FORMULATING A STRATEGY FOR THE REFORM OF NONPROFIT CORPORATION LAW — AN ALBERTA PERSPECTIVE

BAZ EDMEADES*

In this paper, the author argues that the current statutory scheme with regard to nonprofit corporations is a legislative "mish-mash" and would best be replaced by a single act which dealt comprehensively with the area. The bulk of the paper consists of an examination of the current Alberta situation and proposals for a complete reform.

I. INTRODUCTION

The Alberta Business Corporations Act,[1] designed to replace the Companies Act,[2] came into force on February 1st, 1982. Companies can, however, still be incorporated under Part 9 of the old Act which is headed "PROVISIONS APPLYING TO COMPANIES WITH SUBJECTS OTHER THAN THE ACQUISITION OF GAIN".[3] Part 9, the Societies Act,[4] and a number of less important pieces of legislation,[5] presently comprise Alberta's law of "nonprofit" corporations. This article will suggest the replacement of this fragmentary regime with a comprehensive Act specifically designed for nonprofit corporations.

What is a nonprofit corporation? The best way to answer this question is to look at the differences between nonprofit and business corporations. There is no better illustration of these differences than the 1919 case of *Dodge* v. *Ford Motor Company*.[6] In that case the shareholders of the (then phenomenally profitable) Ford Motor Company were receiving less than 2% of their proportionate holdings in the company by way of dividends.[7] They accordingly brought an action for an increase in these dividends, alleging that Henry Ford was operating the Ford Motor Company as "a semi-eleemosynary institution and not as a business. . . ."[8] Ford himself proved to be their best witness, having admitted to a statement that his goals in the operation of the Ford Motor Company were to "employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes".[9] "To do this", he had explained, "we are putting the greatest share of our profits back in the business".[10] The court found that Ford's testimony "creates the impression . . . that he thinks the Ford Motor Company has made too much money, has had too large profits, and that,

* Edmonton, Alberta.

1. Business Corporations Act, S.A. 1982, c. B-15.
2. Companies Act, R.S.A. 1980, c. C-20.
3. *Id.*
4. Societies Act, R.S.A. 1980, c. S-18.
5. The Women's Institute Act, R.S.A. 1980, c. W-13; the Cemetery Companies Act, R.S.A. 1980, c. C-23; the Agricultural Societies Act, R.S.A. 1980, c. A-12; and the Religious Societies Land Act, R.S.A. 1980, c. R-14.
6. (1919) 170 N.W. 668 (S.C. Mich.).
7. In fairness to Ford, it should be noted that the shareholders were receiving dividends amounting to not less than 60% per annum on their original investment in the corporation (*Id.* at 672).
8. *Id.* at 683.
9. *Id.* at 671.
10. *Id.* at 671.

although large profits might still be earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken."[11] Despite (or perhaps because) it concluded that "certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company . . .,"[12] the court held for the shareholders, ordering Ford to increase dividend payments. Ford had chosen the wrong vehicle (so to speak) for his altruism:[13]

> [a] business corporation is organized and carried on primarily for the profit of the shareholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders. . . .

Non-distribution of profits is of the very essence of the nonprofit corporation.[14] Although the law does not generally limit the amount of any profits which nonprofit corporations may make, it insists that the distribution of such profits to members of the corporation be prohibited in the corporation's constituent documents.[15] This ordinarily means that the corporation must plow any profit back into the achievement of its corporate goals. If its existence should come to an end, moreover, its assets should then go to another entity with similar objects in a manner analogous to the *cy-pres* doctrine of charitable trust law.

There is, however, another kind of "nonprofit" body typified by the social club, in which it may be quite proper for the members to divide the assets among themselves on dissolution of the association.[16] Contemporary Alberta legislation does not, however, attempt to distinguish this kind of body from the "pure" or "total" nonprofit which does not distribute a profit at any time.[17] This article suggests that such a distinction be introduced. I apply the term "nonprofit" only to associations which are not permitted to distribute a profit to their members *at any time*, and refer to associations whose members are entitled to share in their assets upon dissolution as "mutual benefit" associations. It is suggested that the Alberta Companies Act, the Societies Act and their lesser

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11. *Id.* at 683.
12. *Id.* at 684.
13. *Id.*
14. *See* generally Henry B. Hansmann, "The Role of Nonprofit Enterprise" (1980) 89 *Yale Law Rev.* 834; and "Reforming Nonprofit Corporation Law" (1981) 129 *Univ. of Pennsylvania L. Rev.* 479. Hansmann — thoroughly imbued with the reigning *Zeitgeist* of American academic law — tends to place historical and ethical realities on the procrustean bed of economics, but his analysis of nonprofit organizations is stimulating and excellent. My own study of nonprofits led me to a conclusion identical to his: that legislative provision should be made for a single type of nonprofit corporation. Although I like to think I took a somewhat independent route to this conclusion I should mention (a) that Hansmann got there first, and (b) that he had cleared the way sufficiently to put me in debt to him for any value that my recommendations might have.

    The only Canadian publication which attempts any kind of in-depth analysis of nonprofit corporations is P. Cumming, "Corporate Law Reform and Canadian Not-for-Profit Corporations" (1974) 1 *The Philanthropist* 10.
15. *See* text *infra* at nn. 53 to 64.
16. *Infra* at nn. 53 to 64, and 155 to 174.
17. *See* text *infra* at n. 54.

concomitants be repealed, and replaced with a single act dealing only with nonprofit corporations as defined here. I argue that mutual benefit associations should be incorporated either under the Co-operative Associations Act[18] or the Business Corporations Act.[19]

II. HISTORY OF THE CONCEPT OF THE NONPROFIT CORPORATION

Although all early English corporations were "nonprofit", the term itself was unknown.[20] Early legal theory knew only of "corporations" — entities endowed with a legal personality separate and distinct from any natural persons associated with them. Because corporations were *personae* in their own right, they could bring and defend law suits, and acquire, hold and dispose of property. In the early Middle Ages when the English Crown was still consolidating its position against powerful rivals such as the nobility and the church, it was not felt that important rights such as these ought to be freely available to each and every group which might arise within the Kingdom.[21] It gradually became accepted, therefore, that incorporation could only be obtained by way of a grant from the Sovereign. Those few corporations (such as Oxford University) which had come into being before this rule had crystallized, were permitted to retain their corporate status. Even here, however, deference to the Sovereign's newly established control over incorporation sometimes led to fictitious talk of lost or forgotten charters. Until well into the 19th century, it was a firmly established rule that no organization could obtain incorporation as a matter of right.[22]

The Mortmain laws,[23] also a product of the consolidation of Royal power in the early Middle Ages, made doubly sure that corporations would not become focal points of private power and wealth, by enacting a general prohibition against the acquisition and holding of land (the most important form of wealth) by *all* corporate bodies. Over the cen-

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18. S.A. 1982, c. C-24.

19. S.A. 1982, c. B-15.

20. The term "non-profit" arose in the present century, probably as a shortened reference to the "Company not having Gain for its Objects," singled out by the legislature for the first time in 1856. (*See* n. 36 *infra*). In 1969 the authors of the New York Not-for-Profit Corporation Law (McKinney 1970) decided upon "Not-For-Profit" since they thought it would better denote a corporation which was permitted to *make* a profit, but not distribute it. The New York name has not come into general use, however. "Nonprofit" is probably the most widely used term at present.

21. *See* Adolph A. Berle, Jr., "Historical Inheritance of American Corporations" in Cary and Eisenberg, *Cases and Materials on Corporations* (5th ed., 1980) 1 to 5. The following works were of general assistance in writing this section: R.R. Formoy, *The Historical Foundations of Modern Company Law* (1923); B.C. Hunt, *The Development of the Business Corporation in England 1800-1867* (1936); C.T. Carr, *The General Principles of the Law of Corporations* (1905); L.C.B. Gower, *Modern Company Law* (4th ed. 1979) 22 to 53. S.J. Stoljar, *Groups and Entities — An Inquiry into Corporate Theory* (1973) was particularly useful.

22. *Sutton's Hospital Case* [1558-1774] All E.R. 11 (Ex. Ch.) *see* also Blackstone, *Commentaries on the Laws of England, Vol. 1* (1978 Garland Publishing reprint of 1783 ed.) 467 "But, with us in England, the King's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given."

23. *See* text *infra* at nn. 69 to 86.

turies, the *raisons d'etre* of the Mortmain laws lost the urgency which they had had in medieval times, and the Mortmain prohibitions themselves began to be eroded by exceptions and exemptions.

During the late sixteenth and seventeenth centuries, the profit-making or "business" corporation began to make its appearance. At first, the typical business corporation was essentially a "guild" or "trade association" of merchants given permission to engage in a particular trade by Royal charter. Later some members of these "associations" began to pool their resources. At first, such pooled resources or "joint stock" would only be maintained for limited purposes or periods such as, for instance, one voyage on a particular ship. By the nineteenth century, however, it had become a permanent feature of almost all profit-making corporations which were then known, as "Joint Stock Companies." The "club-like" exclusivity which had characterized many of the chartered companies of the late sixteenth and early seventeenth centuries disappeared when ownership in this newly developed joint stock was spread among a large number of otherwise unconnected investors through the medium of freely transferable shares. Although it would be simplistic to blame the irresponsible speculation which led to the crash in the value of the shares in the South Sea Company and some of its contemporaries in 1720 solely on the introduction of these freely transferable shares, the two phenomena were not unconnected. The legislature reacted to the panic of 1720 (and its attendant scandal)[24] by passing the so-called "Bubble Act".[25] Among other confused and emotional provisions,[26] this legislation contained a prohibition on freely transferable shares,[27] and a restatement of the old rule against the assumption of the corporate form without Royal sanction.[28]

The new wave of hostility against the corporation provoked by the 1720 crash, proved to be no more than a temporary reversal of a long term trend in its favor. Developing notions of anti-combines law had long since begun to replace the Mortmain prohibition on corporate land ownership as society's answer to the usurpation of excessive power by private groups.[29] Business associations with many of the advantages of incorporated bodies were being fashioned as "deed of settlement companies" with the aid of trust law.[30] The industrial revolution was at hand. In 1844 the cumulative effect of these changes led to an abrupt reversal of the prevailing legal attitude: suddenly incorporation was no longer regarded as an evil. It was felt, in fact, that inducing business associa-

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24. Investigations prompted by the crash "disclosed fraud and corruption (in which members of the Government and the Royal household were implicated) . . .", Gower, *supra* n. 21 at 30.

25. 1719 (U.K.), 6 Geo. 1, c. 18.

26. "A panic-stricken Parliament issued a law, which, even now when we read it, seems to scream at us from the statute book." (Maitland, *Selected Essays* (1936) at 208.).

27. *Supra* n. 25, s. 18.

28. *Id. See* also Maitland *supra* n. 26 at 209.

29. *See* Lord Wilberforce *et al.*, *Restrictive Trade Practices and Monopolies* (2d. ed. 1966) para. 135 to 149 and "The Great Case of Monopolies", *East India Company* v. *Sandys* (1685) 10 St. Tr. 371.

30. Gower, *supra* n. 21 at 33 to 35.

tions to incorporate was a *sine qua non* to the enforcement of minimum standards for their conduct. Not only was incorporation as of right therefore introduced in the famous 1844 Joint Stock Companies Act,[31] but certain bodies were actually compelled to incorporate.[32] The 1844 Act also gave the companies incorporating under it, a general exemption from the Mortmain laws.[33] This was a far more urgent matter than the later introduction of limited liability which seems so important to modern observers[34] — companies would not, after all, have had much practical viability without the right to own land! Free incorporation and exemption from Mortmain were, however, restricted to profit-making corporations.[35] The reason for this may have been that it was primarily the *donation* of land to charitable and ecclesiastical corporations which was felt to be impoverishing society. The legislature was probably moved by the fact that very few people would be likely to donate land to a profit-making or "business" corporation. In 1856 the distinction between corporations which carried on "Trade or Business having Gain for its Object" and those which did not, was spelled out more clearly.[36] From the start, the latter kind, which we now call the "nonprofit" corporation, was treated like a poor relation. It was later relegated to its own small part of the various "Companies Acts" then springing up throughout the British Commonwealth, or permitted to exist as a "friendly society".[37] In Alberta — a fairly typical Commonwealth jurisdiction in this respect — the incorporation of nonprofits, as either companies or societies, is still only granted for a limited list of purposes deemed suitable for that kind of body.[38] (Unincorporated nonprofits are, by contrast, permitted to undertake any lawful activity.). Even where incorporation is sought for a "suitable" (i.e. approved) purpose, its grant has remained a privilege rather than becoming a matter of right.[39]

In the 1950's a movement arose in the United States to end this state of affairs by the development of legislation which would be specifically tailored to the needs of nonprofits, and permit their incorporation as of

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31. 1844 (U.K.), 7 & 8 Vict., c. 110; This Act was accompanied by 7 & 8 Vict., c. 111 which provided for the winding-up of Joint Stock Companies.

32. The Act applied to all business associations formed at 1 November 1844 which had more than 25 "partners", or a capital divided into freely transferable shares. *Id.* s. 2.

33. *Id.* ss. 25(5), *see* also s. 23.

34. *See infra* n. 81.

35. *Supra* n. 31 s. 2: "And be it enacted, That this Act shall apply to every Joint Stock Company, as herein-after defined, established . . . for any commercial Purpose, or for any Purpose of Profit. . . ."

36. Joint Stock Companies Act, 1856 (U.K.), 19 & 20 Vict., c. 47.

37. The legislation providing for the incorporation of friendly societies antedated the nineteenth century reforms of company law. (*See* An Act for the Encouragement and Relief of Friendly Societies, 1792 (U.K.), 33 Geo. III, c. 54. The friendly society — essentially a working man's mutual aid group — developed via the Societies Act (*supra* n. 4) into Alberta's most popular form of nonprofit incorporation. *See* R. Cowdery, "Societies and Not-For-Profit Corporations in England" and "Legislative History of the Various Not-For-Profit Corporation Statutes in Alberta" 7 to 10. (Unpublished research papers on file with the Institute of Law Research and Reform at the University of Alberta.).

38. *See* text *infra* at n. 65 *et seq.*

39. The Alberta Societies Act, *supra* n. 4, provides, for instance, in s. 7, that "[t]he Registrar may refuse incorporation for any reason that appears to him to be sufficient."

right for any lawful purpose. The movement led to the reorganization of New York's General Corporation Law[40] into a Business Corporation statute[41] and a Not-For-Profit Corporation Law.[42] This kind of rationalization has since been undertaken in a number of American jurisdictions, the most recent being California[43] and Alaska.[44]

In Canada, the federal Department of Corporate and Consumer Affairs has attempted to produce a nonprofit act, but the bill[45] embodying the draft legislation has been becalmed for some time. By the admission of its own architects the federal bill closely follows the Canada Business Corporations Act.[46] The latter is, however, a typical business corporations act which in fact owes a great deal to the New York Business Corporations Act. Although it makes sense to base business corporation legislation upon acts such as the Canada Business Corporations Act, it seems to make no sense at all to base a nonprofit act on the business branch of corporate law. As one might expect in these circumstances, therefore, the structure, terminology and philosophy of the federal Canadian nonprofit bill is strongly redolent of business corporation law.[47]

Moves are now afoot to reform Alberta's nonprofit corporation law and one hopes that our Legislature will not repeat Saskatchewan's mistake in adopting the business-oriented federal bill as a model for reform. Eschewing the federal bill/Saskatchewan Act[48] model for reform will present Alberta with the challenging task of drafting the first "true" nonprofit legislation in the common law world outside the United States.

III. EVALUATION OF THE PRESENT REQUIREMENTS FOR NONPROFIT STATUS AND PROPOSALS FOR THEIR REFORM

There are two requirements for nonprofit status in contemporary Alberta legislation. First, a nonprofit corporation must not permit itself to distribute any profit which it may make to its members. Section 200(1) of the Companies Act[49] provides, for instance, that incorporators under Part 9 of that Act must satisfy the Registrar of Companies that ". . . it is

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40. *See* R.S. Lesher, "Revision of the New York Corporation Statutes" (1958-1959) 14 *Business Lawyer* 807.
41. Business Corporation Law (McKinney 1963).
42. An act in relation to not-for-profit corporations, ch. 1066, [1969] N.Y. Laws 2683, as amended N.Y.. Not-For-Profit Corporation Law (McKinney 1970). *See* R.S. Lesher, "The Non-Profit Corporation — A Neglected Stepchild Comes of Age" (1966-1967) 22 *Business Lawyer* 951.
43. Nonprofit Corporation Law, Wests Ann. Cal. Corp. Code, 1982.
44. Alaska Nonprofit Corporations bill, (Senate bill 313).
45. Bill C-10, (32nd Parliament, 1st session).
46. Canada Business Corporations Act, S.C. 1974-76, c. 33.
". . . this report recognizes as a fundamental premise when considering proposals for reform of the not-for-profit corporations law the necessity of having a simple, unified and consistent corporation law so far as possible for all corporations incorporated federally." (*Proposals for a New Not-For-Profit Corporations Law for Canada*, Vol. 1, 1974, p. ii).
47. The Bill must be read in order to appreciate how closely its framers have adhered to the Canada Business Corporations Act, *supra* n. 46.
48. The Non-profit Corporations Act, R.S.S. 1978, c. N-4.1.
49. R.S.A. 1980, c. C-20.

the intention of the association to apply the income of the association in promoting its objects and to prohibit the payment of any dividend to members of the association. . . ."[50] This constraint upon the distribution of profit to members is sometimes referred to as the "economic" requirement for nonprofit status. The second requirement is that a nonprofit corporation must restrict its objects to a list of purposes approved for that kind of corporation. Thus, the Companies Act (to use the same example again) only permits incorporation under Part 9 "for the purpose of promoting art, science, religion, charity or any other useful object."[51] This is the so-called "functional" requirement.[52]

Generally the new nonprofit corporation statutes found in jurisdictions which have reformed this branch of their law have tended to develop and refine the economic requirement, while abandoning the functional one completely. I shall discuss each requirement separately.

A. THE ECONOMIC REQUIREMENT

Neither Part 9 of the Companies Act nor the Societies Act prohibits a corporation from making a profit. It is, rather, in both acts, the distribution to members of any profits the corporation may make that is prohibited. We shall refer to this prohibition simply as "the distribution constraint".[53]

The extent of this distribution constraint in contemporary Alberta legislation is far from clear. A society is, for instance, only forbidden to "declare any dividend or distribute its property among its members during the existence of the society".[54] Its members are, in other words, free to divide the profits or other remaining assets among themselves on dissolution of the society. This is not necessarily a bad thing — few of us would object to the idea of the members of, for example, a yacht club, dividing up its assets among themselves on dissolution of the club. Most of us would, however, be shocked if the members of the United Way or the CNIB were to make this kind of distribution. It is, therefore, not surprising that modern nonprofit corporation statutes differentiate between at least two classes of corporation: one (like the yacht club) which is only obliged to impose a "current" distribution constraint, (i.e., a constraint which only operates while the society is in existence) and another which imposes both a "current" and a "terminal" constraint (i.e. a "complete" distribution constraint which prohibits any profit from being distributed at any time). The Saskatchewan Act refers to corporations

50. *Id.* s. 200(1).

51. *Id.*

52. *See* D.W. Fessler, "Codification and the Nonprofit Corporation: The Philisophical Choices, Pragmatic Problems, and Drafting Difficulties Encountered in the Formulation of a New Alaska Code" (1982) 33 *Mercer Law Review* 543 at 544 to 546.

53. I am partly indebted to Hansmann for this term. *See* "Reforming Nonprofit Corporation Law", *supra* n. 14 at 501. Hansmann uses the phrase "nondistribution constraint". I prefer "distribution constraint" to Hansmann's double negative. I am also indebted to Hansmann for the terms "current" and "terminal" distribution constraint which will be introduced presently.

54. Societies Act, R.S.A. 1980, c. S-18, ss. 4(1).

with a complete distribution constraint as "charitable non-profit"[55] corporations. It terms corporations which only declare a current constraint, "membership non-profit" corporations.[56] California and Alaska term the former kind "public benefit nonprofit corporations"[57] and the latter, "mutual benefit nonprofit corporations".[58]

Problems may arise, however, when distinctions are drawn between one class of nonprofit corporations which are "charitable" or created for the purpose of "public benefit", and another class of nonprofit corporations created for the purpose of "mutual benefit". Despite the suggestion implicit in their terminology, neither the Saskatchewan nor the American Acts require that a type A corporation actually be "charitable" in the technical sense of that word or that it be incorporated or conducted for the benefit of the public. The fact that they do not make this kind of requirement is, an essential and positive feature of the newer nonprofit legislation. Assume, for instance, that a cloistered order of nuns is denied charitable status because it cannot be proved that their intercessory prayers provide a benefit to the public.[59] Surely there is no reason why such an order should not, despite this holding, still be perfectly free to choose registration as a type A corporation (i.e. one with a complete distribution constraint). The same reasoning applies to an organization like the British Rowntree Social Services Trust which specifically eschewed charitable status in order to devote itself to political aims such as the decolonization of Mozambique.[60] If none of the three acts discussed above would prohibit the registration of either of these two associations as type A corporations, why refer to that category as "charitable" or "public benefit"? If we are not going to require that type A corporations actually be charitable or that they be formed or conducted for the benefit of the public, what is the point of using terminology which suggests the contrary? The real distinction between type A and type B corporations lies, after all, in the fact that type A is required to have a complete distribution constraint whereas type B is not. Type A corporations could, therefore, more accurately be described simply as "nonprofit corporations". The word nonprofit should not be applied to type B corporations at all. This type will accordingly be referred to below simply as "mutual benefit corporations". In the examination of the "ecological niche" of

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55. *Supra* n. 48, s. 29(1).

56. *Id.* s. 2(1)(w).

57. *Supra* n. 43 para. 5110; *supra* n. 44 s. 10-21-105(5)(B).

58. *Supra* n. 43 para. 7110; *supra* n. 44 s. 10-21-105(5)(A). The California Act makes provision for a third type of corporation, viz. the Nonprofit Religious Corporation (para. 9110 *et seq.*).

59. "My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in His wisdom think fit to answer them? But, my Lords, whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof." (*Gilmour* v. *Coats* [1949] 1 All E.R. 848 (H.L.) at 854 per Lord Simonds).

60. *See* B. Whitaker, *The Foundations: An Anatomy of Philanthropic Bodies* (1974) 164.

mutual benefit corporations which follows this part,[61] I will argue that there is no need for a mutual benefit category in any new nonprofit legislation. Such legislation should provide only for the registration of type A corporations. "Mutual benefit" remains, however, a useful term which will be used throughout the rest of this article to denote corporations (or associations) which impose a current but no terminal distribution constraint.

Two general points about the distribution constraint remain to be made. First, at the risk of sounding trite, I should like to affirm that the distribution constraint does not apply to legitimate disbursements by the corporation. Nonprofit corporations can and often do receive donations, but they are not compelled to restrict themselves to the use of the resources that are available to them free of charge. They are free to pay for their requirements where necessary. The payment of a salary, for instance, (even to a person who exercises control over the corporation) need not violate the distribution constraint. Less obvious perhaps, but equally clear, is the right of every nonprofit corporation to pay for the capital it may require. A nonprofit corporation's "payment" for the use of capital must, however, take the form of a fixed and commercially necessary rate of interest. By definition, nonprofit corporations may not obtain capital in exchange for the promise of a share of their future profits. Nonprofits are, in other words, restricted to debt financing and cannot be permitted to stray into the province of equity financing by undertaking, for instance, to pay a variable rate of interest on loans, dependent upon the level of their earnings.[62,63]

The second of my two general observations on the distribution constraint is that it is not only a constraint upon the distribution of profit: business corporations are forbidden, in order to protect their creditors, from distributing assets to members unless they have made a profit.[64] Nonprofit corporations uphold a similar ban on distribution of assets to members, but that ban is not lifted in cases where the corporation has made a profit. We focus on this difference when we speak of the distribution constraint as a constraint upon the distribution of "profits", but the use of the word "profit" in this context should not obscure the fact that the distribution constraint applies to all the assets of a nonprofit corporation.

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61. *See* text *infra* at n. 155 to 174.

62. *See* Appendix, Memorandum of Association heading 5.

63. In my view, the only hybrid between debt and equity financing which *may* deserve a place in any new nonprofit legislation is the subvention. This device, which had its genesis in New York, is designed to permit payment of a quasi-charitable nature in order to allow a nonprofit organized, say, by members of a disadvantaged group, to start up a business. (Not-For-Profit Corporation Law, (McKinney 1970) para. 504). The payment may be considered to be a gift repayable only if the group makes a profit. The amount of such repayment could then vary in accordance with agreement between the parties, provided it does not exceed the amount of the capital sum together with a rate of interest not exceeding the current market rate. (The New York Act fixes a ceiling of ⅔ of maximum authorized rate.).

64. *See* for instance s. 40 of the Alberta Business Corporations Act *supra* n. 1.

B. THE FUNCTIONAL REQUIREMENT

Under the existing Alberta legislation the declaration of a distribution constraint (whether partial or complete) is not the only requirement for nonprofit status. A nonprofit must also be incorporated for one or more of a number of statutorily approved purposes.[65] The Societies Act allows a society to be formed, for instance, for "any benevolent, philanthropic, charitable, provident, scientific, literary, social, educational, agricultural, sporting or other useful purpose, but not for the purpose of carrying on a trade or business".[66] Incorporation under Part 9 of the Companies Act is only available "for the purpose of promoting art, science, religion, charity or any other useful object",[67] or "solely for the purpose of promoting recreation among its members. . . ."[68]

1. The Origin of the Idea of Permissible Objects for Nonprofit Corporations.

In order to understand why the older or "unreformed" nonprofit legislation (like that of Alberta) only offers incorporation for a limited number of activities or purposes one has to know something about the rise and fall of the Mortmain laws.[69] While aimed primarily against religious bodies, Mortmain law, beginning with the Magna Charta[70] itself, enacted a general prohibition against the acquisition and holding of land by all corporations. Non-religious corporations were included because, in the words of the Statute of 15 Richard 2, c. 5, they "be as perpetual as people of religion."[71] The reasons for these laws were a fear that land (the most important form of wealth) would be withdrawn from circulation by donation to ecclesiastical corporations, a desire to protect the heirs of the would-be donors, and the need to maintain the flow of feudal dues by keeping land in the hands of mortal, non-perpetual tenure holders.[72] The general rule against the alienation of land to corporations, firmly established throughout the Middle Ages was augmented in 1736 by 9 Geo. 2, c. 36 ("The Georgian Statute"). This Act forbad the gratuitous transfer of land and personal property which was intended or might be used to purchase land, to charity (whether or not the charitable donee was incorporated), unless the transfer was completed at least a year before the death of the transferor.[73] The statute also contained an exemption which had become a familiar feature of the earlier Mortmain legisla-

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65. W.H. Wood, "What Are Improper Corporate Purposes For Nonprofit Corporations?" (1939-1940) 44 *Dickinson L. Rev.* 264. Note, "Permissible Purposes for Nonprofit Corporations" (1951) 51 *Columbia L. Rev.* 889.

66. The Societies Act, *supra* n. 4 s. 3(1).

67. *Supra* n. 2, s. 200(1).

68. *Id.* s. 202(1).

69. I am heavily indebted to an excellent article by A.H. Oosterhoff, "The Law of Mortmain: An Historical and Comparative Review" (1977) 27 *U. of Toronto L.J.* 257 for the discussion which follows.

70. 1297 (U.K.), 25 Edw. 1.

71. Section 7.

72. Oosterhoff *supra* n. 69 at 264 to 271.

73. Preamble of 1736 (U.K.), 9 Geo. 2, c. 36.

tion: it was not to apply to either of the two Universities in England, their colleges, or the colleges of Eton, Winchester or Westminster.[74] By the time the Georgian Statute was passed, however, the Mortmain laws were already obsolescent.[75] The power of the church no longer constituted a threat to the Sovereign. Feudal dues, which the Mortmain laws had sought to maintain, were no longer the main source of revenue. Though Mortmain has been moribund for a considerable period, it was only given the *coup de grace* in England in 1960.[76] In Ontario (where corporate ownership of real property is no more a rare phenomenon than anywhere else) it lingered on until 1982.[77]

Incorporation, conferred as a matter of privilege by the Sovereign, was invariably accompanied by a licence in Mortmain, i.e. an exemption from the rule against corporate land acquisition.[78] The grant of corporate status could hardly have been a meaningful concession if this were not so. Discretionary incorporation by the Sovereign was, therefore, essentially "a licencing system designed to authorize certain very active groups to hold land in perpetuity".[79] The Joint Stock Companies Act of 1844 replaced that discretionary licencing system with a regime which allowed all business associations to incorporate as of right — indeed the Act compelled some of them to do so.[80] It was simply not feasible to introduce these changes without providing such associations with an across-the-board exemption from the Mortmain restrictions. Exemption from Mortmain would after all have been far more important to the viability of business corporations than limited liability, a concession only made some 12 years after the introduction of incorporation as of right.[81] All joint stock companies were accordingly empowered by section 25 para. 5 of the 1844 act:

> [t]o purchase and hold Lands, Tenements, and Hereditaments in the Name of the said Company, or of the Trustees or Trustee thereof, for the Purpose of occupying the same as a Place or Places of Business of the said Company, and also (but nevertheless with a Licence, general or special, for that Purpose, to be granted by the Committee of the Privy Council for trade, first had and obtained), such other Lands, Tenements, and Hereditaments as the Nature of the Business of the Company may require; . . . .

There were powerful arguments for exempting profit-making corporations from the Mortmain rules: precisely because they were not charitable, no one would be improperly persuaded to give property to them on his or her deathbed to atone for a life of sybaritic roistering. Why, indeed, would anybody *give* something to a profit-making body in any circumstances? Since trading corporations would normally provide a *quid pro quo* for land which they acquired, they were impoverishing

74. *Id.* s. 4.

75. Oosterhoff *supra* n. 69 at 274 to 291.

76. The Charities Act, 1960 (U.K.), 8 & 9 Eliz. II, c. 58, ss. 38(1), 48(2), and sched. VII, Part II.

77. Mortmain and Charitable Uses Repeal Act, S.O. 1982, c. 12, ss. 1(1).

78. Stoljar, *Groups and Entities*, *supra* n. 21 at 125 *et seq.*.

79. *Id.* at 127.

80. 1844 (U.K.), 7 & 8 Vict., c. 110, s. 2. *See* n. 35 *supra*.

81. Limited liability was provided for certain companies in 1855 (U.K.), 8 & 9 Vict., c. 133. This Act was repealed and incorporated into the Joint Stock Companies Act, 1856 (U.K.), 19 & 20 Vict., c. 47.

neither the transferor, his heir, nor society itself. These considerations would not apply to corporations not organized for the purpose of gain. On the contrary some of the *raisons d'etre* for the Mortmain laws still applied to charitable and ecclesiastical corporations.[82] Originally, therefore, the legislature did not extend the trading or "business" corporations' exemption from Mortmain to nonprofits. Twelve years later, however, some of them were permitted to hold up to two acres of land, and apply to the Board of Trade for permission to increase that amount.[83] Section 21 of the first act to bear the title Companies Act, passed in 1862,[84] made provision for this exemption in the following terms:

> [n]o Company formed for the Purpose of promoting Art, Science, Religion, Charity, or any other like object, not involving the Acquisition of Gain by the Company or by the individual Members thereof, shall without the Sanction of the Board of Trade, hold more than Two Acres of Land; but the Board of Trade may, by Licence under the Hand of One of their Principal Secretaries or Assistant Secretaries, empower any such Company to hold Lands in such Quantity and subject to such Conditions as they think fit.

This section is clearly the original source of the Alberta Companies Act's 'provisions applying to companies with objects other than the acquisition of gain', commencing with section 299(1). That section repeats the identical list of permissible objects which was written into the 1862 Act, viz. "art, science, religion, charity", except that the "any other like object" of the 1862 Act is changed to "any other useful object."

What do we achieve today by confining the right to incorporate a nonprofit to this list of activities? Surely nothing but the denial of nonprofit incorporation for activities not exempted from the Mortmain laws. In effect, therefore, section 200(1) of the Alberta Companies Act gives a kind of vestigial effect to the Mortmain laws — a bizarre anomaly for a province which never adopted them in the first place.[85] Although it may seem

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82. Oosterhoff, *supra* n. 69 at 279 to 288 points out the irrational nature of the later arguments in favor of what might be called "Mortmain-type" prohibitions. Rational or not, the perceived need for those prohibitions was still very much a factor to be reckoned with in the mid-nineteenth century.

83. 1856 (U.K.), 19 & 20 Vict., c. 47, s. 38: "No Company that is not for the Time being carrying on a Trade or Business having Gain for its Object shall be entitled, without the Sanction of the Board of Trade, to hold more than Two Acres of Land, but the Board of Trade may empower any such Company to hold Lands in such Quantity and subject to such Conditions as they think fit."

84. Companies Act, 1862 (U.K.), 25 & 26 Vict., c. 89.

85. *See* B. Conlin, "The Applicability of the Statutes of Mortmain in Alberta" unpublished research report on file with the Institute of Law Research and Reform at the University of Alberta. *See* also J.E. Cote, "The Introduction of English Law Into Alberta" (1964) 3 *Alta. L. Rev.* 262, esp. at 284.

Attempts to exempt corporations in Alberta from a supposed disability to hold land may therefore be mere surplusage. The Religious Societies' Land Act, R.S.A. 1980, c. R-14, section 14(1), provides, for example that

an incorporated congregation may acquire real and personal property, ...

(b) by devise or bequest if the devise or bequest is made at least 6 months before the death of the testator, ..."

Section 4 of the Act is more peremptory, providing simply that "[n]o religious society or congregation is capable of holding under this Act more than 320 acres of land." The forerunner of the Societies Act, the Benevolent Societies Act, R.S.A. 1922, c. 159, contained a number of provisions regulating the right of benevolent societies to hold real property: see ss. 9, 10 and 11.

trite to say so, there really is no need at all for any kind of Mortmain prohibition in the closing years of the Twentieth Century.[86] Contemporary North American society seeks to deal with the problems which gave rise to the Mortmain laws (viz. the usurpation of excessive power by corporations) through anticombines and antitrust laws. Nonprofits are not exempt from these laws — indeed trade associations, typically incorporated as nonprofits, are frequently involved at centre stage in litigation and prosecutions arising from alleged conspiracies or agreements to limit competition.[87] A tendency to subject nonprofits in full measure to antitrust laws in the United States seems to have emerged clearly in the widely discussed recent decision of the U.S. Supreme Court in *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corporation.*[88]

2. The Functional Value of the Permissible Objects.

Quite apart from the fact that the permissible objects may be an historical anomaly, do they not perhaps serve some useful purpose? It has been argued, that confining nonprofit corporations to "traditional" roles would asist in keeping them out of gain-oriented activities and protect the volunteer ethic.[89] The pursuit of the traditional "permissible" objects can, however, be extremely lucrative. The *Scripture Press* case[90] may serve to illustrate this contention. There, a deeply religious electrician became dissatisfied with the poor quality of the teaching materials then available to Sunday school teachers. He started producing and selling his own materials, which proved so popular that he became extremely wealthy. The revenue authorities contended that the income of the Scripture Press Foundation through which his "business" was being conducted, had expanded to the point where it was no longer "related" to the tax exempt purposes to which the Foundation was allegedly devoted. Section 101(6) of the Internal Revenue Code of 1939,[91] exempted bodies "operating exclusively for religious, charitable, scientific, literary or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . ." The court found for the IRS, contrasting Scripture Press with the exempt Forest Press Inc.,[92] a nonprofit organized to prepare and publish the Dewey

86. Oosterhoff *supra* n. 69 at 328.

87. *See* R.J. Roberts, *Anticombines and Antitrust* (1980) 387.

88. (1982) 102 S.Ct. 1935, 456 U.S. 556 "ASME contends it should not bear the risk of loss for antitrust violations because it is a nonprofit organization, not a business seeking profit. But it is beyond debate that nonprofit organizations can be held liable under the antitrust law." (456 U.S. at 576). Cf, however, *Marjorie Webster Junior College* v. *Middle States Association of Colleges*; *infra* n. 153.

89. H.L. Oleck, "Proprietary Mentality and the New Non-Profit Corporation Laws" (1971) 20 *Clev. St. L. Rev.* 145. *See* also Oleck, "Nature of Nonprofit Organizations in 1979" (1979) 10 *Toledo L. Rev.* 962 at 972 to 976.

90. *Scripture Press Foundation* v. *United States* (1961) 285 F. 2nd 800 (Ct. of Claims).

91. 53 Stat. 33, U.S.C. paragraph 101(6) (1952 ed.), as am. by paragraph 301(c)(1), Revenue Act of 1950, 64 Stat. 906, 953 and by paragraph 314(b)(1), Revenue Act of (1955), 65 Stat. 452,492.

92. *Forest Press, Inc.* v. *Commissioner* 1954 22 T.C. 265, cited in *Scripture Press, supra* n. 90 at 803.

Decimal Classification System for libraries, whose products "were priced to recover manufacturing cost plus enough to sustain the small staff of seven to ten persons working for the corporation."[93] Although the court made it clear that "very large" profits would not *per se* be a sufficient reason to justify a conclusion that a corporation was non-exempt, it based its decision on the fact that the Scripture Press Foundation's income no longer bore any relation to its stated religious aims.

There is, of course, no requirement in the nonprofit law of Alberta that profits be related to one or more of the permissible objects listed in the Societies or the Companies Acts. Could we not put a workable ceiling on the profits of nonprofit corporations by requiring, on the model of corporate tax legislation,[94] that profits be so related? Section 10.21.75 of the recent Alaska Nonprofit Corporations bill[95] provides the first, and, as far as I could determine, only example of an attempt to do so. The section reads as follows:

> (a) Notwithstanding another provision of this chapter or of law, a domestic corporation may not accumulate current assets in excess of its current liabilities and anticipated expenses including a reasonable reserve for planning.
>
> (b) In this section, "current assets" means cash, accounts receivables, inventory, and investment in assets or obligations unrelated to the purpose of the corporation stated in the articles.
>
> (c) Current assets are presumed to be in excess of the amount permitted under (a) of this section if they exceed fifty percent of the larger of either the corporate gross income from the preceding year or the average corporate gross income for the five immediately preceding years.

Interesting and innovative as the provision is, it does not really come to grips with the problem of gain-oriented nonprofits. Its framers no doubt hoped that, where the marginal utility of money in relation to the corporation's objectives had declined to zero, its controllers would be obliged to stop making profits since they would no longer be allowed to accumulate them.[96] The trouble with this reasoning is that few of us like to admit that our projects have reached the stage where extra money would not bring further improvement. It is all too human to build, say, a still larger edifice to house our particular operation no matter how grandiose, ostentatious, or unnecessary others may consider it to be. (One of the Scripture Press Foundation's *permissible* tax deductions was the erection of a building costing one million dollars in 1956.)[97]

The trite saying that "money isn't everything" is particularly apposite to the nonprofit milieu where people often seek to achieve cultural or spiritual goals. It is important, moreover, to realize that money might not become merely useless in relation to this kind of objective, but actually counter-productive. Alcoholics Anonymous, an unincorporated nonprofit, has formulated a "corporate poverty" policy to meet this con-

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93. *Scripture Press, supra* n. 90 at 803.

94. *See* text *infra* at notes 175 to 189.

95. *Supra* n. 44.

96. *See* D.W. Fessler, "Codification and the Nonprofit Corporation: The Philosophical Choice, Pragmatic Problems, and Drafting Difficulties Encountered in the Formulation of a New Alaska Code" *supra* n. 52 at 564 to 565.

97. *Scripture Press Foundation* v. *U.S. op cit. supra* n. 90 at 805.

cern.[98] Accordingly, AA accepts no outside contributions. Only members may contribute, and even they are asked not to donate more than $500 per year.[99] The following quotation (which concerns AA's decision to refuse a $10,000 legacy in the formative period its corporate poverty policy) gives some of the reasons for its adoption:[100]

> . . . at the slightest intimation to the general public from our trustees that we needed money, we could become immensely rich. Compared to this prospect the $10,000 under consideration was not much, but like the alcoholic's first drink, it would, if taken, inevitably set up a disastrous chain reaction. Where would that land us? Whoever pays the piper is apt to call the tune, and if the A.A. Foundation obtained money from outside sources, its Trustees might be tempted to run things without reference to the wishes of A.A. as a whole. Every . . . [member] . . ., feeling relieved of responsibility, would shrug and say, "Oh, the Foundation is wealthy! Why should I bother?" The pressure of that fat treasury would surely tempt the Board to invent all kinds of schemes to do good with such funds, and so divert A.A. from its primary purpose.

William Griffith Wilson, who played one of the most important roles in the fight to keep AA from being sidetracked by financial "success", started an initially lucrative career as an analyst and investor on the New York Stock Exchange.[101] Reduced to poverty by a drinking problem, Wilson was to find sobriety in 1934 through what he termed a "spiritual awakening". In 1935 Wilson sought to complement his spiritual progress with success of a more material nature. He accordingly undertook a business trip to Akron, Ohio, but had the misfortune of losing the corporate proxy voting battle which had taken him there. Fearing that he would turn to alcohol to palliate this situation, he made a number of telephone calls from his hotel to contact a fellow alcoholic for the purpose of mutual support. These calls led him to the home of a physician, Dr. Robert H. Smith. Smith — still drinking at this time — would attain sobriety as a result of the visit and co-found AA with Wilson. Three years later, when AA had made small but solid gains, Wilson was offered ". . . an office, a decent drawing account and a very healthy slice of the profits . . ."[102] of a large hospital in New York in exchange for "moving his work"[103] into that institution. Wilson (always the promoter) was initially delighted — his wife was at this time working as a sales clerk in a department store to support him. A discussion with the group persuaded him, however, that the offer was too strongly redolent of a takeover of — or merger with — AA by a business corporation, and he accordingly refused it. Even after Wilson had renounced the idea of personal material gain which might jeopardize the goals of AA, he clung to the idea that AA itself should be liberally funded. It could then build a chain of hospitals and mount a public education campaign which would result in the reform of the law relating to alcoholism. John D. Rockefeller Jr., an early (nonalcoholic) supporter of the group, did more than anybody to avert the consequences of this notion. At a dinner which he gave to introduce

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98. A.A. World Services, Inc., *Alcoholics Anonymous Comes of Age* (1957) 113 *et seq.*

99. A.A. World Services, Inc., *Advisory Action of the General Service Conference of Alcoholics Anonymous* (1978) 27.

100. *Supra* n. 98 at 113.

101. Most of the following account was drawn from R. Thomsen, *Bill W* (1975).

102. A.A. World Services, Inc., *Twelve Steps and Twelve Traditions* (1953) 140.

103. *Id.* at 140.

AA to the leading members of New York's financial community in 1941, Rockefeller discouraged the idea of anything behond minimal assistance to it. To the surprise (and dismay) of Wilson *et al* he announced that he himself was donating only $1,000 to the group. Rockefeller's misgivings about the effect of money on AA were obviously communicated in an effective fashion: one banker who had been at the dinner sent the group a check for $10.[104]

Although the connection may not be immediately apparent, AA's principle of anonymity is also bound up closely with the nonprofit ideal. Anonymity does not so much serve to shield individual members from the stigma of alcoholism, as it does to protect AA from leader figures. Personal publicity is an important device for the entrenchment of leadership. Entrenched leadership is repugnant to the nonprofit ideal because it can be functionally identical to ownership of the corporation or association. The fact that the name of William Wilson, who Aldous Huxley described as "the greatest social architect of the century",[105] remains unknown to the general public provides some idea of the effectiveness of this policy. In a letter that was published seven years after his death in 1971, Wilson, declining an honorary Doctor of Laws from Yale University, explained that the tradition of AA "entreats each member to avoid that particular kind of personal publicity or distinction which might link his name with our Society in the general public mind. AA's Tradition Twelve reads as follows: 'Anonymity is the spiritual foundation of all our Traditions, ever reminding us to place principles before personalities.' "[106]

While the affairs of some nonprofit associations or corporations will be conducted at a level which is significantly higher than the minimum standards imposed by the law, others will inevitably be operated — or exploited — in a manner which violates those standards. This fact of nonprofit life has been pointed out in a convincing (if lugubrious) fashion by a leading authority.[107] Law reform has a useful, but hardly a decisive, role to play in a situation such as this: a clear and complete distribution constraint would, for instance, undoubtably be more difficult to evade than the ambiguous constraints of the present legislation, but it could

104. Thomsen, *supra* n. 101 at 298.

105. *Id.* at 365.

106. A.A. World Services, Inc., *The Grapevine* (June, 1984) 5.

107. Use of non-profit status for personal advantage now is becoming almost the majority rule, rather than the rare and exceptional case.

In all too many cases the various attorneys-general and legislatures of the various states don't seem to care.

It is all very sad and disheartening — so depressing that one wonders what really can be done about it.

Perhaps the thing to do is hum the popular song titled "Is That All There Is?", and then to follow its advice — to break out the booze, etcetera.

It reminds me of an expression used by youngsters today, when queried as to what they will do about problems that seem to be insoluble.

Their answer is poignant:

"Cry a lot."

(H.L. Oleck, "Proprietary Mentality and the New Non-Profit Corporation Laws," *supra* n. 89 at 168.).

hardly be expected to eradicate the phenomenon of personal enrichment through the nonprofit corporation. Recognition of this state of affairs does not, however, mean that we should resign ourselves to cynicism and abandon our legal standards. Certainly people act as if they own nonprofit bodies; certainly they justify the receipt of large salaries from them with perfunctory but solemn simulations of work. The fact that such behavior is common does not mean that it is lawful — nor does the fact that it may be tactically unassailable at a particular point in time. What strategy should the legislature adopt to minimize the incidence of these problems? Neither the traditional permissible objects, nor the sophisticated approach of section 10.21.75 of the Alaska Act, is likely to be of much assistance in promoting a more "effective" or "ethical" use of incorporated nonprofits. I suggest that the functional criterion for nonprofit status be abandoned completely, and that the incorporation of nonprofits be permitted for any lawful purpose.[108] Our efforts should then be concentrated upon the creation of adequate remedies to enforce adherence (at the instance of both the Crown and the private citizen) to a clearly defined and complete distribution constraint.

IV. THE ECOLOGY OF NONPROFIT AND MUTUAL BENEFIT CORPORATIONS

Nonprofit corporations are very similar in function to charitable trusts, while mutual benefit corporations occupy a similar "ecological niche" to that occupied by co-operative associations. The discussion in the first part of this section focuses on evaluating nonprofit and mutual benefit corporations with reference to their relationship to such "competing" or "contiguous" entities. Thereafter, I shall deal with the tax environment in which each kind of corporation functions. Finally, I propose to deal with the relationship *inter se* between the various subunits (corporate or unincorporated) of nonprofit associations.

108. On a practical level this would not make a great deal of difference. The Registrar seldom if ever refuses to incorporate a society because its objects are not among the permissible or appropriate purposes prescribed by subsection 3(1) of the Act. The "Invisible Empire Knights and Ladies of the Ku Klux Klan, Realm of Alberta" was, for instance, formerly registered under the Societies Act with the following object:

"[t]o inculcate principles of Protestantism; Racial Purity, Gentile Economic Freedom; Just Laws and Liberty; Separation of Church and State; Pure Patriotism; Restrictive and Selective Immigration; Freedom of Speech, Press, and Radio; Law and Order; Higher Moral Standard; Freedom from Mob Violence; One National Public School and One Flag, (The Union Jack); One Language, (the English Language)."

While the *Invisible Empire* presently registered under the Act seeks in its object (d) to "honor the original and revived aims of the Ku Klux Klan order . . .", it also seeks to object (b) "[t]o bring together in this society a membership, both male and female, from varied racial and religious backgrounds . . . and . . . to assist, by this example in the promotion of world unity." Members are, however, required by object (j) to "marry within their own religious affiliation and racial color".

A. INTERACTION WITH EXISTING ENTITIES AND CORPORATIONS

1. Nonprofit Corporations and Charitable Trusts

(a.) Change of objectives.

I do not propose to discuss the obvious structural and historical differences between nonprofit corporations and trusts and will focus instead on the more important functional differences between these entities. The first difference of this kind which I would like to discuss lies in the area of change of objectives or strategy. On a very general level, corporations are allowed more freedom to change their objectives than are trusts. This is so because corporation law favors those who manage the corporation over the entrepreneurial person or persons who originally promoted it. In trust law the "promoter" is the settlor, and the "managers", the trustees. The "managers" of a charitable trust are not allowed to change the basic strategies laid down by the "promoter". Alberta's Trustee Act[109] has brought corporation law and trust law somewhat closer together in this respect by permitting the variation of trusts (including charitable trusts)[110] upon application to court.[111] It must not be imagined that the traditional immutability of charitable trusts was a capricious rule which lacked all justification. Strong arguments can be made in its favor: if we are to protect the freedom to dispose of property in any lawful fashion, that protection must extend to settlements which most of us would regard as inappropriate or wrong-headed. Surely one of the *raisons d'etre* of the charitable trust is to allow people to make provision for precisely those causes which the majority might decide not to support out of the general revenue. This reasoning should apply with equal force whether the charitable benefactor makes use of either a trust or a nonprofit corporation. I must, however, be careful not to overstate the case against tampering with a benefactor's wishes, because trust law is, in my view, too inflexible in this regard. One does not have to be a student of Heraclitus to know that change is a central part of our existence — if we try to deny its workings completely, we may well end up defeating the settlor's intention in our efforts to uphold it. This point was forcefully made in Lord Macnaghten's classic dissent to the ruling upholding the "immutability" doctrine in the famous *Free Church* case.[112] "Was the Free Church", his Lordship asked there, "by the very condition of her existence forced to cling to her subordinate standards with so desperate a grip that she has lost hold and touch with the supreme standard of her faith? Was she from birth incapable of all growth and development? Was she (in other words) a dead branch and not a living Church?"[113]

New nonprofit legislation should, therefore adopt a policy in relation to corporate change which stands midway between the "dead branch"

109. R.S.A. 1980, c. T-10.

110. Institute of Law Research and Reform, *The Rule in Saunders* v. *Vautier* (February 1972) Report No. 9, Recommendation #7 at 21.

111. *Supra* n. 109 s. 42.

112. *Free Church of Scotland* v. *Overtoun* [1904] A.C. 515 (H.L.).

113. *Supra* n. 112 at 631.

rule of contemporary charitable trust law, and the freedom to change objectives at will (subject only to a statutory right of dissent) which characterizes modern business corporation law.[114] Reconciliation of these disparate regimes could perhaps proceed along the following lines. The interests of stability should be served by requiring nonprofit corporations to state objects. (This would also facilitate the statutory transfer of surplus assets on winding up to groups with objects as near as possible to the terminating corporation, allowing the "promoter's" wishes to transcend the existence of the corporation itself in certain cases). A careful formula could then be drafted which would allow a change from this stated position by a method involving, say, a special majority and court confirmation. The rights of dissenters would, of course, also have to be carefully considered, and issues such as expulsion, control over assets and rights to the corporation's name would have to be thoroughly canvassed as a part of the creation of the proposed "living branch" rule.[115]

What about assets given in trust to a nonprofit corporation? Would these be subject to trust law or the more flexible "living branch" rule suggested here? In this case, the draftsperson may wish to choose between New York's radical solution of simply deeming every transfer of assets to a nonprofit corporation not made by way of a loan to be an out-and-out gift,[116] or a more moderate provision under which no gifts on trust to nonprofit corporations are recognized unless the trust is expressly stated.[117]

(b.) Membership

Whereas the trustees of charitable trusts correspond to the directors of nonprofit corporations, there is no trust equivalent to the members of a nonprofit corporation. What then, is the function of the membership of a nonprofit corporation? Membership in a nonprofit bears very little resemblance to the membership in a business corporation. For one thing, members of nonprofit corporations often play a negligible role in the provision of finance to "their" corporations. The Canadian Mental Health Association is, for instance, discouraged from asking its members for more than a nominal membership fee since its principal donor, the United Way, feels that this would undermine the effectiveness of their own "we'll only bother you once a year" approach to charitable solicitation. Members of nonprofits are then, frequently neither donors to, patrons of, nor investors in, nonprofit corporations. Often, the only function of the membership is the politically useful demonstration of

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114. *See* generally P.W. Blackman, "Selected Problems of California Charitable Corporation Administration: Standing to Sue and Director's Ability to Change Purposes" (1966) 13 *U.C.L.A. L. Rev.* 1123.

115. *See* E. Hughes, "Resolution of Disputes in Relation to Nonprofit Corporations" unpublished research report on file with the Institute of Law Research and Reform at the University of Alberta.

116. New York Not-For-Profit Corporation Law, *supra* n. 42 para. 513. This provision is discussed under the dramatic sub-heading "The Death of Trust Law in New York!" at p. 237 of B.R. Sutter's "Death of Charitable Trust Corporation Law" (1971) 20 *Cleveland St. L. Rev.* 233.

117. Canada Non-Profit Corporations Act, bill C-10, (32nd Parliament, 1st session), s. 26.

community support which it provides. Since most members of nonprofit corporations do not (like members of business corporations) have to "put their money where their mouth is", a membership can, moreover, be hastily assembled after the fashion of the "instant" party members which were alleged to have appeared at recent leadership selection procedures on the political scene. When "delegates" are, in addition, given the right to vote by proxy for these instant members, completely farcical results may follow.[118] For these reasons I would suggest that a new nonprofit act provide (like the California Act) that a nonprofit corporation should not have members unless the articles of incorporation or bylaws specifically provide for them.[119] This kind of provision would underline the fact that having members would be no more than an option which the organizers of future nonprofit corporations could freely accept or reject. I am not suggesting here that nonprofit corporations should be permitted to incorporate without the inclusion of a human component. The proposal is not, in other words, for the incorporation of a mere bundle of assets devoted to a purpose or "Zwekvermoegen". While there should have to be at least one natural person associated with the incorporation of a nonprofit or mutual benefit corporation, he or she would be designated as a director if the corporation had not opted to create a membership. If the membership of such a single incorporator should be terminated, however, (by death or otherwise) the corporation should not necessarily have to be dissolved. The new legislation should instead, give the court a wide discretion to make any order that may be just and equitable in the particular circumstances of such a case.

In the light of the considerations discussed above, the distribution constraint should not be referred to as a constraint upon distribution to members. It is, more accurately stated, a constraint upon the distribution to the financiers and controllers of nonprofits. A nonprofit like the Canadian Mental Health Association which encourages clients (i.e. people who may be receiving assistance from the Association) to join the organization as members might, therefore, quite properly distribute assets to such a member in the pursuit of its charitable objectives.

(c.) Attorney General Supervision

Members do not, as we saw above, necessarily contribute any funds to a nonprofit corporation. *Ex hypothesi*, they are not entitled to share in any profit which it may realize. They cannot, therefore, be expected to maintain the same degree of vigilance towards management that one might expect from members of a business corporation. Like charitable trusts, a large proportion of nonprofits are created to benefit a section of the public who may not even be aware that they exist. These facts underlie the idea that the Crown should undertake a supervisory role in respect of nonprofit corporations similar to the role that it presently plays in the supervision of "charities".[120] Since many, if not most, non-

118. I am not suggesting, however, that proxy voting be disallowed in nonprofit corporations.

119. *Supra* n. 43 para. 5310(a).

120. *See* generally, K.L. Karst, "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility" (1960) 73 *Harv. L. Rev.* 433.

profit corporations would in fact already enjoy charitable status, the new supervisory role would simply be an extension of the existing one. Historically, the task of supervising the conduct of charities was shared by the Chancellor (whose jurisdiction has devolved upon the superior courts of each common law jurisdiction), and the Attorney General who performed the role of the Crown as *parens patriae* in this respect.[121] In England this function of the Attorney General was delegated in the mid-nineteenth century to officers known as "Charity Commissioners".[122] A similar development took place in Ontario early in the present century.[123] There, the delegate is termed "the Public Trustee". No such delegation has taken place in any other Canadian jurisdiction.[124]

Although reform of the administration of charities could conceivably be undertaken in conjunction with the reform of nonprofit corporations, it would probably be more realistic to assume that a new nonprofit corporations act would be developed independently and that it would therefore have to be compatible with the existing machinery in its jurisdiction. Therefore, in the majority of Canadian jurisdictions there would, at this time, be little point in recommending the active and routine participation by the Attorney General in the administration of nonprofit corporations that characterizes the recent American nonprofit corporation legislation. The California Act requires, for instance, that additional copies of a "public benefit" nonprofit's articles of incorporation be sent to the Attorney General,[125] that proposed merger agreements be submitted to him,[126] and that decisions to wind up the corporation[127] or convert it to a mutual benefit or business corporation[128] be communicated to him. Even Ontario, which has the kind of administrative machinery necessary to "plug in" a set of requirements like these, would presumably have to expand the office of the Public Trustee to accommodate this level of involvement. Ontario's Charities Accounting Act[129] already applies to a wide spectrum of nonprofits: the Act refers to "gifts, trusts and corporations" created for a "public" as well as a "charitable" purpose.[130]

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121. D.W.M. Waters, *Law of Trusts in Canada* (1974) 535. Alberta's Department of the Attorney General Act, R.S.A. 1980, c. D-13, ss. 2(e) states that the Attorney General ". . . shall exercise the powers and is charged with the duties attached to the office of the Attorney General of England by law or usage in so far as those powers and duties are applicable to Alberta."

122. Waters, *supra* n. 121 at 536.

123. Charities Accounting Act, R.S.O. 1970, c. 63. The Act was originally passed in 1915: *see* S.O. 1915, c. 23.

124. Alberta has a Public Trustee, but the legislation creating this office (Public Trustee Act, R.S.A. 1980, c. P-36) does not require the supervision of charities by him. *See* generally Waters, *supra* n. 121 at 546.

125. *Supra* n. 43 para. 5120(d). *See* generally W.J. Abbott and C.R. Kornblum "The Jurisdiction of the Attorney General Over Corporate Fiduciaries Under the New California Nonprofit Corporation Law" (1979) 13 *Univ. of San Francisco Law Rev.* 753.

126. *Supra* n. 43 at para. 6010.

127. *Id.* para. 6611(a).

128. *Id.* para. 5813.5(b).

129. *Supra* n. 123.

130. Subsections 1(1) and (2).

There is very little of value in Alberta's present "nonprofit" legislation with respect to *parens patriae* supervision in the public interest.[131] The only significant discretionary power given to the Registrar of Companies by the Societies Act relates to incorporation itself[132] and the determination of the suitability of the objects of a society[133] — powers which would not be found in a modern nonprofit corporations act providing for incorporation as of right for any lawful purpose. Winding up — a topic which is of particular importance to nonprofit corporations because of its close relation with the distribution constraint — is left[134] to the Business Corporations Act.[135] While the Companies Act[136] is similarly barren in respect to the supervision of nonprofits, the Federal Canadian bill[137] contains a number of pertinent provisions. These provisions will be discussed in conjunction with those of the California Nonprofit Corporations Act.[138] There are two main differences between the Canadian and the Californian approaches. Firstly, rights and duties of "overseeing" the conduct of nonprofits given to the Attorney General in the California Act, are conferred upon the Director of Corporate and Consumer Affairs in the Canadian bill. Secondly, the extent of these rights and duties is very limited in the bill by comparison with the California Act. The

131. A company must file with the Registrar information about directors (Companies Act *supra* n. 2 s. 162(2)(e)), members (if it is a private company — *see* s. 162(2)(a)), and it must (if it is a public company), also file a balance sheet (s. 162(3)). (Nonprofits can, apparently, be private companies — *see* s. 1(r)(i) and (ii)). Societies must file information about officers and directors (*see* Societies Act, *supra* n. 4 ss. 22(b) and s. 23), special resolutions (s. 24) and the audited financial statement (s. 22(2)(d)). Both sections 162(2)(b) of the Companies Act *supra*, and 22(2)(a) of the Societies Act *supra* require the address and registered office of the body corporate to be filed.

132. S. 7: "The Registrar may refuse incorporation for any reason that appears to him to be sufficient." *See* also ss. 11(3).

133. Section 6(1): "Subject to the right of appeal given under subsection (3) the Registrar is the sole judge as to whether the purposes mentioned in the application for incorporation, or any of them, are purposes for which the society may be incorporated under this Act."

134. Societies Act *supra* n. 4 s. 30.

135. *Supra* n. 1.

136. *Supra* n. 2.

137. Bill C-10, *supra* n. 117.

138. *Supra* n. 43.

rights of both investigating[139] and dissolving[140] nonprofits are (to give two examples) far more widely and positively stated in the California legislation. Other features of the California Act such as mandatory supervision of the sale of all or substantially all of the corporation's assets[141] have no counterpart at all in the Canadian bill.

While there would be little point in expecting the Attorney General to play an administrative role in the supervision of nonprofits in a jurisdiction such as Alberta, it would be both feasible and desirable to extend his

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139. *Supra* n. 43 at para. 5250:

A corporation is subject at all times to examination by the Attorney General, on behalf of the state, to ascertain the condition of its affairs and to what extent, if at all, it fails to comply with trusts which it has assumed or has departed from the purposes for which it is formed. In case of any such failure or departure the Attorney General may institute, in the name of the state, the proceeding necessary to correct the noncompliance or departure.

Bill C-10, *supra* n. 117, s. 203

(1) A member, a security holder or the Director may apply *ex parte* or upon such notice as the court may require, to a court having jurisdiction in the place where the corporation has its registered office, for an order directing an investigation to be made of the corporation and any of its affiliated corporations.

(2) If, upon an application under subsection (1), it appears to the court that

(a) the activities or affairs of the corporation or any of its affiliates are or have been carried on with intent to defraud any person,

(b) the activities or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a member or security holder,

(c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose, or

(d) persons concerned with the formation or activities or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly,

the court may order an investigation to be made of the corporation and any of its affiliated corporations.

140. *Supra* n. 43 at para. 6511:

(a) The Attorney General may bring an action against any corporation or purported corporation in the name of the people of this state, upon the Attorney General's own information or upon complaint of a private party, to procure a judgment dissolving the corporation and annulling, vacating or forfeiting its corporate existence upon any of the following grounds:

(1) The corporation has seriously offended against any provision of the statutes regulating corporations or charitable organizations.

(2) The corporation has fraudulently abused or usurped corporate privileges or powers.

(3) The corporation has violated any provision of law by any act or default which under the law is a ground for forfeiture of corporate existence.

[further provisions of para. 6511 omitted]

Bill C-10, *supra* n. 117 s. 186

(1) The director or any interested person may apply to a court for an order dissolving a corporation if the corporation has

(a) failed for two or more consecutive years to comply with the requirements of this Act with respect to the holding of meetings of members;

(b) failed to comply with subsection 15(2), [ignoring any restriction on activities contained in articles]; 20, [access to corporate records]; 139, [financial statements of subsidiary bodies corporate] or; 141; [filing financial statements with Director] or;

(c) procured any certificate under this Act by misrepresentation.

[further subsections omitted].

141. *Supra* n. 43 at para. 6716 (b) and (c).

present common law *parens patriae* power of supervision over charitable trusts. This power should not, in my view, merely be extended to all corporations created for a public purpose after the fashion of the Ontario legislation,[142] but rather to all nonprofit corporations. This would be consistent with my previous suggestion that we should not distinguish between nonprofits on the basis of public benefit.[143] Fraudulant evasion of the distribution constraint (and attempts to conceal such evasion) ought to be criminalized. Because nonprofit corporations will so seldom have "watchdog" memberships, it is also important that the Attorney General also be given the right (but not the duty) to seek any civil remedies for unlawful conduct in relation to nonprofit corporations which may be available under the Act or otherwise. I can see no objection to combining the Federal Canadian and California approaches to this problem by giving the Registrar of Companies the same broad powers of investigation and intervention as those that would be given to the Attorney General. The Registrar could then shoulder the routine or "administrative" aspects of the *parens patriae* burden which the Attorney General is not presently equipped to handle.[144]

2. Nonprofit Corporations and Business Corporations

If the functional requirement for nonprofit status were jettisoned, there would be nothing to prevent incorporators from carrying on a business through a nonprofit corporation. Henry Hansmann describes how a shoe store would be operated under these circumstances:[145]

> [t]he incorporators plan to control and operate the shoe store themselves. They, or some of them, will serve as employees of the store. They plan to observe the nondistribution constraint scrupulously, never paying to themselves anything beyond a reasonable salary for work performed for the store. They do not expect the store to receive any donations, from themselves or anyone else. The store's income will come exclusively from the prices charged for the shoes it sells. Any financing required will be obtained by means of loans, credit, and merchandise obtained on consignment. Like any other shoe store, this store will sell its shoes to anyone, rich or poor, who is willing to buy them. The shoes they sell will be purchased from commercial for-profit manufacturers.

It is hardly likely that the removal of the functional restrictions on nonprofits would lead to a general takeover of the retail or any other business by this kind of corporation. Even if it were, we would presumably (as participants in a free economy) accept the result and enjoy the consequent increase in efficiency. A nonprofit "takeover" is, however, unlikely because nobody can (lawfully) enrich himself through the medium of a nonprofit corporation. If one accepts that the desire for individual gain is the mainspring of our economy, it follows that the business corporation, with its ability to distribute profit, has a well-nigh unbeatable advantage over the nonprofit. There are, however, situations where that advantage may shift to the nonprofit: the rational, free exchange of values which

142. *Supra* n. 129.

143. *See* text *supra* at n. 59 *et seq.*

144. The Registrar presently plays this kind of role in relation to organizations which solicit funds from the public (*See* the Public Contributions Act, R.S.A. 1980, c. P-26). The present supervisory machinery is, however, hardly an ideal system (*see* the Edmonton Journal (June 9, 1984) 1).

145. Hansmann, "Reforming Nonprofit Corporation Laws" *supra* n. 14 at 515.

characterizes important segments of our economy cannot supply all our needs. It is in the nature of things that some commodities cannot be produced and distributed through market transactions. "Public" goods pose this kind of problem.[146] Clean air, noise reduction, and "non-cable" radio and television broadcasting are "public" goods. A "private" good like a hamburger may be withheld until a consumer has paid for it, but the producer of clean air cannot stop a given member of the public from breathing that air until he has contributed his share to the cost of cleaning it. Radio and television broadcasters have traditionally solved the problem created by the "public" nature of their product by providing their services to the audience without cost and then, in effect, "selling" that audience to advertisers. In theory it may seem that all three parties to this arrangement will then have an identical interest in the maximization of listening or viewing enjoyment of the audience, but this is not necessarily so. The advertiser may, for instance, decide quite rationally that for his purposes it is better to err on the side of underestimating the tolerance and intelligence of the audience, and leave a significant segment of it dissatisfied by what it perceives to be a lack of stimulating or challenging material. Appeals are therefore made to the public to contribute to broadcasting which is free of the pressures and interruptions associated with commercial sponsorship. The fact that such appeals are often successful is a surprising one: after all, the viewer sends his contribution knowing full well that he will still be able to make use of the service even if he were to send nothing. In all probability the success of PBS solicitations has something to do with the fact that the corporations asking for contributions are invariably nonprofit. The contributor to this kind of corporation may reason as follows. "Once a business corporation has covered its costs all further income is profit. If I thought that the broadcaster would regard everything over and above a particular cost figure as 'gravy' I would not want to contribute. I will, however, contribute because there is an undertaking that all the money received by the broadcaster will be devoted to broadcasting". Our hypothetical contributor need not, moreover, assume that the nonprofit broadcaster has undertaken to limit his income. The nonprofit broadcaster may be seen to undertake, rather, that even if his income should increase beyond his present needs or expectations, he will nonetheless devote all money which he receives to the cost of providing a broadcasting service. If he has received more than he has "bargained" for, that will simply entail an improvement in his programming. Here again we therefore have an example of a nonprofit which is engaged in a "business", but in this case the nonprofit form would presumably have been chosen because it offers a competitive advantage over the business corporation. According to Hansmann, this advantage will arise whenever there is what he calls "contract failure",[147] a phrase he uses to describe situations in which market transactions are

146. *See* Hansmann "The Role of Nonprofit Enterprise" *supra* n. 14 at 845 *et seq.* I am indebted to Hansmann for the discussion of his "contract failure" theory which follows, but my remarks are not intended as a comprehensive description of the theory. Hansmann's own discussion of the theory may be found in "The Role of Nonprofit Enterprise" *supra* n. 14 at 843 to 898.

147. *Id.* at 845.

difficult or impossible. Apart from the "public goods" example, contract failure may come about in the area of what Hansmann calls "complex personal services".[148] Geriatric care,[149] child care[150] and education[151] are possible examples of this kind of contract failure:[152]

> [t]he patients at a nursing home, for example, are often too feeble or ill to be competent judges of the care they receive. Likewise, hospital patients and consumers of day care, owing to the difficulty of making an accurate personal appraisal of the kind and quality of services they need and receive, must necessarily entrust a great deal of discretion to the suppliers of those services. The nondistribution constraint reduces a nonprofit supplier's incentive to abuse that discretion, and, consequently, consumers might reasonably prefer to obtain these services from a nonprofit firm.

Obviously, there cannot be universal agreement about situations in which the market mechanism will or will not tend to fail. Some people may, for instance, hold firmly to the view that educational or medical services should only be undertaken by nonprofit operators.[153] Others may maintain the opposite. In my view, we should not hasten to set aside exclusive preserves for either nonprofit or business corporations unless there are compelling political or ethical reasons for doing so. There is nothing inherently objectionable about competition between business and nonprofit corporations. In particular, nonprofit status does not, *per se*, confer any tax advantages over business corporations.[154] Competition between business corporations and nonprofits would, moreover, tend to restrict itself to the borderland between the arms length world of the market place where financial gain is legitimate, and the fiduciary world where it is not. The majority of nonprofit corporations would operate in the fiduciary heartland as charitable or altruistic bodies where both self interest and general legal principles would significantly limit any participation by business corporations.

3. Mutual Benefit Corporations, Co-operative Associations and Business Corporations

Before examining the relationship between co-operative associations and mutual benefit corporations, we should ask ourselves what a co-

148. *Id.* at 862.

149. *Id.* at 863.

150. *Id.* at 865.

151. *Id.*

152. Hansmann, "Reforming Nonprofit Corporation Law" *supra* n. 14 at 506.

153. ". . . [W]e do not think it has been shown to be unreasonable for appellant to conclude that the desire for personal profit might influence the educational goals in subtle ways difficult to detect but destructive, in the long run, of that atmosphere of academic enquiry which . . . appellant's standards for accreditation seek to foster." (*Marjorie Webster Junior College* v. *Middle States Ass'n of Colleges and Secondary Schools* 432 F. 2d 650 (D.C. 1970) at 657; aff'd 400 U.S. 965. Action by a college against the appellant, an administrative body, which refused to consider it for accreditation because it was a business corporation rather than a nonprofit.).

154. *See* text *infra* at nn. 175 to 189. Many nonprofits enjoy tax exemptions because of factors *additional* to their nonprofit status. Business corporations might well be justified in objecting to competition in these circumstances. *See R.* v. *The Assessors of the Town of Sunny Brae* [1952] 2 S.C.R. 76. Cf. the dissent in that case by Estey J. at 103, and *Scripture Press Foundation* v. *United States*, *supra* n. 90.

operative association is.[155] The best way to define the co-operative association would be to contrast it with the business corporation. In the business corporation, investors fund (and own) an organization which produces goods or services for patrons which have (apart from their consumption of its product) no connection with the organization. In theory at least, this ownership generally gives those investors rights to participate in (a) the control and (b) the profits of the corporation. Again generally speaking (because different rights may be attached to different classes of shares) the number of votes an investor may cast and the extent of his participation in profits are both likely to be proportionate to the size of his investment in the corporation. Co-operative associations are, on the other hand, funded and organized by the patrons themselves rather than by a "distant" investor or group of investors.[156] The extent of each individual patron's participation in profits and control is not usually dependent upon the relative value of any investment he or she may have made in the association. Instead, the size of any dividend is usually proportionate to the volume of the member's patronage. Control is typically apportioned on a basis of equality between members. Shares in co-operative associations are permitted in Alberta by the Co-operative Associations Act,[157] but the Act does not permit control to be tied exclusively to ownership.[158] No member may own more than one-sixth of the share capital.[159]

The social club (which is the archetype of the mutual benefit corporation) may be very similar in function to the co-operative association.[160] Like co-op members, club members may wish to place the control of their associations on a basis other than the one-share-one-vote philosophy of the business corporation. They may either opt, therefore, for a one-man-one-vote rule, or for some other non-financial arrangement. While it may be possible to adapt a business corporation to this kind of function, business corporation law can hardly be said to provide a useful set of rules for such "non-financial" control. There may even be some question as to whether a particular jurisdiction's business corporation legislation would allow club members to neutralize the usual requirement that con-

155. *See* D. Ish, *The Law of Canadian Co-operatives* (1981) 1 to 11; C.S. Axworthy, "Consumer Co-operatives and the Rochdale Principles Today" (1977) 15 *Osgoode Hall L.J.* esp. at 137 to 141; and Province of Ontario Legislative Assembly Select Committee on Company Law, *Report on Co-operatives* (1971) 1 to 5.

156. *Report on Co-operatives supra* n. 155 at 1.

157. R.S.A. 1980, c. C-24.

158. *See* subsections 30(4)(a) and 26(1).

159. Subsection 19(8).

160. *Report on Co-operatives supra* n. 155 at 1.

trol be connected with shares sufficiently for their purposes.[161] Members who wish to put the control of their clubs on a non-financial basis, would, therefore, find a far more hospitable environment in co-operative association legislation. The fact that the Co-operative Associations Act[162] and other co-operative acts allow terminal distributions of assets to members is also convenient and appropriate to mutual benefit or "club-type" corporations. It is, after all, the power to make such terminal distributions which distinguishes mutual benefit from nonprofit corporations in the first place.[163] Surprisingly, perhaps, the fact that co-operative legislation permits *current* distributions to members[164] may also be convenient from the point of view of a club. Let us assume by way of illustration that twenty people form a yacht club which then purchases a lakefront lot. There should not be any legal or ethical objection to the idea of disbanding the club at any time and sharing the proceeds of the sale of the land between the members. However, what if one of the members wishes to leave the club before its dissolution? Should a club not be permitted to provide for payment of his share of the value of its assets upon his departure?[165] The California Nonprofit Corporations Act allows the redemption or sale of shares in "Mutual Benefit Nonprofit Corporations"[166] despite the fact that the former clearly amounts to a *current* distribution of the corporation's assets. The Act draws the line at the distribution of assets to a member while both his membership and the corporation itself remain in existence: it is, after all, already doubtful

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161. Alberta's Business Corporations Act, S.A. 1981, c. B-15 requires at least some connection between shareholding on the one hand and voting and entitlement to assets on the other. Subsections (3), (4) and (5) of s. 24 read as follows:

(3) If a corporation has only one class of shares, the rights of the holders of those shares are equal in all respects and include the rights

(a) to vote at any meeting of the shareholders of the corporation,

(b) to receive any dividend declared by the corporation, and

(c) to receive the remaining property of the corporation on dissolution.

(4) The articles may provide for more than one class of shares and, if they so provide,

(a) the rights, privileges, restrictions and conditions attaching to the shares of each class shall be set out in the articles, and

(b) the rights set out in subsection (3) shall be attached to at least one class of shares but all of those rights are not required to be attached to one class.

(5) Subject to section 27, if a corporation has more than one class of shares, the rights of the holders of the shares of any class are equal in all respects.

162. *See* generally ss. 19, 20 and 51 *supra* n. 157. *See*, however, the recommendation of Axworthy, *supra* n. 155 at 157 to 158.

163. *Supra* text at n. 53 to 64.

164. Patronage dividends are an essential feature of the co-operative association going back to the Rochedale declaration itself in 1844. *See* Axworthy *supra* n. 155 at 138.

165. The classic English "members' " club is based, however, upon the understanding that, although members own their club, they will not take any share of the assets out of the club if their membership comes to an end. If all the members of such a club were, therefore, to die simultaneously, the assets would go to the Crown as *bona vacantia* even though the members could, at any time before their death, have resolved to terminate the club and divide its assets among themselves. Such termination does not, in practice, take place because of an unstated feeling that the present members hold the club's assets in a kind of quasi-trust for the future generations of their community or class. (*See* J.F. Josling and L. Alexander, *The Law of Clubs* (Fourth Edition 1981) 7.)

166. *Supra* n. 43 para. 7320(b), 7332(a), 7332(b).

whether a corporation which permits itself to make a terminal distribution deserves the right to call itself a "nonprofit" — a full right to make current distributions would surely have made the nonprofit label a complete travesty. Experience and common sense suggest, however, that clubs should not be forbidden from making current distributions in order to force them into the ill-fitting nonprofit category. There is no reason why these associations should not be permitted to pass any savings they may have made on bulk purchases to members by way of lower prices for the goods or services so purchased. There is, in fact, no reason why the right to receive direct current distributions from a club should be restricted to departing members. Assume, for instance, that the members of a travel club overestimate the cost of their summer excursion, and enter the fall with a $1000 credit to the club account. Why should they be forbidden from distributing the money to themselves immediately (rather than exhausting it, say, by means of an end-of-summer party or dissolving the club)?[167]

The Co-operative Associations Act would, in short, be an ideal vehicle for many "club-type" associations. Although some of them (like the classic "gentlemens' " club or the country club) may feel little sympathy with the ideology of what we may call the "co-operative movement", their structural similarities to co-ops is striking. This similarity has prompted Hansmann to question the whole policy of putting what we have called mutual benefit corporations under the same statutory roof as the very different nonprofit corporation:[168]

> [c]urrent efforts to deal with such private membership organizations by creating a separate and more loosely regulated category for them within the nonprofit corporation statutes, however, constitute poor policy. A far superior approach would be to provide for the formation of such organizations under the cooperative corporations statutes, and at the same time to reform the nonprofit corporation law to provide for only a single class of nonprofit corporations that would all be held to a strictly defined nondistribution constraint. Because cooperative corporation statutes are generally designed to provide precisely the type organizational features that are needed by social clubs and similar organizations — such as control by patron-members and the right to make distributions to members on appropriate occasions — this alternative approach should serve their interests well.

What objections can be brought against Hansmann's suggestion? The "ideological" point just mentioned does not present an insuperable difficulty. We may be quite sure that "non-movement" people of the kind we described above presently make use of the Co-operative Associations Act. There is, moreover, no way to define a "non-movement" registrant and no way of stopping anybody who has complied with its requirements from registering under the Act. While it is true that the Co-operative Associations Act could be modified in some non-essential respects to accommodate a few extra would-be registrants,[169] there is no doubt that the Act can (and does) presently provide an appropriate and convenient en-

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167. Provision 5 of the Memorandum of Association of Edmonton's Mayfair Golf and Country Club incorporated under the Alberta Companies Act (*supra* n. 2) allows, for instance, a "return of capital" and other current distributions to its members.

168. Hansmann, "Reforming Nonprofit Corporation Law" *supra* n. 14 at 587 to 588.

169. The Act has its own list of "permissible purposes", for instance, s. 11 which might conceivably prove a problem to some kinds of would-be registrants.

vironment for the vast majority of what we have described as "mutual benefit" associations.

What about the limitations placed by the Co-operative Associations Act on the proportion of shares that any member can own and on the voting rights which can be attached to such shares?[170] Will there not be some mutual benefit bodies whose members wish to issue, say, 90% of the shares carrying 90% of the votes to one of their number? The fact that co-op legislation has set its face against this kind of arrangement does not mean that we are obliged to make room for it in our nonprofit legislation by appending a mutual benefit category.[171] There is no reason why clubs who wish to link shares with control and ownership should not register under business corporation legislation. It should be clearly understood that no tax advantage would be lost by their doing so: clubs which allow terminal distribution are disqualified from the "non-profit" exemption created by section 149(1)(1) of the Income Tax Act irrespective of the Act (if any) under which they may be incorporated.[172] The so-called "co-operative" exemption, viz. section 135 of the Income Tax Act[173] which exempts taxpayers distributing patronage dividends from income tax on amounts so distributed is, moreover, available to all taxpayers (including business corporations) which distribute profits on the basis of patronage.[174]

B. THE TAX ENVIRONMENT

Let us start this brief sketch of the salient features of this area with a naive question: isn't it nonsense to talk about taxing the profits of nonprofit corporations? Were we not told that nonprofits are obliged to devote their whole income to the achievement to their corporate goal?

170. *See* nn. 157, 158, and 159 *supra*.

171. It is in fact doubtful whether corporate control can be linked to shareholding at all in California's "mutual benefit nonprofit" category *supra* n. 58. It seems that rights to the assets of the corporation may, however, be made dependent on share ownership.

Para. 7312

No person may hold more than one membership, and no fractional memberships may be held, provided, however, that:

(a) . . .

(b) If the articles or bylaws provide for classes of membership and if the articles or bylaws permit a person to be a member of more than one class, a person may hold a membership in one or more classes; . . .

Para. 7610

Except as provided in a corporation's articles or bylaws or section 7615 [which allows cumulative voting] each member shall be entitled to one vote on each matter submitted to a vote of the members.

Subparagraphs 8717(a) and (b) appear to permit terminal distributions of the corporation's assets on a basis other than equality.

Para. 8717

(a) If the articles or bylaws provide the manner of disposition, the assets shall be disposed of in that manner.

(b) If the articles or bylaws do not provide the manner of disposition, the assets shall be distributed among the members in accordance with their respective rights therein.

172. *See* text *infra* nn. 185 to 189.

173. S.C. 1970-71-72, c. 63, as am.

174. H.H. Stikeman (ed.), *Canada Tax Service* (1983) 135 to 204.

How can we therefore speak meaningfully of a "profit" in these circumstances? True, profits are calculated by deducting the costs of carrying on a business from its gross revenue, but tax law makes a distinction between the everyday, recurrent costs of a corporation (which are so deductible) and "capital" costs which represent out-of-the-ordinary, non-recurring expenditures (such as those involved in expanding its operation) which are not. Any surplus remaining after the payment of recurring costs is, according to this analysis, the profit of a nonprofit corporation.[175] Such profit must, because of the distribution constraint, be devoted to capital expenditures. Business corporations also plow surplus income back into the achievement of corporate goals. These corporations must, however, pay tax on this "surplus income" before it is put to use in the business. The advent of incorporation as of right of nonprofit corporations for any lawful purpose (including business purposes) in some jurisdictions, has made it increasingly plain that there is no point in giving nonprofits an advantage over their profit-making competitors in this respect. The law has in fact always required something more than the mere declaration of a distribution constraint for exemption from income tax.[176] Nonprofit status *per se* is not then, a sufficient ground for exemption from income tax. The vast majority of nonprofit corporations do, however, in fact enjoy this exemption. Most of these untaxed nonprofits owe their exemption to the fact that they enjoy "charitable" status under the Income Tax Act.[177] The definition of charitable status for the purposes of this Act still rests upon *Pemsel's* case and the common law.[178] That status has been exhaustively treated elsewhere and will not be discussed here.[179] I should like to mention only that, without some familiarity with the workings of the administrative staff of Revenue Canada, one cannot get an up-to-date feel for what will or will not be regarded as charitable. We have seen in another context, that the case of *Gilmour* v. *Coats* [180] established a rule that a tangible, non-metaphysical element of public benefit must be present before charitable status will be granted. Therefore, it is most surprising to learn that a nonprofit called

175. This simple analysis only attempts to identify profits made by "commercial" nonprofits. Philanthropic nonprofits (some which *are* taxable — *see* text at n. 59 to 60 *supra*) require a completely different approach: *see* B.I. Bittker and G.K. Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Tax" (1976) 85 *Yale L. Journal* 299.

176. *Comtoir de Robervale, Inc.* v. *M.N.R.* [1956] D.T.C. 5 (T.A.B.); *The Pas Lumber Company Ltd. M.N.R.* [1959] D.T.C. 95 (T.A.B.); *Campus Co-operative Residence, Inc.* v. *M.N.R.*, [1963] D.T.C. 857 (T.A.B.); *Church of Christ Development Co. Ltd.* v. *M.N.R.* [1982] C.T.C. 2467 (T.A.B.).

For rulings on various municipal tax provisions, *see Re Loma Linda Foots (Canada) and The City of Oshawa*, (1964) 42 D.L.R. (2d) 120 (Ont. H.C.); *Re Planned Parenthood* v. *The City of Toronto* (1981) 113 D.L.R. (3d) 218 (Ont. H.C.); and *Cremation Society of Australia Ltd.* v. *Commissioners of Land Tax* [1973] 2 N.S.W.L.R. 704 (Comm. L. Div.).

177. *Supra* n. 173.

178. *See* (1981) 3 Canadian Tax Reporter (2d) paragraph 21,741 which states that Revenue Canada accepts for tax purposes the common law meaning of "charitable" as found in *Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531 and *I.R.C.* v. *Glasgow Police Athletic Association* [1853] 1 All. E.R. 747.

179. *See* D.W.M. Waters, *Law of Trusts in Canada* (1974) 419 to 547 and A.B.C. Drache, *Canadian Tax Treatment of Charities and Charitable Donations* (2nd ed. 1980).

180. *Supra* n. 59.

the Hunger Project incorporated *inter alia* as a society in British Columbia enjoys the status of a registered charity. The Hunger Project is closely associated with *Est, an educational corporation*, a business corporation controlled by Werner Erhard. Notwithstanding its name, the Hunger Project spends almost none of its income on what it regards as "dehumanizing gestures"[181] such as sending money to anti-hunger organizations or starving people. Its funds go, instead, "toward the continued communication of the Hunger Project to an ever-expanding sector of the . . . public. . . .".[182] Est philosophy questions the objective reality of the external world, suggesting that each individual projects or creates his own reality. When the Hunger Project has, accordingly, mobilized "the critical mass of agreement", "things will manifest" and "a context will be created in which hunger cannot exist".[183] The Hunger Project seeks not so much to end hunger as to "transform the universe"[184] through the dissemination of est philosophy.

After charitable status, section 149(1)(L) of the Income Tax Act[185] is the next most widely used nonprofit tax exemption. It reads as follows.

> 149(1) Non-Profit Organizations
>
> (L) a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which way payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada; . . . .

There are strong indications that the phrase "or for any other purpose except profit", will be interpreted *ejusdem generis* with "social welfare, civil improvement, pleasure or recreation". If this were not so, it might seem that — contrary to the case law discussed above — nonprofit status *per se* would be sufficient for exemption. The latest information circular on this topic advises, moreover, that a nonprofit must not only adhere to the exempt objectives of section 149(1)(L), but also limit its income to an amount reasonably needed to pursue them.[186] The circular also makes it clear that, in Revenue Canada's view, nonprofits carrying on a trade or business do not fall within the section.[187]

A final point remains to be made about section 149(1)(L). In order to qualify under the section, according to both the case law[188] and stated departmental policy,[189] corporations must declare and uphold both a current and a terminal distribution constraint. By definition, the mutual

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181. S. Gordon, "Let Them Eat Est" *Mother Jones* (Dec. 1978) 41 at 42.

182. *Id.*

183. *Id.* at 44.

184. K. Garvey, "Anatomy of Erhard's Est" (1980) 10:46 *Our Town* 1.

185. *Supra* n. 173.

186. Interpretation Bulletin IT-496 Feb. 18, 1983 paragraphs 8 and 9.

187. IT-496 *Id.* paragraph 7.

188. *St. Catherines Flying Training School, Ltd.* v. *M.N.R.* [1955] C.T.C. 185 (S.C.C.).

189. IT-496 *supra* n. 186 paragraph 11(c). *See* generally also Interpretation Bulletin IT-409 Feb. 27, 1978.

benefit corporation does not qualify for exempt status under this section or any other provision in the Income Tax Act. It seems, therefore, that the overwhelming majority of the clubs, charities, religious orders, cultural associations, hobbyists, professional and trade associations etc. which presently use Alberta's Societies and Companies Acts would probably choose the nonprofit form as we have defined it — i.e. a corporation with a double distribution constraint, rather than the mutual benefit form, if they were presented with that choice. This is another factor pointing towards the appropriateness of a single-category nonprofit corporations act.

C. "MULTICELLULAR" NONPROFIT CORPORATIONS

Not all nonprofits have a simple, "unicellular" structure: like living organisms, many of them are "multicellular". For instance, the Canadian Mental Health Association can be divided into three organizational levels: national, provincial and regional. Units at any of these levels can be broken down further into various sub-units as, for example, audit or executive committees. All the units and sub-units are linked by a network of interconnections which conduct the flow of authority, responsibility and funds throughout the "body" of the organization. Incorporation can enter this complex picture at any level. Any entity, ranging from the organization as a whole, down to its smallest liaison committee could be given juristic personality. An organization that prefers to remain unincorporated for whatever reason may wish to incorporate only a small sub-unit of its total gestalt, such as a "general service board" where some juristic "person" may be required for a purpose such as asset ownership. Alternatively, an organization which is partly charitable and partly noncharitable may wish to segregate its activities as far as possible and incorporate a separate charitable "division" to obtain a tax concession.[190] How should the relationship between various corporations constituting a nonprofit body be maintained? Share ownership, the bond which theoretically holds a group of business corporations together, is obviously inappropriate in the nonprofit context. The business corporation-oriented Bill C-10 strikes a note which is particularly inappropriate to nonprofit law when it speaks in this connection of "holding" corporations.[191] The Societies Act has a short provision on "branch societies",[192] but the section does not really make it clear whether what it calls "a branch" is a separate body corporate or not. Even the California Nonprofit Corporations Act (which has provisions regulating the relationship between a "head organization" and a "subordinate" corporation)[193] is rather too laconic in respect of this important and complex issue. When the Provincial Division of the Canadian Mental Health Association was incorporated as one organ of the national CMHA body, Part 9 of the Companies Act[194] was found to offer the most convenient existing

190. Drache, *supra* n. 179 at 91.

191. *See* subsection 2(4).

192. *Supra* n. 4 s. 27.

193. Para. 5132(a)(2) and (b).

194. *Supra* n. 2.

machinery in Alberta for relating the corporation (or "company") to its group. The constituent documents of this company,[195] reproduced as an appendix to this article, may be referred for the way in which the technical difficulties presented by the group relationship were addressed in both its memorandum and articles of association.

V. INCORPORATION AS OF RIGHT, LIMITED LIABILITY AND *LOCUS STANDI*

The argument has been made that business corporations "earn" the right to limited liability through their contributions to society — what justification is there, then, for offering the right to limited liability to all nonprofit groups through the introduction of incorporation as of right? I should like to respond to this question with a general discussion of the problems of suits against both nonprofit associations and their members.

Strictly speaking there cannot be any actions against (or by) unincorporated associations, since they lack legal personality.[196] There is nothing which can be sued. One must sue the members of such associations in their individual capacity. If one does not join *every* person who was a member of the association at the time the cause of action arose, one cannot execute against the joint (or "association") property: "the funds belong to all members in equal shares: hence to reach them he has to show that all the members of the society are liable to him".[197] In some cases, the requirement that all the members be joined presents a problem which may quite simply be insuperable.[198] The common fund cannot, moreover, be rendered accessible by bringing a representative action against the members of the association. Although one can probably assume that a representative action is available in Alberta in an ordinary

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195. These documents were drafted by the author with the assistance of Pieter de Groot and other members and officers of the Canadian Mental Health Association.

196. *See* generally J.F. Keeler, "Contractual Actions For Damages Against Unincorporated Bodies" (1971) 34 *Mod. L. Rev.* 615; H.A.J. Ford, *Unincorporated Non-Profit Associations* (1959) 50 to 145; A.H. Oosterhoff, "Indemnification of Trustees: A Rule in *Hardoon* v. *Belilios*" (1977-78) 4 *E.T.Q.* 180; and V. Lirette, "Unincorporated Non-profit Associations in Contract: A Need for Reform" (1983) 21 *Alta. L. Rev.* 518.

197. Keeler, *supra* n. 196 at 615.

198. The following quotation from *George on Companies* (1825) 22 to 23, taken from R.R. Formoy, *The Historical Foundations of Modern Company Law* (1923) 34 to 35 illustrates the difficulties which used to apply to suits against unincorporated business associations as strongly as they apply to actions against unincorporated nonprofits today:

> "[s]uppose then that the body consists of 2,000 partners (no very extraordinary number, if we may trust to the 'prospectuses' of the day), and that Stiles has bought goods of them at twenty-five different times, the credit for all of which goods is now expired. Suppose, that during this period of time, there have been 300 changes in the members of the firm by the sale or supposed sale of the interests of that number of members. Suppose, during the same time there have been six deaths, and that in consequence of these deaths ten new individuals as personal representatives of the deceased members have been admitted as partners to hold the interests of the deceased . . . Now let the exact times of the several sales or transfers, which have led to the supposed 300 changes in members of the partnership, to be all of them ascertained. Let the times of the deaths of the deceased partners be also supposed to be accurately known, and also whether any and which of those members who have parted with their interests in the 'concern' have also died, and when they died. In the next place, let the exact days of the sale of the several parcels of goods to John Stiles be likewise clearly ascertained, and let all these points be clearly capable of proof . . . ."

action for damages,[199] the plaintiff will also have to show that all members of the association have the same interest in the cause.[200] Even if members who have joined after the cause of action arose can be said to have adopted the debt sued upon by ratification or consent, they will clearly have defenses different from those raised by the persons who were members at the date when the liability arose. A representative order will, as a result, have to be refused.[201]

Those members of the unincorporated nonprofit who made or expressly authorized the making of the contract might be personally liable if the court finds that the requisite intention to assume this kind of liability was present. The same difficulties arise in this context as those which have become familiar in pre-incorporation contracts.[202] Personal liability will not, even if it can be established, bind the non-contracting members of the association: the familiar rule that each party is jointly and severely liable for all "partnership" debts contracted by each other partner[203] (the "mutual agency rule") only applies to unincorporated business associations. There is no such rule in unincorporated *nonprofit* associations. There, the liability of non-contracting members is ordinarily limited to the extent of any unpaid subscriptions to the association. The liability of "ordinary" or noncontracting members of unincorporated nonprofits is, therefore, already limited at common law.[204] Neither partnership law nor the general rule that a trustee can indemnify himself for trust expenditures and liabilities[205] can override this established rule.

Incorporation loses its crucial position when we move from a consideration of contract to tort. What counts, in effect, in tort, is the immunity (strongly reminiscent of the charitable exemption from corporate income tax itself) which is given by courts to "voluntary" nonprofit organizations whether or not they are incorporated.

> . . . I think there is a policy reason for exacting a lower standard from a voluntary nonprofit organization like this defendant than from any other person. That reason is that it is in the interest of society that voluntary efforts directed towards promoting excellence and safety in any field of endeavour are to be encouraged. If the standard expected from a non-profit organization is put too high, such organizations may depart the field. In my judgment, the standard to be expected of them may be compared to the standard expected from a rescuer — another form of volunteer.[206]

"Volunteer immunity" is clearly a *quid pro quo* for voluntary, beneficial activities. Therefore, where the association is not seen as voluntary and altruistic, it will be held responsible for the acts of its servants acting within the course and scope of their employment or for the acts of those

199. *See Alberta Pork Producers' Marketing Board* v. *Swift Canadian Co. Ltd.* (1982) 129 D.L.R. (3d) 411 (Alta. S.C.).

200. *General Motors of Canada* v. *Helen Naken* [1983] 1 S.C.R. 72 at 96 to 105.

201. Keeler, *supra* n. 196 at 616.

202. *Id.* at 617.

203. *See*, for instance, Alberta's Partnership Act, R.S.A. 1980, c. P-2, ss. 6, 7 and 8 and P.R. Webb and A. Webb, *Principles of the Law of Partnership* (1972) 73 to 117.

204. *See Wise* v. *Perpetual Trustee Co., Ltd.* [1903] A.C. 139; and *Bradley Egg Farm Ltd.* v. *Clifford* [1943] 2 All E.R. 378. *See* Keeler, *supra* n. 196 at 616 *et seq.*

205. *Hardoon* v. *Belilios* [1901] A.C. 118 (P.C.).

206. *Smith* v. *Horizon Aero Sports* (1982) 130 D.L.R. (3d) 91 (B.C.S.C.) at 110 per Spencer, J. *See* also *Dodd* v. *Cook* (1956) (2d) 4 D.L.R. 43 and *Terry* v. *Boy Scouts of America, Inc.* 471 F. Supp. 28, affd. 598 F. 2d 616.

acting as organs of the association regardless of whether it is incorporated, or nonprofit.[207]

We can conclude that in contract at least, the common fund of an unincorporated nonprofit association is often inaccessible. To the extent that nonprofits choose to avail themselves of the right to incorporate, corporate status provides a solution to this problem: the action is then brought against a legal *persona* (even if it is a *persona ficta*) and its assets are accordingly fully exigible.

It is most undesirable to have groups within society which are often, in practice, simply not accessible to litigation. This was an important reason for compelling business associations which had either more than twenty-five members or freely transferable shares to incorporate in 1844.[208] Certainly we should respond to the logic of this argument by allowing incorporation as of right for nonprofits. We should not, however, allow its logic to tempt us to bring any kind of legislative pressure to bear upon nonprofits to incorporate. The problem of the immunity of the assets of unincorporated associations to civil suits should be dealt with as a part of a broader reform of the representative or class action procedure in Alberta, or more specifically perhaps, by legislation allowing unincorporated associations to be sued in the "association" name in the same way that unincorporated business associations can presently be sued in the "firm" name,[209] and declaring the property to be exigible.[210] There are simply too many nonprofit groups who value their unincorporated status for reasons of privacy, autonomy and informality to consider the introduction of compulsory incorporation under the proposed act as a serious option.

It is true that all nonprofit associations choosing to incorporate will probably be given the privilege of limited liability under any new legislation. The contracting member or members will therefore no longer be personally liable to the creditors of the association. The common fund of the association will, however, become exigible, and, in a nonprofit the size of, say, a branch of the Canadian National Institute for the Blind, this will provide the creditor with a deeper pocket than most "natural" persons. In smaller nonprofits, the creditor may in some cases be worse off than he was at common law, but the "shell" corporation has not arisen as a practical problem of any significance in the nonprofit area at this time.

VI. CONCLUSION

In 1969 the New York Not-For-Profit Corporation Law created four kinds of "not-for-profit" corporations. In 1980, the California Nonprofit Corporations Act made provision for three types. The Alaska Nonprofit Corporations Bill reduced the number to two in 1983. It is

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207. *See Hudson* v. *Riverdale Colony of Hutterian Brethren* (1981) 114 D.L.R. (3d) 352; and *Mink* v. *University of Chicago* (1978) 460 F. Supp. 713 (Dist. Ct. Ill.).

208. Formoy, *supra* n. 198 at 31 to 43.

209. W.A. Stevenson and J.E. Cote, *Annotation of the Alberta Rules of Court* (1981) 100 to 103, Rules 80 to 82.

210. *See*, for example, New Mexico Ann. Stats., ss. 53-10-5 and 6.

both desirable and feasible that this trend should culminate in the passage in a Canadian jurisdiction of a nonprofit corporations Act providing for the registration of a single kind of corporation, with a complete constraint upon the distribution of profit, referred to simply as a nonprofit corporation.

Although practical considerations, as well as the dictates of ethics or tax legislation, may well compel the controllers of a nonprofit corporation to limit the profits of "their" corporation, the law should not attempt to do so. It should only require that nonprofit corporations declare and uphold a complete constraint upon the distribution of assets to controllers of the corporation at any time. Any profits realized by the corporation should be devoted to its objects. If only for this reason, nonprofits should be required to state their object or objects. There should not, however, be any prescribed objects for nonprofit corporations. Nonprofits should instead be permitted to incorporate as of right for any lawful purpose not involving the distribution of a profit to their controllers but no nonprofit association should be compelled to incorporate.

MEMORANDUM OF ASSOCIATION OF THE CANADIAN MENTAL HEALTH ASSOCIATION, ALBERTA DIVISION, 1983

1. NAME

The name of the Company is "THE CANADIAN MENTAL HEALTH ASSOCIATION, ALBERTA DIVISION, 1983", which will hereinafter be referred to as "the Association." The National Body of the Canadian Mental Health Association incorporated by Letters Patent of the Government of Canada in 1926 will be referred to as "the CMHA."

2. OBJECTS

The objects for which the Association is established are as follows:

(i) to ensure the best possible care, treatment and rehabilitation of the mentally ill and the mentally disabled;

(ii) to strive to prevent mental illness and mental disability;

(iii) to promote research into the causes, treatment and prevention of mental disability;

(iv) to protect and promote mental health.

3. POWER AND CAPACITY

a. The Association shall have the power and capacity to do any otherwise lawful thing whatever or enter into any otherwise lawful transaction whatever which would, in the *bona fide* opinion of its Board of Directors, be incidental to and in furtherance of the objects of the Association.

b. The powers authorized by section 20 of the Companies Act, Chapter C-20 of the Statutes of Alberta are hereby excluded.

4. LIMITED LIABILITY

a. The liability of the members is limited.

b. Every member of the Company undertakes to contribute to the assets of the Company in the event of its being wound up while she is a member, or within one year afterwards, for payment of the debts and liabilities of the Company contracted before she ceases to be a member, and the cost, charges and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding $1.00.

5. NONPROFIT STATUS

a. The Association shall apply such profit, if any, as it may realize in the course of its activities, and any other income of the Association, in promoting its objects. The payment of a dividend or any other distribution of the Association's assets (either during the course of the Association's

existence or upon its dissolution) to its members or other persons who exercise control over it is forbidden, provided that nothing in this clause shall affect any distribution of its assets in accordance with subclause b. of this clause.

b. In the event of the winding-up of the Association, all its assets shall be transferred to the CMHA. In the event that the CMHA is no longer in existence, the assets of the Association shall be transferred to one or more corporations, trusts, entities, funds or associations which are nonprofit and whose objects and activities are charitable. The members of the Association shall be responsible for the selection of the recipient or recipients of such assets of the Association, and shall give preference as far as possible to bodies whose objects comprise or include the promotion of mental health.

c. The Association shall not issue any shares or other securities giving any person rights in the nature of ownership or equity in any of the assets or profits of the Association. The Association may, however, create security interests whether by way of mortgage or otherwise in any of its real or personal property to secure the repayment of any loan which it may be empowered to make in terms of clause 3 of this Memorandum together with the payment of any commercially reasonable rate of interest thereon.

6. INCORPORATION OF REGIONAL COMPANIES

a. The Association may, in terms of Section 11(3) of the Companies Act, Chapter C-20 of the Statutes of Alberta give its express consent to the incorporation in Alberta under the same Act of companies (hereinafter referred to as "Regional Companies") which may incorporate the words "Canadian Mental Health Association" in their names. The Association shall not grant such permission to any other company unless that company or proposed company obtains the consent of the Registrar of Companies in terms of Section 200(3) of the Companies Act Chapter C-2 of the Statutes of Alberta to include in its memorandum of association a provision substantially similar, and identical in effect, to subclauses b., c. and d. of this clause, i.e. clause six of this Memorandum.

b. Each Regional Company shall be assigned a specific region within the province of Alberta in which it shall be primarily responsible for the promotion of the common aims of the Association and the Regional Company. To this end the Association shall transfer assets owned or acquired by it within each region to the Regional Company incorporated within that region and give to each such Regional Company the primary right to raise funds within that region.

c. It shall be an express condition precedent to the incorporation of any Regional Company with the permission of the Association, that:

(i) the objects and powers of such Regional Company shall be identical to the objects and powers of the Association as set forth in clauses 2 and 3 of this Memorandum;

(ii) that each Regional Company will conduct its affairs in accordance with the objects and powers set forth in clauses 2 and 3 of this Memorandum;

(iii) that such Regional Company will maintain an up-to-date membership list at all times and produce it to the President or Board of Directors of the Association upon the request of the Association;

(iv) that the Regional Company shall abide by such other contractual terms and conditions as may be agreed upon between the Association and that Regional Company.

d. The Association may, either by an ordinary resolution of its members or by a decision of its Board of Directors apply to the Court of Queen's Bench for an order for the winding-up of any Regional Company or such other remedy as may be available and appropriate in the circumstances where that Regional Company has breached clause 6(c) of this Memorandum.

WE, the several persons, whose names and addresses are subscribed, are desirous of being formed into a Company in pursuance of this Memorandum of Association.

ARTICLES OF ASSOCIATION OF THE CANADIAN MENTAL HEALTH ASSOCIATION, ALBERTA DIVISION, 1983

1. INTERPRETATION

In these Articles, words importing one gender shall include the other unless the context demands otherwise.

2. TABLE "A"

The regulations in Table "A" of the first schedule of the Companies Act shall not apply to the Association.

3. ENTITLEMENT TO MEMBERSHIP

a. Subject to any specific provision in these Articles, all persons have a right to become members of the Association upon application to the Association for membership, and payment to the Association of a fee to be determined by the Association from time to time.

b. Both individuals and associations, whether incorporated or not, may be members, and, while a membership may be held jointly by one or more person, no person shall hold more than one membership.

c. Conferring membership in the Association upon any person shall automatically confer upon such person membership in the CMHA.

d. The admission of any person to membership of any company referred to as a "Regional Company" in Clause 6(a) of the Memorandum of Association, shall automatically confer upon such person a membership in the Association.

e. The rights of any member of the Association admitted to membership by virtue of her membership in such Regional Company shall be determined by reference to these Articles, the bylaws of the CMHA and, where applicable, the Articles of Association of the Regional Company admitting such member to membership. In case any other article or bylaw conflicts with any of the Articles of the Association, the Articles of Association of the Association shall prevail in respect of any question involving the standing of the member in the Association.

f. The Board of Directors of the Association may confer an honorary life membership upon individuals in recognition of their contribution to the work or the goals of the Association. Such members have the right to vote and hold office and shall not be required to pay a membership fee.

g. No company or other organization having the words "Canadian Mental Health Association" as part of its name shall be a member of the Association.

4. NO TRANSFER OF MEMBERSHIP

No member may transfer for value or otherwise a membership or any right arising therefrom.

5. EXPULSION OR SUSPENSION

a. The Association may expel or suspend its members for the commission of any act or the indulgence in any course of conduct by that member which seriously impedes or disrupts the Association's lawful activities.

b. The Association shall not expel or suspend any member before it has obtained a recommendation to that effect by the majority vote of the members of a committee consisting of the following four persons:

(i) one member of the Board nominated by the Board of Directors of the Association

(ii) one member of the Board nominated by the member sought to be expelled or suspended

(iii) one member of the Association nominated by the Board of Directors of the Association

(iv) one member of the Association nominated by the member sought to be expelled or suspended.

In case the member sought to be expelled or suspended refuses or otherwise neglects to nominate the committee members mentioned in subclauses (ii) and (iv) above within 48 hours of the time appointed for the hearing, the Board of Directors of the Association may nominate them in her stead. The committee constituted by this provision will be referred to hereinafter as "the disciplinary committee".

c. The member sought to be expelled or suspended must be given not more than 40 and not less than 7 clear days' notice of the intention to seek her expulsion or suspension. Such notice shall include

(i) a statement that the Association will seek a recommendation from the disciplinary committee for the expulsion or suspension of the member as the case may be;

(ii) a short statement of the specific reasons for which the Association is seeking said recommendation;

(iii) a statement of the fact that the member sought be expelled or suspended has a right to be heard before the disciplinary committee;

(iv) a statement of the fact that she has a right to nominate two members to the disciplinary committee, and

(v) the day, time and place of the hearing.

d. Adherence to the procedure described in this article constitutes *prima facie* proof that an expulsion was fair and reasonable, but the Association may validly expel a member without adhering to the procedures prescribed in this article provided that it can show on a balance of probabilities that the alternative procedure followed by it was fair and reasonable. Conversely, a member may impugn the validity of her purported expulsion by showing on a balance of probabilities that, although the association followed the procedure prescribed by this article, its action was not fair and reasonable.

6. MEMBERSHIP LIST

a. The Association shall maintain and periodically update a list of all of its members which shall be certified by the Secretary or President. The

Association shall, in bringing its membership list up to date in compliance with this provision, request an updated membership list from each Regional Company as defined in clause 6(a) of the Memorandum of the Association in order to incorporate the persons listed thereupon into its own membership list. The task of bringing the Association's membership list up to date shall be performed at least once every year, and shall be completed not later than 50 days before the day upon which each Annual General Meeting or each special meeting of the Association is held.

b. The membership list of the Association shall be made available to members under the following circumstances:

(i) at all meetings of the Association in order to assist in the resolution of any disputes or the attainment of any interests relating to membership in the Association, and

(ii) on any other business day after any member wishing to peruse or copy the list has given the Association three clear business days' notice in writing of her request to do so, and has included in such written request her reason for wishing to so peruse or copy the list.

c. If the Association reasonably believes that the production of the list under the circumstances of either sub-paragraphs (i) or (ii) of subclause b. of this provision would lead to the use of the list by any member for a purpose not reasonably related to her interest as a member, the Association may refuse to produce the list under either the circumstances of paragraph (i) or (ii) of subclause b. as the case may be, or both.

d. Nothing in clauses 6(b) or 6(c) shall be construed to place any qualification upon the right of any executive member, committee or body of the CMHA to access to the membership list of the Association at any reasonable time.

7. MISCELLANEOUS PROVISIONS RELATING TO MEMBERSHIP

a. The membership fees of members of the Association shall be payable annually. Membership shall commence with the payment of the first annual payment by any applicant for membership, and is renewable on the first day of April in each succeeding year.

b. All members of the Association are permitted and encouraged to attend, actively participate in, and vote at all general and special members' meetings of the Association.

8. TERMINATION OF MEMBERSHIP

a. Membership in the Association shall terminate in the following circumstances.

(i) The resignation of the member, (no particular formalities are required for resignation);

(ii) the death of the member;

(iii) the dissolution of the Association;

(iv) the expulsion of the member; or

(v) the expiration of 30 days after the day fixed for the payment of membership fees by article 7(a) if the fee has not been paid by that time.

9. MEETINGS OF MEMBERS

a. The Board of Directors of the Association shall call a regular annual meeting of the members of the Association hereinafter referred to as the "Annual General Meeting", ("AGM"). The AGM shall be called at such time and place as the Board shall determine from time to time, and shall not in any event be called after the expiration of 18 months after either the most recently preceding AGM or after the end of the Association's most recently preceding fiscal year, whichever is the shorter. The fiscal year of the Association shall run from April 1 to March 31 of the succeeding year.

b. In addition to the AGM the Board shall call a Special Meeting of the members of the Association if requested by the following persons to do so:

(i) the lesser of 20% of the total membership of the Association or 25 members of the Association, or

(ii) the President of the Association, or

(iii) at least 50% of the Board of Directors of the Association.

c. Notices of every meeting and of each adjournment of every meeting shall be mailed not more than forty and not less than ten clear days before the day of the meeting to

(i) each member

(ii) each Director, and

(iii) the auditor of the Association.

Such notice shall be written or printed and may be sent by ordinary mail to the latest address furnished by the person in question to the Association.

d. The AGM of members will deal with the consideration of financial statements, auditor's report, election of Directors and re-appointment of incumbent Directors.

e. All matters other than matters mentioned in subclause d. of this clause shall be deemed to be special business.

f. Notice of a meeting to members at which special business is to be transacted shall state

(i) the nature of that business in sufficient detail to permit the member to form a reasoned judgment thereon and

(ii) the text of any special resolution to be submitted to the members.

This clause shall not be interpreted to restrict the rights of members to raise and discuss any issue relevant to the affairs of the Association at all meetings of the Association.

g. The President of the company, or in her absence a Vice President, shall preside as chairman at all meetings of the Association. If neither of them is present fifteen minutes after the commencement of the meeting, then the members may select a Director, or if no Directors are present, a member, to chair the meeting.

h. Save in the cases where the Memorandum of Association or the Articles of Association of the Association or the Companies Act, Chapter C-20 of the Statutes of Alberta, require any resolution to be

passed by a special majority of members at a meeting of members, the members present shall pass resolutions to facilitate or carry on all or any lawful activity of the company by a majority vote.

i. Voting will normally take place by a show of hands, except that it will take place by ballot when a demand is made by any member for a vote by that method.

j. A quorum for both general and special meetings of the Association is forty members.

k. If there is no quorum at a meeting, those members who are present shall not transact any business, but they shall have both the power and the duty to adjourn the meeting.

l. Members may vote by proxy. Every instrument appointing a proxy, whether for a specified meeting or otherwise shall, as nearly as circumstances will permit, be in the form or to the effect of the following:

"I _____ of _____
being a member of the Canadian Mental Health Association Alberta Division hereby appoint _____
and failing her, _____ of
_____ as my proxy to vote for me and on my behalf at the meeting of the company to be held on the _____ day of _____ 19____ and at every adjournment thereof, and at every poll which may take place in consequence thereof.

Date _____

Signature _____

Witness _____"

10. NOMINATION, ELECTION AND APPROVAL OF APPOINTMENT OF DIRECTORS BY MEMBERS

a. The first Directors of the Company shall be those persons who subscribe to the Memorandum of Association as Directors, but the members of the Association shall have ultimate control over the composition of the Board of Directors. They shall therefore either nominate, elect, or, in terms of their right under subclause b. of this clause, approve the appointment of, all Directors of the Association.

b. All appointments to the Board of Directors including those made in terms of subclause a. of this clause and subclauses a. and b. of clause 16, shall be valid until the first meeting of members after such appointment was made. At such meeting the appointment in question shall lapse unless confirmed by the members. Notwithstanding the effect of this provision, an appointment made for the unexpired portion of a term of office under clause 15 which would expire before the first meeting of members to be held thereafter, shall be valid until such expiry.

11. POWERS OF DIRECTORS

a. Subject to the provisions of the Companies Act and the Memorandum and Articles of Association of the Association the Directors shall

(i) manage or supervise the management of the affairs of the company; and

(ii) exercise all the powers of the Association.

b. The Board of Directors may delegate the management of the activities of the Association to any person or persons or committee, provided that no such delegation shall be irrevocable and that the activities and affairs of the Association shall be managed and all powers of the Association shall be exercised under the ultimate direction of the Board.

12. EXECUTIVE COMMITTEE

The Executive Committee of the Association shall be elected by the Board of Directors of the Association from among its members, and shall consist of up to seven persons including a President, Past President, Executive Vice President, and up to four other Vice Presidents. The Executive Committee is hereby vested with authority to exercise all of the powers of the Board while such Board is not in session except such powers as are required to be exercised by the Board by these articles. The Executive Committee may meet at stated times or on notice to all or any of their own number and such committee shall advise and aid the Board in all matters concerning the Association's interests and in the management of its affairs and generally perform such duties and exercise such powers as may be directed or delegated to such Committee by the Board from time to time. A quorum of the Executive Committee shall consist of not less than three of their number. The Executive Committee may act by the written request of the quorum thereof although not formally convened. The Executive Committee shall keep minutes of its proceedings and report the same to the Board at the next meeting thereof.

13. REGIONAL REPRESENTATION ON THE BOARD OF DIRECTORS

a. In order to facilitate representation of, and allocate service to, all persons in the Province of Alberta as fairly as possible, the Province shall be divided into regions. The number and boundaries of such regions shall be determined by the Association except where a Regional Company would be affected by such determination. In the latter case the existence and extent of a region shall be determined by negotiation and agreement with the Regional Company or Companies so affected.

b. The Association may consent in terms of Clause 6 of its Memorandum of Association to the incorporation of companies created to further objects identical to its own within each of these regions.

c. In each region where no such Regional Company is incorporated, the affairs of the Association shall be carried on by a branch or unit of the Association which shall be referred to in these Articles as a "regional unit" of the Association. The power to manage the affairs of each such regional unit shall be delegated by the Association to a Board of Regional Directors.

d. Each Board of Regional Directors shall be elected by the members of the Association ordinarily resident within that region. Such Regional Directors need not be members of the Association's Board of Directors,

but they shall have the exclusive right to nominate such Directors to the Association's Board as is permitted to that region by subclause e. of this article.

e. For the purpose of this provision and subclause f. of this clause both the Regional Companies referred to in subclause b. above and the regional units referred to in subclause c., shall be referred to as "regions". Both the north central and the south central regions have the right to nominate a maximum of two Directors to the Board of Directors of the Association. Each other region may nominate one Director to the Association's Board.

f. If any person who was nominated to the Board of the Association as the representative of a region in terms of subclause e. of this clause is subsequently elected to the office of President of the Association in terms of clause 24 of these Articles, the region in question may appoint another person to the Association's Board as its representative or one of its representatives.

14. MEMBERS AT LARGE OF THE BOARD

In addition to the Directors nominated by each the region, five further Directors may be elected to the Board of the Association by the members of the Association. The maximum number of Directors on the Board of the Association shall be fifteen. The minimum number shall be ten.

15. STAGGERED TERMS OF OFFICE

The terms of office of the Directors shall be staggered. Accordingly, one half of the Directors of the original Board of Directors, or a number as close as possible to one half, shall be appointed for a period of two years. The balance of the Board of Directors shall be appointed for a period of one year. When these initial periods have expired, each subsequent period of appointment shall continue for a full two years. Accordingly, if any Director resigns or is otherwise unable or unwilling to serve out the full term of her office for any reason whatever, and a substitute Director is appointed in her place before her term of office has expired, the term of office of such substitute Director shall be no longer than the unexpired portion of the term of office of the Director in whose place such substitute Director is appointed.

16. BOARD APPOINTED DIRECTORS

a. Should any of the regions as described in clause 13(e) above fail to nominate all or any of the Directors which it is entitled to nominate in terms of that same clause, the Board of Directors may appoint one or more persons to the Board up to the maximum number permitted to such region by Article 13(e).

b. Should there be a vacancy in the Board of Directors by reason of the removal, retirement or death of any Director, or because maximum number of Directors permitted by clause 14 has not been reached, the Board may make an appointment in order to fill such vacancy, provided that, if the removal, reitrement or death mentioned above terminated the Directorship of a Director nominated by a regional company or unit in

terms of clause 13(e), such vacancy shall be filled by the nomination of the region in question.

17. MEETINGS OF DIRECTORS

a. The persons attending any meeting of the Directors at which a quorum is present may waive their right to, and dispense with the necessity of, receiving notice or valid notice of that meeting. Presence at and participation in such meeting *per se* shall constitute such waiver unless the person so attending attends the meeting in question with the express purpose of objecting to the fact that notice of the meeting was not given or validly given.

b. A resolution signed by all members of the Board shall be as valid and effectual as if it had been passed at a meeting of the Board.

c. Meetings of the Board may be held at any place within the Province of Alberta which has been designated in the notice of the meeting. Members of the Board may participate in the meeting through the use of conference telephone or similar communications equipment, so long as all members may actively participate in such meeting. Participation in a meeting pursuant to this clause constitutes presence in person at such meeting.

d. Fifty percent of the Directors present in person or participating in the meeting as provided in clause 17(c) shall constitute a quorum for a Directors' meeting.

e. A meeting of the Directors of the Association shall be held as soon as practicable after the issue of the Association's Certificate of Incorporation. At such meeting the Directors shall transact and authorize all such matters as may be necessary to carry on the Association's business without interruption.

f. Meetings of the Board may be called at the request of the President, the Executive Vice President, any two Vice Presidents, or a majority of the Directors of the Association. A meeting of the Board may be held at any time the Board may deem necessary and shall be called upon at least four days notice by registered mail or 48 hours notice delivered personally or by telephone or telegraph.

18. DIRECTORS' DUTIES

The Directors of the Association shall

(i) act honestly, and

(ii) exercise the care, skill and diligence that a reasonably prudent person would exercise in comparable circumstances.

19. INDEMNIFICATION OF DIRECTORS

The Association may purchase and maintain insurance for the purpose of indemnifying any Director who is substantially successful in her defence against any action brought for a breach of the duties imposed by Article 18 or by any rule of common or statute law. No Director shall be entitled to such indemnification unless she establishes affirmatively that her behaviour was not dishonest.

20. REMOVAL FROM OFFICE OF DIRECTORS

a. Any Director may be removed from office without reason by the vote of a majority of the members present at a meeting of the members of the Association provided that, if the Director sought to be removed from office is a Director who has been nominated to the Board of the Association by a regional unit of the Association, or a Regional Company, she shall not be so removed unless the approval of the regional unit or Regional Company is obtained. The phrase "approval of the regional unit or Regional Company" used in this sub-clause shall mean

(i) the approval of at least one half of all the members present at a meeting of members of the Association or a meeting of the members of the relevant regional unit or Regional Company who are members of both the Association and of that regional unit or Regional Company; or

(ii) the approval of the majority of the whole Board of Directors of the regional unit or Regional Company in question.

b. Where a Director has been nominated to the Board of the Association by a regional unit of the Association or a Regional Company, she may be removed without reason as a Director of the Association by a majority vote of all the members of the regional unit or Regional Company in question who are present at either a meeting of the Association or a meeting of that regional unit or Regional Company, regardless of whether the Association or its members approve such removal or not.

c. Notwithstanding the provisions of subclauses a. and b. of this clause the Association may at any time, by ordinary resolution of its members, or through the agency of any of its executive organs, remove any Director from office for fraudulent or dishonest conduct, or gross abuse of authority or discretion. No confirmation or approval of any regional unit or Regional Company shall be required for the removal of a Director in terms of this provision.

21. MISCELLANEOUS PROVISIONS RELATING TO DIRECTORS

a. A retiring Director shall be eligible for re-appointment to the Board of Directors.

b. All acts performed by, or participated in by, persons who reasonably and in good faith believed themselves to be Directors at the time of such performance or participation, shall be as valid as if the appointment to, and tenure of, the office of Director of such person were lawful and valid.

c. Only Members of the Association shall be appointed to the Board of the Association.

22. REMUNERATION AND REIMBURSEMENT OF DIRECTORS

No director is entitled to remuneration for any work which she does for the Association as a Director, but she may be reimbursed for any reasonable expenditures which she may incur in the performance of such duties.

23. EXECUTIVE DIRECTOR

The Executive Director shall be a paid, full-time employee of the Association and shall therefore, in accordance with clause 22, not be a member of its Board. She shall, subject to the ultimate authority of the Association as expressed and exercised through its members, Board of Directors, Executive Committee or President, be charged with the active day-to-day management of the Board's affairs and operations.

24. PRESIDENT

a. The Board shall elect a President who shall be charged with the general mangement and supervision of the affairs and operations of the Association. She shall, when present, preside over all meetings of the members of the Association, its Board of Directors, or its Executive Committee. She shall, in addition, be an *ad hoc* member of any subcommittee which may be created by the Association.

b. The President shall hold office for two years. She shall be entitled to re-election to the position of President of the Association, provided that no person may occupy the position of President of the Association for more than two consecutive terms.

25. VICE PRESIDENTS AND EXECUTIVE VICE PRESIDENT

The Board may from time to time appoint from among its number up to five Vice Presidents, one of whom shall be appointed Executive Vice President and vested with all the powers and who shall perform all the duties of the President in the absence of the latter.

26. PAST PRESIDENT

The person who last held the office of President shall, during the term of office of her successor, automatically be a member of Board and be referred to as the Past President.

27. SECRETARY

The Board shall appoint a secretary from among its members. She shall attend meetings of the Board and meetings of members of the Association and keep, or supervise a keeping of, accurate minutes of such meetings. She shall keep minutes of any meetings of the Executive Committee or any other Committee of the Board at which she is requested to do so. She shall keep the financial statements and the books and records required by Articles 30 and 31 respectively together with the list of the members of the society and their addresses required by Article 6, and send all notices to the members which may be required by these Articles, the Companies Act, or any request or directive of any executive organ of the Association.

28. TREASURER

The Board shall appoint as Treasurer one of its Vice Presidents. She shall receive all monies paid to the Association and shall be responsible for their deposit in whatever bank the Board may order. She shall proper-

ly account for the funds of the Association and keep such books as may be necessary in order to do so. She shall present a full and detailed account of receipts and disbursements to the Board, the Executive Committee or the President whenever requested to do so. She shall prepare the annual financial report required in clause 30, and submit a copy thereof to the Secretary for the records of the Association.

29. AUDITOR

The Association shall, in General Meeting, appoint an auditor who shall complete an audit of and report upon the books, accounts and financial report of the Association before the expiration of 110 days after the end of the Association's financial year.

30. FINANCIAL REPORT

a. The Board shall cause accounts to be kept, and a financial report to be compiled, an audited copy of which shall be available for inspection by any member of the Association not later than 120 days after the close of the Association's financial year. "Availability" as required by this clause means availability of the report for inspection by any member upon request

(i) at the AGM of the Association, and

(ii) during office hours at the Association's head office.

b. The financial report required in clause 1 shall contain the following information in appropriate detail:

(i) The assets and liabilities of the corporation as of the end of the fiscal year;

(ii) The principal changes in assets and liabilities during the fiscal year;

(iii) the revenue or receipts of the corporation, both unrestricted and restricted to particular purposes, for the fiscal year; and

(iv) The expenses or disbursements of the corporation, for both general and restricted purposes during the fiscal year.

31. BOOKS AND RECORDS

The Secretary shall keep or supervise the keeping of books or records in which the following data is recorded:

(i) the minutes of the meetings of both the members and Directors required or permitted by clause 27;

(ii) a complete and up-to-date list of the members of the Board of Directors of the Association, together with their addresses, occupations and a description of any special duties assigned to them;

(iii) the audited financial reports furnished to the Secretary by the Treasurer in terms of clause 28;

(iv) an up-to-date copy of these Articles and Memorandum of Association of the Association, accurately reflecting the latest amendments to each, if any; and

(v) the list of the Association's members required by clause 6(a).

32. SEAL

The Association may have a corporate seal.

33. WINDING-UP

The Association may be wound up by a unanimous decision of its Board of Directors or by a decision of two-thirds of all its members provided that no resolution for so winding-up the Association shall contain any provision which conflicts in any way with clause 5(b) of the Association's Memorandum of Association.