPER

2005

Service Nova Scotia and Municipal Relations ("SNSMR"), in collaboration with the Nova Scotia Barristers' Society, is undertaking a review of the Nova Scotia *Companies Act* ("NSCA"). This review will identify potential amendments to the NSCA that will bring about efficiencies to incorporation and registration processes for Nova Scotia companies. A discussion paper has been prepared for SNSMR by Cox Hanson O'Reilly Matheson that provides analysis and recommendations on specific areas of concern.

This is an extract of the Summary of Recommendations contained in the discussion paper. The chapters of the discussion paper noted below examine each topic in greater detail and include excerpts from the statutes of Nova Scotia and other jurisdictions.

Copies of the discussion paper are available on line from the Registry of Joint Stock Companies website at www.rjsc.ca or by telephoning (902) 424-5223.

We welcome your comments on the discussion paper and the *Companies Act* Review. To provide input or for further information please contact:

Kerry MacLean
Registrar of Joint Stock Companies
Service Nova Scotia and Municipal Relations
1505 Barrington Street, 9th Floor South
PO Box 1529
Halifax, Nova Scotia
B3J 2Y4
Phone (902)424-7742
Fax (902)424-0523
Email: joint-stocks@gov.ns.ca

Summary of Recommendations

Nova Scotia *Companies Act* Discussion Paper

A. The Role of the Court in Amalgamations and Fundamental Changes of ULCs (Chapter 3)

Under the NSCA, companies must obtain court approval for amalgamation. Chapter 3 provides a summary of the law in this area, in Nova Scotia and in other jurisdictions, in order to determine whether it is necessary to continue involving the courts in amalgamations or whether Nova Scotia should follow other jurisdictions in Canada and eliminate the courts' role in this area. We have also included a discussion of the courts' role with respect to fundamental changes of ULCs.

Traditionally, the rationale for requiring court approval for amalgamations was the protection of shareholders and creditors. However, as a result of multiple amendments to the statutes in other jurisdictions, supplementary provisions have been added which provide sufficient protection of the right of shareholders and creditors. These provisions include a shareholder's right to dissent and the oppression remedy, both of which appear in the Third Schedule to the NSCA at sections 2 and 5. Other jurisdictions have addressed the issue of protecting the interests of those who may be prejudiced by the amalgamation by requiring solvency tests and statutory declarations to the effect that the amalgamation will not prejudice creditors or that creditors have been notified, and that shareholder approval has been obtained.

The amalgamation process under the NSCA is used primarily by two groups: Nova Scotia companies with local shareholders, and Nova Scotia companies owned by extra-jurisdictional shareholders, who are creating ULCs for tax purposes. Until recently, Nova Scotia was the only jurisdiction in which ULCs were able to be created. ULCs are now permitted in Alberta and other jurisdictions are considering the introduction of similar legislation.

Of the two existing methods for the conversion of an existing limited company to a ULC under the NSCA, amalgamations are by far the most common. The second method is the creation of a ULC by way of a plan of arrangement under section 130 of the NSCA. The plan of arrangement avoids some of the difficulties associated with the amalgamation procedure, but it is still not a straightforward process. One of the concerns expressed by members of the Nova Scotia Bar with respect to ULCs is that our process is unnecessarily complex and we may be at risk of losing our current status as a jurisdiction of choice for ULCs.

Given the uses to which the amalgamation procedure is currently put and the importance to Nova Scotia of ensuring that reorganizations be permitted as simply and efficiently as possible so long as the rights of creditors, shareholders and others remain protected, we make the following recommendations:

1. The current amalgamation procedure should be retained, as it allows for flexibility;

2. The current amalgamation procedure should also be supplemented by a second, alternative procedure, which mirrors that found in CBCA-type statutes and allows for amalgamation

   (a) upon approval of the amalgamation by a special resolution of the shareholders of each company involved, or by a directors' resolution where the companies are related, and

   (b) upon the filing of an amalgamation agreement to which are attached the memorandum and articles of association of the (proposed) amalgamated company, as well as a statutory declaration of an officer or director of each company indicating that the company will be able to meet a solvency test on amalgamation and that creditors either will not be prejudiced by the amalgamation or have been notified of the proposed amalgamation and have not objected;

3. The current method of creation of a ULC should be simplified to allow:

   (a) an existing Nova Scotia limited company to convert to a ULC by altering its memorandum of association through a unanimous resolution of the shareholders;

   (b) an extra-jurisdictional company to elect to become a ULC upon continuance; or

   (c) an existing Nova Scotia limited company to re-register as a ULC; and

4. The Province should reconsider the amount which should be charged for the incorporation of a ULC (currently $6,000.00), especially if it becomes apparent that a ULC may be incorporated in other jurisdictions at a lower cost. It should also reconsider the amount of the annual registration fee or tax (currently $2,000.00).

B. THE ROLE OF THE COURT IN REDUCTIONS OF CAPITAL (CHAPTER 4)

Nova Scotia is the last jurisdiction in Canada where reductions of a company's capital require court approval. The primary purpose of the court's involvement is to ensure that the interests of creditors and members of the company are protected by preventing the company from being "stripped" of its assets. Other jurisdictions in Canada address creditor and member concerns by (1) placing statutory restrictions on when capital may be reduced; (2) providing creditor remedies in the event capital is distributed contrary to the legislated criteria; and (3) through the provision of oppression remedies in cases where the conduct of the majority of the shareholders of the company is oppressive or unfairly prejudicial to the interests of certain minority shareholders.

Chapter 4 examines reductions of share capital only, and does not consider distribution of a company's property *in specie* pursuant to paragraphs 19(1)(g) and 26(4)(h) of the NSCA. However, these provisions state that the distribution of a company's property *in specie* is subject to the same rules as those imposed for reductions of capital.

The traditional reason for the requirement for court involvement in reductions of share capital is the protection of creditors and shareholders. Creditors are entitled to assume that the capital of the company will not be impaired, and shareholders are entitled to assume that the capital they contributed to the company will not be paid out except for *bona fide* commercial purposes.

The underlying principles to be applied to amendments of the NSCA with respect to reductions of share capital should include efficiency, creditor protection and minority shareholder protection. To preserve these principles, we suggest that consideration be given to adopting provisions similar to those in the BCBCA, which endeavours to provide flexibility through permitting reductions of capital by way of both special resolution and court order.

In order to protect the interests of creditors where a reduction is by special resolution, a company should be required to meet reasonable financial tests before the reduction can occur. The interests of creditors may be further protected by placing liability for reductions made contrary to stated financial tests on the shareholders of the company. On the other hand, no amendments are required to the NSCA to ensure the protection of shareholders in reduction of capital proceedings, given the protection afforded in the Third Schedule.

Based on the foregoing, we propose that sections 57-67 of the NSCA be repealed and replaced with provisions that include the following:

(a) Reduction of Capital Provision: This provision should be based on subsection 74(1) of the BCBCA, with the financial test in subsection 74(1)(b) replaced with financial tests similar to those found in subsection 38(3) of the CBCA.

(b) Shareholder Liability: A provision similar to subsection 38(4) of the CBCA should be included in the NSCA amendments such that shareholders are liable for reductions made contrary to the NSCA. Under subsection 38(4) creditors can compel shareholders to repay or redeliver money or property paid or distributed as a reduction of capital.

There does not appear to be any reason to remove section 49 from the NSCA, although its usefulness in today's modern business climate is unknown. We suggest, however, that the provision be amended to clarify what is meant by "memorandum" and whether court approval is required.

We recommend that a provision be added to the NSCA stating that a ULC may reduce its capital simply by passing a special resolution to that effect and expressly providing that court approval of the resolution is not required.
There remains some uncertainty surrounding reductions of capital by way of redemption of shares for ULCs pursuant to subsection 51(5) and (6). We recommend that these provisions be amended by simply changing "company" to "company limited by shares".

C. THE ROLE OF THE COURT IN THE RESTORATION OF STRUCK-OFF COMPANIES (CHAPTER 5)

Subsection 136(4) of the NSCA allows the restoration of the name of a struck-off company upon application to the court for approval. No other jurisdiction in Canada requires court approval for the restoration of a struck-off corporation. Most jurisdictions allow the restoration of a corporation on application to the director or registrar under the governing legislation, upon the provision of certain documents. In general, the other Canadian jurisdictions which allow restoration of a company which has been struck off the register follow a relatively simple procedure of applying to the registrar or director, as applicable, with supporting documentation, upon receipt of which the registrar or director either may or must reinstate the registration of the company. The BCBCA follows a hybrid system and permits restoration either by application to the registrar or by application to the court, with the registrar's approval.

We recommend that the provisions of the NSCA be amended to permit the application for restoration to be made to the Registrar of Joint Stock Companies (the "Registrar"). Upon being restored by the Registrar, the company would continue as if it had never been struck off, with the proviso currently found in the NSCA protecting those who may have acquired from the Province assets which escheated to the Province upon the initial dissolution.

We have also recommended consideration of a provision in the *Corporations Registration Act* which would permit the Registrar to determine that the Certificate of Registration under that Act is deemed not to have been revoked.

This chapter also contains a recommendation that these decisions (and decisions of a similar nature by the Registrar) should be reviewed by the court upon application by any aggrieved person, similar to provisions contained in the CBCA and other statutes.

D. THE ROLE OF THE COURT IN THE ALTERATION OF THE MEMORANDUM OF ASSOCIATION (CHAPTER 6)

A Nova Scotia company may not alter its memorandum except as provided for in the NSCA (section 14). Section 19 of the NSCA lists the circumstances when a company may, by special resolution, alter its memorandum. Such alteration must be approved by a court, except where the company wishes to change to a company which has the capacity, rights, powers and privileges of a natural person.

Other Canadian jurisdictions allow alterations of a corporation's articles of incorporation either by special resolution, resolution of shareholders, or resolution of directors, depending on the nature of the amendment. Under the UKCA, a company may alter its memorandum by special resolution, and court approval is only required if minority shareholders make an application to the court for a review. Similarly, in Delaware, New York, and Florida, amendments may be made to a company's Certificate of Incorporation (the equivalent of the memorandum of association) with director and/or shareholder approval.

We have not found any discussion of the historic reasons for which the court's approval is required for alterations to a company's memorandum of association under the NSCA. None of the alterations contemplated under section 19 constitutes a fundamental change to the company such that the interests of shareholders would be endangered. Paragraph 19(1)(i) allows a company to alter the provisions of its memorandum to enable it to amalgamate with any other company or body of persons. This, although it is linked to a fundamental change, is not in itself a fundamental change. Most of the alterations in subsection 19(1) are directly related to business efficiencies of the company. The only change which does not fall into that category is under paragraph 19(1)(j), which allows a company to change to a company which has the capacity, rights, powers and privileges of a natural person; this is also the only change which currently does not require court approval. There seems to be no valid reason why alterations to the memorandum of association require court approval. Because the alterations do not result in fundamental changes to the company, and because they are related to business decisions of the company, requiring the court's approval would seem to contradict the tradition in companies law of leaving the direction of a company to the company itself, where the rights of shareholders and creditors will not be prejudiced. Allowing alterations to the memorandum of association by special resolution should be sufficient to protect the shareholders' interests.

The foregoing comments apply only to subsection 19(1) as it currently reads. If subsection 19(1) is amended to allow an alteration of the memorandum of association to change a company from limited liability to unlimited liability, this particular alteration should require approval by unanimous shareholder resolution, as discussed in Chapter 3.

RECOMMENDATION

For the above reasons, we recommend that subsection 19(4) be amended to read to the following effect:

> (4) An alteration made pursuant to clause (j) [and (k), if the NSCA is amended to allow a company to change from limited to unlimited liability by way of unanimous shareholders' resolution] of subsection (1) shall not take effect until and except insofar as it is approved by all of the members of the company, whether or not the shares held by them otherwise carry the right to vote, and where an alteration is made in this manner the company is subject to subsections (8) to (12) of Section 26.

E. FINANCING SHARE PURCHASES (CHAPTER 7)

The issue examined in Chapter 7 is whether it is appropriate under the NSCA to allow companies to assist in the financing of the purchase of their own shares without the solvency tests currently required by subsection 110(5). This discussion includes a comparison of the Nova Scotia provision with similar provisions in other Canadian jurisdictions and how those jurisdictions have either repealed or amended them, with respect specifically to the solvency tests, and whether approaches taken in other parts of Canada would be useful in Nova Scotia.

This chapter reviews provisions requiring certain disclosure following the granting of financial assistance which is a requirement in Saskatchewan, Alberta, Ontario and British Columbia. It also considers the repeal of such provisions under the CBCA. This chapter contains a recommendation that there be a definition of financial assistance and an express statement that financial assistance may be permitted. We recommend that there not be any statutory restriction on the ability of a company to provide financial assistance.

In order to make it clear that creditors may apply under the provisions of the Third Schedule in this and other areas, the chapter also includes a recommendation to specifically include creditors in the definition of "complainant" in subsection 7(5) of the Third Schedule.

F. CAPITAL OF CONTINUING COMPANIES (CHAPTER 8)

Chapter 8 examines the concerns raised by certain members of the Nova Scotia Bar about the lack of certainty in the NSCA with respect to the share capital of companies continuing into Nova Scotia. We have reviewed how legislation in other jurisdictions in Canada has addressed share capital for continued companies, and recommend that the NSCA be revised to include a provision similar to those found in the CBCA, OBCA and ABCA requiring a company to expressly state what the paid-up capital of a company continuing under Nova Scotia law shall be following continuance.

As noted above, the NSCA embodies the concept of paid-up capital as opposed to stated capital. With this in mind, we recommend that paragraph 133(4)(b) of the NSCA be revised to the following effect:

> (b) For the purposes of this subsection (4) of Section 133, "paid-up capital" shall be the aggregate amount of the consideration for the issue and allotment of shares of each class and series of shares of the company and, for greater certainty, shall include all amounts included as paid-up capital or stated capital in the jurisdiction of the company immediately prior to continuance.

G. AUTHORIZED CAPITAL LIMITS (CHAPTER 9)

Nova Scotia and Prince Edward Island are the only two jurisdictions left in Canada which prescribe that a company's constating documents must set out its maximum authorized capital. In other jurisdictions, companies are permitted to cap authorized capital, but it is not mandatory to do so. This cap on authorized capital is a carry-over from British companies' law, and originally served as a form of protection for investors by preventing dilution of shareholder interests through an increase in authorized capital absent a shareholders' resolution. Until 1983, annual fees payable pursuant to the Nova Scotia *Corporations Registration Act* were calculated on the basis of the nominal capital of a company. The annual registration fee is now a fixed amount and is no longer based on the nominal capital of a company.

We recommend that legislators in Nova Scotia follow the lead of legislators in other jurisdictions in Canada by eliminating the requirement that companies incorporated under the NSCA specify a limit on their authorized capital. The cap is not in line with other jurisdictions in Canada, an issue that frequently arises when companies continue into Nova Scotia. Further, investors can be more suitably protected by pre-emptive provisions similar to those found in the CBCA.

With this in mind, we recommend that paragraphs 10(a)(iv) to (vi) of the NSCA be revised to the following effect:

> 10 In the case of a company limited by shares,
>
> (a) the memorandum must state
>
> (iv) for each class and series of shares with or without nominal or par value, the maximum number of the shares of that class or series of shares that the company is authorized to issue, or state that there is no maximum number;

Further, we recommend the deletion of subsections 20(3) and (4) of the NSCA and the inclusion of a pre-emptive right section similar to section 28 of the CBCA. We recommend this provision be inserted as section 51A and read to the following effect:

> 51A If the articles so provide, no shares of a class shall be issued unless the shares have first been offered to the shareholders holding shares of that class, and those shareholders have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others.

> (2) Notwithstanding that the articles provide the pre-emptive right referred to in subsection (1), shareholders have no pre-emptive right in respect of shares to be issued
>
> (a) for consideration other than money;
>
> (b) as a share dividend; or
> (c) pursuant to the exercise of conversion privileges, options or rights previously granted by the company.

Consideration should be given to amending paragraph 134(3)(c) of the NSCA to read to the following effect:

> 134 (3) The amalgamation agreement shall further set out
>
> (c) for each class and series of shares with or without nominal or par value, the maximum number of shares of that class or series of shares that the company is authorized to issue, or state that there is no maximum number;

H. SPECIAL RESOLUTIONS AND SHAREHOLDERS' AND DIRECTORS' MEETINGS (CHAPTER 10)

Under the NSCA, a special resolution must be passed by no less than three-quarters of the members present at a general meeting and confirmed at a subsequent meeting by a majority of members present, or it must be in writing and signed by every shareholder who would be entitled to vote on the resolution at a meeting. In most other jurisdictions in Canada, a special resolution requires no less than two-thirds of the votes of shareholders in order to pass, and in no other Canadian jurisdiction is the confirmatory meeting required.

It is recommended that the current requirement for three-quarters of the votes of shareholders be reduced to two-thirds, if for no other reason than to reduce the number of inconsistencies between the NSCA and the majority of other Canadian statutes. We further recommend that the requirement for confirmatory meetings be removed from the NSCA, as the protection of shareholders, which is the aim of the confirmatory meetings, is already built in to the definition of special resolutions. This definition requires that notice be given to all shareholders specifying the intention to propose a resolution as a special resolution at a general meeting.

Currently, there is no provision in the NSCA allowing for meetings of shareholders or directors to be held by electronic means. Some Canadian jurisdictions allow electronic meetings; others do not go as far, but they do allow more flexibility than requiring meetings to be held in person (for example, meetings may be held via telephonic or other communication facilities). Most other jurisdictions in Canada have turned their attention to the issue of modernizing their statutes to reflect technological advances. To facilitate meetings of shareholders and directors, who are frequently not present in the same jurisdiction, it would be advisable for the NSCA to be amended to allow for meetings to take place by telephone or by electronic means which allow instantaneous communication. There should also be a provision deeming a shareholder or director who participates in a meeting by such means to have been present at the meeting.

I. DOCUMENTS TO BE AVAILABLE AT THE REGISTERED OFFICE (CHAPTER 11)

Subsections 43(1) and 90(1) of the NSCA require the register of members to be kept at the registered office of the company and to be available for inspection by members of the public. This does not cause a problem with privately held companies, since shares are transferable at the registered office. However, in the case of public companies where the transfer agent is a trust company, the transfer of shares does not normally take place at the registered office, and it has been suggested that allowing the register of members or a copy of the register to be kept elsewhere than at the registered office would facilitate such companies' business practices. The question addressed in Chapter 11 is whether a removal of the restrictions on the location of the register of members is warranted.

Most other jurisdictions in Canada allow flexibility for the location of the share register, so long as the location is controlled by the directors of the company. Most of these jurisdictions, however, restrict the location of the records to within Canada and, in most cases, within the applicable jurisdiction.

Given that there are situations where it would be more convenient and efficient to have the share register of a company held at a location other than the registered office, and given that there is no apparent need to retain the share register at the registered office, it is recommended that the Province consider relaxing the restrictions of location with respect to the register. An amendment should be made to the NSCA allowing the share register to be kept at a location in Canada other than the registered office, where such location is designated by the directors. This will allow greater flexibility for the company while retaining some control over the register. It would also be desirable to require the register and other documents, if located somewhere other than the registered office, to be accessible via computer terminal at the registered office during business hours. This will allow all records of the company to be accessible from the registered office at all times, even if not physically present therein.

J. ACCESS TO THE SHARE REGISTER (CHAPTER 12)

In Nova Scotia, access to the register of members is available to anybody, and anybody may make a copy of the register for a small charge. Refusal to allow access to the register makes the company and any director and manager of the company who knowingly authorized or permitted the refusal liable for a small penalty. If a person wishes to commence a proceeding for a remedy with respect to the refusal of access, that person must first obtain leave in writing of the Attorney General. These requirements are set out in section 43 of the NSCA.

There is no obvious reason why the requirement for the participation of the Attorney General should be retained. It would be preferable to follow the examples set by other jurisdictions, specifically British Columbia, as the procedure in that province is more straightforward, quicker, and presumably less expensive. Such an approach allows a complainant to make an application to the registrar for a compliance order and, where the registrar is unable or unwilling to provide the compliance order, to then have recourse to the court system directly. We recommend that the NSCA adopt the approach taken in the BCBCA and that subsection 43(5) be repealed and replaced with a provision allowing recourse to the Registrar where there has been a breach of the provisions allowing access to the share register, following in general the approach taken under the BCBCA. We also recommend the addition of a provision allowing an application to the court for a compliance order in a summary manner, as included in the CBCA-type statutes and the BCBCA.

We also recommend that only the Registrar, directors, shareholders and creditors of a company and their personal representatives be permitted to examine the share register, unless the company is a distributing corporation. In the case of a distributing corporation, any person should be entitled to obtain a list setting out the names of the shareholders of the company, the number of shares owned by each and the address of each shareholder or member.