

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)

... 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)

“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)

“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.

“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

“...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.

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)

“... 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

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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)

“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 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

“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... .

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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)

“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)

“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

“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

“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 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

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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)

“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)

“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, 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)

“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

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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)

“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.

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)

“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

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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)*

"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....

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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)

"[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)

"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.)

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- ▶ 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)

“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)

“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 moves toward Straight Through Processing and other

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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)

“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)
