THE LAW OF ANNUAL GENERAL MEETINGS EXAMINED FROM
A PERSPECTIVE OF CERTAIN ECONOMIC THEORIES

by

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ABSTRACT

The large modern corporation possesses characteristics which set it apart from other corporations both present and past. The existence of the annual general meeting of shareholders within the structure of these large entities suggests problems of a fundamental nature respecting the principles of law governing those meetings.

The extent to which these problems, suggested by the characteristics of the modern corporation and their effects, compel a need for a reconsideration of the legal principles respecting annual general meetings, is the subject of this essay.

It is the thesis of this essay that the attributes of the large modern corporation and their effects have in fact shattered the integrity of the law relating to annual general meetings. It is submitted that the legal principles governing these meetings no longer serve most of the functions of law and ought, therefore, be reconsidered.

The method used to establish this thesis will be to observe the existence of the annual general meeting from the perspectives of law and economics, individually. From these two observations two models will be constructed which will
then be compared to discover any discrepancies. As the economic perspective is assumed, in this essay, to be the correct one, the discrepancies that exist between the two models must indicate inaccuracies in the legal perspective.

Only the descriptive function of law is considered in this essay; the prescriptive function is not here subject to criticism.
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The landscape of modern business bears hardly any resemblance to its predecessor of a century ago and scarcely much more to its immediate progenitor of forty or fifty years. While it used to be almost homogeneous, exhibiting only the occasional monopolistic exception, it now reveals clusters of firms which overshadow competitors and control them and which rather than being exceptional and local colour the entire landscape.

Individually, these firms are characterized by enormous size, baffling complexity and considerable sophistication. Capital and technology are amassed to such a degree of intensity that the resultant entity can assume a degree of power not possessed by other corporations which do not achieve such development. Whereas their primary aim had been profit and their character had been commercial, these modern corporations transcend market conditions and by the development and deployment of their power reshape the laws of traditional economic theory.

Whether it be by a concentration of economic activity into a few firms, a managerial 'revolution' within the structure of the firm and the resultant separation of
ownership from control, the development of a vast non-statist bureaucracy or the multinational scope of activity, the landscape of modern business and the nature of the individual modern corporation have altered the traditional assumptions and the traditional explanations concerning property and its legitimacy. The actuality of economic activity need be reinterpreted and explained in order that activity and power which now appear as raw may be clothed with the dress of legitimacy. The law as a principle actor in the legitimization of power and the rationalization of its effects need be a primary target of attempts at such a reinterpretation and explanation if the legal system is to retain its relevance and utility.

This need has not gone unnoticed by legal scholars in both Great Britain¹ and the United States.² Professor Gower


2 The seminal work is Berle and Means, "The Modern Corporation and Private Property", 1932. A.A.Berle has since then written a number of books on the same theme. See also articles by Rostow and Chayes, in Mason (ed.), "The Corporation in Modern Society", 1959. Other writings will subsequently be referred to in this essay as the context demands.
has outlined it in the following manner under the heading of "The Future of Company Law in a Mixed Economy" in his "The Principles of Modern Company Law":

"Modern writers have suggested that the large company today does not aim primarily at maximization of profit and is not so much a creature of the laws of supply and demand as the creator of market conditions and consumer demands, a theory which, if it is correct would necessarily demand a reconsideration of much of our company law."\(^3\)

While legal writers have been assessing the nature of the corporate revolution its effects in the marketplace have been experienced with such a degree of intensity that there has arisen from participants in that marketplace a chorus for change in corporate behaviour. These reactions have for the most part taken the form of demands for shareholder democracy, industrial democracy and corporate social responsibility. These demands are characterized by a desire that the corporation serve a constituency wider than that defined by management alone: that constituency ought include, it is argued, in the case of shareholder democracy, the shareholders, in industrial democracy,

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\(^3\) op.cit., at p.58.
the workers or in the case of corporate social responsibility, the general public which is serviced by the corporate system. Of these three, industrial democracy is the least important in the North American context and does not as yet seem to have caught the imagination of organized labour.

The focal point of activity for both shareholder democracy and corporate social responsibility as well as the most important medium for the accomplishment of their ends is the annual general meeting of the corporation. It is obvious that shareholders will attempt to use the annual general meeting to further their ends. What is not so clear is that those who seek to extend corporate goals and make them responsible to society also use the general meeting. This use has been developed primarily because of the S.E.C. proxy and shareholder proposal machinery in the United States. This machinery has enabled

4 For a comprehensive bibliography on shareholder democracy and corporate responsibility see Blumberg, 27 Bus. Law. 1275 (1972).

5 Those attending the annual general meeting for purposes of corporate social responsibility must as well be shareholders; but they are usually only such in the most technical sense, see infra Part II, p.25.

6 Medical Committee for Human Rights v. S.E.C. (1970) 432 F 2d 659 (D.C.Cir.) is the recent example of how these proxy rules have been used. This is the so-called "Dow Chemical" case. It concerned the sale of napalm for military use
the development of a new use for the general meeting - the public interest proxy contest of which Campaign G.M. was the prototype. It is not that other media are ignored by the advocates of corporate responsibility but the general meeting receives the major share of their attention and interest.

Earlier in this Introduction it was stated that much of company law may need reconsideration in view of the new and changed character of the large corporation. This statement suggests changes to company law as a body of integral and cohesive principles. Later in this Introduction specific uses of a recent and developing nature for the annual general meeting were set out. These uses suggest changes of a pragmatic nature which are related to the application of those principles rather than their existence as a theory. In either case the importance to company law of a reconsideration of some of its principles and of the annual general meeting in particular has been indicated.

by the Dow Chemical Company and the attempt by a minority group of shareholders, through proxy machinery, to raise the moral and political issues of this sale at the company's annual general meeting.

This essay will attempt a reconsideration of the law of annual general meetings from the perspective of certain new economic theories which concern the behaviour of modern large corporations.

Only the annual general meetings of large companies are studied in this essay. Certainly it is true that shareholder meetings of small companies have their special nature and problems and perhaps also so do the meetings of medium size companies, but it is in the largest companies that those characteristics referred to earlier in the Introduction are most developed.\(^8\) By a 'large company' is meant one of the several hundred companies of the North American economy that produce the majority of goods and services although they represent only a very small percentage of the total number of companies.\(^9\)

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8 See pp.1-2. For a criticism of the notion that the largest companies are the most important in the study of company law and that they are typical see Eisenberg, 57 Cal. Law Rev. p.1 at pp. 33-44.

9 Fortune Magazine in its survey of the 1973 industrials stated at p. 231, May issue: 
"The 500 largest industrials now account for 65 percent of the sales of all U.S. industrial corporations, 76 percent of the employees and 79 percent of the profits."
The method to be used to carry out the examination of the law of annual general meetings of large companies will be analytical. One theoretical model of the meeting will be constructed in accordance with company law principles and a second will be constructed in accordance with recent economic theory. The legal model will then be compared to the economic model. By this process of comparative analysis, differences between the models will be made apparent.

This method is not intended to prove or disprove the existence or veracity of company law principles. Certainly in law the annual general meeting does exist and law is a kind of fact. Furthermore, economics as an intellectual discipline has different goals and uses methods different from law. But it is submitted that by comparative analysis of the one model with the other, benefits to a reconsideration of the legal model might emerge. For although economics pursues different goals by different methods, it seeks an approximation of specific phenomena under study in order to characterize them in economic terms much as the law in order to characterize behaviour in legal terms must approximate the nature of phenomena. Therefore, there is benefit to the lawyer to know what approximations related intellectual disciplines have made respecting the nature of specific phenomena. It is not necessary to accept the economic
characterization of the phenomena; only the descriptive approximation of that nature need be retained. By such process of cross-fertilization the phenomena to be characterized in legal terms might be approximated more accurately and their existing approximation cross-checked. The characterization or description of the annual general meeting in law will be the focus of attention and criticism. The emphasis of this essay, therefore, will be on the descriptive functions of law.

The plan of the essay beyond this Introduction is to present firstly the legal model of the annual general meeting. This model will be presented in accordance with the law as expressed by An Act respecting Canadian Business Corporations,\(^\text{10}\) recently assented to by Parliament and the Companies Act of the Province of British Columbia.\(^\text{11}\)

In Part III the economic model of the meeting will be presented. This model is constructed in accordance with the economic theories of J. K. Galbraith. While any choice is arbitrary, the choice of Galbraith's theories reflects a generally recognized

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11 Companies Act, S.B.C., 1973, c.18 (hereinafter cited as Companies Act).
acceptance of his role as a leading exponent of ideas concerning the modern corporation.\textsuperscript{12} Whatever inaccuracies or imperfections might exist in his theories are not here examined or considered; in this essay they are accepted in whole as representative of recent thinking on the modern corporation.\textsuperscript{13}

The remaining two Parts of this essay are concerned with a comparative analysis of the two models and commentary and conclusions on the effects for company law of the results of this analysis.

\textsuperscript{12} A more complete explanation of this choice appears in Part III, pp. 60-63.

\textsuperscript{13} This is not to suggest that Galbraith has not aroused considerable controversy; see Hession, "Galbraith and His Critics", 1972.
II
i. introduction

A company as an inanimate entity can only act through the intermediary of natural persons. Company law doctrine requires that these persons act only at duly called meetings.¹ They may as a collectivity then deliberate and resolve a course of action for the company acting through the formal device of a meeting. Shareholders, therefore, cannot act either individually or collectively as intermediaries for the company unless they are constituted as a duly called meeting at which procedure and competence as to subject matter, as required by the principles of company law, are respected. Annual general meetings constitute with special general meetings one of the primary organs of the company. But whereas special general meetings are rare, if they occur at all in the life of a company,² the annual

¹ Pictou County School Trustees v. Cameron (1879) 2 S.C.R. 690.
² Special general meetings are of three types:
   a. Court ordered meetings, see Companies Act, ss. 165, 172; Business Corporations Act, s.138; Getz, "Court Ordered Meetings", 33 Convey. 399 (1969).
   b. Requisitioned meetings, see Business Corporations Act, s.137; Companies Act, s.170; Getz, "The Structure of Shareholder Democracy", in Ziegel (ed.), "Canadian Company Law", 1973, pp. 249-252.
   c. Director initiated meetings, see Business Corporations Act s.127b; Companies Act, Table A article 7.3.
general meeting must occur every year for the regular transaction of the company's affairs assigned to it by law. Therefore, the annual general meeting emerges as the most important kind of shareholder meeting.

At the annual general meeting the shareholders can regularly express their views, exercise their voting and other rights and receive information about the undertaking of the company as required by law or obtain information beyond that legally required through informal exchange with management. Without at this point defining the legal nature of the respective roles of the two involved parties, shareholders and management, annual general meetings provide a mechanism whereby the two organs of the company may converse and exchange views and the shareholders may formally express their opinion through the exercise of their rights.

This Part of the essay will examine the mechanisms of the annual general meeting as set out by the law as it is under the Business Corporations Act and the Companies Act and to a limited extent as it was before the ascendancy of modern doctrines. Philosophical and doctrinal assumptions will also be examined as

3 infra p. 19.
they relate to and influence the mechanical structure of meetings and the operation of that structure. From those examinations it is sought to create an image of the legal model of annual general meetings.

ii. law - history

It is useful at this point to consider from a historical perspective the law respecting annual general meetings. The device of examining what did exist may render what does exist more clear. By historical perspective is meant an examination of the legal role of the annual meeting in the period up to the series of decisions by the House of Lords at the end of the nineteenth century, which forged a new relationship between the annual meeting and the board of directors and a new concept of the corporate personality.

Even before the passage of the Joint Stock Company Act\(^4\) in 1844, English courts had noted the significance of the general meeting and enunciated the rule that was to govern for over a

\(^4\) Joint Stock Companies Act (7 & 8 Vict. cc.110 & 111). This Act for the first time in Britain placed the joint stock company on a legal footing. It was in a few years superceded by a second Act. See Gower, op.cit., pp. 42-47.
century relationships of that body to the company and its other organs. In 1741 the Lord Chancellor indicated that it was a principle of English company law that, "whenever a certain number are incorporated, a major part of them may do any corporate act." 5

This view is an early judicial statement of the rule that the general meeting is the company and can exercise power over the directors and trustees who are its agents and subject to its control. 6

Foss v. Harbottle 7 in 1843 affirmed this rule as a corollary of the principle of majority rule. In that case the Vice Chancellor made use of the term "supreme governing body" 8 when referring to the general meeting and attributed to that body primary and residual power in the following terms:

"...the directors are made the governing body, subject to the superior control of the proprietors assembled in

See also R. v. Varlo 98 E.R. 1068 (K.B. 1775).
6 See Slutsky, "The Relationship Between the Board of Directors and the Shareholders in General Meeting", 3 U.B.C.L. Rev. 81 at pp. 81-82 (1968); Gower, op.cit., at p. 130.
7 (1843) 2 Hare 461, 67 E.R. 189.
8 ibid., p. 205.
general meetings; and, as I understand the Act the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any Acts which they may have originated." 9

He further stated:

"I attribute to the proprietors no power which the Act does not give them: they have the power, without the consent and against the will of the directors, of calling a meeting, and of controlling their acts..." 10

By this decision the primacy of the general meeting was affirmed in the corporate structure and its proprietorial character was emphasized. The will of the owners was the will of the company. In the legal structure there was no separation of ownership from control.

A statutory embodiment of this rule was contained in the Companies Clauses Consolidation Act 11 of 1845 which governed

9 ibid., p. 203.
10 ibid., p. 205.
11 8 & 9 Vict. c.16.
statutory companies. Section 90 of that Act stated:

"The Directors shall have the Management and Superintendence of the Affairs of the Company and they may lawfully exercise all the powers of the Company except as to such matters as are directed by this or the special Act to be transacted by a General Meeting of the Company, but all the Powers so to be exercised shall be exercised in accordance with and subject to the Provisions of this and the special Act; and the Exercise of all such powers shall be subject also to the Control and Regulation of any General Meeting specially convened for the Purpose, but not so as to render in valid any Act done by the Directors prior to any Resolution passed by such General Meeting."

The Joint Stock Companies Act 12 of 1856, the first of the modern company acts, did not contain a similar provision. Table B to that Act (the model articles, equivalent to the modern day Table A) contained a provision respecting directors' powers similar to that in a modern Table A.13 However, the courts

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12 19 & 20 Vict. c.27.
13 See Companies Act, 11 & 12 Geo. 6, c.38 (U.K.), Table A, article 80 for a modern example. B.C. now has a general
continued to apply the rule contained in s.90 of the Companies
Clauses Consolidation Act.\textsuperscript{14} In \textit{Isle of Wright Ry. v. Tahourdin}\textsuperscript{15} the Court refused an application by the directors of a statutory
company for an injunction to restrain the holding of a general
meeting, one purpose of which was to appoint a committee to
reorganize the management of the company. Cotten, L.J. said:

"It is a very strong thing indeed to prevent shareholders
from holding a meeting of the company when such a meeting
is the only way in which they can interfere, if the
majority of them think that the course taken by the
directors in a matter intra vires of the directors, is
not for the benefit of the company."	extsuperscript{16}

This decision can be taken as an expression of the law relating
to the powers of general meetings in the late nineteenth century.
Doctrinally the rule was expressed as late as 1891 in the
following manner:

"The business of a company is conducted by its directors,
subject to the general control of the company. The company

\begin{flushleft}
\textsuperscript{14} \textit{op.cit.}
\textsuperscript{15} (1883) 25 Ch.D. 320.
\textsuperscript{16} \textit{ibid.}, p. 329.
\end{flushleft}
being a legal person only, provision is made by statute or its regulations as to the mode in which its will is to be ascertained and expressed...a majority of the shareholders are entitled to act in the name of the company."17

In 1906 the Court of Appeal enunciated a new rule in Automatic Self-Cleansing Filter Syndicate Co. v. Cunningham18 whereby the relationship of the board to the annual general meeting was held to be one of contract; when the articles had vested the board with the power of management, the general meeting could not interfere with its exercise.

This change was not at first accepted and in a decision a year later it was suggested that the Cunningham case depended on a reference in the relevant article to an extraordinary resolution.19 But since Quin & Axtens v. Salmon20 the rule of the Cunningham case has been accepted. The modern rule is expressed by Gower in the following terms:

18 1906 2 Ch. 34 C.A.
20 1909 1 Ch. 311, 1909 A.C. 442 H.L.
"...under an article in the terms of Table A the members in general meeting can not give directions on how the company's affairs are to be managed, nor can they over-rule any decision come to by the directors in the conduct of its business. And this applies even as regards matters not specifically delegated to the directors provided they are not expressly reserved to a general meeting by the Act or the articles." 21

By the reversal of the rule in Tahourdin's case the role of the general meeting was fundamentally altered. No longer was the general meeting the will of the company nor were the directors subject to the superior control of the proprietors assembled in general meeting. The board of directors now began to assume the power and control in the company. But, as will be discussed in section iv. of this Part, the idea that the general meeting is the will of the company dies hard. It recurs in commentary on the nature of corporations and is at the root of the shareholder democracy movement.

21 op.cit., p. 132.
iii. law - existing

This section attempts to set out the existing state of the law respecting annual general meetings. The method used is to discuss the subject under two headings: procedure and content.

(a) procedure

This subsection relates to those aspects of the annual general meeting concerned with form and method. While they do not themselves determine what a general meeting can do, they must be observed in order to render what is done valid. These aspects will be discussed by subject.

Holding

An annual general meeting of the shareholders of a company must be held within eighteen months from the incorporation of a company under the Business Corporations Act\(^\text{22}\) and fifteen months under the Companies Act\(^\text{23}\). Subsequently an annual general meeting must be held not more than fifteen months from the holding of the previous meeting under the Business Corporations Act.

\(^{22}\) s.127a.

\(^{23}\) s.162 (1).
Act\textsuperscript{24} and thirteen months under the B.C. Act.\textsuperscript{25} Default to hold any of these meetings gives rise to an application to the court by any shareholder of the company to order the holding of such a meeting.\textsuperscript{26} However, default in calling the meeting does not affect the existence of the company or the validity of any acts taken in the name of the company. This is a matter of internal management and the doctrine in \textit{Burland v. Earle}\textsuperscript{27} would apply as regards third parties.

Under the Business Corporations Act a shareholder meeting must be held in Canada.\textsuperscript{28} The B.C. Act provides that the

\begin{footnotesize}
\begin{enumerate}
\item s.127(a). This section is different from s.102(1) its counterpart in the Canada Corporations Act R.S.C. 1970, c.32, which required meetings to be held at least once in every calendar year. The new section gives the directors flexibility in choosing a time more suitable to them. Theoretically there could be no meeting in a given calendar year under this section.

A resolution in writing signed by all shareholders entitled to vote at that meeting is valid in lieu of the meeting - s.136.

This device constitutes the only exception to the mandatory holding rule.

\item s.162(1). This section expressly requires the holding of an annual meeting at least once in every calendar year.

A company that is not a reporting company under the Act may have members' consent in writing to the business of a proposed meeting in lieu of that meeting - s.163.

\item Business Corporations Act, s.138(1), "Court" is defined in s.2(1). Companies Act, s.165, "Court" is defined in s.1(1).

\item 1902 A.C. 83.

\item s.126(1).
\end{enumerate}
\end{footnotesize}
meeting must be held within the province except as the Registrar may provide otherwise. 29

Quorum

Without a quorum the meeting will be a nullity; 30 therefore it is essential to ensure that a quorum is present. The by-laws, however, may provide that if a quorum is not present the meeting may be adjourned to reconvene later. The quorum requirements are usually found in the by-laws 31 or articles 32 but if there is no such requirement, a quorum of shareholders consists of at least two and the shares they represent need not total a majority of the outstanding shares of the company. 33 In unusual circumstances

29 s.169. For a discussion of a similar provision under R.S.B.C. 1911, c.39, see Re Lands and Homes of Can. Ltd. 1918 3 W.W.R. 935, which suggests that even if a meeting were held outside the province with all the members' consent, the business conducted there would bind the company.

30 Lumbers v. Fretz 1929 1 D.L.R. 51.

31 Business Corporations Act, s.98(1) gives the directors that power.

32 Companies Act, s.167(a).

33 The common law position is that two constitute a quorum and that they need not represent a majority of shares:

Sharp v. Dawes (1876) 2 O.B.D. 26,
Montreal Trust v. Oxford Pipeline 1942 O.R. 490,

This position is reflected in the Companies Act s.167. The Business Corporations Act, however, requires the holders of
as where one person holds all the shares of a class, one person may constitute a quorum. 34

If by reason of shareholders leaving a meeting before all matters are dealt with so that less than a quorum remain in attendance the meeting is a nullity as regards any action taken after the quorum fails. 35 This common law rule has been reversed by the Business Corporations Act. 36

Voting

In the absence of special provisions in the Act or the charter of the company, all questions proposed for the consideration of the shareholders at a meeting of shareholders are to be determined by a majority of votes. 37 A majority of votes is not constituted by a majority of shareholders but by a majority of shares

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34 Business Corporations Act, s.133(4). Companies Act, s.167(b). Also Foss v. Bennet Bros. Ltd. 1911 1 Ch. 163 Re Woodward 1940 O.R. 387.


36 s.133(3).

represented by shareholders present. This rule of one share
one vote is of fundamental importance in the legal model of the
annual general meeting.

A shareholder's vote is a right of property which he may
use as he pleases. The propriety or impropriety of his motive
is normally immaterial; he is free to exercise his own judgment
as to how he shall vote or to vote or not vote. The court
has no power to go behind the vote and invalidate it on the
ground that the shareholder had a personal interest in the
subject matter different from or opposed to that of the company
and did not exercise his vote in the best interest of the company.

The taking of a vote is in the first instance by a show of
hands unless the by-laws provide otherwise; each shareholder

Certain matters of a fundamental nature require greater than
simple majority approval. These matters are specified in the
respective Acts.

38 Business Corporations Act, s.134(1). Companies Act, Table A
article 9.1.
39 Pender v. Lushington (1877) Ch. D. 70.
40 North-West Transportation Co. v. Beatty (1887) 12 A.C. 589.
41 Greenwell v. Porter (1902) 1 Ch. 530.
42 Fast Pant Mining Co. v. Merryweather (1864) 2 H & M 254.
Burland v. Earle, op.cit.
43 Business Corporations Act, s.135(1). Companies Act, s.181(1).
This reflects the common law rule in Re Horbury Bridge,
present on such a poll has one vote. Under s.174(2) of the Companies Act a proxy cannot vote on a show of hands unless the articles provide otherwise. Whether a proxy can vote on a show of hands at common law is unclear. For both these reasons the result of such a vote may reflect an imperfect picture of the sense of the meeting. In these circumstances a poll by ballot should be demanded. The right to demand a poll is incident to an election at a public meeting. The Companies Act and the Business Corporations Act give a proxy the right to demand a poll, that right at common law is uncertain. The by-laws usually provide for the manner of the poll; if they do not the chairman shall decide. By a poll the full voting power of the shares represented at the meeting can be deployed.

44 Companies Act, Table A, article 9.1. Ernest v. Lama Gold Mines 1897 1 Ch. 1.
46 Campbell v. Maund (1836) 5 Ad. & El. 865
47 Business Corporations Act, s.135(2). Companies Act, s.181(3).
48 Proposals Commentary, para. 285.
Admission

As an incident of the right to vote shareholders holding voting shares are entitled to be physically present at the meeting. A company which is a shareholder may be represented by a person designated by it. A deceased shareholder's representative may also attend. Also the auditor of the company may attend and receive information that a shareholder is entitled to receive. Usually also students and reporters are admitted as a matter of courtesy. Whether voteless shares carry the right to attend is disputed. Getz states no but Fraser and Stewart suggest yes. Or consider shareholders who acquire one share solely to attend the annual general meeting.

50 Business Corporations Act, s.134(2).
51 Business Corporations Act, s.2(1).
52 Business Corporations Act, s.162.
54 Fraser & Stewart, op.cit., p. 654, suggest a right of attendance may be attached to a share. I feel it would be an advancement to shareholders' rights if the right to vote were clearly separated from the right to attend and the latter were granted to all shareholders.
55 Consider Campaign G.M. and the Dow Chemical case, where only a handful of the several million shares outstanding were held by the protagonists.
The right of admission, however, can become a problem if the possibility of contentious issues being raised exists. Therefore, what has in the past been granted casually may in the future give rise to some disputes.  

**Chairman**

A chairman must be provided to preside over the meeting. Usually the by-laws or articles designate the person who will act as chairman. Subject to any express provisions there it is the duty and right of the president to preside at the meeting. In *Fremont Canning Co. v. Wall*, at page 409, Masten, J.A. said that such conclusion was entirely consistent with the provisions of the by-laws giving the president general charge and control of the business and affairs of the company which in his Lordship's opinion included the business of the annual general meeting of

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56 Corporations are becoming aware of the dangers to themselves of a broad admissions policy. See Mooallem, "Conducting a Fair and Informative Stockholders Meeting", Bus. Quart., p. 47, Winter 1971.

Mooallem, a legal counsel with Alcan, presumably wrote this article in response to the disruption of the Spring 1971 Alcan annual meeting by, "some bearded men, some slim and sexy girls and quite a few black people". Toronto "Globe and Mail", April 2, 1971, p. B1.

57 The Business Corporations Act is silent on the appointment of a chairman. The Companies Act, Table A, article 8.4, requires the president to act as chairman.

58 1941 O.R. 379 (C.A.).
the shareholders. The by-laws in this case did not expressly provide that the president should be chairman at shareholder meetings.

At common law the chairman has no right to a casting vote. If the chairman is granted a casting vote he cannot use his casting vote as a means of giving himself control of the company; the casting vote is only intended as a means of dealing with occasional tie votes rather than a settled condition.

The position of chairman is an important and onerous one, for the meeting is substantially controlled by him. Whether the meeting be long and harried or short and decisive depends on his ability to make snap decisions which are acceptable to the majority of those present. In this regard Chitty J. stated in *National Dwellings Society v. Sykes*:

"It is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are

59 *Nell v. Longbottom* 1894 1 Q.B. 767. 
*Also Companies Act, Table A, article 8.8.*


conducted in a proper manner, and that the sense of the meeting is properly ascertained.\(^\text{63}\)

The chairman must ensure that the meeting is conducted in accordance with whatever procedural rules are applicable to it.\(^\text{64}\)

It has been held that he has prima facie authority, "to decide all emergent questions which necessarily require decision at the time";\(^\text{65}\) he also must ensure that the meeting does not fall into disorder - a task not easy in the presence of 'professional' shareholders who seek to disrupt meetings to advance their cause.

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\(^{63}\) 1894 3 Ch. 159 at 162. Approved in Bleuchel and Smith v. Prefabricated Buildings Ltd., 1945 2 D.L.R. 725 at 729.

\(^{64}\) John v. Rees 1969 2 W.L.R. 1294 at 1312-1319. The question of what procedure is applicable is usually settled by the by-laws or articles, otherwise parliamentary rules apply. - Lumbers v. Fretz, op.cit.

It seems that those in control of the annual general meetings of large corporations think otherwise; consider Moollem, op.cit., at p. 48:

"It is therefore unnecessary to follow specific rules of procedure such as those outlined in Robert's "Rules of Order" or Wainberg's "Company Meetings". Accordingly "points of order", "questions of personal privilege", "inquiries", "appeals", and other parliamentary practices need not be considered by the chairman unless he believes it appropriate and advisable to do so. In fact parliamentary rules of procedure often tend to kindle immediate discussion which would usually affect the conduct of the entire meeting by frustrating the major issues at hand and by creating formal impediments to a fair, frank and fruitful discussion."

\(^{65}\) Re Indian Zoedone Co. (1884) 26 Ch. D. 70 at 77. See also Henderson v. Bank of Australasia (1890) 45 Ch. D. 330.
This problem was discussed by Megarry J. recently in John v. Rees\(^66\) where it was held that the chairman has the duty to preserve order and may in the exercise of that duty adjourn the meeting; this power must be exercised bona fide, "for the purposes of forwarding and facilitating the meeting and not for the purpose of interruption or procrastination".\(^67\) The chairman cannot be allowed to defeat the purpose of the meeting by stopping it or clogging the procedure.\(^68\)

In practice the decisions of the chairman will not be challenged.\(^69\) However, his wisdom in the conduct of the meeting is a decisive factor in its expedition for the benefit of both shareholders and management.

**Proxies**

The proxy system plays a vital role in the modern annual general meeting. For although the meeting is structured and intended, "for the fundamental purpose of...a forum for the

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\(^{66}\) op.cit.

\(^{67}\) ibid., p. 1317.

\(^{68}\) Gray v. Yellowknife G.M. Ltd. (Nol) 1946 O.W.N. 138.

\(^{69}\) Few shareholders are wealthy or determined enough to penetrate the legal obstacles, the most imposing of which is the rule in Foss v. Harbottle, op.cit., that the acts of the majority bind the minority. See Gower, op.cit., p. 490; Palmer, "Company Law", 21st ed., 1968, p. 487.
expression of a relevant body of opinion on the matters that those assembled have gathered to discuss, the result of any such discussion is in reality generally determined in advance through the system of proxy votes. The form and effect of the proxy system respecting the function of annual general meetings is a subject beyond the scope of this essay. It will suffice for the purposes here to outline its salient features. In a later section of this essay the use made of it by certain power groups will be related to this examination.

The word 'proxy' has two different meanings: its first meaning is an agent appointed by a shareholder to vote on his behalf at a meeting of shareholders; its second meaning is the document by which such agent is appointed. The proxy system, while capable of much complexity in law and fact, put simply is the right of a shareholder to appoint a representative to vote on his behalf at a shareholders' meeting because that shareholder is unwilling or unable to attend in person.

There is no common law right to vote by proxy; the right

71 Harben v. Phillips 1883 23 Ch. D. 14 C.A.
McLaren v. Thomson 1917 2 Ch. 261 C.A.
has been granted by statute. There are also provincial securities statutes and regulations which regulate proxies for companies that have shares listed on stock exchanges or that make a public offering of securities.

Management of the company shall, and a shareholder may, solicit proxies from shareholders by sending, if management a management proxy circular and if non-management a dissident's proxy circular to each shareholder whose proxy is solicited. The proxy form sent must be in what is called 'two-way' form: the shareholder must be given an opportunity to specify that his vote be cast either for or against a particular proposal. Hence in practice a dissident shareholder group does not send its own proxy form but rather requests that the shareholder

72 The provisions respecting proxies are set out in the Business Corporations Act, ss. 141-148; Companies Act, ss. 173-180.
73 Business Corporations Act, s.143(1); exception for companies of fewer than 15 shareholders - s.143(2). Companies Act, s.176(1), exception - s.178(1).
74 Business Corporations Act, s.144(1). Under the Companies Act "information circular" refers to both types - s.177(1).
75 The requirements for the Circulaters are set out in the Companies Act, s.180(f) and (g). The federal requirements are not as yet enacted.
76 Companies Act, s.180(b). There is no similar provision in the Business Corporations Act but see Proposals Commentary, para. 319.
complete the proxy in a particular manner. 77

By means of the proxy machinery the nature of the annual general meeting is altered. Most of the topics so far set out in this Part and those that will be are designed to construct a model that possesses the attributes of a forum in which debate may occur and into which pertinent issues may be injected in a manner conditioned by a kind of quasi parliamentary procedure. The significant effect of proxy machinery is to remove the debate from the forum and shift it into other areas. However counterproductive the system may be to the concept of a meeting it nevertheless exists enmeshed in the legal framework of the annual general meeting.

Resolutions

Questions for submission to a meeting are expressed in the form of motions. A motion is a proposal to do something, to order something to be done or to express an opinion about something. A motion according to the ordinary practice of companies

77 This is to save costs. Schwartz noted that it would have cost Campaign G.M. $100,000 to send a proxy statement to each G.M. shareholder. - 69 Mich. Law Rev. 421 at p. 489. Quare - Can a successful dissident group recover this cost from the corporation?
may be proposed by the chairman or by a shareholder; it is then put to the meeting by the chairman, whereupon it is open to discussion; when the discussion has closed the chairman puts the motion to a vote by stating what the motion is and that it has been proposed by A and seconded by B. A motion when duly passed becomes a resolution.

Ordinary resolutions require a simple majority of votes. There are also, however, special resolutions which require greater than majority voting. The by-laws or articles may provide in addition that certain corporate acts can only be sanctioned by greater than majority voting.

Amendments

At meetings amendments may also be put to motions under deliberation. There is little law on the subject of amendments to motions but they would seem to be governed by the same principles as the motion itself: does the amendment fall within

78 Wainberg, op.cit., at p. 41, believes that the chairman cannot propose a motion. There is no authority for this view however.
79 At common law a motion need not be seconded - Henderson v. Bank of Australasia, op.cit; as a practical matter if a motion lacks a second it is unlikely to be passed.
80 Business Corporations Act, s.2(1).
Companies Act, s.1(1).
the perview of the notice of the meeting. 81

Getz questions whether, in view of the operation of the proxy system, amendments have any value because the person conferring the proxy will not know of possible amendments at a future meeting and hence the proxy can not vote on the amendment as he may not possess the requisite authority. 82

Minutes

A company must keep minutes of the proceedings at its annual general meeting. 83 Such minutes constitute evidence of the proceedings, "if purported to be signed by the chairman of the meeting at which the proceedings were taken or by the chairman of the next succeeding meeting". 84 However, the minutes are not exclusive evidence of what took place at the meeting. There is simply a presumption of regularity in favour of recorded proceedings; it does not preclude proof that other proceedings which are not recorded took place. 85 Failure to keep minutes as required by the

81 See Palmer, op.cit., p. 489 for a discussion.
82 "Shareholder Democracy", op.cit., p. 265.
83 Business Corporations Act, s.20(1)b.
Companies Act, s.183(1).
84 Companies Act, s.183(2).
85 Companies Act, s.183(2).
In Re Fireproof Doors Ltd. 1916 1 Ch. 142 at 149.
Act is an offence on the part of the company.  

Minutes need not contain speeches, arguments or motions that were not passed. A minute is only a record of what was agreed upon. It is customary at meetings to move that the previous meeting's minutes be adopted.

Closure and Adjournment

A meeting may resolve to close discussion on a motion and to take a vote on it but the closure may not be moved until members have had a reasonable opportunity to discuss the substantive motion. If the closure is being used to suppress discussion the vote taken on the motion for closure is void.

Because a quorum is not present or time does not permit conclusion of the business in one day or for other factors it may be necessary to adjourn the meeting. The by-laws can confer the discretion to adjourn, with the consent of the meeting, on the chairman. If the chairman improperly adjourns or stops the meeting, the meeting can choose another chairman and go on with the business. If the meeting is duly adjourned or dissolved

86 Business Corporations Act, s.20(6).  
Companies Act, s.186(4).

87 Boston Shoe Co. Ltd. v. Frank (1915) 48 Que.S.C. 66.

88 Wall v. London and Northern Assets Corporation 1898 2 Ch.489.

members who remain behind cannot continue the business.\textsuperscript{90} In respect of notice, an adjourned meeting is considered in law as a continuance of the original meeting;\textsuperscript{91} therefore new notice for it need not be given. Usually upon completion of the business on the agenda, the chairman will ask if there remains any business unfinished. If anything is raised he must decide whether it is within the purposes for which the meeting was called, before placing it before the meeting. If there is no further business he will move that the meeting be closed.

(b) content

Thus far only the form or structure of the meeting has been considered. Now the content of that form will be examined. This comprises: matters expressly assigned to the meeting by statute and statutory provisions respecting shareholder proposals, and notice which though procedural in nature affects the content of a meeting by introducing or limiting and excluding certain matters for the consideration of the meeting. Therefore the remainder of this subsection is concerned with examining the content of the

\textsuperscript{90} R. v. Gaborian 1809 11 East 77.

\textsuperscript{91} Business Corporations Act, s.142(3).

Wills v. Murray (1850) 4 Exch. 843.

Scadding v. Lorant (1851) 3 H.L.C. 448.
annual general meeting under the headings of constitution, notice and custom.

By constitution is meant the documents which govern the powers and duties of the corporation and to which it owes its legal existence. These comprise the governing statute, the Letters Patent, memorandum or articles of incorporation and the by-laws or articles. The principle of constitutionality means that an annual general meeting of shareholders can only perform those acts which are within its jurisdiction under the provisions of these documents.

Constitution

The Statutes state the essentials of business at annual general meetings by enumerating the mandatory statutory duties which must be performed there. The directors shall place before the meeting a comparative financial statement covering the financial year ending not more than six months before the meeting and the preceding financial year, consisting of the auditor's report and any further information that may be required by the company's articles or by-laws or unanimous shareholders agreement.

92 Business Corporations Act; Companies Act.
93 Business Corporations Act, s.149(1).
Companies Act, s.168(1).
In addition to reception of these financial statements, the business mandatory by statute includes the appointment of auditors to hold office until the next meeting, the fixing of their remuneration, and the election of directors for the next year.

There also are statutory duties at annual meetings respecting by-laws. Under the Canada Corporations Act the directors may pass by-laws which have effect until the next annual general meeting where, in default of confirmation by the shareholders, they cease to have effect. There is nothing in these provisions to stop the directors from reenacting other by-laws substantially the same for the ensuing year and thus circumventing a decision of the shareholders not to confirm them.

Hence these provisions give the directors alone de facto power to adopt or alter by-laws and therefore residual power to

94 Business Corporations Act, s.156(1). Companies Act, s.201(3).
95 Business Corporations Act, s.156(4). Companies Act, s.205.
96 Business Corporations Act, s.101(3). Companies Act, s.132(2), Table A, article 11.1. The articles may provide otherwise.
97 op.cit.
98 op.cit., ss.94 & 95.
99 See Proposals Commentary, para. 196.
control the internal government of the corporation. 100

The Business Corporations Act alters this position by conferring on the shareholders the power not merely to confirm by-laws proposed by directors but also to initiate changes in the corporate structure. 101 By-laws proposed by the directors or amendments or repeals of by-laws must be submitted to the next meeting of shareholders who may confirm, reject or amend them. 102 If the shareholders reject a by-law the directors are precluded from enacting another substantially the same and thus circumventing the will of the general meeting. 103 Shareholders may also propose by-laws for the consideration of an annual general meeting through the shareholder proposal mechanism. 104

By these provisions the shareholders in annual general meeting are given significantly greater power over the internal government of the corporation. The Proposals Commentary noted the changes in the following manner:

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100 Kelly v. Electrical Construction Co. (1908) 16 O.L.R. 232.
101 Stephenson v. Volkes (1890) 27 O.R. 691.
102 s.98(2),(3),(4).
103 ibid.
104 Business Corporations Act, s.98(4).
105 Business Corporations Act, s.98(5).
"While it may be sensible to vest exclusive management powers in the directors, as the present Act does, there is nothing to be said for vesting in them the power to control the internal government of the corporation to the exclusion of shareholders...

In the result this scheme recognizes the reality of corporate management by placing residual control of internal government where it belongs - with the shareholders - but giving the directors power to administer the corporation from day to day." ¹⁰⁵ (Emphasis added)

A memorandum company is not a company in the same sense as a Letters Patent company; the articles of association in the former are contractual in nature and all such companies must have them in either Table A or another form; these articles are not simply by-laws under another name.¹⁰⁶ There is some question whether

¹⁰⁵ paras. 194 & 195.
¹⁰⁶ Companies under the Business Corporations Act are no longer technically incorporated by Letters Patent but by articles of incorporation. However, it is submitted that these comments remain valid. For a discussion of by-laws under a memorandum company see Neuman, "Letters Patent and Memorandum of Association Companies", in Ziegel, ed., "Canadian Company Law", 1967, pp. 84-91.
by-laws (proper) may be passed by memorandum companies; but there seems no reason why the shareholders cannot by the articles delegate certain rule making powers to the directors, provided they do not purport to give the directors power to vary the articles themselves. These would be in the nature of internal rules that the shareholders agree by contract will be binding on themselves; they would serve the same function as most by-laws in the Letters Patent system. Under the Companies Act the shareholders in general meeting may by special resolution amend the articles of the company; in this manner they could delegate to the directors this internal rule making power. Or the shareholders could, by the articles, reserve to themselves the power to adopt internal regulations and thereby maintain direct control over the internal government of the company. Either way, the shareholders in a memorandum company have considerable power and flexibility respecting its internal government.

In jurisdictions where the Letters Patent system of incorporation operates such as that of the Canada Corporations Act,

107 Neuman, op.cit., p. 84.
108 By-laws themselves are not contractual in nature.
109 Companies Act, s.240(1).
the power of corporate management is vested by statute in the
board of directors and it would seem that no derogation from
this is possible. The board is regarded as an original organ
of the company whose powers are derived not from the corporation's
charter but from the Act itself. If the Act stipulates that
the directors shall manage the affairs of the company, as the
Canada Corporation Act does, the shareholders are powerless to
change the allocation of powers.

The statutory vesting of management powers in the directors
under a Letters Patent regime allocates to them, by the principle
of constitutionality, "the power to do anything not specifically
reserved to the shareholders by the Act. If a question arises as
to whether a particular transaction is within the Board's juris­
diction, one simply examines the statute to see if there is an
express provision requiring the authorization of a general meet­
ing - if there is not, the directors have the power."

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110 Canada Corporations Act, op.cit. s.86(1).
111 See Proposals Commentary, para. 191; also cases listed there.
Vol. 1, op.cit., at p. 553; also Slutsky, "Division of Power
between the Board of Directors and the General Meeting", in
113 Slutsky, "Division of Power", op.cit., p. 179.
See also Slutsky, "The Relationship between the Board of
Directors and the Shareholders in General Meeting", op.cit.
The effect of this legal principle is to grant shareholders the exercise only of their statutory powers which have in previous paragraphs been defined and to vest residual power in the board.

The authors of the Federal Draft Act\textsuperscript{114} recognized the inflexibility of such a statutory vesting of management powers and decided to alter it by drafting s.901(1) of that Act which provided that:

"Subject to the articles, the by-laws and any unanimous shareholder agreement the business and affairs of a corporation shall be managed by one or more directors."

However, this provision was not incorporated into the Business Corporations Act in that form.\textsuperscript{115} The 'articles' and 'by-laws' reference was dropped in the relevant section.\textsuperscript{116} Subsection (1), the relevant part reads:

"Subject to any unanimous shareholder agreement, the directors shall manage the business and affairs of a corporation."

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\textsuperscript{114} Proposals for a New Business Corporations Law for Canada, op.cit., Vol II.

\textsuperscript{115} This provision would allow the management power to be defined by a simple majority of shareholders.

\textsuperscript{116} Business Corporations Act, s.97(1).
Thus the powers of the directors to manage the company, under the Business Corporations Act can only be limited by a unanimous shareholder agreement. For a large company such an instrument is a virtual impossibility. Therefore, in large companies the de facto management powers of directors under this Act remain the same as under the Canada Corporations Act.\(^{117}\)

In memorandum companies the relationship between the board of directors and the general meeting is based on the contract contained in the memorandum and articles of association.\(^{118}\) Section 140(1) of the Companies Act vests power of management in the board subject to the articles. Table A to that Act does not alter this general vesting of management power in the directors.\(^{119}\) The result is that if the formula in Table A is used, as it almost invariably is, residual power rests with the board and it can do, "everything the company can do except where the authorization of the general meeting is required."\(^{120}\) Those

\(^{117}\) op.cit.

\(^{118}\) The contractual effect flows from a provision in the Act, s.15.

\(^{119}\) Companies Act, Table A, article 10.1.

\(^{120}\) Slutsky, "Division of Power", op.cit., p. 178.
See also Gower, op.cit., pp. 130-132.
Automatic Self-Cleansing Filter Syndicate Co. v. Cunningham, op.cit..
matters which require such authorization have been previously mentioned.

Therefore, if a company were incorporated under the Companies Act using Table A to that Act, the position, in fact, of the annual general meeting with respect to the board would be almost identical to the position under federal legislation with the important proviso that under the Companies Act the annual general meeting can, in theory by special resolution under Section 240(1), amend the articles to abridge the board's power and shift the allocation of management functions to itself; this possibility is not open to shareholders in general meeting under federally incorporated companies. It gives to general meetings under this Act, in theory, considerably more potency. 121

It seems then that the division of powers, either under the federal Act 122 or the Companies Act and Table A, limits the scope of an annual general meeting by allocating to it only certain specific statutory powers. The most significant of these powers is the right to elect the directors; although the

121 The validity of this conclusion for corporations governed by the Business Corporations Act is subject to the possible existence of a unanimous shareholders agreement and to the ensuing discussion of the shareholder proposal.

122 Business Corporations Act, op.cit.
directors have complete powers of management and the residual power in the company, they must secure reelection by the shareholders and therefore must account to them in some manner. But aside from this power the shareholders have little to do at the annual meeting. The extent to which this conclusion is valid under the Business Corporations Act is subject to the ensuing discussion.

There is a method whereby there may be injected into the content of a meeting business not mandatory under the statutes previously referred to. This method is a shareholder proposal made under provisions to that effect in the Business Corporations Act. Under s.131(1) any shareholder entitled to vote at a meeting may submit a notice to the corporation of any matter that he proposes to raise at the meeting with a statement relating to it. Management must at the expense of the company submit the proposal to all shareholders in its circular and if requested by the shareholder include a statement identifying the proposal by him of not more than two hundred words in support of the

123 There is no proposal mechanism in the B.C. Companies Act. Under s.133, shareholders holding not less than ten percent of the shares entitled to vote at a meeting may nominate directors but broader grounds for proposals are not authorized by the Act.
A shareholder proposal may be excluded by the corporation under certain grounds set out in the Business Corporations Act. The grounds of exclusion comprise the following:

(1) promotion of general economic, political causes, etc. or a personal claim or grievance;
(2) that the proposal had been included in a circular at either of the two previous annual meetings and the shareholder had failed to present the proposal;
(3) the rights are being abused to secure publicity;
(4) that substantially the same proposal has previously been submitted to shareholders in the information circular relating to an annual meeting held within the two preceding calendar years and the proposal was defeated;
(5) that the proposal has not been submitted at least ninety days before the anniversary date of the previous meeting.

In all cases the shareholder must be notified of the exclusion within ten days of receipt of the proposal.

124 s.131(2),(3).
125 Business Corporations Act, s.131(5),(7).
The shareholder proposal is then a mechanism whereby certain matters of interest to shareholders may be introduced into the content of annual general meetings. But must these proposals be subject to the constitutional rules of the company respecting the division of powers or do they enable a meeting to assume a broader scope than would otherwise be by permitting the shareholders to introduce, deliberate and resolve matters not specifically assigned to them by the statute and judicial decisions?

Getz discusses this problem in relation to the provisions of the Canada Corporations Act\(^\text{126}\) at some length with the view to examining whether shareholder proposals may be used as they have been in the U.S. for the application of greater shareholder democracy by widening the scope of the annual meeting.\(^\text{127}\) He states that the key phrase is, "ordinary business operations of the company" in the exclusionary provisions of section 108.8 of that Act.\(^\text{128}\) The problem is to define this phrase. Does it go beyond the minutiae of day to day managerial decisions which

\(^{126}\) op.cit.
\(^{128}\) ibid., p. 262.
certainly do fall within its perview, to include broader questions of general policy of the company? Then questions of the type raised by the Medical Committee for Human Rights\textsuperscript{129} in the U.S. can be raised at meetings. Getz concludes that any proposal concerning specific business contracts made by the corporation would be excluded under s.108.8(6)c\textsuperscript{130} and a proposal formulated in terms clearly directed to general corporate policy rather than to routine management decisions is an uncertain ground.\textsuperscript{131} But it would seem that even if such general corporate policy decisions were not excluded under s.108.8(6)c,\textsuperscript{132} they would be excluded under s.108.8(6)b,\textsuperscript{133} - the proper subject exception. Getz suggests that general policy might come in as a subject under s.108.8(6)c\textsuperscript{134} because, "All the case law concerns specific attempts to instruct the directors in respect of particular transactions, and none is capable of sustaining the view that general policy is exclusively in the hands of the directors."\textsuperscript{135}

\textsuperscript{129} Medical Committee for Human Rights v. S.E.C., op.cit.
\textsuperscript{130} Canada Corporations Act, op.cit.
\textsuperscript{131} Getz, "Shareholder Democracy", op.cit., p. 262.
\textsuperscript{132} Canada Corporations Act, op.cit.
\textsuperscript{133} ibid.
\textsuperscript{134} ibid.
\textsuperscript{135} Getz, "Shareholder Democracy", op.cit., p. 262.
It seems that matters within the competence of the directors may be excluded either under s.108.8(6)b\textsuperscript{136} - the proper purpose - or s.108.8(6)c\textsuperscript{137} - the ordinary business - provisions. Hence the shareholder proposal mechanism, while giving to the shareholder the right to raise issues at a meeting does not extend the scope of issues that may be considered at a meeting. The rules of constitutionality are not affected and the shareholders are left to consider only those matters expressly assigned to them by the Act.

The conclusion seems well founded for the proposal provisions in the Canada Corporations Act\textsuperscript{138} and Bill C-213\textsuperscript{139} which reproduced almost intact those of the Canada Corporations Act. The shareholder proposal provisions of the Business Corporations Act,\textsuperscript{140} however, confuse further an already confused area by omitting the 'proper subject' and 'ordinary business' grounds of exemption by the company contained in the previous legislation.\textsuperscript{141} The intention

\textsuperscript{136} Canada Corporations Act, op.cit.
\textsuperscript{137} ibid.
\textsuperscript{138} op.cit., s.108.8.
\textsuperscript{140} s.131. s.131(5) contains the exemption provisions.
\textsuperscript{141} Canada Corporations Act, op.cit.; Bill C-213, op.cit.
of Parliament in making this omission seems to have been a widening of permissible action when shareholders are assembled in annual general meeting. But this goal may not be achieved. Directors still remain vested by statute with the management of the company and the case law prohibiting instruction to directors during their tenure by shareholders would still seem to apply. The conclusions of Getz respecting the limitations on subject matter for shareholder proposals still seem to be valid for the same fundamental reason he advances: the operation of the principle of constitutionality. The effect of the omission in the Business Corporations Act of the 'proper subject' and 'ordinary business' exceptions, however, will have to be definitively settled by the Courts.

142 I make this statement as conjecture.
143 Business Corporations Act, s.97(1).

On the 'proper subject' and 'ordinary business' grounds, the Proposals Commentary, para. 277, states: "...(they are) designed to make it clear that the machinery of this section cannot be used to authorize the taking of decisions by the general meeting which the shareholders are not otherwise competent to make."
The broader scope of the shareholder proposal mechanism coupled with the powers given to shareholders in general meeting to approve, amend or propose by-laws under the Business Corporations Act compels a reassessment of the balance of power formulation in a company that would be incorporated under this Act. It seems that notwithstanding the lack of clarification, respecting the extent of shareholder proposal subject matter, the existence of that device together with the by-law powers shifts the residual power in the company to the general meeting and causes a return to the rule expressed in the early English cases that the will of the company is the will of its general meeting. By this shift the importance of the annual general meeting within the company structure is greatly enhanced.

145 The scope of the proposal mechanism has not only been broadened by the possible increase in shareholder management powers but also by the reduction from 20 percent to 5 percent of shares required to nominate a director by proposal - the Business Corporations Act, op.cit., s.131(4); Canada Corporations Act, op.cit., s.108.8(5).

146 op.cit., s.98.

147 This seems to have been the intention of the Government. See the remarks of Mr. N. Cafik, Parliamentary Secretary to the Minister of Consumer and Corporate Affairs, at the introduction of Bill C-29 at second reading, House of Commons Debates, November 8, 1974, p. 1202.
Notice

Provisions respecting notice also affect the content of annual general meetings. While it is a power of directors to determine the time and place for the holding of meetings, the company must give notice of annual general meetings to each shareholder who is entitled to vote. The notice must be mailed, prepaid, not less than 21 days or more than 50 days before the meeting. Only shareholders of record on the record date are entitled to notice, but if no record date is fixed a shareholder who has not received notice is still entitled to vote if he is registered on the company's books on the day set for the meeting.

In order that the business transacted at the meeting be valid the provisions respecting notice need be followed. A provision may be inserted in the by-laws that accidental omission to notify any shareholder does not invalidate the business

148 Business Corporations Act, s.127. Companies Act, Table A, article 7.1.
149 Business Corporations Act, s.129(1). Companies Act, s.166. No maximum period is stated.
150 Business Corporations Act, s.128(2). Companies Act, s.184(a).
151 Business Corporations Act, s.128(3)(a)ii.
of the meeting. Failure to have such a by-law will cause such omission to invalidate the proceedings.

As no action may validly be transacted by a meeting unless notice of that action has been given to all those entitled to receive notice of the meeting and action going beyond the scope of the notice is invalid and void, it is imperative that the contents of the notice state clearly what business will be transacted. The content of the notice will determine the content of the meeting.

This principle requires that every matter to be considered at the meeting be properly identified. Not only must the business of the meeting be disclosed but something about that business must be disclosed. Information must be provided about the matters to be acted upon. In this regard Getz states:

"No useful purpose is served by a detailed examination of the many cases dealing with whether there has been sufficient disclosure about matters to be acted upon. The

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152 See Re West Collieries Ltd. 1962 1 All E.R. 26.
153 Alexander v. Simpson 1889 43 Ch. D. 139
R. v. Longhorne (1836) 4 Ad. & El. 538.
154 Re Hampshire Land Co. 1896 2 Ch. 743.
general principle is clear and, again, is succinctly stated in the regulations prescribing the contents of information circulars: the matters to be acted upon must be described in 'sufficient detail to permit shareholders to form a reasoned judgment concerning any such matter.' This is no more than a statutory formulation of a principle that is judicially well established...

Custom

There are certain items not mandatory in law which in times of acute public relations consciousness when charges of excess profits, pollution and other "rip-offs" are made and corporate management is sensitive to adverse publicity that may result from a poorly handled shareholders' meeting have become part of most annual meetings as custom. These include the report by the chairman of the board on the present performance and future hopes of the company, the answering of questions from the floor on matters outside the notice of the meeting and the distribution of agendas and other written information both about the meeting and the company.

See also Fraser & Stewart, op.cit., pp. 650-652.

156 Consider the elaborate annual reports sent to shareholders.
This class of meeting function, not required by law, nevertheless may be considered as a custom of meetings whose usage over a period of time has made it part of the content of the legal model of annual general meetings.

iv. law - policy

Both under the provisions of the Companies Act and the Business Corporations Act the annual general meeting emerges from the discussion in the previous section as an institution within the structure of the company that possesses considerable influence and power over the whole. The inherent flexibility in a memorandum company given by the contractual nature of the articles and the recent modifications by the Business Corporations Act to the rigid constitutionalism of the Letters Patent regime assure and enhance the existence and vitality of annual meetings. But while to understand meetings an examination of their mechanics and machinery is necessary, their occurrence and importance in the company's legal structure and their continued vitality suggest assumptions and premises that are made or accepted which are fundamental to them. Almost all of these assumptions and premises do not exist as explicit in the relevant statutory provisions or judicial decisions but rather must be inferred from these. Nevertheless these assumptions have exercised influence, sometimes
considerable, in creating the architecture of meeting structure. This section will outline the more important of those assumptions and premises.

(a) proprietorialism

Historically as previously noted the general meeting was the company and the directors were "subject to the superior control of the proprietors assembled in general meeting." The will of the annual meeting was the will of the company. Although Letters Patent jurisdictions because of their statutory vesting of directors' management powers did not need the case law development as did memorandum companies whereby the directors ceased to be mere agents of the shareholders and became with the annual general meeting primary organs of the company, there remains in both types of companies a historical residue of the earlier concept that the will of the meeting is the will of the company.

This historical sense of the annual general meeting as a proprietary assembly with all the attributes of ownership cannot be discounted solely because it is not reflected in the law. 

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158 As previously noted in section iii. of this Part, under the heading "constitution", the Business Corporations Act might be attempting to reenact this character.
as a fact it is part of the legal model of the annual general meeting.

(b) constitutionalism

The government of corporations like the government of states has as a constitution a basic structure of authority relationships. Company law, therefore, is constitutional law in the sense that one of its functions is to regulate the, "manner in which the institution is constituted, to define the relative rights and duties of those participating in the institution and to delimit the powers of the institution in relation to the external world." 159

The assignment of distinct functions by company law statutes to both the annual general meeting and the board of directors and the resultant discussion in company law doctrine of the division of powers, the delimitation of the primary organs and of the locus of residual power in the company, reflects the assumption of the constitutional law doctrine of the separation of powers and the accompanying techniques for the application of that doctrine. A dogmatic application of the separation of powers doctrine to the internal structure of corporate authority relationships is not

being suggested as existing or desirable. But this doctrine of public law and government is the assumption underlying the existence of an annual general meeting and board of directors in company law.

The tacit acceptance in Anglo American corporate governance, reflected in the use of the concepts of corporate organs, residual power and division of powers, of the public constitutional model of Anglo American public constitutional law ensures that the annual general meeting, which reflects the enfranchised estate in the public constitutional model, must play a role in any corporation that is based on these models. Elimination of the annual general meeting in corporate government, therefore, will be resisted until there is a rejection of its public government counterpart; until this is done the annual general meeting will be part of the theory of corporate government.

Another concept appropriated from the public constitutional model is that of majority rule.\textsuperscript{160} When transferred to corporate constitutionalism this concept becomes the rule by a majority of shares rather than a majority of persons, and it becomes subject to the various devices of vote gearing created by ingenious practitioners

\textsuperscript{160} The law respecting the majority rule principle is set out earlier under the heading "voting" in section iii. of this Part.
in order to blunt its impact but these adjustments are in some sense no different from the gerrymandering of the public model. The majority rule concept is an integral part of the annual general meeting model and as such represents an assumption made by that model.

III

i. introduction

The purpose of this Part is to set out the economic model of the annual general meeting from an examination of the work of J.K. Galbraith. The mainstream of Galbraith's thought is contained in his three books, "The Affluent Society", 1 "The New Industrial State", 2 and "Economics and the Public Purpose". 3 He has written other books and numerous articles in learned journals as well as magazines which present his views on diverse subjects; but for the purposes of this essay these three books are assumed to set out the essentials of his ideas on the new industrial system. This assumption is in accordance with what he and most of his critics believe. 4

Each of these books examines a part of the American industrial system in an attempt to construct the whole; each builds in a cumulative manner and each relates to the others, to form a progression. Together they constitute a unique and controversial

4 See "Economics and the Public Purpose", op.cit., Forward.
study of the dominant institution in modern American society: the modern corporation. Galbraith writes as an economist and with the tools of an economist but defines his area as larger than that usually defined as economics and employs methodology and conceptual devices not part of strict economic method to make an interpretative analysis of society from the viewpoint of corporate dominance. Paul Samuelson, the noted economist and sometime Galbraith foe, stated of this analysis that, "the study of economics will never be quite the same as in the days before the Galbraithian trilogy." Others, both economists and not, share this sense of the importance of his analysis.

The thought of Galbraith is not necessarily unique or original in either its content or method. Studies embodying synthesis and interpretation usually incorporate in their presentation other studies; the unique quality of synthesis is an original interpretation and an original combination. Galbraith is no exception to this rule.

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7 Galbraith does in fact give credit to a group of theoretical economists who have done work in anticipation of his ideas. These economists include Robin Marris of Cambridge,
However, lineage is not as important as existence. The synthesis has been made and the interpretation has been given. Whatever aspects of method or conclusion are questioned or rejected, the existence of this study and the construction of the model of the new industrial system compel an examination of the tenets of this system.

Considering that Galbraith's doctrines are interrelated and cumulative, the method used in this essay for their exposition is to present first an overview of his three main works in chronological order so that the general shape and direction of his ideas can be perceived. In section iii. of this Part a more detailed examination of certain of his ideas will be given. Only those which relate to the thesis of this essay will be examined. In section iv. a summary construction of the relevant parts of the Galbraith model of the new industrial system will be attempted.

William Baumol of Princeton, Jack Downie of London and Carl Keyser, all of whom did work on managerial behavior in the mature corporation. Thurstine Veblen's books, especially "The Engineers and the Price System", also reflect the lineage of Galbraith's thought although no credit is given. The book of Berle and Means, "The Modern Corporation and Private Property", which enunciated the doctrines of the separation of ownership and control, and the ascendancy of management in large corporations is also acknowledged by Galbraith.

Others relate to criticism of institutions beyond the corporation such as unions and universities.
ii. overview

"The Affluent Society"⁹ is an examination of poverty, both in the private and public sectors, coexistent with the great wealth of American society. It attempts to explain why pockets of poverty in parts of the U.S.¹⁰ (urban ghettos and certain rural areas such as Appalachia) can exist while economic growth and a high level of consumption are maintained in an otherwise viable economy. This explanation involves a historical examination of economic theory which Galbraith calls the tradition of despair and an examination of three unsolved problems that this economic attitude generates. The three are: artificial creation of demand through advertising, inflation and the imbalance between the public and private sectors.¹¹

To solve these problems Galbraith urged a rejection of the ideas of growth and progress; scarcity is no longer the threat it was for past generations and now society can afford to control its production and allocate that production across a broad spectrum instead of to personal consumption of a needless or conspicuous

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⁹ op.cit.
¹⁰ See Michael Harrington, "The Other America", 1963, for a study of this phenomenon.
¹¹ "The Affluent Society", op.cit., chs. XIII, XV, XVII.
kind. In this manner poverty both individual and public can be eliminated by the vast resources of the affluent society's productive capacity.

"The Affluent Society"\textsuperscript{12} is however more than an explanation of poverty; certainly chapters on poverty are there and explanation and solutions offered. Galbraith attacks the neo classical synthesis of economics which began with Adam Smith, Malthus and Ricardo as the classical tradition and later was refined by Keynes and others to become the dominant explanation of economic phenomena. This body of thought Galbraith irreverently terms the "conventional wisdom".\textsuperscript{13} He attacks the main body of this central economic tradition and questions its applicability at all to the economy of the modern day.

The rejection by Galbraith of the traditional economic doctrine is characteristic of all his work: it reappears in both the "New Industrial State"\textsuperscript{14} and "Economics and the Public Purpose".\textsuperscript{15} It is Galbraith's view that this doctrine has imposed a particular viewpoint upon attempts to understand existing economic phenomena,

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\textsuperscript{12} op.cit., the book was originally called "Why People are Poor".
\textsuperscript{13} "The Affluent Society", ch. II.
\textsuperscript{14} op.cit.
\textsuperscript{15} op.cit.
\end{flushleft}
which preclude by their nature certain interpretations of those phenomena.

In "The Affluent Society"\textsuperscript{16} he argues that the traditional doctrine has made productivity, inequality and insecurity the main preoccupations of the economic system of North America when in fact goods and services are abundant. This preoccupation exists because of the acceptance of the "conventional wisdom", a doctrine of despair which no longer applies to the affluence of the present. The tenets of the conventional wisdom must therefore be rejected and new explanations sought. Galbraith professes his purpose to be the seeking of these new explanations: the construction of a new theoretical economic model.

"The New Industrial State"\textsuperscript{17} is the second book in the continuance of Galbraith's economics. In his forward to this book, Galbraith emphasized that it has a close connection with "The Affluent Society".\textsuperscript{18}

"I must again remind the reader that this book had its origins alongside "The Affluent Society". It stands in relation to that book as a house to a window. This is

\textsuperscript{16} op.cit.  
\textsuperscript{17} op.cit.  
\textsuperscript{18} op.cit.
the structure; the earlier book allowed the first glimpse inside."^{19}

But whereas "The Affluent Society"^{20} emphasized historical economics and the limitations of its accompanying ideology, "The New Industrial State"^{21} is a study of the industrial system as it exists in the present and done in broad strokes. By the phrase 'industrial system' he means the world of the great corporations: those few hundred technically dynamic, massively capitalized and highly organized corporations.^{22} He asserts that these giant, mature corporations are the major agents of change and the centres of power in contemporary industrial society. The relation of the state to the industrial system, the growth of mass advertising, the retardation of trade unions, the increase in university education and technical development are examined. He insists that these changes must be seen not in isolation from each other but in terms of their close interdependence: "This matrix of change has been more than the sum of its parts."^{23}

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19 op.cit., p. viii.
20 op.cit.
21 op.cit.
22 These are the same corporations that this essay purports to be considering.
He states that whatever its ideological billing, the economic system has become in substantial part a planned economy. "The imperatives of technology and organization, not the images of ideology, are what determine the shape of economic society." This remark can be taken as the major theme of that book.

In his view, the imperatives of modern technology have two effects: (1) technology is so intricate as a process that it can be carried out only by specialized professionals, operating primarily in groups, whose individuality is submerged in a world of committees. They constitute what he terms, "the techno-structure"; (2) the only entity able to supply the organization of effort and capital required to realize this technology is what he terms the "mature corporation".

A secondary theme of the book is how mature corporations manage the economy that their security and growth are assured. This process of management he calls industrial planning. The central concept of neo classical economics is that of the market. By supply and demand and diminishing marginal utility, price, supply and profitability are determined. But, Galbraith maintains mature corporations cannot because of the technological imperatives

rely on the market mechanism. It injects into corporate activities too many uncertainties; the market must be replaced by corporate planning and control. The market is too uncertain even if it were to exist as described in the economic textbooks. Thus planning emerges; he describes it as:

"...replacing prices and the market as the mechanism for determining what will be produced, with an authoritative determination of what will be produced and consumed and at what price."\(^{25}\)

Galbraith ascribes to mature corporations through his development of the concept of planning a role far beyond that of the traditional economic textbooks. Rather than being entities subject to the laws of the market, they regulate the market. This regulation, because of the vast scope of their undertakings and their degree of involvement in the total economy, amounts to macro economic planning similar in effect to the planned economies of East Europe and the Soviet Union. Free enterprise, the hallmark of American political and economic theory, has become a myth to which corporate leaders pay lip service while the entities they represent continue the process of planning.

With the degree of control exercised by corporations goes the accessory of control - power. No longer the landowner or the classical entrepreneur but the corporation is its possessor. Galbraith states:

"Power has, in fact, passed to what anyone in search of novelty must be justified in calling a new factor of production. This is the association of men of diverse technical knowledge, experience or other talent which modern industrial technology and planning require."\(^{26}\)

Galbraith has been accused of being an apologist for the large corporation\(^{27}\) but this is not the main thrust of this book. He assumes as a first premise that the corporations exist and that certain of them are very large (others have established the extent of this existence and size); his main concern is to examine the significance and effect of their existence and size on society as a whole.

In the third book by Galbraith on the industrial system, the world of the large corporation is brought into focus with the market system as it does exist in the economy. This book,

\(^{26}\) "The New Industrial State", op.cit., p. 72.
\(^{27}\) See Mintz & Cohen, "America Inc.", 1971, p. 53.
"Economics and the Public Purpose",\textsuperscript{28} accepts the conclusions of earlier works and then attempts to construct a model of the American economy in totality.

Even more than "The New Industrial State",\textsuperscript{29} this latest book is a study of power. Economics and its tools are used by the author to ascertain the nature and function of power in an industrial economy of the 'capitalist' variety. The traditional view regarding the locus of power in the corporation, the directors, is shown to be, in the model constructed, invalid. Power which had shifted from the owners to the directors has now shifted to the technostructure. As with any group which possesses the attributes of power, the technostructure concerns itself with maintaining its privileges; therefore, most corporate activities are directed towards preserving the structure of that particular corporation and the corporate world in general. The more traditional activities of the firm such as the maximization of profits and active competition under the market system are abandoned.

Whereas "The New Industrial State"\textsuperscript{30} and "The Affluent Society"\textsuperscript{31} by implication dealt with the world of great corporations

\textsuperscript{28} op.cit.
\textsuperscript{29} op.cit.
\textsuperscript{30} op.cit.
\textsuperscript{31} op.cit.
which Galbraith calls, "the decisive part of the economy", \(^{32}\) "Economics and the Public Purpose"\(^ {33}\) attempts to consider the whole system. The segment of the economy occupied by small businesses, about half of the G.N.P., is discussed under the title "market system". This segment resembles a mixture of the neo classical monopoly, oligopoly and competition. The entrepreneurial firm is its characteristic form.

An explanation of the market system is important because many of the critics of "The New Industrial State"\(^ {34}\) stressed that competition as defined by the traditional economics did exist in the American economy and that Galbraith simply chose to ignore it.\(^ {35}\) If a market system of the traditional kind does exist or even coexists with the planning system of mature corporations, then it can be argued that the planning system is a mere perversion of the market system and appropriate legislative measures ought be taken to arrest its development and stimulate the market

\(^{32}\) "Economics and the Public Purpose", op.cit, Forward p. ix.
\(^{33}\) op.cit.
\(^{34}\) op.cit.
system which otherwise would be viable. Furthermore, if a traditional market system exists at all, from that existence it can be argued that such system is normative; this is in fact the argument of traditional economics which is empirical in nature.

But while acknowledging the existence of a market system, the book states that this system exists only to perform a supportive role to the large corporation; it is allowed to exist only to give services which the mature corporations do not wish to offer. Remuneration of its employees is low - lower than in the planning system. Independence of business opportunity - one of the hallmarks of a free enterprise economy, does not exist even for the firm in the market system. This system is predominantly a service industry.

"Economics and the Public Purpose"\textsuperscript{36} is important in construction of the Galbraith economic model because it refines the ideas contained in the earlier books and offers a new interpretation of what remains of the traditional market economy.

iii. specific concepts

This section examines in greater detail several concepts of

\textsuperscript{36} op.cit.
Galbraith respecting the behaviour of corporations which affect shareholders assembled in annual general meetings. These concepts may be seen under two divisions: those that directly alter the traditional model of shareholder attributes and those that affect the corporate structure generally and thereby have repercussions for shareholder attributes.

The Imperatives of Technology

This concept is a main building block in Galbraith's thesis argued in "The New Industrial State". Although he explains it only in a short chapter, once postulated it is used to support most of his subsequent ideas on corporate behaviour.

Another phrase for the imperatives of technology is technological determinism. The rapid and vast advances in technology, almost all of which are visible to the public in their effects, compel the corporation to produce a range of products whose complexity was unknown in the last century. Technology in the economy is no longer a static factor, as it was in 1875 with changes from time to time in the product or its manufacturing process, but a powerful and dynamic force having its own initiative. Technology is treated as if it were a primary, autonomous

37 op.cit.
force in its own right - its imperatives must be followed. As well as being a change, it causes change: change in organizations and hence change in society.\textsuperscript{38} The more sophisticated the technology, the greater, Galbraith contends, will be the need for the imperatives.

The purpose of the emphasis by Galbraith on the role of technology is his desire to construct a new model of the corporate structure. While technological change is a familiar idea, and has been so since the industrial revolution, the rate of change and the intrinsic nature of it or both have in the last three decades caused a second industrial revolution. Although Galbraith does not use that phrase (others have)\textsuperscript{39} this is what he seems to be

\textsuperscript{38} Galbraith lists six major consequences of the imperative of technology, "The New Industrial State", op.cit., p. 84:

(1) a lengthening span of time to separate the beginning from the completion of a task;
(2) a more complex technology and specialized knowledge requires considerably more capital to achieve production;
(3) an inflexible commitment of physical capital (tools and other equipment) to the particular task as initially defined;
(4) specialized personnel not only for production but for guidance and planning of output and its distribution;
(5) large and complex business organizations to assemble the components from the specialized task;
(6) planning of all aspects of the task.

saying. The corporate model of the entrepreneurial and capitalistic variety, which served so well for the first industrial revolution, will not function in the world of the second.

The outstanding imperative of technology is the need for an organization that can control that technology. The mature corporation evolved to meet this imperative; in the economies of the U.S. and Western Europe this institution fulfills the imperatives of technology. It is the contention of Galbraith, mainly expressed in the first ten chapters of "The New Industrial State", \(^{40}\) that this entity was unknown and unneeded before this technological explosion.

The idea that technological change can spawn a culture, is not new. Many interpretations of history have demonstrated that various cultures or civilizations depended on particular inventions - the plow, seed planting, smelting of metals and others. \(^{41}\) Galbraith applies this kind of interpretation, technological determinism, to the corporate world at mid twentieth century and not only "discovers" the new industrial state but attempts to explain its attributes.

\(^{40}\) op.cit.

\(^{41}\) See Bronowski, "The Ascent of Man", 1973, for such an interpretation.
Technostructure

Galbraith argues that mature corporations are controlled by large staffs of professional employees who are experts in the various aspects of the corporation's operations. This group he calls the "technostructure". He defines the technostructure in the following terms:

"...it extends from the most senior officials of the corporation to where it meets, at the outer perimeter, the white - and blue - collar workers whose function is to conform more or less mechanically to instruction or routine. It embraces all who bring specialized knowledge, talent or experience to group decision-making."\(^{42}\)

Galbraith does not intend the concept of the technostructure to include the chairman of a company, the president or those vice-presidents with important staff responsibilities; these persons are part of management but not part of the technostructure; therefore, the more traditional term 'management' is not coterminous with the term 'technostructure'.

The need for a technostructure in the mature corporation is caused by several factors:\(^{43}\) (1) technological requirements in

\(^{42}\) "The New Industrial State", op.cit., p. 84.

modern industry force the corporation to bring together those experts who possess the required skill for a particular technical operation; (2) the planning inherent in mature corporations; (3) the need to coordinate the specialized technical skills and the industrial planning. "Talent must be brought to bear on the common purpose", Galbraith states. \(^{44}\)

Decision-making is diffused throughout the ranks of technically skilled personnel: no single group or individual has control. Decisions once made move upward through the various reviewing groups for approval and action. "One can do worse than think of a business organization as a hierarchy of committees". \(^{45}\) As no one person has more than a fraction of the knowledge necessary for the design, marketing or production of a new product, it follows that no one person should make the investment decision respecting a proposed product. These matters must be resolved by groups in which each participant contributes the specialized knowledge which he possesses. As the size of the corporation increases, the number and the technical complexity of decisions increase; accordingly, the size of the technostructure increases.

\(^{44}\) ibid.
\(^{45}\) ibid.
In the past the leadership and control in business organization was identified with the entrepreneur - that individual who united ownership or control of capital with a capacity for uniting it with the factors of production and a further capacity for innovation. It is Galbraith's contention that the entrepreneur can withstand a substantial degree of industrial development. Even if the entrepreneur no longer owns the majority of shares in the corporation, he may retain control through strong leadership. 46 In fact the corporation may be an excellent vehicle for these entrepreneurial purposes. However, with the emergence of the technostructure required by modern technology and planning the entrepreneur can no longer exist as an individual in the mature corporation. Galbraith summarizes as follows:

"...what the entrepreneur created passed inexerably beyond the scope of his authority. He could build. And he could exert influence for a time. But his creation, were it to serve the purposes for which it was brought into being, required his replacement. What the entrepreneur created, only a group of men sharing specialized information could

46 Consider the power of the Bronfman family over Seagrams Ltd. At his death in 1972, Samuel Bronfman owned only 12 shares in that company - 1973 Annual Report Distillers Seagrams.
ultimately operate."  

Control has, therefore, necessarily shifted from management to the technostructure. An outsider to the technostructure, without its collective technical knowledge cannot participate either collectively or solely in the decision-making process of the corporation. There is no possibility of intervention in this process from those in the conventional model, either legal or economic, who are not members of the technostructure.

If an exclusive right is given to the technostructure due to its monopoly of knowledge required to make decisions, it effectively controls the corporation whatever the conventional model might otherwise dictate. The exclusive right is ascribed to this group by Galbraith, because of the monopoly. He explains that as land in the Middle Ages and capital in the period from the renaissance to the present have given to their possessors control and power, now a new factor of production, the collective skills of the technostructure, give to that group control and power.

48 "management" in the sense of the directors or the most senior officers.
49 Galbraith gives examples of management who have interferred with decisions of the technostructure with negative results for the corporation - "The New Industrial State", op.cit., p. 101 et seq.
He states:

"Power goes to the factor of production which is hardest to obtain or hardest to replace. In precise language it adheres to the one that has the greatest inelasticity of supply at the margin."\(^{50}\)

The term 'technostructure' as used by Galbraith is simply a neologism for the term 'bureaucracy'. But whereas in government it is recognized that considerable power if not almost complete power is exercised by the bureaucrats as opposed to the Ministers and other elected officials although the theoretical model grants total power to elected officials, in corporate organizations it is not generally recognized that a bureaucracy exercises almost complete power. The accepted view of economists is that the shareholders in general meeting are the primary locus of power and the directors are the intermediate locus.\(^{51}\)

By development of the concept of a technostructure, Galbraith attempts to explain the power structure of a mature corporation. He rejected the conventional wisdom which ascribes to the mass of employees of the corporation no authority and little power; instead he maintains it is the reverse.

\(^{50}\) "The New Industrial State", op.cit., p. 70.

\(^{51}\) See Samuelson, "Economics" 7th ed., ch. 5.
Planning

Planning is a word that is used several different ways in several different contexts. A planned economy usually refers to the economies of the communist states of Eastern Europe and the U.S.S.R.. In these economies all economic activity is under the direction and control of the state; 'free' or individual enterprise is prohibited. It has been assumed that planning is alien to Western economies because of the market assumptions made in the model of these economies. In a planned economy prices, production and profits are set by regulation; in a market economy these factors are controlled by the "invisible hand" of competition.

Galbraith rejects this dichotomy between the two types of economies and questions the market assumption for the complete spectrum of Western economies. He states that although the market system may exist for part of the economy, the part occupied by mature corporations which is the larger part is not governed by the market mechanism but by planning carried out by the corporations. In taking this position he contradicts the main body of economic thought of the Western economies.  

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Respecting the 'market' concept held by neo classical economists Galbraith comments: "To them the market is more than an institution. It is a mystique, a supernatural endowment which evokes not technical but religious attributes." New York Times, June 25, 1967, Book Review, p. 3.
In two chapters near the beginning of "The New Industrial State", Galbraith sets out his concept of planning. To the same extent as the other subject headings under examination in this subsection of the essay, Galbraith's concept of planning is related to his other ideas concerning the industrial economy. Technological imperatives and the technostructure are interrelated with the concept of planning in a cause and effect symbiosis. What follows is an outline of Galbraith's views on the need for the industrial planning practiced by mature corporations and the nature of that planning.

Planning by corporations is necessary because the uncertainties of the market must be superceded. The unknown with its inherent risks cannot be tolerated when advanced technology with its companion commitment of time and capital are employed. Under the usual market system there is no guarantee that investment in a product which represents a high proportion of the corporation's assets will be profitable because there is no secure market for that product at a profit or even a market at all. This is a condition that cannot be tolerated by a large corporation; if it makes

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53 op.cit.
54 These two chapters were revised for the 2nd edition.
a mistake in an investment decision it may become bankrupt.  

Galbraith states:

"The needed action...is evident: in addition to deciding what the customer will want and will pay, the firm must take every feasible step to see that what it decides to produce is wanted by the consumer at a remunerative price. And it must see that the labour, materials and equipment that it needs will be available at a cost consistent with the price it will receive. It must exercise control over what is sold. It must exercise control over what is supplied. It must replace the market with planning."  

Planning also extends to capital. As has previously been stated, Galbraith associates with the use of technology large

55 There are certainly mistakes made such as the Edsel of Ford Motor Company or the corfam leather substitute of Dupont Chemicals but the notoriety of these examples affirms the rule.


57 Having defined planning and having established its need, Galbraith outlines the strategies available for its implementation:

(1) The market can be superceded.
(2) Market control.
(3) Market suspension for an indefinite time. "The New Industrial State", op.cit., p. 44.
amounts of capital. The supply of capital therefore cannot be left to chance; it must come within the ambit of planning. Galbraith states that capital formation in the mid twentieth century corporate economy is not accomplished by individual personal savings. Corporations with their great size and capital flow are the source of capital. This fact is useful to planning by the corporation. The happy coincidence of a large capital formation by the corporations and the need to plan their capital movements results in the phenomenon of corporate financing from internally generated funds.

Galbraith's view of corporate financial planning is contentious but whatever side of the debate is taken two statements are clear: 58 (1) his analysis of corporate finance and its uses is consistent with the rest of his theory, (2) whatever statistical evidence is adduced a large part of corporate financing (at least a third of requirements) is internally generated. 59


The great advantage of internally generated funds to corporate management is that they are not owned externally to the corporation and therefore do not represent a debtor or shareholder relationship with the corporation. Both debtors and shareholders have legal prerogatives inherent in the nature of their quality; it is these legal prerogatives that the corporation desires to avoid. Any rights not possessed by the corporation will impair its ability to plan; therefore, these rights against the corporation must be eliminated or minimized.

Galbraith summarizes the advantages of self-funding as follows:

"A basic level of earnings also provides the firm...with a source of savings, and thus of capital that is fully under its own control. This protects it from creditors. Not needing outside funds, it does not have to make any concessions to the views of those who would provide them."^61

Secure with its internally generated funds, a corporation can make decisions without external interference from those with claims to its capital. The planning process can continue successfully by engulfing the area of capital formation. This aspect of

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^60 I assume the two classifications of corporate funding: debt - bonds, debentures, notes - and equity - stock issues.

^61 "Economics and the Public Purpose", op.cit., p. 95.
planning is a significant departure from the orthodox view.

If there are few or at least a diminished number of 'capitalists' (those with claims to capital) in a relationship with the corporation, can the carrying on of activity by these corporations be termed 'capitalism'? Revised sequence part a.

Building on his concepts of technological imperatives, bureaucratic control and industrial planning, Galbraith is then ready to set out the last major characteristic of the mature corporation - the revised sequence. By this concept the features of the industrial state are brought into focus and the differences from previous economic models of the corporate system are outlined.

The accepted or traditional sequence is based on the concept of the margin as developed in economic theory. This concept

62 Samuelson expresses this concept in the following terms: "Each good...is demanded up to the point where the marginal utility per dollar (or penny) spent on it is exactly the same as the marginal utility of a dollar (or penny) spent on any other good - such as salt. If any one good gave more marginal utility per dollar, one would gain by taking money away from other goods and spending more on that good...If any good gave less marginal utility per dollar than the common level, the consumer would buy less of it until the marginal utility of the last dollar spent on it had risen back to the common level."
explains the behaviour of prices, supply and demand in the market. The theory of the margin postulates a model whereby the consumer is sovereign. He initiates the responses of the market; the firm responds to the message of the market. The firm cannot act in a profitable manner except in accordance with the market. Price and product are as well determined by consumer sovereignty. This concept Galbraith terms 'the accepted sequence'.

In contradiction to this Galbraith postulates the concept of the revised sequence whereby he maintains that rather than being sovereign the consumer is subject: demand and prices are managed by the firm. By this inversion of conventional market behaviour, the market is superceded and managed by the firm. The management of demand and the setting of prices are a further example of its desire to plan the environment in which it operates.

The implementation of the revised sequence involves not only the persuasion of advertising but also an overall sales strategy. It consists in devising a product or features of a product, around which a sales strategy can be built. These techniques comprise what is usually termed 'marketing'.

By means of the main marketing tool, advertising, a market for a product can be created and the price of that product can be set by the firm irrespective of conventional supply and demand mechanisms because advertising maintains the consumer's demand for the product at an artificial price.

Marketing strategies, in addition to advertising, involve the use of sales and merchandising staffs and of sales and dealer organizations. They make use of market research and testing to ascertain to what extent the consumer can be persuaded and by what means at what cost. These strategies influence the choice and design of products to ensure that they incorporate features that lend themselves to persuasion. Products, brands and packaging are examined against the criteria of persuasion in order that money and effort may be expended to best effect this end.

By these strategies consumer needs are not simply ascertained and filled thus affirming consumer sovereignty as conventional economic doctrine maintains but rather exploited and developed in order to meet the needs of the corporation.

In treating this subject in "The New Industrial State", Galbraith employs an analytical structure which is different

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64 op.cit.
from that employed in "The Affluent Society". In the "Affluent Society", he treated advertising in a competitive context and in relation to demand theory and modern want creation. The imbalance between the public and private sectors of the economy, the theme of the book, is attributed in part to the persuasion for private goods. However, in "The New Industrial State" advertising and sales strategy are assumed to have an organic role in the industrial system. The purpose of demand management is to ensure that people buy what is produced and not the reverse.

The "invisible hand" of Adam Smith is by these processes excluded. Production does not follow the need of the aggregate of consumers but the need of the corporation to plan their profits and productive runs. Products are offered which fit the particular situation of the corporation at that time rather than the corporation adjusting its structure to produce the product that the market demands. The advantage to the corporation is obvious: it gains control of its environment and therefore can plan its undertakings. The advantages to the consumer are nebulous at best. Unwanted,

65 op.cit.
66 ibid.
67 op.cit.
68 This phrase was used by Adam Smith to explain the self regulating character of the market. See "The Wealth of Nations", Modern Library Edition, 1937, p. 423.
dangerous, and useless products are dumped on the market at prices above even their objective value. The consumer does not have a choice and cannot complain about quality or product utility. 69

Galbraith qualifies the concept of the revised sequence. It varies as to the kind of producers involved. It is greatest where the industrial system is most developed - where the firm is large and the technostructure is in control. He further qualifies the existence of the revised sequence by admitting the existence of the accepted sequence coexistent with it. The accepted and revised sequences exist, "side by side in the manner of a reversible chemical reaction". 70 The accepted sequence is the rule in the market system: here the power of the producer is minimal or nonexistent and therefore the rules of economic behaviour as enunciated in the traditional textbooks operate. "Outside the industrial system - beyond the limits of the large corporation - the accepted sequence still rules." 71

Furthermore even within the industrial system where the revised sequence operates the consumer may reject the persuasion

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69 Consider the American automobile industry.
71 ibid., p. 212.
of advertising and other marketing strategies. "That the power to manage the individual consumer is imperfect must be emphasized," he concedes.\footnote{ibid., p. 313.} Ford Motor Company could not sell Edsels and tobacco and soap companies cease production of certain brands where consumer manipulation has failed.

Qualified in such manner, Galbraith anticipates that the concept of the revised sequence ought to be acceptable: "In the form just presented, the revised sequence will not, I think, be challenged by many economists. There is a certain difficulty in escaping from the inescapable."\footnote{"The New Industrial State", op.cit., p. 213.} But this concept has attracted a substantial degree of criticism for it attacks the central core of conventional economic thought.\footnote{See New York Times, June 25, 1967, op.cit., for a criticism. It has also, of course, been attacked by many corporate executives.}

Revised sequence part b.

If the theory of the revised sequence as set out in part a. is correct then certain assumptions fundamental to explanations of the behaviour of firms in the market are invalid.

In the market system where the traditional economic doctrines
prevail, a firm will seek the maximum profit from its operations. This rule is expressed in the economic formula that a firm will seek to produce until the last unit it sells brings in extra revenue just equal to its extra cost.75

While modern economists are aware of the imperfections of competition, it still remains a fundamental assumption of economic theory that a firm will seek to equate revenue with marginal cost.76 But if the attributes of the revised sequence so far delineated are applied to a firm, the aim of profit maximization will not emerge as the primary goal. The control exercised by the firm over the market, as explained in the revised sequence part a., liberates the firm from any need to follow the dictates of the market. No longer are prices set by the market but by the firm. No longer does the rule of the survival of the fittest compel a firm to seek profit maximization in the interests of its own survival. The mature corporation in control of its economic environment can then choose its goals.

The traditional goal of profit maximization is further eroded by the concept of the technostructure. Galbraith assumes that

75 See Samuelson, 7th ed., op.cit., ch. 25.
76 ibid.
it is an established fact that the mature corporation is controlled by its technostructure. Also he assumes that the technostructure is in no danger of being displaced from power as long as earnings are above a certain minimum. Therefore, he asserts, it seems remote and contradictory assuming usual patterns of human behaviour that the technostructure will seek to maximize profits only to reward a group extrinsic to itself when that group is already happy with profitability at a level below maximum.\(^77, 78\)

From the viewpoint of this essay the abandonment of profit maximization is of considerable importance. Its acceptance by a firm effectively excludes other goals; its affirmation is essential to maintain the conventional economic model of the firm and the explanation of its behaviour. But in view of the various attributes of the mature corporation as already set out, it is a logical step in the construction of Galbraith's model to conclude the abandonment of this goal.

\(^77\) Consider that members of the technostructure own little or no stock in the corporation for which they work.

\(^78\) This argument is presented in "The New Industrial State", op.cit., pp. 130-133, and in "Economics and the Public Purpose", op.cit., pp. 89-91.
Corporate Goals

If according to the theory of the revised sequence profits are no longer sought to be maximized, earnings are no longer the goal and the market no longer controls the firm's activities, there exists a lacuna that must be filled by another set of values for the firm to pursue. This lacuna is filled by what Galbraith calls the "protective purposes" and the "affirmative purposes". These new purposes replace the old ones which are related to the economic doctrines he rejects; these purposes are consistent with the new doctrines relating to corporations that he has set out. The postulation of new corporate goals is the last act in the construction by Galbraith of his corporate model; if all the previous concepts he has set out are valid then it follows that the new structure cannot be motivated by the previous structure's values. He therefore seeks to reveal these new values.

It has been stated in previous sections of this Part that in the Galbraith model the technostructure is in control of the mature corporation and that this corporation is, within a broad range, free to chose its goals as a result of the revised sequence. In

79 These terms first appear in "Economics and the Public Purpose", op.cit., ch. X and ch. XI, although they are implied in "The New Industrial State", op.cit.
this model it is therefore within the power of the technostructure to define the direction of corporate activity.

The principal "affirmative purpose" is the growth of the firm. This growth secures for the technostructure several advantages. A large firm is subject to certain exceptions, better able to control its economic environment than a smaller one: the greater the size of the firm the greater the validity of the revised sequence theory.

Growth also serves the direct pecuniary interests of the technostructure. Jobs are created by expansions and therefore promotion chances are greater. As annual gross revenues increase so do chances for benefits expressed as a percentage of that revenue. "The scale of his office and the excellence of its furnishings are enhanced; his access to private lavatory and company plane are assured. So is his reward from employee obeisance and peer group homage."80

Growth, Galbraith points out, rewards the person responsible for it.81 A division of a company that shows exceptional growth is noticed by other divisions, comments are made and management at the highest level is made aware of the achievement.

Growth, he maintains, is accomplished not only by expanding

81 ibid.
existing sales ranges or by inventing new products but also by a policy of acquisition.\textsuperscript{82} Such acquisition is effected by the conventional techniques of merger and amalgamation and by the recently more popular technique of conglomerate merger whereby the acquisition of voting control of one corporation by another is done with the purpose of leaving the former's technostructure and product line intact. This type of merger was most spectacularly and successfully employed by ITT which rose from forty-seventh place in 1961 among the Fortune 500 industrials to ninth place in 1973.\textsuperscript{83} Growth in these cases has no relation to earnings, the traditional yardstick. It is a function of the power of the technostructure of the firm.\textsuperscript{84}

Galbraith does, when setting out the goals of the firm, concede that the level of earnings as well as the size of the firm ought to grow annually:

"A rate of earnings that allows, over and above investment needs, for a progressive rise in the dividend rate will also

\textsuperscript{82} "Economics and the Public Purpose", op.cit., p. 103.
\textsuperscript{83} Fortune, op.cit., p. 232.
\textsuperscript{84} The glamour of conglomerate merger may be waning; the technostructure will develop other ways to express itself, however.
regularly be a goal of the technostructure. This return must not be achieved by prices which would prejudice growth."\(^{85}\)

But this concession to earnings as a goal only emphasizes its subordination to the primary one of growth. The concession to earnings by the technostructure introduces his concept of the protective purposes\(^{86}\) engaged in as goals by that body. The technostructure follows a corporate policy that ensures its existence (as discussed under "revised sequence part a.") and its freedom from outside interference. There are a number of sources of outside interference; from the point of view of this essay the stockholders are the most important. Given some basic level of earnings stockholders are quiescent. Even if a takeover bid is made, an appeal to the stockholders can be made to resist the bid on the basis of the past earnings record of the company.

Although earnings are a primary protection purpose of the technostructure, this goal is quite different from the profit maximization aim of the neo classical firm. In the mature corporation earnings are planned for a certain level to effect a

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86 The protective purposes of the corporation are set out in "Economics and the Public Purpose", op.cit., ch. X.
certain goal; there is no all out commitment to profits in obedience to the dictates of the market.

The important fact in considering the new goals of the mature corporation is that in contrast to the neo classical firm where there was but one goal - profits - however modified by the realities of the marketplace it might be, in the mature corporation there are several goals. These goals are set by the bureaucracy of the firm itself; they do not derive from stimuli external to the firm.

The nature of these goals simply reflects the facts of power; as the technostructure possesses the power in the firm it controls the direction of the firm's activities. These activities, therefore, are concerned with the protection and continuance of the technostructure in power - the maintenance of the status quo.

iv. model

Galbraith does not specifically focus on a model of general meetings of shareholders in the modern industrial corporation although he does at several points comment on their significance. Nevertheless there is implicit in his general model of corporate

87 These comments will be noted in Part V.
behaviour a model of these meetings; this section brings together in a short summary those elements of his theory, already set out, which define the general meeting.

The knowledge, power and control in Galbraith's model rests only with the technostructure because of technological imperatives and cannot because of these imperatives rest elsewhere.\textsuperscript{88} Because the technostructure possesses those attributes of knowledge, power and control it determines goals for the corporation which are consistent with its own character. These goals do not reflect the dictates of conventional economic theory such as profit maximization and competition. The general meeting of the corporation is placated by an annual return on its investment of a reasonable amount, set by the technostructure,\textsuperscript{89} but below an amount that would result from profit maximization. Nevertheless even if the meeting rejected its quiescent role and sought decisive participation, planning and the other effects of the technological

\begin{itemize}
  \item \textsuperscript{88} Galbraith is blunt about the role of shareholder meetings: "The shareholders...have no function. They do not contribute to capital or to management."
  \hfill - "Economics and the Public Purpose", op.cit., p. 272.
  \item \textsuperscript{89} Galbraith terms this process, "The euthanasia of stockholder power". See "Economics and the Public Purpose", op.cit., p. 272.
\end{itemize}
imperatives would preclude that role if the corporation is to remain a viable commercial entity in the complex environment in which it functions.

Under this model the general meeting is a useless appendage of the corporate structure, tolerated but shorn of any power, placated by reasonable dividends and compelled by the nature of circumstances to remain that way.
IV

i. introduction

Part II of this essay has examined the devices and assumptions of company law in order to construct a model of the annual general meeting according to its principles. Part III has examined the thought of economist Galbraith in order to set out his model of the annual general meeting. These two models reflect the different interpretations taken by the intellectual disciplines of law and economics respecting phenomena observed by both - the behaviour of corporations. In this Part the two models of the respective disciplines will be examined together to discover if the behaviour they assume is similar or identical.

This examination will be carried out by comparative analysis. The devices, assumptions and machinery of the legal model will be applied to the model as constructed according to economics to see if they are applicable to the functioning of the economic model or are viable within that model. The assumptions, too, of company law will be compared to the character of the economic model. In this manner discrepancies between the two constructions will be apparent.

ii. comparison

Although the doctrine that the will of the shareholders is the will of the company has not reflected the positive law since the
Cunninghame decision,\(^1\) the concept is part of the assumptions of company law and appears as the doctrine that the annual general meeting is a primary organ of the company. Shareholders are recognized as the owners of the company in law and this condition is reinforced by the affected subservience of management by such typical remarks as: "Unfortunately it is the interest of the stockholder that we must consider." or "I must answer to the board of directors." The directors themselves when addressing the shareholders speak of "your company" in deference to the proprietorial tradition and shareholder primacy.

Implicit acceptance of the doctrine that the shareholders are the company is given further reinforcement by the recent popularity of shareholder campaigns to alter the behaviour of large corporations. If corporate behaviour is sought to be altered by shareholder action, it is assumed that the will which controls that behaviour lies with the shareholder. It is not simply that these campaigns use the annual general meeting for publicity, which they certainly

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1 op.cit.. I modify this statement to the extent that, as discussed earlier, under the Business Corporations Act residual power probably rests with the shareholders.

In this Part, to preserve simplicity, I will not cite the authority for the attributes of the two models as these authorities have in the previous two Parts been cited.
do, but that they also are committed to the idea that the will of the company resides in the annual general meeting. Whenever the components are lacking in the positive law to support this belief, they are supplied by a reliance, whether conscious or not, on the general tenets of company law assumptions.  

Galbraith's development of the concept of the technostructure effectively destroys the assumption that the will of the shareholders is the will of the company or that residual power rests with the shareholders either as a descriptive or prescriptive statement.  

Galbraith has demonstrated that in a mature corporation power and control are attributes of the technostructure. The collegial decision-making by this group extends to all aspects of corporate behaviour; it alone, in fact, determines from within its hierarchy all corporate acts from routine decisions of a daily occurrence, which it delegates to its lower orders, to corporate acts of the most fundamental nature which are decided by committees of its senior members. In this model the shareholders are not the will of the company; there is not even a fragment of that will vested in the collectivity of shareholders. Residual power is not

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2 See Part II, section iv. for these assumptions.
at all attributed to them. Nor can these propositions be sustained as normative\(^3\) statements. The technostructure has not usurped power from an unwilling general meeting. Rather in Galbraith's model the general meeting has willingly allowed the technostructure to assume absolute power and control. This assumption of power is necessary because of the nature of the mature corporation wherein complex decision-making need be centralized in a professional and educated body. Any attempt to vest, even in part, decision-making outside this body, for example with the general meeting, will result in substandard performance by a firm. Therefore, it is not possible to return control of the modern corporation to the general meeting by forcing it from the hands of the technostructure; the mature corporation by definition can only be organized around a technostructure vested with absolute power.

Whatever tenets of legal principle or policy that relate to the will of shareholders or residual shareholders' power and their derivatives such as shareholder democracy or shareholder campaigns are therefore destroyed by an acceptance of Galbraith's concept of the technostructure. For the will of the company cannot reside in a body that possesses neither control nor power and even if such control or

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3 I use 'normative' in the sense of what ought to be.
power were granted to it by legislation, the annual general meeting would be unable to employ it because of the nature of that body's relationship to the corporation.

Legislation gives to the shareholder the right to vote at annual general meeting; this right can be exercised to elect directors and approve certain acts of the company or its agents. Perhaps even the by-laws, articles or unanimous shareholder agreement of the corporation might alter this right of voting in favour of the shareholder by devices such as cumulative voting, voting trusts or others.

If the concepts of the technostructure and the imperatives of technology as postulated by Galbraith are accepted, it does not matter what voting structure is used. The technostructure has power which is derived from knowledge and active participation on a daily basis in the corporate decision-making process. In the mature corporation no meeting of shareholders coming together annually can possess even a fraction of the knowledge and experience of the technostructure.

As well as lacking the required knowledge, the annual general meeting as a body of shareholders numbered in the tens of thousands or even in a few cases in the millions, composed of diverse interests and meeting infrequently is unlikely to ever gain the cohesiveness necessary to pronounce clearly on an issue or to develop one voice in opposition to the technostructure.
However, even if a general meeting did develop a single voice or cohesiveness, perhaps by cumulative voting, one shareholder owning a large block of shares or several institutional investors uniting on certain issues, the power inherent in the knowledge that is possessed solely by the technostructure precludes that voice from speaking in an informed manner. The general meeting may act decisively, but its action will lack the power of knowledge. Therefore, the concepts of Galbraith negate any advantage sought from the implementation of special constitutional voting provisions altering the usual voting methods. 4

The consequences of the technostructure's existence in the mature corporation that negate the advantages sought from voting devices or other means, also profoundly effect the most fundamental of shareholder acts - the election of directors - even if no such devices were to exist. The election of directors is the most important of the annual general meeting's activities; it is the strongest claim the shareholders have to participating in any way in the corporation's activities. The proponents of share-

4 It is assumed here that the intent of the shareholder is in the viability of the corporation. These devices certainly do give the shareholder power. My point is that if that power is used regularly, because it is power without knowledge, the corporation will suffer.
holder democracy behave as though the directors control the company's activities during their tenure\(^5\) and seek to infuse into the directors' elections at annual general meetings an element of drama and suspense by assuming that by means of the ballot, the general meeting as a collectivity is choosing the directors and therefore controlling the company through the directors. Such behaviour is completely in accordance with the legal model of an annual general meeting whereby the various statutes make it mandatory that there be elections for directors and that the shareholders exercise the franchise. What therefore are the consequences of the technostructure's existence on these elections?

The directors are in fact elected by the technostructure. The senior members of the technostructure decide who from their number will become a member of the board and who from outside the corporation will become a director to give the board an appearance of objectivity and dignity.\(^6\) This practice has developed,

\(^5\) Technostructure power challenges this assumption as well; however, this problem is beyond the scope of this essay.

\(^6\) Consider the board of Massey-Ferguson Ltd. It contains no less a personage than the Duke of Wellington. - 1974 Annual Report, Massey-Ferguson Ltd. Without the benefits of nobility, American boards seat retired generals and former politicians.
according to Galbraith, because as already demonstrated the technostructure possesses the power and knowledge in the corporation. Its members, therefore, must sit on the board to ensure that the board's directives are in accordance with the technostructure's wishes. This process of self perpetuation is possible because the directors usually nominate their successors to the Board: the technostructure, therefore, ensures through its representatives on the board that the nominees for election are its nominees. The shareholders acquiesce in this de facto

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7 In law exclusive licence is not given to the board. Shareholders may at a meeting nominate directors. Under the Companies Act, s.133, at least 10 percent of the shareholders may nominate a director before the meeting and under the Business Corporations Act, at least 5 percent may do so.

8 T.K. Quinn, a vice president of General Electric said: "In General Electric, the election of directors was only formalized at stockholders meetings. The directors were in every case selected by the officers." This was early in 1953. "Giant Business", 1953, p. 106.

In 1970 at the annual general meeting of G.M. the following exchange took place between proponents of Campaign G.M. and James Roche then chairman of G.M.:

Barbara Williams, black law student: "Why has no black person been nominated to the board?"

Roche: "No black has been nominated and no black has been elected. Our directors are elected by our stockholders."

Williams: "How are they nominated?"

Roche: "They are nominated at the annual stockholders meeting just as they were today."
disenfranchisement because they are interested primarily in financial return and the technostructure has ensured that this desire is satisfied. Even if the shareholders were to rebel and attempt to elect their own nominees as they may under the legal model do, these, if elected, would not have the required expertise to manage the corporation successfully and would therefore cause the corporation to cease generating earnings; the shareholders would then return to electing members of the technostructure in the hope of a return to profits. The election of the directors at the annual general meeting by the shareholders has become a "solemn farce" in the mature corporation. It, the most important of annual general meeting functions, is a form without substance; it is a rite performed only to accord with the dictates of the legal model.

Harry Huge: "You nominate the board of directors..."
Roche: "I can make my recommendations."
Huge: "Have you ever had a recommendation that wasn't acted on favourably?"

9 See supra p., 98.
10 See Schwartz, op.cit., under the heading, "Focus on Institutions - A Time of Testing", wherein he asks the large shareholders to vote for Campaign G.M. rather than management - to no avail. About two percent of the total shares voted were cast for Campaign G.M..
11 Gower, op.cit., p. 500.
The above comments on the election of directors has assumed the absence of the proxy system. This system, whereby a shareholder who is unable to attend may appoint a proxy to act in his stead at the meeting, is intended to restore power to the shareholders at the annual general meeting. But in fact it accomplishes the opposite. Even if two-way proxies are mandatory by statute, the vast majority of shareholders will complete their proxy in management’s favour for the same reasons that if they were to attend in person they would vote for management. The proxy system cannot infuse new life into the annual general meeting simply because the majority desire to vote for management. The proxy system does not favour management because it contains procedural or structural defects of a nature to impede expression of the shareholder’s will; it favours management because the will of the shareholder is expressed: an expression in favour of management. It does not matter, therefore, if the proxy system is modified by statute to weigh it more in favour of the collectivity of shareholders as against management.

One way to make the annual general meeting more substantial would be to abolish the proxy system outright. Shareholders would have to attend to vote. Because the share holdings of management are very small and dissident shareholders usually attend the meeting anyway, deliberations at the meeting would be critical. However,
this suggestion is undemocratic in its implications to all shareholders; most are unable to attend.

Therefore consideration of the procedure and structure of proxy systems in attempts to increase the expression of the shareholder's will is, if Galbraith's concepts are accepted, ill conceived. The shareholder is unwilling to disturb a profitable relationship and if he were so willing would be unable to successfully manage the corporation himself.

If the election of directors at annual general meetings by shareholders is a rite unrelated to reality, the approval by shareholders of the by-laws passed by the directors during the year is even more so. By-laws are essentially internal regulations of a company; they stand in a close relationship with the daily activity of the company. Rather than being matters of general policy or fundamental in nature, they are particular and specific rules. The vast majority of shareholders don't know of their existence and certainly not of their import. Yet the

12 The "euthanasia of stockholder power", supra, p. 100.

13 I make this statement as opinion. I have not yet discovered an empirical analysis of shareholder knowledge and attributes - its results would be, I think, quite fascinating.
annual general meeting is required by statute to approve them and this right under the Business Corporations Act has been broadened to include rejection and amendments or proposals of new ones.

If the technostructure concept is accepted, all the arguments that have been made to establish that the election of directors is a form only, apply with even more force to the approval, rejection, amendment or proposal of by-laws by the general meeting. Such approval shorn of substance can be formal only.

The shareholder proposal mechanism also falls under the same limitations as the by-law requirements. But the proposal devices appear to defy, even more than those mechanisms respecting by-laws, the Galbraith model. As might be possible under the Business Corporations Act, shareholders in annual general meeting may decide, pursuant to a shareholder proposal to that effect, to instruct the company to carry out a specific business action that contradicts the technostructure's decision on that

14 See supra, pp. 46-50.
15 I mean here what normally are considered business decisions. Consider shareholders instructing Canadian Pacific Ltd. to have CP Air purchase Boeing 747 aircraft rather than
action. In this way the annual general meeting can overrule the technostructure at will on a specific action.

Through the proposal mechanism the general meeting possibly possesses residual power in a company under federal legislation. But it has earlier in this Part been demonstrated that the exercise of a residual power by the general meeting is a futile and meaningless gesture, assuming the company is to remain economically viable.

Even if the Courts decide that shareholder proposals cannot relate to those powers vested in the directors, deemed as "management", whatever powers remain within the competence of this mechanism still are at best an annoyance to the actual control group in the corporation.

In these terms the expanded shareholder proposal mechanism is anomalous to the Galbraith model of the general meeting. It is an interference to the planning that must proceed guided by

Lockheed L-1011's because of its superior economy and air worthiness - what is normally considered a business decision - but stockholders may instruct Cominco to preserve the environment at its Trail smelter - a decision which has business effects but which is more in the nature of a value judgment. Clearly this definition is subject to overlap as Campaign G.M. and the Medical Committee discovered but for purposes of analysis here they are assumed to be definable. The next paragraph relates to the second category.
the technostructure in accordance with the imperatives of technology.

From the preceding analysis of the application of Galbraith's concepts to the established legal model it is apparent that any attempts by the shareholders to affect the decision-making processes of the corporation will be thwarted by their status as non active participants in the corporate entity. Therefore the further rights given by the legal model to the general meeting, such as the right to approve constitutional alterations, mergers, amalgamations, liquidations and dissolutions, will be negated by the same arguments that are used to negate the right to elect directors: the technostructure alone is skilled to make these decisions. With respect to the category of rights affecting charter alterations, etc. the principle of technostructure power is very strong; these rights involve fundamental business decisions. As with the powers of by-law enactment they are not merely a question of regulating the general policy of the corporation; they relate to specific decisions that can only be made in a skilled manner when data possessed by the corporate administration is employed. The decision of merger or amalgamation is a business decision. The question whether the corporation can improve its financial position may only be answered by those whose daily activity gives them access and familiarly with the requisite information.
Galbraith's concept of the imperatives of technology, while interrelated with that of the technostructure, can in application to the shareholders' rights respecting mergers, etc. be usefully separated from that other concept. Technological imperatives colour many of these decisions with a high degree of technical consideration. Decisions become not only business decisions but also decisions which require the assistance of technical experts to explain in many cases even the outline of the decision. Effects beyond the grasp of even the skilled businessman are inherent in such decisions; therefore, the committee system has evolved to cope with these situations. Only the particular committee involved can offer any semblance of an informed comment on many of the decisions respecting mergers, etc. which involve technical considerations. These technical considerations are not only of the scientific or technological type but also of the type that requires degrees of financial, legal and other business skills.

Therefore, the concept of the imperatives of technology alone precludes an informed decision by the annual general meeting on matters of mergers, amalgamation, charter amendments, liquidations and dissolutions.

The revised sequence, whereby the mature corporation is not subject to the laws of supply and demand and does not seek maximization of profits but is rather the creator of market conditions
and consumer demands, attacks some of the fundamental assumptions of policy concerning the existence of the annual general meeting. The implementation of new corporate goals consistent with the revised sequence further reinforces this attack.

The shareholders as owners of the corporation in the sense of ownership as qualified by the legal model convene in annual general meeting by statutory right in their capacity as owners and because they are owners. Shareholders are distinguished in law as having rights in the company as well as against the company; debtors have only a contractual right against the company. Debtors do not convene in annual general meeting. Shareholders also have the right by statute to receive financial information on the activities of the corporation and to appoint the person who will obtain for them that information: the company auditor. The legal model considers that the shareholder as owner, although he may not possess all the attributes of ownership, and as the supplier of the risk capital, has special rights in relation to the corporation to know in detail its financial position and to meet to discuss this position and give direction to the corporation on the basis of that financial information. Although nowhere stated in the law, the assumption is

16 The rise of the position of the company auditor in company law reflects this.
that the shareholder is an owner-capitalist who seeks the maximum return on his investment. He has taken a chance on a venture in the nature of trade; this venture is, for him, exclusively a commercial undertaking whose goal is profit. The law accordingly has granted him the right, through financial disclosure and mandatory assembly, to enforce this goal. The employees of the corporation may bargain at will under the law of supply and demand for the highest salary they can command, but the employees are to the owner merely another cost on the balance sheet; the profits of the venture are to accrue to the owner.

Galbraith contends that the technostructure, a class of corporate employees in the legal model, determine the goals of the corporation. Profits, except in a limited sense, are not part of these goals. Because control has shifted from the owner-shareholder to the technostructure it is within the power of this body to determine the corporate goals. The affirmative and protective purposes it sets for the corporation relate to its own existence. The interests of the shareholders are not considered nor are the shareholders consulted as to the determination of these

17 The proprietorial character of the general meeting is discussed in Part II, section iii.
goals except in a ritualistic fashion after the fact.

If the goals are determined from outside the shareholder group and without its approval and prior consultation, and profits are no longer the primary goal or even a major goal of the corporation, then the entire structure assumed to justify the existence of the annual general meeting falls. The shareholder, if he cannot determine the goals of the corporation, can in no sense at all, not even in the qualified sense of the legal model, be considered an owner. If profits are no longer the aim of the corporation in which he has ventured his capital for the sole aim of profit from trade, he no longer is in any sense a capitalist or risk-taker seeking maximum profit as the reward against complete loss of his capital. Under the legal model the shareholder still loses all his capital upon the failure of the venture. The traditional counterweight to this possibility was participation in all the gains. But that has been removed by the intercession of the technostructure. The role and definition of the owner-capitalist shareholder in law is no longer valid under the corporate model of Galbraith.

Shareholders no longer have a reason to convene in annual general meeting if the goals of the corporation are already set; they no longer need receive financial information to use as the basis of informed decision-making in the corporate process if
those decisions have already been made. All the machinery of
the annual general meeting to reinforce the shareholder's ability
to express and impose his decisions on the corporation is useless
if the decisions have already been made. Even if these decisions
had not been made and were expressly granted by statute to the
shareholder to be made at the annual general meeting, that
statutory machinery would be useless because only the techno­
structure enfranchised by the imperatives of technology can make
an informed and therefore useful decision.
V

i. introduction

In Part IV of this essay, by a process of comparative analysis, discrepancies between the legal model of the annual general meeting and the economic model, were indicated. The legal model was shown not to reflect the corporate conditions as they are approximated by the economic model. The legal machinery surrounding the annual meeting was demonstrated, if the economic theory were accepted, to have no function in the modern corporation. This machinery includes substantive devices such as elections, approvals and disclosure as well as the procedural trappings of the meetings such as the proxy and shareholder proposal systems. These devices are not invalidated by the comparative analysis that has been made in that the law setting them up is validly enacted and therefore they exist both in legal theory and in fact. The conclusion to be drawn is rather that although they do exist in legal theory and therefore in fact, they lack a basis in substance. The actuality of corporate life (as interpreted by the economic theory assumed by this essay) does not correspond to the description inherent in the legal devices respecting meetings. These devices have begun to possess an existence of their own independent of corporate behaviour. They have become formal and ceremonial, devoid of substance and meaning.
It is the intention of this Part of the essay to comment on the anomalous situation revealed in Part IV. This commentary will involve a consideration of the benefits and costs to the company law system and to the parties directly involved in that system as well as possible new legal devices.

ii. benefits - individuals

To the parties involved in the system, shareholders and management, the fact-legal theory discrepancy does not seem to cause too much concern. Management might even find it useful to maintain aspects of this discrepancy. By the fiction of shareholder control management can continue relatively unmolested to direct the corporation itself. If legal theory clearly allocated all powers to management, they could not assume the cloak, as they presently do, of merely serving the "owners" and would be held accountable for all the vicissitudes of corporate existence and would be clearly identified as being charge with that

1 See Hetherington, op.cit., p. 253; Rostow, "To Whom and for What ends is Corporate Management Responsible", in Mason, ed., op.cit.; Manning, 67 Yale Law Journ. 1476 (1958) at 1486-1487.

2 See supra, Part IV, footnote 4 for an example of this technique.
accountability.\(^3\)

Shareholders also feel no need to revise legal theory to align it with corporate life. For the smaller shareholder a degree of participation in accordance with a literal application of the ownership fiction would place on them a much greater work burden. The return on shareholder investment in corporations since the end of World War II has been good both from distributions as dividends and as capital appreciation. If disenchanted with management or with the performance of the corporation in which he has invested, the shareholder need only sell his shares on the stockmarket. The stock brokerage industry has made his relationship with the corporation easily alienable.\(^4\) Even the large institutional investors, who possibly have the financial and other resources to exercise the powers inherent in their role under legal theory, do not behave in a manner much different from the small shareholder - they continue to vote for management.\(^5\)

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3 I am not suggesting that at present anyone would fault the shareholder if for example a company failed; I do suggest that management attempts to cloak its own acts with the master-servant fiction.

4 "Of all those standing in relation to the large corporation the shareholder is least subject to its power...the market affords him a way of breaking this relationship that is simple and effective." - Chayes, "The Modern Corporation and the Rule of Law", in Mason, ed., op.cit., p. 40.

5 For a criticism of this behaviour see Schwartz, op.cit.,
A convincing illustration of the complacency and contentment of the shareholder both individual and institutional in the modern large corporation is the result of the efforts of Campaign G.M.. Directed by skilled and committed persons and related to generally accepted social goals, the shareholder proposals put forth by this group at the annual general meetings of General Motors in 1970 and 1971 managed to secure less than 3 percent of the vote at each meeting.  

iii. benefits - law

The foregoing description summarizes the contented nature of management and shareholders in large corporations. But can it therefore be inferred that the paradoxes and anomalies of corporate behaviour and legal theory are best left undisturbed? Can it be said that because the system seems to work to the satisfaction of the interested parties it is a viable system or at worst a harmless anomaly? Might it not be noted that anomalies are part of any legal arrangements; that the law has never been known to be purely rational

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6 Schwartz, op.cit., p. 59, note 11. Galbraith notes this result as to be expected. He comments on Schwartz citing 3% as a victory for Campaign G.M.: "He is too easily pleased." - "Economics and the Public Purpose", op.cit., p. 218.
and cannot be expected, given its prescriptive nature, to be based on actual conditions too closely? The answer is no. The descriptive aspect of law, which is the subject of a critique by this essay, must reflect the nature of the phenomena that is sought to be prescribed. The dynamics of the relation between the shareholders and management at the interface of the general meeting and the actual dynamics of corporate behaviour must be understood before it is possible to construct a legal model that will effectively prescribe those phenomena.

Despite the lack of shareholder and management concern and despite the apparent absence of difficulty in the case law, this discrepancy has been costly for the development of company law in many other ways. The idea that the locus of corporate power ought, either in whole or in part, rest with the annual general meeting has been a persistent theme in corporate literature for over thirty years and has led to a great deal of time and effort. It has produced a preoccupation, as reflected by recent statutes as

7 I use 'prescribe' in reference to the prescriptive aspect of law.
8 See Hetherington, op.cit., p. 272 for a similar conclusion.
9 The debate began, probably, with the publication of "The Modern Corporation and Private Property", op.cit., or at least the book is a convenient marker.
well as writings, with the reuniting of ownership and control and obscured the factual nature of the relationship between the shareholders, the corporation and management.

Earlier in this Part the apathy of shareholders to Campaign G.M. was noted as illustrative of their contentment and their acceptance of the fact-legal theory discrepancy. As also noted the leaders of Campaign G.M. and other shareholder movements have lamented this apathy and claimed it as a cause of the lack of effectiveness of shareholder movements. This line of reasoning is illustrative of the dangers inherent in the failure to appreciate the nature of the fact-legal theory discrepancy. Even if shareholders had rallied behind the various shareholder causes and compelled, by means available to them in annual general meeting, the corporation to behave in the manner desired, the result would not simply have been a triumph for shareholder democracy and corporate responsibility but as well possible bankruptcy or at least a non-competitive market position. This result is dictated not by the mere fact of managerial ascendancy but by that ascendancy being grounded in a real base of knowledge and skill, as Galbraith points out. Shareholder movements opt for the legal model of the

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10 See Part III of this essay. Gower also supports non-interference by shareholders. Gower, op.cit., p. 499.
corporation and either ignore or are ignorant of the actual corporate structure. Their behaviour in this sense is a specific example of the danger of the existing legal model. The didactic influence of law and legal theory cannot be ignored.

iv. alternatives

By several examples given in the previous sections, it was indicated that both management and shareholders for the most part are satisfied with the existing structure although anomalies exist between fact and theory. It also has been indicated that a policy of laissez-faire with respect to these anomalies, notwithstanding the acquiescence of the main parties involved, is undesirable. These statements suggest a conclusion proposing a remedial course of action. Any course of action involving an alteration of the law relating to general meetings would have grave consequences for company law in general. It would involve considerations not only of company law principle but also of its policy;\(^\text{11}\) such an undertaking ventures into waters almost uncharted by present company law scholarship.

\(^{11}\) See Wedderburn, op.cit., at p. 3, for a criticism of the failure of attempts at law reform to do so; he specifically singles out the Cohen and Jenkins Reports.
Before such radical surgery, radical to lawyers that is, is considered there remains the possibility that if company law is not to be remolded to fit facts, the facts may be remolded to fit the theory. This is not as far fetched as it might sound. The new industrial state so lovingly described by some, is by others regarded as an aberration and a perversion. Most discussions of the modern corporation assume that bigness with its concomitant characteristics of managerialism and sophistication is a permanent feature of modern industrial and financial systems. It is true that the trends in the economy now are to larger and more complex industrial and financial units. On the industrial side the merger movement and the emergence of the conglomerate during the last fifteen years and on the financial side the holding company movement demonstrate the capacity and propensity of big business for diversification and expansion. 12

Galbraith is a leading exponent of the view that business must be big and the concentration of economic power must be accepted. He not only provides in his books a description of the modern industrial system but an apology for it as well. In fact he is probably the leading exponent of the "bigness" imperative. As such

12 To what extent conglomerates retain their glamour is debatable.
he has been the target of considerable criticism by those who seek to establish that business need not be big to be successful and that the scale of the modern corporation is too large. These parties not only include the traditional antitrust advocates but also include such diverse elements as the "New Left" and conservative factions who wish to return to a capitalism of smaller independent business units. Ironically, for Galbraith, many of the newest technological developments have permitted smaller companies to compete successfully against the established giants. This is true not only in the electronics industry but also in the larger business arena where time sharing for computers has permitted advanced research to be carried out by the smallest firm as well as simplifying their administrative procedure.  

Whether it is possible or desirable, from the point of view of considerations other than that of the annual meeting, for business to fragment even in part is a question beyond the scope of this essay. It is sufficient to state here that before any reform of this area of company law is considered, account must be

13 See Mintz and Cohen, "America Inc.", op.cit., pp. 55-57 for a summary of arguments against the idea that bigness is best. Also for a biased but hard hitting account of the costs of bigness see Green, Moore and Wasserstein (Nader Task Force), "The Closed Enterprise System", 1972.
taken of the possibility that others may succeed in their desire to reform the structure of the economy by fragmenting the present large business units into smaller ones which from the company law point of view probably will eliminate the discrepancies between annual general meeting theory and fact. It is in this sense that fact might be remolded to fit theory.

There is another possibility whereby under the existing legal model the annual general meeting would assume its role in fact. Institutional investors such as mutual funds and other investment companies, non-insured private pension funds, insurance companies, bank trust departments, and the endowment funds of non profit institutions are important shareholders in major corporations. They have been growing faster than the economy as a whole and they have been investing an increasing proportion of their assets in stock.\(^14\)

It might be argued that these entities, reversing the trend to fragmentation of shareownership, possess the time and financial resources to oversee management, make decisions at annual general meetings and act generally as shareholders under the legal model.

So far they have not, for the most part, done so. They have aligned themselves with management much in the way as the smaller shareholder has done. Whether they can possess the requisite technical knowledge to make decisions involving the general management of corporations remains as yet undecided. The possibility nonetheless remains that given their size and growth they may develop the expertise and control of shares necessary to act as a shareholder in the legal model and negate the Galbraith imperative for shareholder behaviour.

Assuming that the landscape of modern business is not going to be rearranged to comprise smaller units or that powerful collectivities of shareholders are not going to emerge and assuming, as has been discussed earlier in this Part, that it is undesirable to have company law at variance with corporate behaviour it follows that some reform or alteration of company law ought be attempted to remedy this anomalous situation. The situation has not gone completely unnoticed by Company Law commentators\(^\text{15}\) hence there exist some suggestions as to what ought to be done. Some of these suggestions include making the meeting a preliminary to voting which takes place afterwards.\(^\text{16}\)

\(^{15}\) See Introduction p. 3.

\(^{16}\) Gower, op.cit., p. 500.
If this were done shareholders could consider the issues on both sides and then cast their ballot at some later time after consideration. Voting, being the control issue of the meeting, has come under fire. Some would abolish completely the shareholder's right to vote or abridge that right. Other suggest that as the shareholder is in effect an investor greater disclosure is the end that ought be pursued, thus by implication emphasizing his role as an investor and not as an owner.

Recent developments in Company Law statutes have begun to redefine the nature of the annual general meeting by introducing some changes in its nature and in doing so raise the question of its outright abolition. The Business Corporations Act permits a meeting to be eliminated by a resolution in writing signed by all the shareholders entitled to vote at that meeting and dealing with all the matters that would come before that meeting.

Proposals Commentary states that this provision is intended for use in a one man company or a small company where meetings in practice are not held but the commentary adds: "The principle of the section applies of course to corporations with more than one shareholder."\(^ {20}\) Clearly such a provision could not be used in a large corporation with many thousands of shareholders\(^ {21}\) and it is not intended for use in such a corporation, nevertheless this provision in the Business Corporations Act represents an admission that the annual general meeting is not suited for all cases. Once that admission is made the case for elimination or modification of shareholder meetings in large corporations can be made.\(^ {22}\)

American statutes, in a number of states, also now contain provisions whereby the annual general meeting may be waived. These statutes permit shareholders to act informally and without a meeting by signing a written consent.\(^ {23}\)

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\(^ {20}\) Proposals Commentary, para. 287.
\(^ {21}\) General Motors had in 1971 approximately 1,350,000 shareholders. - Schwartz, op.cit., p. 67.
\(^ {22}\) I do not believe this implied admission is intentional. The thrust of the new federal legislation, as has been demonstrated in Part II, is to a greater importance of the annual general meeting.
\(^ {23}\) Minn. Stat. Ann. 301.26
Ore. Rev. Stat. 57.791
authorizing informal action unanimity is necessary: all the shareholders must sign the written consent for it to be effective. This is also the Federal and British Columbia position. In some states, however, statutes permit shareholders to act without a meeting by the written consent of less than all the shareholders entitled to vote if the corporation's charter provides for action in this way and the shareholders who consent have the number of votes that would be required for action at a meeting at which all shareholders entitled to vote were present. 24

These provisions do not permit the absolute elimination of the annual general meeting even for a single holding. What they allow is a written consent, either by some or all of the shareholders who may vote at a meeting, to business that would have been transacted at that meeting. The principle of shareholder approval for matters within their competence is retained by

Wis. Stat. 180.91
N.C. Gen Stats. 55-63
24 Del. Code Ann. Tit. 8-228
N.J. Rev. Stat. 14A, 5-6 (except merger, consolidation, acquisition of all capital shares of a corporation and sale of assets).
requiring their consent although it is consent without assembly. These provisions do not go as far as to permit shareholders to delegate to management all their general meeting powers allowing management to exercise these powers for the period of delegation without the consent of shareholders. Nor do these provisions permit the further step of an absolute elimination of the annual general meeting by charter provisions. It seems safe to assume that a movement to eliminate the annual general meeting altogether might emerge although it is not being argued here that this would be successful. These provisions are intended for use primarily in a close corporation where meetings usually are informal. Nevertheless their application to large corporations has not gone unnoticed and in at least one instance they have been implemented.25

v. conclusions

Most modifications discussed above, however, have a patchwork and makeshift quality. The ownership fiction with its associated doctrines of management accountability to shareholders

and shareholder control of the corporation have served both legal and economic theory well up to the present. But if the modern corporation by its nature precludes such accountability or shareholder control, as maintained by Galbraith, any amendments or modifications to the rules governing the annual general meeting such as those sketched in the previous section will have only a cosmetic effect. Because shareholders can no longer act, even partially, as owners there exists a lacuna in the theory of the corporate power structure in law. It is not enough to attempt simply to patch the theory by some readjustment.

The nature of the shareholder's role in the corporate legal model must be rethought. The relationship between the shareholder, his share, and the company must be redefined to take into account the nature of modern corporate life. Because the basis for shareholder control of the company, even in part, through the formal structure of the annual general meeting did at one time exist when the company corresponded to a form which reflected that control, a theory was evolved not only for law but a general social theory that explained and sanctioned that control and bound it with the concept of ownership. There is no reason now to retain this theory and its corollaries respecting the status of shareholders for those who invest capital in a company when the basis for their status has disappeared.
By basis is meant the grounding in the facts of modern corporate life as approximated by the economic theory accepted by this essay. Certainly these social theories which tie together ownership and control as attributes of property remain. It is the existence of these theories and the effect of their persuasion on those who consider the functions of shareholders and the annual general meeting that make reconsideration of these functions difficult.

Professor Wedderburn has criticized both the Cohen and Jenkins Reports for the failure to reject the traditional social theory respecting property and their failure to reshape the concept of member in the Companies Act, of Great Britain. "Society no longer accepts this Locke-like notion", he states. Whether society does or does not is an empirical question. But it is submitted that society cannot accept this "Locke-like" theory because it does not work; it no longer corresponds to behaviour in modern large corporations. New theories must be accepted or if they do not exist they must be created upon which a legal concept

26 op.cit.
27 op.cit.
28 11 & 12 Geo. 6, c.38.
29 op.cit., p. 13.
of the role of the shareholder can be based if indeed he is to
perform any role in corporate life. A failure to consider the
acceptance of a new theory of property relationships for the
modern corporation either by the Cohen\textsuperscript{30} or Jenkins\textsuperscript{31} Reports
in Great Britain or more recently the Dickerson Report\textsuperscript{33} in
Canada will sentence these studies to make recommendations for
change to institutions which do not exist except in a formal
sense.

The annual general meeting exists for these Reports and
will continue to exist for the positive law until the "Locke-like
notion" supporting it is rejected notwithstanding efforts to
demonstrate that it no longer is a viable concept. The life
after death quality of the annual general meeting in large corp­
orations is possible because company law still awaits a complete
reconsideration of its principles as well as its policy in the
light of the new economics.

30  op.cit.
31  op.cit.
32  "Proposals for a New Business Corporations Law", op.cit..
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