SYMPOSIUM ON THE REVISED DRAFT UNIFORM COMPANIES ACT (MEMORANDUM AND ARTICLES)—1960*

Opening Remarks by Mr. J. S. Woods

The question of uniformity of company law has been one which has occupied the attention of the Canadian Bar Association since its inception in 1910. Many eminent members of our profession have put their minds to this problem throughout the years, both in Canada and in the United States. To date there has been no marked success.

I recently took a quick look through Martindale and Hubbell[1] and discovered that in the United States no less than three "Model" statutes have been presented. The first, in 1928, was promulgated by the Conference of Commissioners on Uniform State Laws, as the "Uniform Business Corporation Act". It appears that only two states adopted this statute. In 1943, the Conference withdrew the Uniform Act, revised it and renamed it the "Modern Business Corporation Act". This Act was adopted, with substantial variations, by two states. It was withdrawn in 1957.

The Model Business Corporation Act presently afoot in the United States is one prepared by the Committee on Corporate Laws (Section on Corporation, Banking and Business Law) of the American Bar Association and has not been submitted to either the House of Delegates of the American Bar Association or to the Conference on Uniformity. Fourteen states appear to have adopted this last draft in some measure, but in nearly every case Martindale and Hubbell makes notes of the following nature concerning the relative State Act and the Model Act:

"Adopted with variations"
"Based on"
"Adopted with substantial variations"
"Modelled on"
"Adopted in part"
"Based in part on, with variations"

It is evident our American brethren have been unable to establish uniformity in this field. The latest Canadian attempt is the subject of discussion here today.

Moderator's Remarks

This panel was undertaken to discuss the Revised Draft Uniform Companies Act (Memorandum and Articles) as prepared by the Special Committee on the Uniform Companies Act of the Conference of Commissioners on Uniformity of Legislation in Canada following their conference in Winnipeg in October 1960.

---

*A symposium presented at the Meeting of the Alberta Branch of the Canadian Bar Association, at Calgary, January 31st, 1963.
The panel was organized by Mr. James S. Woods, a member of the firm of Chambers, Saucier, Jones, Peacock, Black, Gain & Stratton of Calgary, Alberta.
The panel consisted of the following:
MODERATOR: G. H. Allen Q.C., Allen, MacKimmie, Matthews, Wood, Phillips & Smith, Calgary, Alberta.
MEMBERS: N. D. McDermid Q.C., Macleod, McDermid, Dixon, Burns, Love & Leitch, Calgary, Alberta; W. A. Howard Q.C., Howard, Bessemer, Moore, Dixon, Mackie & Forsyth, Calgary, Alberta; H. G. Field Q.C., Field, Hyndman, Field, Owen, Blakey, & Bodner, Edmonton, Alberta; P. L. MacDonnell, Milner, Steer, Dyde, Massie, Layton, Gregan & MacDonnell, Edmonton, Alberta

1 The *Martindale & Hubbel Law Dictionary*, (1962 94th ed.).

I think it might be of interest if I recited some of the history of the attempts to draft an acceptable Uniform Company Law for Canada.

No less than 47 years ago, in 1916, at the Second Annual Meeting of the Canadian Bar Association, reports were delivered on the possibility and advisability of a Uniform Company Law for Canada.

Some four years later the Manitoba Commissioners, Messrs. Isaac Pitblado, W. O. Tupper and H. J. Symington, made a more detailed report to the Conference on Uniformity of Legislation (which was functioning even at that early date—43 years ago—making suggestions as to principles which might be adopted as a basis for a Uniform Law and two years later the Manitoba Commission actually came up with a draft Act for consideration.

But, like the mills of the Gods, the Conference ground slowly and no perceptible progress was made until ten years later, in 1932, when at a Dominion-Provincial Conference of Premiers and Attorneys General a committee was appointed to try to advance the achievement of uniformity and the late hardworking R. Andrew Smith, then Legislative Counsel for Alberta, finally produced a draft Act which was submitted to the Conference on Uniformity in 1938.

However, at that time the Commissioners decided to await a report of a Commission on Company Law which had been established in England. Then the war intervened and the draft went into limbo from whence I do not think it ever emerged.

Nothing further seems to have happened until around 1948 or 1949 when, under the direction of the Department of the Secretary of State, representatives from the Dominion and the Provinces undertook the job of preparing a new draft Uniform Act. Ontario in the meantime ran into trouble over issuance of securities and a committee of the Ontario Legislature went to work on the subject, finally producing the Ontario Corporations Act of 1953.[2]

It was said at Halifax[3] that this Act introduced the concept that Government should exercise a paternalistic supervision over those charged with the management of Company affairs, but I have an idea this concept originated in the Dominion Legislation of 1934 when the rules of the game were tightened—at least so far as the Dominion Act was concerned—particularly with regard to public offerings and Directors' actions—probably as a result of the sad experiences of 1929.

Anyhow the Ontario Corporations Act of 1953 seems to have been fondly regarded by the Dominion-Provincial Conference, because it was largely in its image that the draft of the Dominion-Provincial Conference was formulated.

It was found, however, that the idea of a draft Act that would do for those jurisdictions where incorporation by Memorandum and Articles was in effect as well as for those jurisdictions favouring Letters Patent and By-Laws wouldn't come out just right. So in 1958 two drafts emerged—one for Memorandum and Articles Companies and another for Companies incorporated under Letters Patent.

---

2 Statutes of Ontario, 1953, c. 19.

3 The 1962 meeting of the Canadian Bar Association: discussion on the draft Uniform Companies Act.

These drafts were widely distributed and were considered and commented on by committees and conferences of Bar, business men, accountants, and others.*

QUESTION 1: IS A UNIFORM COMPANIES ACT FOR ALBERTA NECESSARY OR DESIRABLE?

Answer by Mr. McDermid: You will see that there are really two questions. "Is a Uniform Companies Act necessary?" "Is a Uniform Companies Act desirable?" To give you my conclusions first, before my reasons, I believe a Uniform Companies Act is not necessary, but it is highly desirable and (subject to certain qualifications which I will develop later) should receive the support of this Section of the Canadian Bar.

To first deal with the question of whether a Uniform Companies Act is necessary. I take from the question, if we do not adopt the Uniform Act what is the alternative? Can we get along under our present Act and should this Association recommend any amendments to our present Act?

Our present Act[4] was modelled on the English Companies Act of 1929.[5] If we are to continue with our present Act and not adopt the Uniform Act, then I think we might give some consideration to the new English Act of 1948[6] and see whether we might amend our present Act by adopting some of the provisions inserted in the English Act.

For instance, I find one change made in the English Act of great interest. It is in connection with changing the Memorandum of Association with respect to a company's objects and amalgamation of companies. The new English section sets out substantially the same reasons as ours for allowing a company to change its objects. The objects have to be altered by special resolution but then, instead of putting the onus on the company to apply to the Court and obtain the Court's approval, the English Act now provides the special resolution comes into effect unless an application is made to the Court. If an application is made to the Court then the Court must confirm the resolution before it is effective. The section provides that an application may be made by 15% in value of any class of shareholders or debenture holders. It seems to me there is a great deal of merit in providing that a company need only be put to the expense of going to the Court for approval if there is objection by a significant percentage of its shareholders or debenture holders to the course it proposes to pursue.[7]

There is also a new section 210 in the English Act which gives the Court wide powers over a company if the Board of Trade on behalf of an oppressed minority makes application to the Court and the Court decides the minority is in fact being oppressed. If we had such a section instead of trying to protect minorities in certain sections of the Act we could leave the whole matter to the Courts.

I have cited these sections to show that we are not all on our own, if

*The following questions were posed by the Moderator.

4 R.S.A. 1955, c. 53.
5 19 & 20 Geo. 5, c. 23.
6 11 & 12 Geo. 6, c. 38.
7 The Uniform Act has adopted a similar provision in s. 30.

we decide to continue with our present Act. There are, of course, other provisions in the English Act which we should consider and if we adopt their sections then we shall have the benefit of their decisions also. We can also examine any Act for new ideas and we can adopt those provisions in the Uniform Act we agree with. In fact the whole field is open to us. However, if we decide not to support the Uniform Act I think we should set up a Committee to consider amendments to our present Act to bring it up to date.

I have therefore concluded that it is not necessary, however desirable it may be, to adopt the Uniform Act.

However, in my opinion it is highly desirable that we adopt the Uniform Act.

Uniformity of legislation is one of the objects of the Canadian Bar Association. This object was adopted at the formation of the Canadian Bar and as far as I know has never been criticized. I think also since the commencement of the Association it has been conceded that one of the matters in which the Association should strive for uniformity is Company Law.

The advantages of having uniformity in Company Law are, for the most part, obvious. That uniformity be attained is becoming more important as companies increasingly have Dominion-wide interests. It is important that a business incorporated in one province or by the Dominion be registerable by uniform forms throughout the Dominion. Why shouldn't one firm of lawyers be able to register a company in all provinces by using the same form? Why shouldn't that same company be able to file annual reports on the same form in all provinces; have uniform provisions in regard to keeping share registers? Why shouldn't that same company be in the position that it knows that if it is carrying on its corporate affairs according to the Company Law of one province that it is complying with the corporate laws of all the provinces? To have laws which make it otherwise is to my mind inefficient and wasteful. I think our profession is in duty bound to simplify wherever possible our laws in Canada and one of the easiest ways of doing this is by making them uniform. I think this would not only be for the benefit of the business community but also the ultimate benefit of our profession. That great Canadian lawyer, the late Eugene LaFleur, said, "I have never heard it contended that the activities of the legal profession require any artificial stimulation".

There is another important benefit in having uniformity. With sections uniform we are bound to have a greater number of judicial decisions which will assist us in interpreting the Act. This may not be the case immediately after the adoption of the Act but in the long run I think it is bound to be so. I think also there is an advantage in having Canadian decisions rather than decisions of Courts of other countries.

Now there are undoubtedly many other examples of the advantages of uniformity. What are the disadvantages? To my mind the question becomes "Does the Uniform Act contain so many objectionable features that we can't swallow, that we are better off continuing with our present Act and maybe trying to keep it in line with the English Act?"

There is only one principle that I would be insistent on changing in the proposed Uniform Act before we adopted it.

We don't have to debate whether we want to change from the Registration System to the Letters Patent System. The proposed Act now makes provision for continuing with the Registration System or the Letters Patent System whichever you wish. I think of the two systems the Registration System is the better. However we don't have to worry about the problem and I merely raise the question because I am in favour of our present system and would not favor switching over to the Letters Patent System.

The one matter in the prosposed Act that should be changed is that, in certain instances the approval that formerly had to be obtained by a company from the Court has now been given to the Registrar of Companies.

I think we should insist as a principle that where there is any discretion that must be exercised outside the company, that in the first instance this discretion be conferred on the Court, and only where it is impracticable to confer the same on the Court that such discretion should be conferred on the Registrar of Companies.

This is a principle that goes far beyond the bounds of Company Law. I think it is important that this association take the position that it will oppose in principle any tendency to deprive the Courts of jurisdiction and confer the same on administrators. I think every time a law takes away from a citizen our heritage of having our rights determined by a Court with all the safeguards that are inherent in that right we should object and object strenuously. The onus should be on those who want to make the change to prove that the change is absolutely essential. I don't believe we should be easily convinced that it is.

Now if you accept this principle with me does it stand in the way of our adopting the Uniform Companies Act? I don't propose to discuss with you the changes that would be required in the Act in order to give the Courts back the jurisdiction that has been taken away from them, for Mr. Field is dealing specifically with that question.

I do believe all the changes required in this respect can be obtained and will not be opposed by the Companies branch. In fact I believe the Companies branch would probably be glad to be released of this thankless job.

In considering these changes I think we might consider providing that instead of putting the obligation on a company to go to the Courts, that the obligation be put on dissentients as the English Act does where the objects of a company are to be changed or where companies amalgamate. We have that principle to some extent in Section 138 of our present Act which provides that where a company acquires 90% of the shares of another company it may force the remaining 10% to sell their shares unless the Court on the application of a dissentient provides otherwise.

Outside of this one change I would be in favour of adopting a uniform Act. I do believe that there are many other changes which would improve the Act. If we can get these changes we should. But if we

are unable to have the other provinces accede to our views then I think we should be exceedingly chary of making a host of amendments to the Uniform Act.

For instance, I think the provision which now requires a director to have a share qualification serves no useful purpose. It is not required by the English Act nor by our present Act. However, I can live with it and would accept it if all of the other provinces want it.

There are many other instances where I am sure each of us would like to see changes in the proposed Uniform Act. However, I don't think we should insist on them unless it is a matter of principle.

Each change we suggest should be tested by asking, "Is it fundamental and are we prepared not to approve the Act unless the change is made?"

Even though such a change is not fundamental and in our view necessary, it may be that we think such a change desirable. Even here unless the argument for the change is very cogent I would suggest that we not be insistent on it. I suppose it all gets down to a question of degree.

I am in favour of adopting the proposed Act with only *one* change as to principle that I have mentioned.

I am in favor of other changes if they can be made but not if it means scuttling the proposed Uniform Act.

QUESTION 2: HOW WILL THE DRAFT UNIFORM ACT IN ITS PRESENT FORM AFFECT THE STATUS AND POWERS OF EXISTING ALBERTA COMPANIES?

Answer by Mr. MacDonnell: The present Alberta Companies Act[8] divides companies into three main categories: first, companies limited by shares and this of course is the category into which more than 99% of all companies incorporated in Alberta fall; second, companies limited by guarantee which may or may not have shares; and third, specially limited companies which are restricted to companies with mining objects and in which the shareholders have no liability. These are the NPL or non-personal liability companies.

When the present Act came into force in 1929 specific provision was made to preserve the status of all existing companies in each of these three categories. Provision for this is made in Section 4 of the present Act.

Presumably because they have fallen into disuse the draft Uniform Act eliminates the provisions for the incorporation of companies limited by guarantee and of specially limited companies but Section 4 of the draft Act makes specific provision to preserve the status of existing companies in these two categories and Section 46 further provides for the conversion of existing companies in these two categories into companies limited by shares. This right of conversion exists under the present Act but only extends to specially limited companies and does not extend to companies limited by guarantee.

The draft Act therefore eliminates two of the three existing categories

8 *Supra*, n. 4.

of companies altogether but specifically preserves the status of existing companies in the two categories eliminated.

The draft Act does not, however, in its present form make any specific provision to preserve the status of the most important category of existing companies, namely the thousands of existing Alberta companies limited by shares. No mention of this type of company is made in Section 4 of the draft Act where it might be expected. However, I am advised by one of the persons who has been closely connected with the drafting of the new Act that this omission from the present draft Act was deliberate because it was felt that each province would have different transitional problems and that provisions appropriate for each province would have to be added before the draft Act became law. I think it can therefore be assumed (and it is certainly most important) that the draft Act will include specific provisions preserving the status of existing companies limited by shares.

Turning now to the effect of the new Act on the status of existing Alberta companies outside Alberta, a provincially incorporated company has always had the right to carry on business as of right within the Province in which it is incorporated and following a series of decisions culminating in the familiar *Bonanza Creek* case[9] in 1916 such a company also has the capacity to carry on business beyond the limits of the home province and to accept extra-provincial rights from any other province willing to extend the privilege of operating within its territory. It is very important that a province such as Alberta be able to give its companies the capacity to accept such rights extra-provincially and the present Act in Section 9(2) gives statutory effect to the *Bonanza Creek* decision. As the provisions of this Section are carried forward into Section 11 of the draft Uniform Act almost verbatim the capacity of an Alberta company to carry on business beyond the limits of Alberta will remain unimpaired.

There is, however, one entirely new concept—at least for Alberta—introduced by the draft Act. This is the concept of continuation which will certainly affect the status of companies incorporated in Alberta should they choose to take advantage of it. If time permits reference will be made by another member of this panel to the concept of continuation as applied to the amalgamation provisions of the draft Act because it is in connection with amalgamations that the concept of continuation has perhaps its most immediate importance. Section 137 of the draft Act in effect provides that subject to certain requirements an Ontario company can, for example, apply to become an Alberta company. Under Section 138 the reverse procedure is made possible and an Alberta company can apply to become an Ontario company. An Alberta company if authorized by a special resolution would be able to apply in Ontario for what is called an Instrument of Continuation continuing the Alberta company as if it had been incorporated under the laws of Ontario and from the date of the Instrument what up to that time had been an Alberta company would become an Ontario company and at the same time as far as Alberta was concerned would become an extra-provincial, or what we at the present time call a foreign company. As you can see, to be effective similar provisions would have to be

[9] *Bonanza Creek Gold Mining Company* v. *The King* [1916] 1 A.C. 566.

contained in the Companies Acts of the two provinces concerned and if the concept of continuation is to be made applicable throughout Canada the legislation providing for it would of course have to be uniform in every province.

Doubts have already been expressed as to the constitutional validity of the provisions relating to continuation and the draft Act poses the constitutional question of whether a provincial legislature which under the British North America Act has power to make laws in relation to the incorporation of companies with provincial objects, whether such legislature can give a company incorporated under its jurisdiction the capacity to in turn subject itself wholly to the laws of another province and thereupon cease to exist as a company incorporated under the laws of the province of original incorporation. As one of the main objects in introducing the concept of continuation is to permit the amalgamation of companies which cannot now amalgamate because they come from different jurisdictions and because the amalgamation of companies large or small is not something that can be done today and undone tomorrow, it is obviously essential that the constitutional validity of the continuation provisions be established beyond question before the new concept can be of much practical value.

Turning now briefly to the effect of the Uniform Act on the powers of an existing company it should be borne in mind that the powers exercisable by a company incorporated by Memorandum of Association as companies are and, under the draft Act, will continue to be in Alberta, the powers of such a company are those expressly conferred by its incorporating instruments when read together, that is by its Memorandum of Association, its Articles and the Act under which it is incorporated.

The new draft Act will not substantially affect the powers of existing companies although there are significant differences between the present Act and the new draft Act.

On the negative side the specific powers that a company incorporated under the present Act is precluded from exercising, such as the power to engage in the business of banking or insurance or the power to operate a railway or telegraph or telephone system, remain substantially the same in the new draft Act. The effect of incorporation remains the same under the new draft Act and the restricted power of a company to make loans to directors and shareholders also remains about the same although it should be carefully noted that this power under the new Act will only be exercisable under the authority of a special resolution; in other words, it will become a function of the shareholders rather than of the directors of the company.

Section 19(1) of the present Act gives a company extensive ancillary powers for the "purposes of carrying out its objects". Substantially similar powers (with the notable exception of the power to borrow) are granted under Section 21(1) of the new Act but in this case they are granted as "incidental and ancillary to the objects set out in the Memorandum". This new wording is taken from the Ontario[10] and Dominion Acts[11] and is I think probably less restrictive than the

10 *Supra*, n. 2, s. 14.
11 Dominion Companies Act. R.S.C. 1952, c. 53.

present wording. It should, however, be noted that the power to sell, lease, exchange or otherwise dispose of the undertaking of the company or any part thereof as an entirety or substantially as an entirety contained in Section 21 can only be exercised by a special resolution. I think that to require shareholder approval on the sale of a company's undertaking is not unreasonable although I question whether more than majority approval should be required.

I mentioned that the power to borrow has not been included with the other ancillary powers in the new draft Act, but in a separate section, Section 22, modelled substantially on Section 63 of the Dominion Companies Act and Section 58 of the Ontario Companies Act. The fact that the power to borrow has been dealt with separately recognizes the importance of this power and Section 23 requires that the powers therein set out be authorized by the Articles of Association. It will therefore be essential that the power to borrow be clearly set out in the Articles. It is not clear whether the borrowing powers set out in Section 23 can be extended or restricted by the Memorandum and as this is desirable the present wording should be clarified. The section should also make it absolutely clear that where necessary or desirable a part only of the borrowing powers authorized by Section 23 could in turn be authorized by the Articles.

QUESTION 3: WHAT PROTECTION DOES THE ACT AFFORD TO MINORITY SHAREHOLDERS IN PUBLIC AND PRIVATE COMPANIES AND WHAT PROBLEMS DOES SUCH PROTECTION RAISE FOR THE MAJORITY SHAREHOLDERS?

Answer by Mr. Howard: I think that the simplest method of doing this is to set forth the principal items of so-called protection for minority shareholders in the draft Act, relating it to the problems thereby presented to the majority shareholders and, indirectly, the management of the company. In so far as management and directions are concerned I will refer briefly to several features which may be expanded by Mr. MacDonnell in comments on this or a subsequent question.

(i) Under Section 8 of the draft Act a company, whether public or private, shall not make loans to shareholders or directors, or provide financial assistance in any way to any person for the purchase of shares in the company, provided that it may, with the authority of a special resolution of the shareholders make such loans to shareholders or directors if the so doing is in the ordinary course of its business or to enable employees (whether directors or not) to purchase or erect their dwelling houses, or to employees (whether or not directors) pursuant to an employee benefit scheme, or to employees other than directors to purchase fully paid shares, or in the case of a private company, to enable shareholders or directors to purchase *issued* shares of the company. The protection granted to minority shareholders, not granted under the existing Companies Act[12], is that even those items excepted from the prohibition must be approved by special resolution of the shareholders and the general prohibition extends to both public and private companies. Whilst this may well give considerable protection

12 *Supra*, n. 4.

to the minority shareholders of a company, in the case of a private company in many cases it may work a hardship as such companies would now be prohibited, except in the few limited cases set forth in the section from loaning money to its shareholders and/or directors, however secure the loan may be.

(ii) Under Section 30 of the draft Act, where the Memorandum or Articles provide for the deletion or variation of the preference or rights of any class of shareholders, or for the creation of new shares which would rank in priority to any existing class, and if a special resolution making such changes or creating such new shares is passed but not *unanimously*, the holders of not less than 15% who did not consent to or vote in favor of such resolution (whether or not they attend the meeting) may apply to the Court to have the resolution disallowed and in such event the Court may within 15 days, wholly or in part, either disallow or confirm such special resolution. If the Memorandum or Articles do not contain provision for making such changes and the resolution is not agreed to unanimously by the shareholders, then the resolution must be confirmed by the Court who may confirm it either wholly or in part. This is a considerable power given to the minority shareholders who had notice of the meeting, possibly didn't even bother to attend, who then apply to the Court and the company may end up with changes which result in something that the minority never intended and which may be impossible to live with.

(iii) The draft Act in Sections 68, 69, 70, 71 and 72 provides for the redemption and purchase by the company of preference shares and for the purchase by the company of common shares. It provides for a measure of protection to ensure that shareholders of a Class will be dealt with equitably. Such protection in the case of redemption of preference shares is not so clearly set forth in the present Companies Act. As to whether or not it is a good thing to open the door for a company to purchase its common shares is not really part of my question, but I do wonder if it is a good thing, then why can a public company only do so with employees' shares.

(iv) Under Section 88 of the draft Act, a Company is required to allow a shareholder or creditor of the company, his agent, or personal representative, to inspect and make extracts from various things including any resolution signed by all the directors, and on seven days notice the company must provide to any shareholder so requesting a copy of all minutes of meetings of *shareholders, directors and executive committees* at a charge not exceeding .25 cents for every hundred words. Under the existing Act the shareholders only have access to and may secure copies of the shareholders' minutes unless they proceed under the investigation provisions of the Companies Act. This may well give protection to the minority and give the minority shareholders a look into the inner workings of the company, but in so doing, the door would be left wide open for a business firm to use this as a means of determining company policies of a competitive business firm and may be used by a malicious shareholder to harass and abuse the company, the management and thereby create a real problem for the majority shareholders.

(v) Under Section 100 of the draft Act a company can provide for cumulative voting in the selection of directors. This is a method which

enables a minority to gain representation on a board of directors and it works briefly in this fashion—if you have 5,000 issued shares and a shareholder holds 1,000 shares and there are 5 directors to be elected, they are all voted on at the same time and you multiply the number of shares that you hold by the number of directors to be elected, with the result that the man with the 1,000 shares casts 5,000 votes and may cast them all for one director and he is likely to elect one director. In the case of a private company there is considerable merit in this method in that instead of 51% electing all the board, the minority will probably have one director. This device has been used in the United States to enable a minority to get control of the Board of Directors.

(vi) The draft Act provides in Section 140 that in the case of a private company, if at a meeting of shareholders a special resolution is passed authorizing the sale or other disposition of the assets of the Company or any part thereof, or if a special resolution is passed providing for the conversion of the private company into a public company, or if an amalgamation is approved by the shareholders, any shareholder *who has voted against such resolution* may require the company to purchase his shares at a price to be agreed upon or failing agreement, as may be determined by the Court. Such purchase will not be made if the company is insolvent or if the purchase would make the company insolvent. Presumably this is on the premise that the private company shareholder comes in on a certain basis and for a certain purpose and if either of these be changed without his consent he is entitled to be bailed out. This seems to give to the minority shareholder the power to either force the company to drop its plans or buy the minority out, notwithstanding that the plans as approved were in the best interests of the company and the purchase of the minority interest or the abandoning of its plans may severely handicap the company.

(vii) The more detailed spelling out of the information to be included in a company's financial statement is a distinct benefit to all concerned, including the minority shareholders.

(viii) The draft Act in Section 132 refers to an "arrangement" which is stated to include consolidation of shares, reclassification of shares, varying rights of shares, and transferring assets of the company for shares of another corporation with the purpose of distributing acquired shares to the shareholders of the company. Such an arrangement requires the approval of ¾ of the shareholders, present in person or by proxy (and if it alters the control or management, it must also get the consent of ¾ of any outstanding preferred shares) and upon the application to the Court, the company shall notify all dissenting shareholders unless the Court otherwise directs. Upon the hearing before the Court the dissenting shareholders may present their arguments and the Court may approve the scheme upon such terms and conditions as it thinks fit. As a result of all this the resolution as ultimately confirmed by the Court may bear no resemblance to what the majority of the shareholders originally passed.

(ix) Under the present Companies Act an investigation into the affairs of a company is secured upon application to the Lieutenant Governor in Council by holders of not less than $\frac{1}{20}$ of the issued shares. Under the draft Act the application is to the Court. I think this is more

satisfactory. I would prefer to have the decision made by the Court as to whether or not a particular company would be investigated rather than by the Lieutenant Governor in Council.

(x) Section 196 of the draft Act states that where a shareholder or creditor of a company is aggrieved (whatever that means) by the failure of the company or a director, manager, officer or employee of the company to perform any duty imposed upon it or him by the charter or Articles of the company, the shareholder or creditor, in addition to any penalty under the Act or any other right that he may have, may apply to the Court for an order directing such person to so perform his duty. Whilst this on the face of it may appear to be an added safeguard to a minority shareholders, it may also leave the door open, depending upon the obligations in or wording of the Articles, for abuse and enabling those who are so disposed to make a full time occuption of harassing companies, their directors, officers and employees.

Comment on Question 3 by Mr. MacDonnell: There is no question that the most important right of shareholders of a company is the right of the majority to order its affairs. On the other hand a proper balance of the rights of majority and minority shareholders is essential for the efficient functioning of a company and although at common law a minority shareholder has always been given a fair measure of protection from fraudulent, oppressive or unfair treatment at the hands of the majority the tendency has been ever since the various companies Acts first became law to continually extend statutory protection of the minority. As Mr. Howard has indicated the new draft Act goes to considerable lengths in extending protection to minority shareholders and contains a number of new provisions inserted solely for that purpose.

If time permits the effect of some of these minority rights on the effective management of the company by the directors will be considered in more detail but I think it is very important that in trying to protect the minority the majority should not in effect be prejudiced because obviously if there are too many safeguards and too many checks on the powers of the directors (who in effect are the majority) to run the affairs of the company nothing will be accomplished effectively to the detriment of both the majority and minority alike.

When you consider that in addition to the usual incidental rights to be conferred upon shareholders by the draft Act such as the right to inspect the corporate books and records,[13] the right to receive financial statements[14] which under the new Act will be much more comprehensive and to have the auditor's report presented and to inspect it, when in addition to these rights a shareholder is to be given the right to apply to the Court to have an inspector appointed to investigate the affairs of the company[15] or for an Order directing the company or any director, officer or employee to perform any duty imposed on them by the Act[16] or to have the company wound up where it is just and equitable,[17] the right to requisition a meeting of shareholders at any time,[18] and in the

13 Revised draft Uniform Companies Act, s. 88.
14 *Ibid.* s. 121.
15 *Ibid*, s. 141.
16 *Ibid.* s. 196.
17 *Ibid.* s. 213.
18 *Ibid.* s. 128.

case of a private company the right to require the company to purchase his shares in certain cases,[19] it seems to me that perhaps the time has come in the interest of effective management and operation to look to the rights of the majority who after all are entitled to some protection as well.

It is no doubt necessary for the protection of shareholders that the activities of companies and those responsible for their management should be subject to a considerable degree of statutory regulation and control. But controls and regulations carried to excess may defeat their own purpose. In my view it is undesirable to impose the type of restriction which would seriously hamper the activities of honest men in order to defeat an occasional wrongdoer and it is important not to place unreasonable fetters upon business which is conducted in an efficient and honest manner.

QUESTION 4: DO THE DISCRETIONARY POWERS GRANTED BY THE DRAFT ACT TO THE REGISTRAR AFFECT THE LAWYER ACTING FOR CORPORATE CLIENTS?

Answer by Mr. Field: In order to answer this question it is necessary to do three things: first, ascertain what discretion the Registrar has under the draft Act; second, compare that discretion with the discretionary powers in the present Act, and third, consider both sets of such powers for their effect on the practicing lawyer with particular reference to new discretionary powers from the new Act which exist in the present Act.

In order to condense this answer somewhat, I am dealing with parts 1 and 2 together and in making a comparison of these discretionary powers have classified them into groups by their subject matter.

The subjects upon which the Registrar has discretion under both Acts are as follows:

1. As to the selection of a name or the change of name;[20]
2. Discretion as to the time for filing. This covers late filing of Returns of Allotment, of Mortgages, and of Receiver's Abstract;[21]
3. As to the right of a company to voluntarily surrender its Charter, or if a foreign company, its foreign registration;[22]
4. The approving of amalgamation agreements:[23]
5. The right of the Registrar to give notice if he believes that the company or a foreign company is no longer actively engaged in business.[24]

To some extent these are all contained in both Acts and in addition the draft Act contains two others. One is a discretion granted to the Registrar to allow documents to be kept elsewhere than at the head office, and secondly there is a wide discretion granted to the Registrar as to his requirements under Section 137 of the draft which deals with a company migrating from one jurisdiction to another.

19 *Ibid.* s. 140.
20 Uniform Companies Act ss. 12, 13, 15, 34; Alberta Companies Act ss. 12, 43.
21 Uniform Companies Act ss. 54, 182, 188; Alberta Companies Act s. 132; s. 100 (2); s. 108.
22 Uniform Companies Act ss. 143, 167; Alberta Companies Act ss. 170, 152.
23 Uniform Companies Act s. 136; Alberta Companies Act s. 140(a)(5).
24 Uniform Companies Act ss. 143, 165; Alberta Companies Act ss. 152, 170.

Four discretions which presently appear in the Alberta Act have been dropped from the draft Act. They are:

1. The Registrar's right to relieve a company from holding its Annual Meeting under certain circumstances;[25]
2. The Registrar's right to require "such other information as the Registrar may require" in registering foreign companies;[26]
3. The Registrar's right to permit a foreign company to carry on business in the jurisdiction under a name or title other than that under which it is registered;[27] and
4. The Registrar's right to require a foreign company to file with its Annual Statement "such further and other information as he deems reasonable and proper".[28]

I shall comment briefly on each of the classifications.

Every practicing lawyer is familiar with the difficulties in securing a name or change of name for a company, particularly when a variety of jurisdictions are involved. This, however, is one area where I submit, the Registrar's discretion is essential and ought to be retained in the Act. It will be noted that under the draft Act where a company is forced to change its name the company has an appeal to the Court against this ruling. This is a salutary addition.

I am unable to see any particular advantage in having a discretion to permit late filing of documents. In the first place I think that having to file a Return of Allotment at all is no longer a necessary function and might well be left out of the Act. However, if it is to be filed, then there should be some reasonable time set for the filing and if the filing does not take place within that time then the delinquent party should explain to the Court why it has not been filed. This discretion, however, poses no real problem to the practicing lawyer.

In the draft Act the decision of the Registrar to accept the withdrawal of a foreign company or the surrender of its Charter is subject to appeal to the Court. This is a useful provision. It appears reasonable that there should be some flexibility in establishing the circumstances under which a company could withdraw or surrender its Charter but it does seem odd that the Registrar be fixed with the burden of studying the appropriateness or otherwise of the withdrawal. It appears to me that it would be better if the requisite documents for withdrawal were spelled out in the Statute and when they were filed the Registrar would withdraw the company or accept surrender of its Charter subject to appeal to the Court by any dissatisfied affected party. As this provision now stands the lawyer will have to check with the Registrar first then meet all the Registrar's requirements and even then cannot be certain that the Registrar will accept the withdrawal.

I see no advantage to the Registrar being required to approve amalgamation agreements. There is a practical advantage of having him check the agreement to be sure that its content is consistent with the corporate structure of the amalgamating companies immediately prior to the amalgamation and that the amalgamation is in fact done in

25 Alberta Companies Act s. 125.
26 *Ibid.* s. 148.
27 *Ibid.* s. 157.
28 *Ibid.* s. 159.

accordance with the Act, but other than that there appears to be no reason why the Registrar should be asked to exercise any discretion in regard to the agreements. It is obviously ridiculous for him to dictate to the parties the terms of their agreement. He, of course, can refuse to accept the documents if they are not consistent with the corporate structure or with the terms of the Act when they are presented to him, and this discretionary power in this Section appears quite unnecessary. If the Registrar undertook to seriously exercise his discretion, the lawyer and clients could be very seriously affected by some idiosyncracy of the Registrar.

I am in agreement that the Registrar's right to give notice to a company if he thinks it is not carrying on business should be preserved. In both the present Act and the draft Act the company has an opportunity to act after it receives the notice and the provision appears reasonable. The lawyer has no problem here.

Why the draft Act has included in it a provision giving the Registrar discretion to keep documents elsewhere than its head office escapes me. If the matter should be of importance to the company, the Registrar's discretion could be unfortunate.

Under the new concept in the draft Act of a company changing its home jurisdiction it may well be that the exact documentation required is difficult to spell out and that the Registrar should have some discretion. In my opinion, however, it is unfortunate if the Certificate, when it issues, is subject to limitations which can be imposed by the Registrar. If his registration requirements are met then the company should be free to carry on its business in the Province without being subject to discretionary limitations on its activities imposed by the Registrar. The fact that the registration requirements are not clearly codified will present problems for the lawyer who is attempting to effect registration, but this may be unavoidable.

It will be observed that the draft Act now removes from the Registrar the discretions as to whether or not he will permit a foreign company to register and this discretion is now placed with the Lieutenant-Governor in Council.

In closing, it would be appropriate to make reference to Section 156 of the draft Act which contains a provision stating that an extra-provincial corporation registered under this part and not otherwise empowered to do so, may within the Province "carry on business in accordance with its Certificate of Registration . . .". It would appear that the Certificate of Registration would have to recite the entire objects of the company in order that the company be free to carry on its business in the Province. In my opinion these words can pose unnecessary problems.

Comment on Question 4 by Mr. Howard: I think perhaps the question might be expressed as "What function does the draft Act grant to the Registrar and how will his discretionary power affect the lawyer acting for corporate clients?"

I think that the discretion granted to the Registrar in the draft Act is confused to say the least:

(a) Some criticism has been levelled by some people at the dis-

cretionary power of the Registrar[29] in granting a name and it has been suggested that it would be desirable to relieve the Registrar of some of the burden and leave aggrieved persons to seek their relief in court. To me, this is a proper place for the Registrar's discretion to get the matter of the name reasonably established at the time of incorporation, and the aggrieved person still has his right to the Court;

(b) Why a Return of Alltoment[30] is necessary, I do not know, and even more inexplicable is the magic number of 60 days in the draft Act—beyond which the Registrar has no discretion and you must go to Court. If it is necessary to file a Return of Allotment, then why limit his discretion to 60 days? The filing or not filing has no bearing on whether or not the shares were issued. The Company's financial statements under the draft Act requires that the number of shares issued since the last statement be shown separately;

(c) The Registrar under the draft Act[31] has the power to agree to books of account, minute books, etc. being kept other than at the head office and can thereafter, at his discretion, change his mind. It appears to me that the best method is to let the books of account, etc. be kept in the Province where the directors see fit but available for inspection by those entitled so to do;

(d) The approval of the Registrar of an amalgamation agreement[32] without any limitation or explanation seems to be an impossible obligation. If he is to properly discharge his duty he must examine and decide upon the public, business, financial, accounting and legal aspects. Is the Registrar likely to have or is his office likely to contain such extensive and all-embracing qualifications? If he is not to look at these factors, what factors is he to look at? Surely all he can look at is the capital provisions, the name, the registered office, the capital and possibly certain other statutory requirements;

(e) The discretionary powers under Section 137 of the draft Act whereby the Registrar may issue a certificate of continuation to a company incorporated under the laws of another jurisdiction on such terms and subject to such limitations and conditions and containing such provisions as appears to the Registrar to be proper appears to be granting to the Registrar an absolute and unfettered discretion with no guidance or elucidation as to how it will be exercised, what documents or prerequisites he may require and presumably will be applied in as many different ways as there are Registrars or similar appointments across Canada.

QUESTION 5: HOW WILL THE DRAFT ACT AFFECT THE POWERS OF A BOARD OF DIRECTORS TO EFFICIENTLY MANAGE A COMPANY?

Answer by Mr. MacDonnell: Under existing Alberta law the corporate powers of a company are, depending upon the Articles of Association, exercised partly by the directors and partly by the shareholders in general meetings. If powers of management are vested in the directors

29 Uniform Companies Act. ss. 12-16.
30 *Ibid.* s. 54.
31 *Ibid.* s. 85.
32 *Ibid.* s. 136.

they and they alone can exercise these powers. They are entitled to manage the company without interference from the shareholders and in the absence of illegality, fraud or oppression of minority shareholders' interests to which reference has already been made the Courts will not interfere in its management. The only way in which the shareholders can control the exercise of the powers vested by the Articles of Association in the directors is by either altering the Articles or by refusing to re-elect the directors of whose actions they disapprove. Shareholders cannot themselves usurp the powers which by the Articles are vested in the directors any more than the directors can usurp the powers vested by the Articles in the general body of shareholders.

As the directors of a company occupy a most important position and bear a substantial part of the responsibility for the success of all corporate undertakings, the provisions of any companies act relating to directors are likewise most important and in the case of a new draft Act such as the one we are considering should be examined with great care.

In the new draft Act the main provisions relating to directors are contained in Sections 94 to 108 but there are in addition certain other sections of the draft Act which have a bearing on directors and the functions they perform.

Under Section 94 the affairs of a company are to be managed by a board of not less than three directors in the case of a public company and not less than two in the case of a private company and the same section makes it clear that the directors are to administer in all things the affairs of the company.

As has already been mentioned the new draft Act provides for cumulative voting on the election of directors. This is covered by Section 100. Although there has been a good deal of criticism of the concept of cumulative voting as giving rise to a number of undesirable results such as corporate raiding it should be borne in mind that the provisions contained in the new draft Act are purely permissive and do not in my view change the existing situation. There is nothing in the present Act to prevent cumulative voting and so nothing new will be added by the provisions of Section 100.

The draft Act does, however, specifically provide for the removal of a director before the expiration of his term by special resolution. Although this is a new provision it should be borne in mind that there is nothing in the present Act to prevent the Articles of Association of an existing Alberta company providing for the removal of a director by special resolution. I have always had some doubts about the right of shareholders to remove a director during his term of office except in very unusual circumstances. If it is now to become a statutory right then I feel that in addition to the two-thirds majority that would under the new draft Act be required to pass such a special resolution there should be a strict quorum requirement that a substantial number, perhaps as many as two-thirds of the issued shares of the company having voting rights, be represented at the meeting before the matter of removal can even be considered. Otherwise of course the two-thirds majority which passed the special resolution removing a director might represent a very

small proportion of the total issued shares and I think this would be very undesirable. The statutory power to remove a director before the end of his term of office—usually one year— and the lack of stability that could be created by giving the shareholders such power seems to me to justify inserting in the new Act adequate safeguards to ensure that only in very exceptional circumstances and only with the support of a very substantial majority of the shareholders could a director be removed from his office.

The other sections relating specifically to directors are generally satisfactory. They permit the Articles to provide for signed resolutions of directors being as valid and effective as if passed at a meeting of directors. This is of course a very common practice now recognized by the draft Act.

In the same way the Act recognizes the common practice in larger companies of appointing an Executive Committee of the Board of Directors to which any powers of the Board can be delegated.

The specific provision in Section 104 that the quorum for a meeting of the Board of Directors shall never be less than two-fifths of the Board could in some circumstances be rather impractical and inconvenient and I see no reason why the matter cannot be left for companies to determine for themselves.

The liability of directors for such things as wages, unauthorized loans to shareholders or directors, the wrongful declaration of dividends remains substantially the same and the provisions of Section 108 requiring directors of a public company to disclose their dealings in shares of the company at the annual meeting are comparable to existing provisions of other Companies Acts and are in my view reasonable and unobjectionable.

There are, however, several sections of the new Act which if abused might well hamper the management of the company by the directors and be damaging to the company itself.

First there is Section 88 already referred to by Mr. Howard, which permits shareholders and creditors to inspect, among other things, resolutions and minutes of directors. This section not only ignores the fundamental element of competition but could be used to completely undermine the position of the directors and do irreparable damage to the company. I think it should be deleted altogether.

Then there is Section 140 already referred to in connection with minority rights. As suggested by Mr. Howard to give a dissenting shareholder of a private company the right to either block a plan approved by a majority of the shareholders or be bought out could completely frustrate the directors in pursuing plans in the best interests of the company and in that way their management of the company.

Next is Section 141 which gives to shareholders who hold 5% of the issued shares of a company the right to apply to the Court for an Inspector to investigate the affairs and management of the company. Section 141 of the present Act gives a similar right to shareholders but the power to appoint an Inspector is vested not in the Court but in the Lieutenant Governor in Council. In my view to give the right to the Court to appoint an Inspector to investigate the affairs of the company

is objectionable in that it opens the gate to making public the affairs of the company which might be very much to the detriment of the company and to the advantage of its competitors. The present provisions of the Companies Act authorizing the Lieutenant Governor in Council to interfere and to appoint Inspectors is I think adequate since an Inspector so appointed is able to keep confidential the subject of his investigation except to the extent necessary to rectify any abuse. Court proceedings inevitably make all matters public and the Court should only be used where there is a case of fraud or severe oppression of minority interests and should not be made a device for assisting in upsetting the stability and continuity of company operations.

Although in principal I agree with Mr. McDermid and prefer to have discretion exercised by the Court rather than by administrative officers I think in this case the reasonable protection of the interests of companies coming under the Act requires it.

Finally in Section 196 a shareholder or creditor of a company who is aggrieved by the failure of the company or a director, manager, officer or employee of the company to perform any duty imposed upon it or him by the Charter or Articles may apply to the Court for an Order directing the company, director, manager, officer or employee, as the case may be, to perform the duty. This section comes straight out of the Ontario Companies Act and is in my view objectionable. As Mr. Howard has already suggested, it will be an open invitation to persons who are so disposed to make a full time occupation of harassing companies, their directors, officers and employees and could in the same manner as the sections referred to earlier be most damaging to a company.

Although I am much in favour of a uniform Companies Act I am not as ready as Mr. McDermid to accept the present draft Act with little or no amendment. As far as the provisions affecting directors are concerned and in particular Sections 88, 140, 141 and 196 I feel that substantial amendments and in some instances complete deletions are necessary before the Act would be acceptable.

Summation by the Moderator: To sum up briefly, I think perhaps I can say that the papers delivered by the members of the panel and the discusion following thereon indicate:

1. That the desirability of uniformity in Company Law across Canada is accepted in principle.
2. That, in general, most of the provisions of the draft Act are found satisfactory and that the progresss of its enactment into law should not be unduly impeded by insistence upon changes which may not be entirely essential.
3. That some constitutional questions may remain to be resolved, particularly in relation to the provisions regarding amalgamations of companies incorporated in separate jurisdictions, but these might be settled by a reference to the Supreme Court of Canada.
4. That the proposed extension of the rights of shareholders of access to minutes of directors meetings and meetings of executive committees is not approved as, among other things, it is felt that this may lead to, and assist, unfair competitive practices.

5. That the co-operation which officials of the Companies branches have extended to representations with respect to amendments of the Companies Acts to meet changing conditions or to correct anomalies has been appreciated and inasmuch as the enactment of the new legislation may be some time away, such further co-operation may have to be sought in the intervening period.[33]

[33] At the conclusion of the meeting the following resolution was passed unanimously:

Whereas the Companies Acts now in force in Canada and its provinces vary greatly in matters of procedure and in their effect on substantive rights and obligations;

And whereas a draft Uniform Companies Act prepared by a special inter-provincial committee has been considered by this meeting;

NOW THEREFORE BE IT RESOLVED THAT:

1. This branch of the Canadian Bar Association go on record as approving the principle of uniformity as embodied in the said draft; and
2. This branch forthwith approach the Law Society of Alberta with a view to setting up a joint committee to review the said draft act in detail and to meet with officials of the Provincial Government to resolve the difficulties and problems contained therein.