PROBLEMS IN COMPANY LAW
A SYMPOSIUM

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1. *What considerations determine whether or not a company should be incorporated?*

When this problem is being discussed the following questions should be answered: who are the individuals involved, what is their present relationship, what are their ages, how many are there and what type of business is to be carried on?

People in business tend to fail to realize that a company can carry on business through a limited partnership. In special situations this type of organization is satisfactory and it should not be overlooked as it provides for limited liability insofar as the special partner is concerned. It should be noted however, that such a business form would have no status outside Alberta.

It may be your opinion that the present relationship between the owners of a business is such that a detailed form of agreement is necessary. In the case of many father and son businesses it will be found that the parties find difficulty in formulating a clear agreement which adequately protects the rights and privileges of all concerned. The corporate form of business, with its rights of ownership being represented by shares, is an excellent way to carry on such a business and prevent many prospective disagreements.

The most important aspect and main advantage of incorporation is limited liability. A member of a company cannot be compelled to contribute in excess of the amount remaining unpaid on his shares. It is not correct to say that the company has limited liability, its liability is akin to that of any other legal entity, the full extent of its physical resources. The true significance of limited liability was revealed in *Saloman* v. *Saloman*[1] when the major shareholder succeeded in protecting much of his investment through the issue of debentures. As Lord Watson stated in that case, "a creditor who will not take the trouble to use the means which the statute provides for enabling him to protect himself, must bear the consequences of his own negligence." This apparent advantage over unwary creditors must be explained to the principal shareholder. Many institutions will require a pledge or hypothecation of any securities held by the principal shareholder and a postponement of his claims to that of the institution.

The ability to finance is an important feature of the corporation. There are a great many forms of "ownership" available and this is as great an advantage to the small business as it is to the large. A great many different interests can be accommodated: those who seek a prior claim, convertibility, preference, features of redemption, security can all be accomodated in some form or other.

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[1] [1897] A. C. 22

A full appreciation of your client's position can result in your advising him to choose a form of organization which will be most advantageous with regard to income and succession duty tax. If we compare a single proprietorship with a corporation, and the profits are left in the business then we will see that money is saved by using the corporate form once the income exceeds $8,000.00 per year. The governing considerations depend upon the situation of the individual client but income tax and succession duty must be considered in determining the relative advantage of the different forms of business.

2. *What considerations determine whether a company should be incorporated as a Dominion or Alberta Company?*

The main consideration is, where does the proposed company intend to carry on business?

The provinces are given power to create companies "with provincial objects" under section 92 of the B.N.A. Act. Also, under s.9(2) of the Alberta Companies Act a company is given capacity to accept powers to effect its objects outside the province. It is necessary to consider the other places where your company might carry on business and then to examine the statutes of those jurisdictions to see if an Alberta company could carry out business in those jurisdictions. One must look for a provision similar to our s.140:

> Subject to the provisions of this Act and the laws of the Province, a foreign company registered under this Act and not otherwise empowered to do so may within the province carry on business in accordance with its certificate of registration, and for that purpose exercise the powers contained in its charter and regulations.

The Acts of the Provinces of British Columbia, Saskatchewan and Manitoba contain what appears to be an adequate provision. Ontario and Quebec are not so explicite in their company provisions and Nova Scotia, Prince Edward Island and New Brunswick do not have comparable sections to our s.140.

The jurisdictional problem does not confront a Dominion company. Provincial legislation cannot destroy the status of a Dominion company. The provinces cannot pass legislation which is prohibitive with respect to Dominion companies. Moreover Dominion companies may be in a more favourable position if recognition by a foreign jurisdiction is desired. It is interesting to note that Dominion Letters Patent authorize the company to carry on business throughout Canada and elsewhere.

The jurisdictional problem may determine the form of company. Generally speaking, if the company is to do business throughout Canada, a Dominion company is preferable. The problem of carrying on business in foreign countries is usually solved by setting up a wholly owned subsidiary in the foreign jurisdiction.

Another factor is cost. As tariffs covering fees generally vary with authorized capital it is necessary to have particulars of the capital before an accurate estimate can be made. The fees in some provinces vary according to the capital investment in the particular provinces. If we take an Alberta company with minimum authorized capital and register or license it in all the provinces the approximate cost would be $400, while it would cost approximately $600 to incorporate a Dominion company and put it in a position to carry on business in all provinces. An Alberta company authorized to carry on business in the western provinces would cost about $205, while a Dominion company in the same position would cost about $400.

A third consideration is the objects of the proposed company. In the Alberta Act there is no restriction or limitation dealing with object clauses. There is a limitation on Dominion companies: the Secretary of State is responsible for an examination of the objects clauses, and the government order-in-council states;

> . . . the purposes or objects recited in the charter shall be confined to one purpose and such other purposes as are reasonably incidental thereto.

There are other minor considerations which may determine which form of company to choose. For example, a promoter may not desire a Dominion Company since the Dominion Companies Act states that a director shall not speculate for his own personal account, directly or indirectly, in the shares or securities of the company. There is no similar provision in our Act. One should become familiar with all the details concerning the purposes and objects of the company and then consider the differences in the Acts.

3. *What considerations determine the choice of a company's name?*

Generally speaking the name of a company should be descriptive of its objects or business with the exception that if a company is formed solely for investment or holding purposes it may contain the surname of a principal shareholder.

S.12(1) of the Act sets out some prohibitions. A company is not to be registered with (a) an identical name to that of another company even if its purpose be entirely different and its place of operations in a different part of the world; (b) a name which in the opinion of the Registrar is calculated to deceive, even if the name is that of a person who is to be a shareholder in the company; (c) names restricted by the practice of the Registrar. A descriptive word cannot be claimed as a monopoly and instances here are, "Western", "Plains," and "Prairie".

The Registrar has set down certain general principles: (a) the name must not be misleading, (b) a name cannot be allowed which suggests a connection with the Crown, a member of the Royal Family, or with a department of government; (c) names such as "Imperial", "Commonwealth", "National", "International", "Co-Operative", and Society are generally not allowed; (d) names such as "Bank", "Banking", and "Trust" are not generally allowed and if it is the name of a shareholder he must be a major shareholder or director, (e) If a proposed name is a registered trade mark the consent of the owner of the trade mark should be produced.

The question has been raised as to whether a company can carry on business under a trade name without in any way publicizing the fact that the business is owned by a limited company. It would appear that s.77(1)(c) answers that question in the negative. It may be that individuals signing on behalf of such a business may be prepared to accept unlimited liability or may have an indemnity which they consider sufficient.

4 *Does the doctrine of ultra vires serve a useful purpose to-day?*

The courts have attributed to the term "ultra vires" as applied to companies. a variety of meanings. and have used it to describe the following:

(a) acts of a corporate officer who has engaged in transactions outside the scope of his authority e.g. borrowing by a director when only the Board of Directors has authority under the Articles

(b) illegal transactions, e.g. when a company buys its own shares.

(c) transactions beyond the powers conferred on the company by the statute under which it was incorporated or by its memorandum; e.g. a company empowered to own and operate a bakery engages in mining uranium.

Since the legal consequences flowing from each of these activities are not the same. to describe all of them by the same term serves only to confuse and mislead. "Ultra vires" ought properly be used to describe only transactions in the third category.

If we examine briefly the history of the doctrine we will see the reason for its formulation. It was held by Lord Coke in *Sutton's Hospital Case*[2] that corporations which were created by the grant of a charter from the king had all the powers of a natural person. The King could not withold any powers although he might set out the objects the company was to pursue and if the company abused its powers proceedings by way of *scire facias* could be taken to forfeit the company's charter. The doctrine of ultra vires did not apply to these common law corporations however, and the contracts entered into by them were valid.[3]

The railway boom which England experienced in the nineteenth century gave rise to the incorporation of many companies by special act of Parliament. It was to these companies which owed their existence entirely to the incorporating statute, that the doctrine of ultra vires was first applied. The courts held that they, unlike the common law corporations, had only the powers expressly or impliedly granted to them by the sovereign Parliament, and all other activities were forbidden.[4] Similarly, companies formed by the registration of a memorandum of Association and Articles of Association under the company acts are held to have power to do only those things set out in their Memorandum.

A transaction entered into by a company outside the objects of its memorandum. and hence beyond the powers conferred upon it by the legislature. was not voidable only, but wholly void and of no legal effect. Since it could not be authorized it could not be ratified or confirmed, even if all the shareholders were in favour of the transaction. The object of the doctrine was held by the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche*[5] to be two-fold: (1) the protection of shareholders. and (2) the protection of creditors. Persons who might be willing to invest in a textile company may be unwilling to put their money into a mining enterprise. And a lender who might be pleased to extend credit to a company engaged in the manufacture of automobiles might be loathe to see its assets dissipated in oil exploration activities.

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[2] (1613). 10 Co. Rep. 1 a

[3] *Baroness Wenlock v. River Dee Co.* (1887). 36 Ch.D. 674, at 685

[4] *ibid*

[5] (1875). L.R. 7 H.L. 613

Although the doctrine may have had some beneficial effect initially, it soon proved to be something of a mixed blessing for the groups it was intended to protect. Business activities being dynamic rather than static, many businesses developed profitable lines never contemplated at the time of incorporation. If the new activity could be regarded as reasonably incidental to the company's expressly authorized objects, the doctrine did not operate. Alteration of the company's objects clause was permitted under the statute, generally speaking, only to facilitate the attainment of the company's main purpose rather than to enable it to enter some entirely new field of business. You note the provisions of section 38 of the Alberta Companies Act in this respect. The "ultra vires" doctrine also operated to the great disadvantage of creditors who, having advanced money on an ultra vires borrowing, were precluded from suing on the contract.

To circumvent the effect of the doctrine incorporators no longer set out shortly and in general terms the activities proposed to be carried out by the company but instead, have formulated the practice of drafting long and extremely detailed objects clauses which permitted the company to engage in any form of activity in which it might at some later date wish to engage. Although the undesirable consequences of the doctrine were largely overcome in this way, the original purpose was rendered nugatory. In the words of Professor Gower:[6]

> . . . the whole object of the ultra vires doctrine had been largely frustrated. It has ceased to be an effective protection to anyone and had become merely a trap for the unwary third party and a nuisance to the company itself.

In answer to the question posed it may be fairly said that the doctrine serves no useful purpose to-day. In support of this conclusion I should like to quote from the Report of the Cohen Committee, which was appointed by the President of the Board of Trade in England to consider and report what major amendments to the Companies Act of 1929 were desirable. In recommending the abolition of the doctrine, the report said in part:

> . . . the doctrine of ultra vires is an illusory protection for the shareholder and yet may be a pitfall for third parties dealing with the company. For example, if a company which has not taken the powers to carry on a taxi-cab service, nevertheless does so, third persons who have sold taxi-cabs to the company or have been employed to drive them may have no legal right to recover payment from the company. We consider that, as now applied to companies, the ultra vires doctrine serves no positive purpose but is, on the other hand, a cause of unnecessary prolixity and vexation.

5. *Should the objects and powers of the Company be set out in considerable detail or set out shortly in general terms?*

The clause containing the objects of the company is one of the most important parts of the memorandum of association. Objects should state with as much clarity as possible the trades, businesses or fields of industry which the company is formed to carry on. It is advisable to use broad general terms in a short form rather than long and detailed clauses. If the incorporators of the company desire a wide range of activities, necessitating a number of objects clauses then there should be an interpretation clause excluding the operation of the *eiusdem generis* rule.

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[6] Gower, Modern Company Law, pp. 86-7

Once the objects have been stated the company has conferred upon it all powers reasonably requisite to the attainment of these objects. Section 19 of the Companies Act states that a company shall have the powers therein set out for the purpose of carrying out the objects of the company unless the power is expressly excluded. Powers should not be confused with objects. An object is the trade, business or industry which the company intends to carry on. A power is simply the right and authority to attain the objects.

The confusion between objects and powers has resulted in the memorandum containing what are interpreted by the courts as objects clauses which at the time of incorporation were intended to be power clauses only. There has also developed a body of law to the effect that a stated purpose in a memorandum is presumed to be the trade or business of the company. As we are all aware if a venture of a company is its trade or business then it will be taxed on the gain derived therefrom. The confusion between power and purpose has long been recognized:

> There has grown up a pernicious practice of registering memoranda of association which, under the clause relating to objects, contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose, but confusing power with purpose and indicating every class of act which the corporation as power to do. The practice is not one of recent growth. It has now arrived at a point at which the fact is that the function of the memorandum is taken to be not to specify, not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere in its terms. Such a memorandum, is not, I think, a compliance with the Act.

Some of you may have read the recent decision in *McMahon and Burns v. M.N.R.*[7] A company, carrying on the business of underwriters, had made a private investment in one of its own securities and had recorded the same in a private investment account which it kept. On the sale of the security a gain was made and the gain was held to be income. The learned judge in the Exchequer Court stated that the transaction, even though regarded as an investment by the taxpayer, was part of the business of the company:

> The Appellant's memorandum of Association provides for particular species of business exercised in the purchase and sale of pipe-line debentures and a profit ensued from the exercising of such business.

It would be interesting to know what the court would have said if the objects clause of the company had simply stated that the company's objects were to "carry on the business of an underwriter, broker or dealer" and nothing more.

My own impression is that the taxpayer would have had a better chance of success. It can be seen from the above that there is a presumption that the company's business is stated in its objects clause. The taxe consequences of this presumption may be costly. It must always be remembered that the Memorandum of Association can be amended to include other objects and a new company can be formed to carry on new ventures.

6. *What is the nature of the restrictions on private companies and where should they be placed, in the Memorandum or in the Articles?*

A private company is defined by the Alberta Companies Act as a company which by its Memorandum or Articles:

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[7] [1956] Ex. C.R. 364

(a) restricts or prohibits the right to transfer any of its shares;
(b) limits the number of its members to fifty or less;
(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

The latter two of these three elements pose no difficulty and are generally effected in language almost identical to that of the Act.

It is the first element which gives rise to difficulty. The restrictions or prohibitions cover a wide field and vary from a brief provision prohibiting a transfer of shares unless the same is approved by the directors to complicated provisions granting to other shareholders what is, in effect, a pre-emptive right to purchase shares offered for sale.

The provision placing approval in the hands of the directors is more suitable for use in the incorporation of a subsidiary where simplicity of operation is desired. Where a company is to be incorporated to carry on the business of a single proprietorship or partnership, it would be more desirable to provide a more complete machinery for transfer. This is particularly important in the case of a partnership. By the very nature of the association a partner may find it impractical to continue in business with his associates and in most instances it is not desirable to preclude him from disposing of and realizing on his investment by an outright refusal of the Board of Directors of the company to register a transfer.

Here are some examples of clauses which might be used in the incorporation of a private company to acquire a partnership:

(1) No share may be transferred to a person not a shareholder as long as any shareholder is willing to purchase the same; provided that such a transfer may be made to a non-shareholder if approved by the Board of Directors.

(2) If not approved by the Board of Directors the following procedure becomes effective:
- (a) a transfer notice is given to the company specifying the details of the shares offered and the fair value of the shares in the opinion of the proposed transferor.
- (b) unless otherwise determined by a special resolution of the shareholders the shares are then offered to the other shareholders pro rata to their existing holdings.
- (c) a time is set for acceptance.
- (d) the purchasing shareholder indicates his willingness to purchase by a further notice which also sets forth whether the transferor's fair value is accepted.
- (e) if the transferor's fair value is not accepted, the fair value is determined by the company's auditor.
- (f) once that fair value is determined and the purchase price paid, the company may effect the transfer.
- (g) if the other shareholders are not interested and the sale is not completed within the limited time, the proposing transferor may transfer the shares to any person at a price not less than the agreed fair value.

One of the main precautions in using such restrictions is that a qualified auditor must be appointed by the shareholders of the company who will be available to ascertain a fair value. In making such an appointment, the solicitor of the company should draw to the attention of the auditor the nature of the restrictions and his duty in respect of them.

A solicitor should also consider the effect of death of a company shareholder. The solicitor might consider whether or not an insurance scheme should be established whereby there would be funds made available for the purchase of the deceased's shares thereby making money available for the payment of succession duties if that is a problem.

The Alberta Companies Act provides that restrictions may be placed either in the Memorandum or the Articles. The present trend in Alberta is to use the Articles, a trend I favour because:

(a) the Articles contain a more complete picture of the basis on which the affairs of the company are to be run;

(b) that, if any changes become desirable, it may be effected merely by special resolution.

If, on the other hand, the restrictions are placed in the Memorandum, the Companies Act does not have any clear method of amendment if we keep in mind s.35 of the Act which reads:

> A company shall not alter the conditions contained in its Memorandum, except in the cases and in the mode and to the extent for which express provision is made in this Act.

It is suggested the only possible way to effect such amendment would be by special resolution of the shareholders approved by the Court as a reorganization of share capital pursuant to s.42 of the Act.

7. *Are the contents of Table A satisfactory for private and public companies?*

The answer is that Table A is not satisfactory.

There are nine sections in our Companies Act which use the words "if so authorized by the Articles" or words to that effect. Table A takes advantage of one complete section and part of another, leaving therefore, eight sections of our Act which are not utilized if Table A is used. Those sections are:

s.40 dealing with alteration of share capital.

s.41 dealing with increase, consolidation, conversion and subdivision of share capital.

s.64 which deals with the right to have a branch register outside the Province of Alberta.

s.75 which deals with the right to issue "share warrants".

s.82(b) which permits the directors to issue shares as dividends.

s.100(a) which gives the company right to issue bonds, debentures, debenture stock, notes, obligations or fully paid preference shares upon conversion.

s.103(1) which gives the company the right to authorize payment of a commission on the sale of shares.

s.124 which allows a company the use of another seal which may have on its face the name of the province, state or country where it is to be used.

The powers given by ss. 40, 41, and 82(b), I would suggest are essential in the Articles of both private and public companies. The powers given by ss. 64 and 124 are only required where the company may do business outside the province. The powers given by ss. 75 and 100(a) and 103(1) are more applicable to public companies.

Without going into the question of whether the Articles are drafted for the protection of management or shareholders it is suggested some consideration should be given to the following:

1. The insertion of a clause which will permit the company to use what is called a "round-robin" resolution. Such a clause provides that a resolution signed by all directors shall have the same force and effect as one passed at a meeting of the directors.
2. Whether the Articles should follow Table A and include a provision for a director to hold a share in the company. This requirement is imposed

the Articles, through s.79. In certain private companies it may be disadvantageous from a tax point of view. There are situations where it is desirable to have a person a director and yet not a shareholder.

3. The Notice required for a general meeting under Table A is 7 days. If the company is a public company it may in the future have its shares listed for trading on the American Stock Exchange, in which case the seven days should be changed to ten.
4. By reason of Article 62, Table A, a director who has an interest in a contract is not entitled to vote. By s.60 (a) (4) of the Act such a Director is prohibited from voting unless the articles otherwise provide.
5. Article 61 in Table A requires a resolution for the use of a seal. It is suggested that it is not advisable to have such a requirement.
6. Where the company is a public one it is suggested there should be some provision for indemnifying officers and directors, particularly in the case of a public company.
7. Article 58 provides a limit on the borrowing power of the directors, and it is suggested this limit is too harsh for normal business activities.
8. Article 78 gives the company the right to declare a dividend, and it is suggested that the Directors are in a better position to decide upon the declaration of a dividend.
9. In the case of a public company it is desirable to have provision for the appointment of committees and provisions for their operation.
10. Clause 17 of Table A deals with the fee to be charged on the transfer of shares. It is suggested that if the company is a public company and its shares may be listed on the American Stock Exchange the clause should be varied to give the Directors the right to decide if a fee should be charged.
11. Article 91 provides that a copy of the Balance Sheet and Report of the Directors be sent to all persons entitled to receive notice of general meetings. It is submitted it should be left to the discretion of the directors whether the company should go to the expense of mailing copies to all shareholders.
12. Article 73 of Table A provides that the President be Chairman of the Board of Directors. In public companies the position is often held by another person, and this matter should be left in the discretion of the directors.

In conclusion, if Table A is not to apply it should be so stated in the first of the substituted articles. Moreover if Table A is used in whole or in part it should be reproduced with any changes and a copy filed in the minute book.

8. *What factors should be considered in determining the share capital of a company?*

The amount of authorized capital is the first factor to be determined in light of the nature and size of the undertaking, bearing in mind the ratio which it is desired to maintain between issued share capital and ... as by shareholders. The incorporators must then consider:

1. Whether shares having a nominal or par value or shares without par value are to be used in the first instance. In the usual private company where only a nominal number of shares are issued to define the respective interests of the participants, it is preferable to use par value shares. However no par value shares will be more useful if the venture is speculative and it is desired to place the company in a position to be able to issue shares as fully paid in the first instance at a low price. This is more applicable to public companies where it is desirable to create initial interest and permit the interest to keep pace with the hoped-for increase in the value of the company's assets. There would also appear to be a psychological advantage in being able to offer no par value shares for sale to the public at a price of $1.00 per share rather than shares having a par value of 10c at $1.00.

There are two further observations that should be made with regard to no par value shares. Firstly, the Alberta Companies Act, as patterned on the English Act, contains many sections which are not readily applicable to no par value shares. One particular example is s.45 with respect to the form of minute on reduction of capital. Secondly you must make certain that the articles of the company are adapted to no par value shares. For example, with respect to dividends, Article 81 of Table A states:

> Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares.

The last phrase causes some difficulty where it is desired to pay equal dividends on all shares regardless of the amount paid for the individual shares.

2. Another factor to be considered is the voting rights to be attached to the shares. In the case of a sole proprietorship there may not be any necessity for the shares carrying different voting rights. However, if incorporation is employed as a means of fixing the value of the incorporator's estate for succession duty purposes and the incorporator is to receive preferred shares with his beneficiaries taking common then the preferred should possess voting rights until redemption or cancellation.

In the case of incorporation of a partnership it may be important to determine that the shares of each participant entitle him to elect a stated number of members to the Board of Directors.

It may be desired to employ the system of cumulative voting. This is a method frequently employed in the United States and is generally employed in the election of directors. Under this system a shareholder is allowed to cast a number of votes, related to the number of shares he holds and the number of vacancies. He may cast the whole number of votes available to him for one person or he may distribute them as he sees fit. Minority shareholders are given a better opportunity to secure representation under this system. Cumulative voting has recently been recognized in Ontario, and provisions are to be found in the Corporations Act, 1953. S.114 (1) of our Act provides for non-cumulative voting, unless otherwise provided for ...

sider our clause 73 (2b) which deals with voting requirements where a company has different classes and series of shares.

3. The use of preferred shares will be considered in the following situations, amongst others;

(a) where incorporation is desirable for succession duty purposes and to insure continuity.

(b) where funds are to be advanced by others to an incorporator. Preferred shares will be useful in such a situation of the person advancing shares does not demand a secured position. In such a case it is desirable to make the preferred shares cumulative to insure the return of a predetermined rate of return and redeemable so that the company may retire the debt.

(c) where the operations of the company indicate that its profits will be such as to permit it to take advantage of the provisions of Part 11 of the Income Tax Act. In such a case it is not necessary to be unduly concerned about the cumulative feature.

In any event it seems that any Memorandum of Association should contain a clause permitting its shares to be issued with preferred or other rights in the manner referred to in s. 73 (1) of the Alberta Act.

4. A fourth factor to be considered is pre-emptive rights. In the United States there is frequent use of a provision, in private companies, requiring that shares be offered to existing shareholders, pro rata. Such an offer helps to preclude dilution of minority interests. It is useful only in small private companies, and the use of such a provision is limited by the fact that:

(a) shareholders cannot always protect their interests if they cannot afford to purchase the additional shares.

(b) the variety of shares now in use make it difficult to determine a basis on which to offer the shares.

(c) the opportunity to acquire additional capital and, in effect, advance the position of existing shareholders becomes too restricted.

5. *What organizational steps should be taken after incorporation?*

Once a certificate has been issued, the first meeting of the provisional directors may be set. A clause in the Articles usually states that such directors are to continue as permanent directors of the company until replaced. At the first meeting the organizational steps are taken in the adoption of a seal, the form of share certificate, banking resolutions, election of additional directors, resignation of provisional directors, passing of a resolution regarding the registered office, and depending on the circumstances an allotment of shares.

A meeting of shareholders is generally held immediately after the first meeting of directors in order to adopt the necessary banking resolution entitling the directors to borrow, hypothecate and pledge. A later meeting of directors should be called if and when the agreement for the purchase of assets of the company is drafted. The returns required to be filed with the Registrar, the notice of registered office, the notice of Directors, and the return of allotment of shares are to be filed. In this connection s. 81 of the Act requires the filing with the Registrar of the appointment of any Manager and any change in his office.

10. *What are the Records required by the Alberta Companies Act to be kept by the company?*

The following records are to be kept:

1. Register of Members. (ss.58-64).
2. Register of Company's Directors and Managers (ss.81. 82).
3. Register of mortgages (ss.90, 92).
4. Books of Account (ss.108-111).
5. Minute Book (s.116).

One of the practical problems a lawyer faces is to see that his client is aware of certain requirements of the Act which includes keeping the above mentioned books and records. When private companies are involved records are sometimes left with the solicitor. It is important that the client be familiar with the requirements of the Act as non-compliance is an offence.

The problem is solved in one of two ways. One is to furnish the client with a copy of the Act. In Ontario the Provincial Secretary forwards an up-to-date copy of the Act upon incorporation. The other procedure is to prepare a brief memorandum on the various requirements of the Act. In some ways this is more desirable as references to the Articles of the individual company can be incorporated.

The Act does not specify the form which the various books and registers must take. In practice, special books are not kept and a recommended practice is to use a loose leaf book, appropriately divided. It is also suggested that the minute books of the meetings of Directors and shareholders be kept separate, as the shareholder is entitled to see the minutes of the shareholders but not of directors.

11. *What are some considerations with respect to shareholders' meetings?*

General meetings are dealt with specifically by ss.112-115 of the Act. This is a particular problem with private companies because they rarely hold general meetings. This is, of course, an offence under the Act. Everyone concerned with the practice of company law should be concerned to discover some way to insure compliance with the Act. Firstly it provides the shareholders with some opportunity to guide the affairs of the company, and secondly, it seems only proper that persons taking advantage of the provisions of the Companies Act ought to be bound by its obligations.

Perhaps you will feel the best way to assure compliance with the Act is by the incorporating solicitor taking a position as director and assuming responsibility for its books and records. It seems to me such a course is not desirable as it infringes upon the solicitor's obligation to advise and handicaps him in that duty. The undesirability of taking an appointment as director is best illustrated in the case of an incorporated partnership when the old partnership disagree and the solicitor finds himself in the difficult position of having to make decisions with respect to the policy and operations of the company.

Insofar as general meetings are concerned shareholders act through resolutions and it is now common to have resolutions signed by all those entitled to vote having the same force and effect as a resolution passed at a general meeting.

It should be pointed out that the Alberta Act distinguishes between extraordinary and special resolutions. The initial distinction between the two was the length of notice required to be given. By reason of recent amendment the distinction does not bear the same weight and the extraordinary resolution is something of an anomaly.

The Act provides that auditors are to be appointed at and financial statements are to be laid before general annual meeting. Every incorporator should abide by these provisions. It is also customary to provide that at each annual meeting the Directors retire and the offices be filled. These three matters comprise the essential matters to be dealt with at the meeting.

Insofar as financial statements are concerned, it should be noted that these statements are to be laid before the meeting by the directors. For that reason it is desirable to have the statements approved at a prior meeting of the Directors when it will also be proper to authorize the calling and holding of the general meeting.

At the time of the meeting it will be necessary to see that a quorum is present and that any proxies filed are in order. It will also be necessary to conform with the requirements as to the election of directors.

12. *How are changes in share capital carried out?*

A change in share capital may be effected by:

1. Extraordinary resolution (section 40).
2. Resolution of the Board of Directors (Section 40).
3. Special Resolution (Section 41).
4. Special Resolution confirmed by the Court (Section 42).

The method used depends on the nature of the change to be effected. Under the first three methods the power must be given by the Articles of Association. If the Articles do not contain a provision then you must proceed under section 42. Section 42 might be referred to as "the catch-all section", as it uses the words "modified the provisions contained in its memorandum so as to reorganize its share capital, in any way". To obtain a court order it is necessary to make application by Petition to the Supreme Court. Usually an affidavit is filed in support and it is suggested that such an affidavit should contain:

1. The full name of the company and date of its incorporation;
2. A statement that the Petition has been read and that it is true and correct;
3. A copy of the memorandum and any changes thereto;
4. Details of when the Notice calling the Special Meeting was mailed and a copy of the notice;
5. Verification that a copy of the said notice was mailed to all shareholders;

6. Information concerning the requirements of a quorum and that the meeting was held and a quorum was present;
7. The special Resolution passed at the meeting and the voting thereon
8. A letter from the Registrar of Companies or statement that the company is in good standing;
9. Where there is a reduction in capital, a list of the creditors or a statement that there are only current accounts. The reason for the reduction should also be stated.

If the application is for a reduction of share capital, the following points should also be considered:

(a) That a notice of the application be sent to all creditors
(b) Section 45 requires a minute approved by the court, the minute should therefore, be part of the order.
(c) If the company is a public company and has its shares listed for trading on any exchange it is necessary to have the name of the company changed at the same time

For details of the Petition and affidavit, the Encyclopedia of Court Forms and precedents in Civil Proceedings is recommended.

13. *What are some of the considerations to be kept in mind in terminating a company's existence?*

Firstly, there should be some advice, which would properly go under the answer to question one; that is, every incorporator should be fully advised as to the difficulties and procedure involved in terminating the existence of a company. I have in mind, in particular, the situation facing a person who has been a minority partner as he cannot dissolve a business he feels is improperly operated in the same way as he could dissolve a partnership

Dissolution is covered by Part X of the Alberta Companies Act at great length. The appropriate means must be chosen for termination in the case of each company based on the relative facts. Particular reference may be made to s. 158 which provides for the removal from the Register of companies which are in default or defunct. A careful reading of this section may disclose a prompt and effective way of achieving termination where there are no debts or liabilities.

One must not overlook the income tax considerations and particular reference is made to s.81 of the Income Tax Act, wherein it is stated that on the winding up of a company, a dividend shall be deemed to have been received at the time of the winding up by each shareholder equal to the lesser of

(a) the amount of the value of the funds or property so distributed or appropriated to them, or
(b) his portion of the undistributed income then on hand

One of the first steps then is to have the auditors of the company calculate the undistributed income of the company and to have the Taxation Division check the computation.

The decision then to be made is whether to wind up the company or to postpone the proceeding until the undistributed income can be reduced.

Another section to keep in mind is s.52(2) of the Act which states that every assignee, liquidator etc., before distributing property under his control shall obtain a certificate that there are no outstanding taxes.

This section can be employed to determine whether a particular venture of a company is or is not liable to assessment prior to the actual winding up.

*A panel discussion presented to the meeting of the Alberta Section of the Canadian Bar Association, held at Calgary in January of this year. Members of the panel were: D. J. Sherbaniuk, B.A., LL.B.; R. G. Black, B.A., LL.B. of Chambers, Might, Saucier, Milvain, Peacock, Jones and Black; R. B. Love, B.A., LLB., of Macleod, McDermid, Dixon, Burns, McColough, Love, and Leitch; and W. D. Dickie, B.A., LL.B. of Sanford and Dickie.