THE PROCESS OF LAW REFORM—FOCUS ON
THE NEW B.C. COMPANIES ACT

by

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ABSTRACT

This thesis is an investigation of the process of law reform as it was illustrated by the Corporate Legislation Committee of the Department of the Attorney-General for British Columbia in its drafting of a new Companies Act. To provide the context for this study, the opening chapter briefly surveys the work that has been done up to the present in law reform as a subject for investigation. The necessity for an understanding of the workings of semi-official and official bodies to which the governments are more and more frequently assigning problems of law reform is stressed.

The next portion of the thesis begins the study of the work of the Corporate Legislation Committee. Its method of procedure and the criteria it ultimately selected to guide its drafting of the new act are analyzed in terms of the Committee's structure and the major trends in company law reform. Then four areas of the new statute are selected to correspond with and represent the four major areas of change into which the Committee divided its work. These areas are assessed for the influence they reveal of the form, procedure and policy of the Committee. Each in turn is examined through its legislative history, its background of law in this and other countries, and the way with which it has been dealt by other major law reform proposals.
Finally, conclusions are drawn about the actual sections drafted by the Committee.

The thesis concludes that in the case of this ad hoc law reform body, there was a very close connection between the criteria it selected as a guideline for reform and the changes it made in the Companies Act. However, because of the Committee's structure and methods of procedure, these criteria were formulated in isolation from many of the practical economic realities of companies today. They were generally conservative in policy, and drawn largely from the work of other law reform projects in company law. The sections of the new act examined reflect these limitations. Generally, they fulfill well the goals of limited change selected by the Committee.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Law Reform: Background to a Case Study</td>
<td>1</td>
</tr>
<tr>
<td>Law Reform: Myth and Disorder</td>
<td>2</td>
</tr>
<tr>
<td>Official Sources of Reform Proposals</td>
<td>9</td>
</tr>
<tr>
<td>The Historical and Present Importance of the Study of Law Reform</td>
<td>15</td>
</tr>
<tr>
<td>II. A History of the B.C. Companies Act</td>
<td>25</td>
</tr>
<tr>
<td>The Drafting of the New Act</td>
<td>25</td>
</tr>
<tr>
<td>The Legislative History of the Act</td>
<td>27</td>
</tr>
<tr>
<td>III. The Criteria For Reform</td>
<td>29</td>
</tr>
<tr>
<td>Legal Policy v. Legal Principle</td>
<td>29</td>
</tr>
<tr>
<td>Limitations on the Conceptual Study of the Committee</td>
<td>31</td>
</tr>
<tr>
<td>Criteria Not Accepted</td>
<td>33</td>
</tr>
<tr>
<td>The Criteria Selected</td>
<td>37</td>
</tr>
<tr>
<td>IV. Shareholder Democracy and the Pre-Emptive Right</td>
<td>54</td>
</tr>
<tr>
<td>Introduction</td>
<td>54</td>
</tr>
<tr>
<td>The History of S. 40</td>
<td>55</td>
</tr>
<tr>
<td>Background of the Section</td>
<td>58</td>
</tr>
<tr>
<td>The Field of Choice for Reform</td>
<td>66</td>
</tr>
<tr>
<td>The Selection of the Committee</td>
<td>70</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS (Continued)

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>V. Shareholder Protection and the Dissent Proceedings</td>
<td>79</td>
</tr>
<tr>
<td>The History of S. 228</td>
<td>79</td>
</tr>
<tr>
<td>The Background of the Dissent Proceedings</td>
<td>85</td>
</tr>
<tr>
<td>The Choice of the Committee</td>
<td>98</td>
</tr>
<tr>
<td>VI. Company Management and Duty of Directors to Disclose Their Interest in Contracts Before the Board</td>
<td>105</td>
</tr>
<tr>
<td>The History of S. 143, 144, and 145</td>
<td>105</td>
</tr>
<tr>
<td>The Background of S. 143, 144 and 145</td>
<td>110</td>
</tr>
<tr>
<td>The Field of Choice for Reform</td>
<td>115</td>
</tr>
<tr>
<td>The Choice of the Committee</td>
<td>123</td>
</tr>
<tr>
<td>VII. Protection for Those Dealing with Companies and the Company Records</td>
<td>133</td>
</tr>
<tr>
<td>History of S. 186 and 187</td>
<td>133</td>
</tr>
<tr>
<td>The Background of the Sections</td>
<td>137</td>
</tr>
<tr>
<td>The Field of Choice</td>
<td>141</td>
</tr>
<tr>
<td>The Choice of the Committee</td>
<td>144</td>
</tr>
<tr>
<td>VIII. Conclusion</td>
<td>152</td>
</tr>
<tr>
<td>Bibliography</td>
<td>157</td>
</tr>
</tbody>
</table>
CHAPTER I

LAW REFORM: BACKGROUND TO A CASE STUDY

LAW REFORM AS A SUBJECT

Although this paper will discuss numerous aspects of Company Law, and, in particular, of the new British Columbia Companies Act, its principal subject is not Company Law. Rather, it is law reform. Nor is its chief interest Company Law reform. Rather, it is the process of reforming statute law. The statute discussed is chosen for the purpose of pursuing a case study in this process, by examining the nature and shape of the mechanism used to decide upon and draft new legislation. During this investigation, it is expected that conclusions will emerge about the relationship between this mechanism and the legislation produced that will fit a reasonably predictable pattern.

Embarking on such a project usually requires a departure from the firm base of a well-defined subject area. This base is lacking in the study of law reform.

The study of the process of law reform has lagged far behind the study of the processes of parliament or the courts. As a heading in legal periodical indices, Law Reform did not make an appearance until the nineteen forties. Not until the fifties were any articles published dealing with other than specific reforms. Even now, there are scarcely more than thirty or forty
articles that attempt to deal with law reform itself as a subject for inquiry and research. Of these, the vast majority are concerned only with the functions of law reform committees. Therefore, it seems necessary to begin this study with a more lengthy discussion of the subject that supplies its background than might be necessary in an already well organized area. This discussion will both provide a definition of the terms of reference in which "law reform" will be viewed in the case study proper, and raise a series of questions as yet unanswered by the existing studies of the process of law reform itself.

LAW REFORM: MYTH AND DISORDER

The literature that presently exists on the subject of law reform is disordered and cluttered with imprecise terms. "Law reform" is itself a phrase with no generally agreed upon meaning, used in many different ways. It is usually treated as a popular rather than a technical term.

Some writers, however, have attempted to define the words more strictly. In his article Law Reform in Historical Perspective, for example, Lawrence M. Freedman gives two uses of the words in common speech. They may mean "a more or less general revision of the laws or some branch of law in the direction of consistency or systematic arrangement. This is reform through codification... The second use of the phrase refers to procedural improvement--change in the housekeeping aspects of justice."
But Professor Freedman has confined himself to law reform in historical perspective, and specifically, American historical perspective. He puts great emphasis on the restriction in the United States of the nineteenth century of law reform to the works of codification and technical change. It is doubtful that this movement ever greatly affected Canada or the United Kingdom.

Just as unsuccessful, for general purposes, have been the attempts of numerous other writers to define "law reform" on the basis of some distinction between "lawyer's law", which is the proper subject for law reform, and "politician's law", which is not. This division has been productive only of disagreement and confusion. Defending the validity of the distinction, Geoffrey Sawer suggests that only Sir Leslie Scarman, and to some extent Professor Wade, have denied the relevance of the concept to law reform, while a long list of distinguished authors have accepted it. However, Professor Lord Lloyd of Hampstead has been quoted as making a direct attack on the distinction, saying that "The old fallacy that there is a sphere of 'lawyer's law' which is purely technical, and can be divided from legislation involving policy, retains its hold on few serious students of the law to-day. All law inevitably involves policy decisions of some kind." And, apparently using the term with the same "policy"-"technical" distinction, Professor Gower commented that "there is no need for a law reform commission to fight shy of highly charged social issues, and certainly no need for it to attempt to restrict
itself to 'lawyer's law', whatever that may mean."

Part of the difficulty with this effort to organize the theory of law reform has been a lack of understanding of what "lawyer's law" is supposed, by its supporters, to mean. Thus Hanan, the late Attorney-General of New Zealand, was able to say in an address on Law Reform that "where a matter is controversial then it can not and should not escape the crucibles of the political process. Lord Gardiner touched on this when he said that the Law Commission of England ought to keep out of social questions and questions involving party politics." However, other writers quoted by Sawer as upholding the concept, use the term in rather different ways. Some, Linden among them, for example, attach the simple division of controversial as opposed to non controversial legislation. This makes no comment as to policy content. However, in designating areas for law reform, this definition of the distinction is probably less useful than it sounds. Gower, a man not without experience in the matter, pointed out that "parliament is utterly unpredictable so that it is impossible to guess what will be controversial."

Another supporter of some type of division in law as it relates to the process of reform is Macdonald, the chairman of the New York Law Revision Commission. Again, however, he approaches the problem in a different way. He states that his commission has "sought to avoid recommendations on topics in which the primary question has been one of policy rather than
law. This practice has been based on an opinion that the best work of the commission can be done in areas in which lawyers as lawyers have more to offer to solve the problem than other skilled persons or groups. This is not a distinction of theory, but one of practice.

This practical distinction is adopted by Professor Beetz in discussing why reform has largely been confined to "lawyers' law" or "those chapters of the law which were already part of integrated legal systems." He denies that lawyers are not and should not be concerned with policy. Instead of a theoretical boundary, he suggests that the character of law reform has been determined largely by isolating "some parts of the law that involved a smaller number of visible policy decisions and in which a tacit agreement may have naturally emerged between statesmen, politicians and government departments on the one hand and law reform commissioners on the other, to the effect that it was more fitting that the area of policy be left to those who are responsible for it and the province of lawyers' law to those who know about it. In other words, a sort of agreement between the members of two professions about their respective zones of influence." This probably is descriptive of the net result of the interaction between law reform commissions and governments. However, it is an ad hoc and adjustable boundary that could alter significantly at any time. It is not a general concept significant to a general theory of Law reform.
"Lawyers' law", in each and every sense that it has been used in the foregoing discussion is purely a problem of the law reform commission. As Macdonald's comments illustrated, the problem varies with the nature of the commission and the way in which it works. Dr. Gosse, in discussing the practicalities of the law reform commission as a tool for law reform sums up the situation by saying that "Each commission appears to be developing its own philosophy on how far it should go in policy matters."\(^{17}\) It is, in fact, the compromise that a permanent law reform body must make when entrusted with the role of mediator between the legislature and the courts with the already established jurisdictions of government departments.

But it remains, therefore, before beginning a case study of a "law reform" project, to give the reader at least fair warning of the area in which the study will operate. The question, after reviewing the authority, still persists: If this paper purports to be about "law reform" what is "law reform"? In some sense, every statute, even every case decision makes some change, however minute in the law. It has also been pointed out that "reform does not necessarily mean change."\(^{18}\) Thus some writers would refer to mere codification as reform.\(^{19}\) However, this does not reflect the common usage attached to the phrase. If "law reform" is a popular term, then let it be defined to mirror its popular meaning.

Generally, it is submitted, "law reform" is taken to
refer to the injection into the political process of a demand for specific changes in the law to be effected by the legislature which originates with some definable group that has at least a measure of independence from the standard channels of the cabinet -civil service lawmaking process. In the general process of law reform, Lord Devlin has observed that there are two stages, the first in which the law is discussed and the second, the stage in which the law is implemented by the parliament. If there is a difference between the common usage of the words "law reform" and the normal statutory business of the legislature, obviously, the difference must be in the first, the discussion, stage. It is suggested that there is indeed such a difference in usage.

This hypothesis is supported by another distinguished judge, Turner, J. of the New Zealand Court of Appeal. He adopts the same two stages as does Lord Devlin, calling them the dynamics and the mechanics of law reform. In discussing the dynamics of law reform he lists the ways in which law reform proposals come to be suggested. The sources he lists are the following: general public feeling or opinion, often mobilized by the press; proposals of private individual citizens; comments on the law attached by juries as "riders" to verdicts; unfavourable comments about a statute made by the judiciary in the course of judgments; the Grand Jury "sounding off" on legal abuses and suggested reforms; Royal Commissions and similar committees entrusted with specific investigatory tasks; writings of theorists and academic lawyers;
Law Reform Commissions and their subcommittees. The mechanics of law reform then involves the implementation of these suggestions by the government in parliament.

This list illustrates the distinction between law reform and general statutory enactments. Generally, the cabinet is the chief source of new legislation proposals. But the cabinet is not included in the above list. This is because what originates solely in those standard channels is not commonly considered law reform. An example may make the point. It has been suggested that no one would think a new tariff a measure for law reform. If the Minister of Trade proposed such a tariff, the technical details were devised by his staff and the legislation drafted by the legislative council, it would not be in keeping with common usage to call the measure law reform. However, if the Minister appointed a Royal Commission to investigate the tariff regulations and that Commission recommended a new tariff be imposed, the tariff would much more readily be thought of as law reform. It is the source of the specific proposal, not the proposal itself, that makes it, in common parlance, law reform or not.

As reading the suggested list of Turner, J. implies, the sources of what can be called law reform legislation are many. Some of his suggestions, however, do not apply to the Canadian situation and some others might here be added. However, it is worth remarking that some of these sources, although enjoying considerable independence from direct direction of the cabinet in
their proposals are more or less under the control of the government. Royal Commissions, task forces, other ad hoc committees appointed to review a specific area of law and Law reform Commissions all have to a greater or lesser degree a connection to the government. The government creates and makes the appointments to all these bodies; in the case of Royal Commissions, task forces and other ad hoc committees, the government provides terms of reference that may direct very specifically the kind of inquiry and recommendations made; in the case of Law Reform Commissions, projects may have to be suggested or if not suggested at least approved by the minister responsible and in some jurisdictions, he is even a member of the commission.25

What work has been done in the general theory of law reform as a subject has already been briefly discussed. Any specific studies that have been made have tended to focus on these official sources of proposals rather than on the less well organized sources. Since this study will be directed chiefly toward law reform in this official context, it will aid in defining more specifically the questions this case study endeavours to raise to summarize some of the trends in the work being done with these official groups.

OFFICIAL SOURCES OF REFORM PROPOSALS

As might be supposed from the foregoing discussion, the large bulk of the work done on these bodies from a legal view-
point has been done with law reform commissions as their object. A good deal of literature exists surveying the composition and methods of work of law reform groups in Alberta, Australia, New Zealand, New York and Ontario as well as many articles dealing with the English Commission. Many of the articles have been written by the chairman or director or a commissioner of these bodies. Most of them are simply descriptive of the structure of the commission and the kind of work it has undertaken.

The special role for a law reform commission has usually been seen in the literature as a body to provide general organization to the work of law reform. So Lord Devlin says that "what is significant about the creation of the Law Commission is that for the first time in our legal history, the work of law reform is being properly organized and directed." It is popular to speak of the purpose of such commissions in the words of Cardozo, J. who, in an address to the New York City Bar Association, delivered a plea for an agency to "mediate between the legislature and the courts ... act as messenger from courts to legislature and legislature to courts." A law reform commission was to be the body that would speak the one word needed to release the law from the tyranny of precedent.

The field of choice for the structure of these commissions has been thoroughly described. However, very little has been done to assess the influence of the structure either upon the boundaries set to their scope or their success of their
proposals. Neither has there been any attempt to assess whether they do in fact fulfill the role mapped out for them.

Royal Commissions have been more thoroughly evaluated in this respect. Courtney, for example, discusses the purposes fulfilled by such bodies and the success of their recommendations. Royal Commissions are seen as fulfilling three major functions. First, an investigation can itself be a policy of the government. Thus Wilson, in an essay on the role of Royal Commissions and task forces, points out that governments pressed by many problems and demands in time of recession or depression have resorted more frequently to the Royal Commission than have governments in more prosperous times. He suggests that this illustrates the government using the Commission to "buy time." Courtney has pointed out and discussed the function of a Royal Commission in educating public opinion and both authors have dealt with its role in formulating legal policy. In this last role, opinions vary as to the success of Royal Commissions in producing useful recommendations. Courtney, on the whole, takes an optimistic view of their usefulness, but points out the difficulty in establishing criteria for success as some recommendations simply have involved the government's continuing to pursue an already accepted policy, some have required no specific legislation, some have been affected by change in government and some have been enacted long after the recommendation was made.

Some comments have also been made on the practical
aspects of using Royal Commissions. These have ranged from consideration of their cost, which is usually tremendous, and their speed, which is usually unimpressive, to an analysis of how effectively they may be manipulated by selection of personnel. The Honourable Mr. Motherwell was once recorded as remarking that if he could choose the chairman and counsel for a Commission, he could guarantee the nature of the report. Occasionally, this predictability has broken down as when the Hall Commission on Health Services, for instance, a commission described by a magazine as "well spiked with Bay Street influences" produced a report that was assessed as being radical enough "to stagger even the former CCF government of Saskatchewan." Control by budget allotment of the government has also received mention.

However, little has been done with the study of Royal Commissions with respect to its nature as a body involved in law reform. Most of the existing discussions have been written by political scientists with the aim of analyzing their general role in government and more particularly, how they illustrate theories of policy making. Two articles have been written assessing the values used by Royal Commissions in England in making their recommendations and comparing them to the values used by lawyers on law reform commissions. More work on the distinctive nature of Royal commissions as an instrument for law reform could usefully be done.

Task forces and similar ad hoc committees of less formal
nature than the Royal Commission, have received the least study of all these officially sponsored, law reform bodies. The task force itself has only come into vogue recently in Canada, beginning with the government of Prime Minister Pearson. Again, most of the analysis of this type of body has been done by and for political scientists. It has been found to be speedier and cheaper than the Royal Commission and has the quality of being able to be made inaccessible to the public. Its secrecy has been commented upon with misgiving. An interesting case study has been done by Axworthy on the Hellyer task force on housing, analyzing the difficulties it faced, including particularly its clash with the established government departments responsible for housing. The cautious establishing of boundaries by law reform commissions has already been noted. Apparently, some such boundaries worked out mutually between the law reform body and the department are important for the success of any project. A task force, as an ad hoc body attempting to work in a speedy way, may have difficulty establishing its area of study without arousing hostility.

Also of interest to students of law reform are Wilson's comments on the effectiveness of task forces as policy-making agents. He suggests that some at least have tended to pay "scant regard to fundamental complexities in problem solving and have tramped where angels have feared to tread." He also points out briefly the need when using ad hoc bodies to involve
professional bureaucrats of the civil service in the formulation of the new policies. Otherwise, he concludes, the civil service departments are, when faced with purely external policy recommendations, "quite capable of reformulating them." 45

Some of these problems of the output of ad hoc bodies in general have been briefly considered specifically in relation to law reform. England, before the establishment of a permanent reform commission particularly, made considerable use of the recommendations of ad hoc bodies. Dr. Goodhart observed in the 1952 Holdsworth Lecture that ad hoc committees had "undoubtedly had useful results, but there are three objections ... reforms tend to be haphazard ... some difficulty in collecting necessary evidence ... and as there is no permanent staff which is concerned with this problem, there is no machinery which is directly responsible for the implementation of any report." 46

Task forces usually make sufficient use of outside expertise to escape the second problem Dr. Goodhart mentioned, but their structure often makes them, in common with other ad hoc methods, unco-ordinated, superficial and easily sabotaged by a hostile civil service.

Although gained in bits and pieces, a considerable amount of information is presented by specific literature dealing with these law reform bodies. However, it is disorganized and is usually not written from motives of investigating problems in the process of law reform.
THE HISTORICAL AND PRESENT IMPORTANCE OF
THE STUDY OF LAW REFORM

Few areas are explored academically until some recognition of their actual or possible significance has been realized. In none of the literature dealing with law reform as a subject, as opposed to literature urging specific reforms, has such importance been explicitly attached to "law reform". It is easily recognized by authors eager for legislative change that their particular project is important and that some committee or commission should deal with it at once, but not so easily recognized in articles discussing the theory of law reform why such theory should receive attention. Since this chapter has set itself the task of filling in the background to such a study, the general history and present significance of the process of law reform deserves, perhaps, a few words of mention.

As a demand, and as a governmental response to that demand, law reform has a long history. The call to reform the laws of England began as a concerted movement with the pamphleteers of the 1640's. The Diggers and the Levellers called for sweeping reforms of the old common law, often with very little conception of the nature of the system they were attacking.

Pamphlets appeared asking that the laws of the land be set down in clear English prose in one book and distributed throughout the land so that every man who could read could inform himself of the law. The obvious by-product of these reforms
would be the abolition of the unnecessary and pernicious race of lawyers. Oliver Cromwell constantly brought the matter before the parliament in the days of the protectorate, pleading for general reform of the law. But he also admitted that he had no idea of how such reform could be carried out. 48

Not all the early reformists were so poorly informed. In the same period, William Sheppard, a lawyer, wrote the pamphlet "England's Balme" in which he discussed many of the reforms that were later carried out in the nineteenth century. The Hale Commission, perhaps the first law reform commission in the world, was established in 1652. Under the leadership of Sir Matthew Hale, that body proposed many reasonable and moderate reforms particularly to the harsh criminal law of England. 49

The Hale Commission, appointed by the parliament of the time, was one of the first responses of government to the popular call for reform. It was an attempt to establish some body that would have responsibility for the general reform of the law, whatever reform was taken to mean. However, the appointment of the commission was government's only response. Its suggestions were not enacted and the law reform movement fell under the counter attacks of the majority of the legal community for whom law reform was probably too closely connected with a public desire to see lawyers lose their fees and possibly their heads. With the restoration, law reform as a popular cause, fell into obscurity almost until the nineteenth century.
Since the nineteenth century, government has relied more and more heavily on its officially created law reform bodies for sources of new legislation. At the present time, particularly in the Trudeau government, federally, the institution of parliament is undergoing change. Increasing reliance on the bodies just discussed in the preceding pages is focussing and precipitating that change. It has been suggested that parliament may be surrenderring its role as the source of new laws to the law reform commission. This appears to be the attitude of Sir Leslie Scarman, Chairman of the English Law Reform Commission. In his address Law Reform—Lessons from the English Experience, he presents a picture of a strong, independent body with the right to appeal to public opinion to judge between its position and that of the elected government, should they differ. He sees the commission as a major originating force for law and parliament, with its ultimate control of the implementation procedure, as a check on the commission's activities. Task forces are equally having impact upon the parliamentary system. Political scientists when examining the extensive reliance of the Trudeau government on the task force ask "why, after all, should it be necessary to 'bother' with representative institutions when, for a few thousand dollars, the Premier can obtain a very accurate estimate of the 'general will' without parliament."

Clearly, the use, and perhaps misuse of these law reform bodies is a subject that will occupy theorists in many fields for
some time to come. The need to understand the workings, and the relationship of these bodies to their output in terms of laws enacted by the parliament is increasing. The questions have only just begun. After examining the philosophy of the English Law Reform Commission, an American writer, Sutton, poses two of the many questions to be expected. "First", he queries, "has a conscious effort been made to adapt the machinery of law reform to the particular needs of each state and country? . . . Second, have we been too conservative in what we think a law commission can achieve? Have we been too ready to circumscribe its activities with arbitrary boundaries?"54

Many other questions arise from the brief survey of the state of the study of law reform just undertaken. What should the relationship between law commissions and ad hoc reform bodies be to promote efficient reform? How should parliament deal with the proposals of each body? What guidelines determine which project is given to what committee or body and what is the result? What characteristic marks, if any, are left by a particularly constituted body upon the legislation it produces? What bodies are most sensitive to public opinion and pressure and why? At what stages is the influence of public opinion felt? How does the choice of body affect the reaction of the public to its recommendations?

Although the role of parliament is in some ways being altered by these bodies, the cabinet-government machinery still
has control of the second and vital process of implementation. It is a mistake therefore to concentrate solely on the lessening of the role of government confronted with the suggestions of these various groups. The government also controls, as discussed above, the official groups for law reform themselves despite their independence of recommendation. Obviously, government must learn to live with these bodies of their creating and will want to draw out of them legislative suggestions that will be reasonable in light of the existing political situation. That is, it is usually of no use for the government to receive a suggestion for reform that is totally opposed to its own policies or that is going to be completely unacceptable to the voter. Otherwise, the process of law reform will break down completely. Projects will not be referred to external bodies and the efficiency of government will be reduced far below present levels. It is therefore essential that an understanding of some of the questions posed above be reached. The government must be able to understand the full implications of its actions in creating an official law reform body, in referring a particular project to it in a particular way and in bypassing the normal channels of law making. Every government needs a philosophy of law reform, and will need it increasingly as the volume of required legislative change multiplies.

But much of the data to answer these questions is not yet available. This paper will attempt to take a very small step in
the direction of acquiring some of this necessary data. It is, as already stated, a study of one particular group carrying out one particular law reform project. That group was an ad hoc body appointed for the purposes of producing new companies' legislation. It was composed of civil servants who also had other responsibilities. In the following chapters, this paper will analyze that process, beginning with a brief history of how the committee proceeded and how the act was produced. Then, the policy established by the committee will be related to the method and structure of the body. Specific parts of the statute will be examined for the influence of the policy adhered to by the committee and for the effect of public opinion.

Generally, it will be expected that there will be a close and predictable connection between the structure of the Committee and its methods of procedure; between its methods of procedure and the criteria for reform of the statute that it selects; and between these criteria and the legislation finally produced.
FOOTNOTES, CHAPTER I

1 Companies Act, 1973 Stats. B.C., c. 18.

2 Geoffrey Sawyer, The Legal Theory of Law Reform, (1970), 20 U. Toronto L.J. 183 at p. 185 found thirty articles. However, the amount written has increased geometrically since then.


4 Ibid., at p. 351.

5 Ibid., at p. 369-370. "The new kind of law reform movement grew up in the last half of the nineteenth century . . . their efforts were technical and craftsmanlike," p. 370.

6 Supra, footnote 2, at p. 192.


11 Ibid., at p. 274.

12 Supra, footnote 8, at p. 2.


14 Ibid., at p. 15.


16 Ibid.

17 Supra, footnote 7, at p. 41.

18 Supra, footnote 15, p. 138.

19 Supra, footnote 3.


22 Ibid., at p. 404-408.

23 Of course, this is somewhat simplified. The cabinet is the official source of legislative proposals, but these are based on policies formulated in interaction with senior civil servants. The interaction differs in each government too. For a brief summary of how these interactions took place in the government of Trudeau, Pearson and Diefenbaker, see G. Bruce Doern, The Development of Policy Organization in the Executive Arena, The Structures of Policy Making in Canada, ed. Doern and Aucoin, (1971).

24 Supra, footnote 3.


26 There are also a number of articles recommending various structures.

27 For example, Scarman of the English Commission; Conacher of the N.S.W.; Macdonald of the New York; Gower of the English; Bowker of Alberta; Gosse of Ontario.

28 Supra, footnote 20, at p. 455.

29 The lecture was delivered in 1921. Surprisingly, it is quoted both by Macdonald, supra, footnote 13 and Scarman, Law Reform--Lessons from the English Experience, (1968), 3 Man. L.J. 47 at p. 49. Yet the two have set very different bounds on the work of their commissions.


32 Ibid., at p. 118.
33 Supra, footnote 30.
34 Supra, footnote 30, at p. 184; supra, footnote 31, at p. 121.
35 Courtney, op. cit. at p. 137-155.
36 Quoted in Courtney, op. cit., at p. 68 from Canada, 4 Debates (Commons), CCXVII (1938), 4449.
38 F. E. Dowrick, Lawyers' Values for Law Reform, (1963), 79 L.Q.R. 596; Laymen's Values for Law Reform, (1966), 82 L.Q.R. 497. Interestingly, he found the values of laymen and lawyers remarkably similar, with the laymen on the Royal Commission laying slightly more emphasis on the individualist ethic and the axiom of distributive justice.
39 See Wilson, op. cit., at p. 122.
40 Ibid., at p. 124.
42 See above, p. 5.
43 Supra, footnote 31, at p. 125.
44 Ibid.
45 Ibid., at p. 126.
47 For an account of the various pamphleteers, their proposals and pamphlets, see Donald Veal, The Popular Movement for Law Reform 1640-1660 (1970).
48 Ibid., at p. 94.
49 Particularly, the Hale Commission proposed reducing the number of capital offences, which were many.
For example, the bypassing of parliament as an instrument of policy with the expanded staff of the Prime Minister's Office; the shutting out of parliament by use of task forces whose reports may be kept secret.


Supra, footnote 31, at p. 124.


However, this control could be lessened in some instances if the request of Lord Devlin, The Process of Law Reform, (1966), 63 Law Soc. Gaz. 453 were granted. He suggested a special legislative machinery to hasten the passage of odd bits and pieces of reform turned out by the Commission. The problems raised by such a suggestion are too obvious to require mention. How, for example, will it be decided which legislation can be passed by the streamlined process?
CHAPTER II

A HISTORY OF THE B.C. COMPANIES ACT

THE DRAFTING OF THE NEW ACT

The new companies act was created by a committee established by the Attorney General of British Columbia. The committee was drawn from the Attorney General's department and composed of the Director of Constitutional Law, Mr. M. Smith, and the Director of Civil Law, Mr. D. Sheppard. It was not specifically requested to produce a new act. Instead, it was required to undertake a study "to review and report upon the provisions and working of the Companies Act, the Securities Act and related corporate and securities legislation; and to recommend what changes in the law are desirable." It was given no procedure to follow and no policy guidelines. Instead, it had the independence of action and recommendation that characterize generally the official law reform bodies.

In addition to its members, the Committee asked Mr. Hall, the Registrar of Companies, Mr. B. Irvin, Superintendent of Brokers and Mr. T. Cantel, the Inspector of Real Estate to attend their meetings. Before beginning their study, they hired Mr. Peter Manson as counsel. These additional members provided practical expertise. They worked as an integral part of the Committee in drafting the legislation.

The first step of the Committee was to publish advertisements in major newspapers for briefs on the subject to be submit-
ted to them. This is the same procedure as is followed by the New South Wales Law Reform Commission. Mr. Conacher, the Deputy Chairman of that commission described their results from such advertisements as invariably disappointing. However, he believed that the practise was carried on "because it seems right as a matter of principle, but it might otherwise be hard to justify the expense." Whether or not this was the feeling of the Attorney-General's Committee or whether they simply proceeded to work out their own approach, is unknown. However, as will be mentioned later, their experience with this method was much the same as that of the N.S.W. Commission.

The Committee specifically solicited briefs from such organizations as the C.G.A., the I.D.A., the Stock Exchange and the Vancouver Board of Trade.

Focussing on the company law first, the Committee undertook a conceptual study of the policy of Company Law. Then they proceeded to produce a draft act. Once this was completed, the Committee was in favour of releasing the draft for public scrutiny before its presentation to the house. The English Commission, for example, works in this way with their reports, releasing them first in white paper form and then later in final recommendations. However, because this took the form of a draft bill, some hesitation was felt in releasing a document that expressed a policy to which the government might or might not decide to commit itself. On December 21, 1971, however, the
draft was submitted together with a final study report on the Companies Act to the Attorney-General. These documents were released.

THE LEGISLATIVE HISTORY OF THE ACT

Bill 66, as the draft act was called, was introduced into the B.C. Legislature and given its first reading on March 23, 1972. It was the final session of the twenty-ninth parliament, and the bill was not passed during that session. At the end of the session, an election was called. When the new parliament met, the Social Credit Party who had sponsored the bill, no longer formed the government of the province.

In the meantime, some extensive criticism had been levelled at Bill 66, particularly by the Company Law subsection of the Canadian Bar Association, and the Committee had revised the bill in several respects. This revised bill was placed on the order paper as Bill 16 by the new government. Bill 16 was introduced into the legislature and given its first reading on February 2, 1973. Its second reading was given on April 4 and on April 17, the bill was given third reading and passed. It occasioned no debate in the House, not surprisingly because it had been put forward as part of the legislative program of both the government and what was now the official opposition.

The New Companies Act was given royal assent on April 18, 1973. It came into effect October 1 of that same year.
FOOTNOTES, CHAPTER II


3. See Chapter I.


5. See Infra, Chapter IV.

6. Mr. Sheppard expressed this hesitation, but, for the purposes of arousing public comment to assist in the creation of a statute in keeping with the needs of the community, was in favour of release.

7. Supra, footnote 2.


10. See following Chapters V - VIII for numerous instances.


12. Ibid.

13. Ibid.

14. Ibid.
CHAPTER III

THE CRITERIA FOR REFORM

LEGAL POLICY V. LEGAL PRINCIPLE

Given a body with power to draft a statute on a matter that has not previously been the subject of legislation, the first logical step is for that body to decide upon a policy to underlie and give unity to their new act. In some cases, such a policy is given to the drafting body, ready-made, already formulated by the cabinet, or the minister or some group allotted that separate responsibility. This will be the common case where the matter arises in the government department and is passed along to the Legislative Counsel for embodiment in statute form. But policy there must be.

Given a body with power to reform an existing statute, the situation alters. There is the temptation to "have at" the existing act in piecemeal fashion. But each amendment, whether or not it is part of an overall scheme, has some policy behind it. There is something that each amendment is meant to accomplish or it would not be suggested at all. And that purpose, that decision to accomplish X instead of leaving the matter alone and thereby continuing to accomplish Y is a policy decision. The result of piecemeal reform of an existing statute is the implementation of many such policy decisions that, because
unarticulated, may be in conflict with each other or with the policy of the original act.\textsuperscript{2}

Such unarticulated policy decisions have even been approved for statutes drafted by law reform bodies, as opposed to statutes originating in the usual process of government-civil service.\textsuperscript{3} Legal principle, not legal policy, is to be the subject of law reform committees, said the House of Lords in debate.\textsuperscript{4} This distinction has been characterized by W. Wedderburn as a false simplification.\textsuperscript{5} Unless the duties of the law reform body are confined to mere summarizing of the existing law without any recommendations where conflicts in that law arise, such distinction is certainly impossible to maintain. Where there is any choice of alternatives, policy, articulated or not, there will be.

The Departmental Committee responsible for the new Companies Act\textsuperscript{6} was given the responsibility, not of summary, but of recommendation. Their terms of reference, insofar as they relate to Company law were "To review and report upon the provisions and working of the Companies Act . . . and to recommend what changes in the law are desirable."\textsuperscript{7} Guided by such terms, the Committee could not avoid policy considerations.

Fortunately, the Committee decided to face policy decisions directly. They divided their task into three phases--research, a conceptual study, and the preparation of a draft act. In that phase which they designated the conceptual study, the
expressed purpose of the committee was "to establish the requirements of the community in respect of the corporate form."\(^8\)

Since it is a principle hypothesis of this paper that the body selected to carry out a project of law reform influences the policy that project ultimately adopts and that in turn, that policy strongly affects the final character of the new act, this chapter will be devoted to a discussion and analysis of the criteria for reform selected by the Committee as a result of its conceptual study.

LIMITATIONS ON THE CONCEPTUAL STUDY OF THE COMMITTEE

The range of possible criteria for company law reform is very broad. The Departmental Study Report\(^9\) reveals three influences that no doubt narrowed the field of choice. The recognition of these influences can establish a general understanding why certain proposals for company law reform, discussed in the next section of this chapter, were apparently not seriously considered by the Committee.

The first of these factors is a recognition by the Committee of the close historical ties between British Columbia company law and that of the United Kingdom.\(^10\) This acknowledgement, undoubtedly accurate, provides a logical starting point for any study of the Committee: That is, how has the United Kingdom modified its own Companies Act? Frequent borrowings from United Kingdom amendments\(^11\) as well as the relatively prominent place
given to the Jenkins\textsuperscript{12} and Cohen\textsuperscript{13} committee reports in the Study Report\textsuperscript{14} suggest that this obvious course was indeed followed. With such a beginning, an hypothesis can be made suggesting that unless clear and urgent reasons to the contrary were shown, the Committee would be unlikely to depart from the basic framework established by the United Kingdom legislation. This hypothesis is confirmed by both the criteria selected by the Committee and by those evidently rejected.\textsuperscript{15}

By the Committee's own account, their conceptual study followed and was made "having regard to the results of" the Committee's research.\textsuperscript{16} This research consisted primarily of submissions solicited from the public at large by advertisement; submissions solicited from specific groups and agencies; meetings with government officials involved in companies work; and commission reports of other jurisdictions.\textsuperscript{17} Apparently, the number of submissions received by the committee was small.\textsuperscript{18} This suggests then that the major source of policy for the new act would be various commission reports and that the criteria selected would be usually drawn from the mainstream of government sponsored company law reform.

Finally, the scope of this conceptual study is limited by the terms in which the committee established its purpose. This was, as will be recalled, to "establish the requirements of the community in respect of the corporate form."\textsuperscript{19} This demands that the first task of the Committee be to define what community it
will consider. It sharpens the need, present in any attempt to
draft a statute, to define that group to whom the statute will
primarily be addressed and to decide whether it will be this
group or some other whose needs and wishes will be uppermost con-
siderations in formulating provisions. Where a statute is enab-
ing, as opposed to prohibitive, the necessity of ensuring its
utilization among that group to whom it is addressed presses for
the identification of the two groups. The needs and wishes of
those persons expected to use the statute cannot be ignored.

In many cases, then, it can be anticipated that the "requirements
of the community" will mean the requirements of those to whom the
statute is addressed, or, generally, promoters, shareholders,
creditors, directors, officers and auditors of companies.

With these guidelines in mind then, some progress can be
made in determining what criteria would not be acceptable to the
committee and why.

CRITERIA NOT ACCEPTED

These restrictive influences eliminated for the
Committee, for example, the gargantuan task of reconsidering the
whole concept of "corporateness". Such reconsideration is
usually urged by scholars considering either the very small or
the very large corporate structure. They believe that some form
other than the all-embracing notion of a corporation must be
designed to cope with the special problems of the close or of the
multi-national organization. Linking the two by use of the word "company" or "corporation" obscures the essential differences in a foggy misleading concept. Thus Francis W. Coker, Jr. found a central problem of the close corporation to be the insistence of the law in treating "corporateness" as a real thing from which principles or generalizations could be drawn instead of purely a creation of the legislature. Every rule needed for a close corporation had to be justified as an "exception" where there was in reality no general rule at all. At the other end of the scale, the fear of the large corporation as a threat to individual freedom was analyzed by Bayless Manning. There, "corporation" was seen as a convenient tag, obliterating the need to search further for the characteristics of those organizations actually posing such a threat. So research into the organization-power-freedom triad was effectively halted.

But the historical nexus, and the wide acceptance of the corporate form in the community made it unnecessary, even undesirable, that any new structure be suggested. And the Committee did not contemplate such fundamental alteration in the principles of business organization. It was the corporate structure in the community for which they sought guidelines. A completely new way of governing business relationships would obviously be a task far beyond the capacities of a two-man committee whose members had other responsibilities as well.

Similarly, it was not to be expected that the Committee
would establish any radically new philosophy of corporate control. The division between ownership and control in the corporate world has, of course, been recognized since 1932.\textsuperscript{27} Since that time, the standard government policies have included a return of some measure of democratic control to the shareholders. Documents such as the Cohen Report\textsuperscript{28} and the Jenkins Report\textsuperscript{29} have advised longer notices for company meetings for the shareholders,\textsuperscript{30} allowing removal of directors by ordinary resolution before expiration of their term,\textsuperscript{31} choice by the shareholder even when voting by proxy\textsuperscript{32} and a scheme for control by the general meeting of share issues.\textsuperscript{33} But as has been pointed out,\textsuperscript{34} this return to corporate democracy is nowhere advocated in such documents as a return to a town meeting style of democracy.

The Committee was likely to follow this mainstream of company law tradition. Had it decided not to do so, it would have been faced with a bewildering array of counter-proposals among which its size and structure made it very unsuited to choose. And having made a selection, not all the Committee's legislative skill could have made the choice workable. The "professional shareholder" would have a return to direct control by the shareholders. Others, like Bayless Manning, welcome the decreasing importance of the shareholder's vote and suggest that the corporate democrats are "romantic and misguided, trying to put control back with ownership."\textsuperscript{35} The aptness of the analogy of political democracy to the governing of a corporate body has
been questioned. Control of company boards by some kind of "super-board"; imposition of state-like constitutional safeguards for human rights; and a role for workers on the company board have all, in their turn, been advocated.

Choice from these alternatives would also have required, not merely a conceptual study for company law, but an extensive economic study to determine where and how control in the corporation is under the present system exerted. It would have required some kind of distinction between the large and the small company based on the exercise of control, since it is only in the large company that the separation from ownership exists, and then only in particular large companies. This kind of radical distinction in how various corporations should be governed is inseparable from the reconsideration of the principle of "corporation" discussed in the first paragraphs of this section. Bodies requiring different sorts of control for different purposes would have to be treated in different ways.

A third major area which it could not be expected that the criteria selected by the committee would attack is the question of the social purpose of the corporation. Again, the problem is characterized by a plethora of suggestions. Wedderburn, for example, would import into the corporate law the notion of irreconcilable goals for management and labour and reject any incorporation of workers on the company board. But, he would require as a condition precedent to incorporation that a company
be willing to engage in collective bargaining. More broadly, it has been suggested that the corporation should be encouraged to pursue the goal, not of profit making, but of a vague "corporate good citizenship". The general social good should be sought by the managers of the company. This position has been criticized on the basis that "freedom will disappear when activities must meet a social purpose" and also on the more rational ground that a concrete application of such a policy would lead to revolutionary changes in the industrial system. The unknown and as yet uninvestigated effects of such changes apart from all the other imponderables involved in the promotion of this policy again make it one that the Committee was ill-equipped and highly unlikely to investigate seriously.

Limits imposed on the Committee by its form, its size, the preconceptions with which it began its research and the methods it employed eliminated these broad areas of inquiry. It was left with a fairly restricted range of conventional aims from which to select its criteria for reform. The next section of this chapter will proceed to an analysis of the criteria finally chosen.

THE CRITERIA SELECTED

The criteria selected by the committee are contained in Part Three of their report. They are contained in six paragraphs and may, for greater convenience of reference, be further
divided into fourteen separate ideas. Divided and numbered by paragraph and idea, they are as follows:

1. a. The legislation must serve the needs of the community.
   b. The statute must be drafted remembering that it will be a working tool for many without benefit of professional advisers.

2. c. Uniformity is desirable, but not paramount.
   d. Adaptations of letters patent concept cannot be recommended for British Columbia.

3. e. Companies legislation should be self-regulating.
   f. Means should be provided for members and creditors to know what is occurring and to call to account those who wrong them.
   g. Government involvement should be confined to providing a record of status and a secure record of vital information.

4. h. The rules established should be clear and meaningful.
   i. The rules must be enforceable within the reasonable economic resources of the community.
   j. The rules must be predictable in their invocation and result.

5. k. Public scrutiny is recognized as a powerful weapon for securing compliance.

1. Public scrutiny is of little use if it is unreason-
ably expensive to comply or produces a plethora of information often hopelessly out of date.

6. m. Companies legislation is not and should not be social legislation.

n. Remedy of a social wrong not directly related to the corporate form should be effected by legislation aimed directly at the matter, not indirectly through the Companies Act.

Point (a), that the legislation must serve the needs of the community, has, in itself, little meaning. It is a mere repetition of the words in which the Committee phrased its own search for the criteria for reform. It does not further identify the community to which it refers. Assuming the community to be the business world, the reader is not informed of what of its many possible needs the committee believes that company law should fulfill.

Point (b), also part of the Committee's first criterion, helps to answer some of these questions. One need at least that the Committee sees as worthy of attention is a certain simplification in the statute. In the words of the Committee, "hoary language which is irrelevant or obscure has no place in a statute such as the Companies Act. This criterion stands apart from many of the others selected by the Committee. Simplification, as a designated end, usually forms no part of company
law reform proposals made in other jurisdictions.

One exception to this rule might be said to be Gower's report on the company law of Ghana. His form of simplification encompassed adding to the forms in which business is carried on a simpler type of limited association than the complete corporation and drafting a complete code of laws to eliminate the need to rely on British precedent. These were both in answer to specific problems of the Ghanaian situation. The recommended Incorporated Private Partnership Act was designed to provide for the unsophisticated African businessman who was not yet ready for full incorporation. But a more complicated form, like British company law requirements was left for other businesses. Moreover, elimination of a reliance on precedent meant the statute had to be longer than its British or Canadian companions in the field. The resulting draft companies act was as complex therefore as any other company legislation. Except for this report, coping with a unique economic situation, other company law reform reports have made no concessions to the businessman without advisers who undoubtedly would have trouble understanding the statute. The Jenkins Committee Report even went so far as to state expressly that they saw it as no part of their function to simplify an inescapably complex statute.

It may be doubted whether the businessman or wronged shareholder is often in the position of having to use the Companies Act without advice. Where there is a company, there is
invariably, business. And where there is business of sufficient complexity to require incorporation, there will invariably be both lawyers and accountants. It may further be doubted whether, should such occasion arise, an act without hoary language will be much assistance to "many without professional advisers" who are also presumably without knowledge either of basic company law principles or of the all pervasive formal requirements of Companies Branch. But simplicity is generally desirable where it can be achieved without confusion. Whether this program was successfully implemented by the Committee in its final act will be a chief topic of inquiry in other chapters of this thesis.

In point (c), dealing with the question of uniformity, the Committee followed a well-established Canadian tradition. Although the provinces have all borrowed each other's ideas in specific areas, neither the Dickerson report nor the Lawrence report, the two major Canadian company law reform proposals preceding the B.C. act, advocated uniformity. However, as discussed above, certain fundamental company law concepts were not closely examined by the Committee. One reason for this is undoubtedly that every Canadian jurisdiction, including British Columbia, is aware that her companies must be able to function in the other jurisdictions and her laws be able to deal with companies from other jurisdictions functioning in her own. A certain uniformity, at least in the basic concept of a corporation and its function is thus imposed.
The refusal to follow the adaptations of letter patent concepts recommended for Canada and Ontario found in point (d) is not fatal to this basic uniformity. Recommendations for dilution of the ultra vires doctrine, for a recognition in letters patent jurisdictions of a right to incorporate and for implementation of a directors' right to manage section in B.C. have considerably lessened any gap between the methods of incorporation, although they remain different in form.

The self-regulation, advocated in point (e), is also a common position in company law reform. The usual rationale for the position is that, as discussed above, companies acts are enabling legislation. Their purpose is to give legal sanction and structure to a particular method of carrying on business. The Dickerson report expresses this by saying that "The primary purpose of corporation law is not regulatory. They are enabling acts to authorize businessmen to organize and operate their business, large or small." Self-regulation implies lack of regulation from some external body. It would appear, taking only the wording of the criteria, that the Committee saw this external body primarily as the government. In point (g), they define government involvement as consisting primarily as a repository of information and records of status. But self-regulation requires some instrument whereby the company or someone in the company may regulate. This instrument can be indirect, such as the stock market price,
which some authorities see as fluctuating with shareholder opinion sufficiently to influence the conduct of the company's affairs. Or the instrument can be direct, such as new actions in the courts to redress wrongs or restrain certain courses of conduct.

There emerge a series of choices. Self-regulation can mean regulation by the directors or the shareholders. It can be carried out through laissez-faire methods or by court action. And the choices made affect one another. If it is desired that the "self" in self-regulation mean the board of directors, then, a laissez-faire method will give only scant power to the shareholders and the directors will act without much interference. If the method chosen is court action, then the "regulation" in self-regulation is more likely to be restraint on the powers of directors and shareholders will have more control.

Only rarely are these questions faced by a law reform commission or committee directly. Usually their stand must be inferred from the mechanisms they set out. The Lawrence Report is in some measure an exception to this, although there is no evidence that they approached the problem in any consistent way. They set out first the standard principle that "The rule of non-interference in the internal affairs or disputes of a company is a deep-seated principle of Anglo-Canadian law." Then they add to this a condemnation of the remedy for oppression suggested by the Cohen report because it "is objectionable on the grounds that
it is a complete dereliction of the established principle of judicial non-interference in the management of companies." Whether or not the committee was correct in this interpretation of the rule, its application in this circumstance would seem to indicate a choice for regulation by the directors only and a laissez-faire approach to shareholders' claims. Even so, they are not perfectly consistent in this approach, sponsoring inclusion of a representative action for shareholders in the act. This would require that a shareholder establish before that court that it is prima facie in the interests of the company that the action be brought. This would appear to be as much judicial interference as an inquiry as to whether a conduct constitutes oppression.

Some recognition of these choices appears to have been given by the B.C. Committee. Point (f) suggests that members and creditors be provided with the means for knowing what is occurring and for calling those who wrong them to account. Some regulation at least is apparently to be provided by both shareholders and creditors and at least to some extent, presumably through the courts.

The recognition implied in this paragraph of the criteria of creditors' rights illustrates the acceptance by the committee of the general theory of corporate control discussed earlier in this chapter. While the shareholders are to be able to call to account those who wrong them and to know the state of the
company's affairs, there is no call for a real return to the corporate democracy of the small company. The changing position of shareholders from owners to investors seems in part to be recognized by linking their position in respect of the right to know and to call to account with that of creditors.

Paragraph 4. including points (h), (i) and (j) espouse the goals of clarity, meaningfulness, enforceability and predictability for the act. These are not simply requirements of company law. Instead, they are general requirements for the efficacy of any law. They only have effect on concrete proposals for reform, however, when the community for whom the rules are to be clear, meaningful, predictable and enforceable has been defined. It will be remembered that the Committee did, at least partially, define this audience in their first paragraph as including those who must use the Companies Act without the benefit of professional advisers. But, in evaluating these criteria, it is also necessary to keep in mind the influence of the wishes of all those who will use the act on its contents. The reasons for this influence have already been discussed in this chapter.

This community will also include the lawyer, accountant and more sophisticated businessman.

Public scrutiny, as recommended by the committee in their fifth paragraph, has historically been much relied upon in controlling behaviour in the corporate field. Thus the 1933 Securities Act in the United States was based on the premise
that sunlight was the best disinfectant. In 1945, the Cohen report said in its opening paragraphs that "the fullest practicable disclosure of information concerning the activities of companies will lessen such opportunities for abuse and accord with a wakening social consciousness." By 1962, the Jenkins Report could say simply that "disclosure is right in principle and necessary to protect those who trade with and extend credit to limited companies."

Parallel to this, the main trend of corporate law reform has also always kept its views on how much disclosure and at what time was practical. The factors mitigating against certain disclosures are, according to the B.C. Committee, to be expense and practicality of keeping the information up to date. These factors appear to be somewhat different from those of the Jenkins report, for example, where it was thought the considerations should include usefulness of information to the persons receiving it; the amount of work in preparing it; and whether the disclosure would be harmful to the company's business.

The relationship between companies law and social harms that may be seen to result from corporate conduct of business is dealt with by the committee in paragraph six. It was already discussed above that a committee constituted and guided as this committee was unlikely to question the social purposes of the corporation. The scope of a study necessary if such purposes were to be redesigned was also discussed. The natural result
follows, and in point (m), the committee declared a "hands-off" policy for social reform.

This policy, again, follows the trend of past reports on company law. As Wedderburn pointed out, neither the Jenkins nor Cohen report was concerned to deal with social policy. In Canada, the Dickerson report stanchly adhered to the tradition. "We have not come to think that the millenium can be achieved by reforming corporation law" was their formulation of the problem. "A corporation law is not the place for controlling objectionable or discriminatory practise," they stated later in their introduction. Even Gower, who admitted that his draft code had to cope with a unique social situation, finally saw social purposes as being only vaguely assisted by the company law. He concluded that "In the last resort, confidence, which is the basis of everything else, depends on general standards of commercial morality, on political and economic stability and on government policy. A company law cannot assure Africans attain a larger share in industry and commerce. . . . On the other hand, company law can provide good or bad instruments through which policy can generate." But the company law itself was not to be a vehicle of policy. That, as the B.C. committee approved in point (n), was to be left to other laws, other committees.

Having completed this analysis of the origins and meaning of the fundamental criteria selected by the draftsmen and formulators of the new companies act, this paper will proceed to
discuss whether, and if so, when and where these criteria actually shaped the proposals and drafting of the statute.
FOOTNOTES, CHAPTER III

1 Such statutes abound. The old Federal Income Tax Act, before the new act, may be one of the best examples.

2 From many possible choices, take the example of Residential Tenancies in Part IV of the Manitoba Landlord and Tenant Act. These, contractual rights rather than property rights are recognized to be the basis for a lease of residential property. But in the remainder of the act, unreformed, leases are still primarily the creation of an interest in property. What is the logical distinction among the types of tenancy?

3 For a discussion of such process distinct from "law reform", see Chapter 1, supra.


5 Ibid., p. 4.


8 Ibid., at p. 5.

9 Ibid.

10 History and Related Systems, Departmental Study Report, p. 2.

11 See the discussion infra in Chapter VI and following for examples.


14 Departmental Study Report p. 2. Of the four of perhaps eight major company law reports (Cohen, Jenkins, Kimber, Lawrence, Dickerson, Ghana, N.Y., American Bar Assoc.) that were mentioned by the committee by name, two were from the U.K. and two from Ontario. Also, in the Committee's files, the Jenkins Report appeared most frequently in their section by section consideration of the statute.
See the discussion in the following two sections of this chapter.

Study Report Part II, p. 5.

Ibid.

Mr. Dennis Sheppard characterized the response at this stage as "disappointing."

Supra, footnote 8.


It is well known that effective legislation must have a large degree of acceptance by the primary audience. See Jones, The Efficacy of Law, 1968 Rosenthal Lectures and K. Llewelyn, Law Observance v. Law Enforcement, Jurisprudence Realism in Theory and Practice, (1962), p. 399 for two discussions of this factor.


Ibid., p. 40.

As they phrased the task they had set themselves. See p. 4.

Only a body such as a Royal Commission could have attempted such a feat. Even then, it is doubtful that public opinion would be sufficiently unified to overbear the concerted position of the present corporate structure.

Berle and Means, The Modern Corp. and Private Property (1932).

Supra, footnote 12.

Supra, footnote 13.

Cohen, p. 126.

Cohen, p. 130.
32 Jenkins, p. 464.

33 Jenkins, p. 122.


36 For a discussion of this position and several of the others following, see Manne's article, supra. His arguments refuting each position are based on a faith in the existence of a true free market economy, but he presents a broad overview of the suggested alternatives for corporate control.

37 There is, of course, no consensus on this point. For the thesis that control of corporations has shifted from the capitalist to the technocrat or the "organization man", see J. K. Galbraith, The New Industrial State, (1967).

38 Wedderburn suggests such a distinction on the basis of where a member no longer fulfills a function of making management work, supra, footnote 4, p. 12. But surely the practical problems of such a distinction, especially at the time of incorporation, make the distinction unwieldy.

39 And this ignores, of course, the prevailing practical problem that a B.C. system of incorporation could not affect more than a small percentage of existing companies operating in the province. See the discussion of "uniformity", infra.

40 K. W. Wedderburn, supra, footnote 4, at p. 15.

41 Supra, footnote 34 at p. 430.


43 Supra, footnote 14, p. 8.

44 I have taken some liberty here with the phrasing of the Committee but only to complete sentences where necessary. Most of the wording, therefore, is direct quotes. The paragraph numbers are the Committee's, the others are mine.

45 The requirements of the community in respect of the corporate form," Departmental Study Report, p. 7.
See the discussion p. 4 Chapter IV, supra.

Fundamental Criterion paragraph 1, Dept. Study Report, p. 7.


Ibid., Introduction.

Supra, footnote 13.

Ibid., Introduction, p. 2.

Supra, p. 9. This is a direct quote from the Study Report, p. 7.

Infra, Chapter V, VI, VII, VIII.


See Lawrence, p. 4.1.6; Dickerson, p. 79; B.C. Companies Act 1973 Stats. B.C., s. 23.

Dickerson, p. 51; Lawrence, p. 1.1.9. This replaces the old idea of letters patent being issued at the discretion of the Crown.

See s. 140, B.C. Act. Also, note Dickerson, p. 10 for a modification of the letters patent doctrine to allow more power to shareholders through stricter accountability of directors.

Dickerson, Preface.


See Manne's article, supra, footnote 34 for this thesis. Also, see the article by Berle, immediately following, for its refutation.

Such as the remedy for oppression, first suggested by the Cohen Commission, p. 60.

Generally, court assessment of director, management of the company business is confined to the question as to whether the directors acted in what they considered to be in the best interests and the court will not set its judgment above these. See Gower, The Principles of Modern Company Law 3rd ed., p. 520, for example. But is it this kind of judicial interference in the management to decide whether the business is being conducted oppressively to a group.

See Harry M. Jones, 1968 Rosenthal Lectures, The Efficacy of Law for a discussion of all these requirements in his comments on failure of obligation and communication in law.


Cohen, p. 5.

Jenkins, p. 61.

Ibid., p. 13.

See Supra, p. 7, 8.

Supra, footnote 4, p. 1-3.

Dickerson, p. 9.

Ibid., p. 42.

Ghanaian report, Introduction. This situation was the gap between the unsophisticated African small businessman and the highly sophisticated, often exploiting, foreign corporation.
INTRODUCTION

When the Attorney-General's Committee submitted their report, they characterized the changes they had made in the new act as falling into four major categories. These were as follows: Shareholder democracy; shareholder protection; protection for persons dealing with companies; and changes in company management.¹ In this and the following three chapters, this paper will examine those areas in terms of the criteria selected by the committee. This examination will proceed by selection from each area of one major and representative section and a discussion of the background of that section, the effect it is likely to have on the law and the business and legal community. It must be emphasized that the framework for these ensuing discussions is that already drawn in the first chapters. There will be no attempt to evaluate the selected sections in any terms of "what is good for company law", only in terms of how it was influenced and shaped by the form, methods and chosen criteria of the committee that drafted it.

The sections to be discussed in this manner will be s. 40,² the pre-emptive right section in the area of shareholder democracy; s. 228,³ the shareholder's appraisal remedy in the
area of shareholder protection; s. 186\(^4\) and, inevitably its closely related s. 187,\(^5\) the record keeping sections in the area of protection for those dealing with companies; and s. 143,\(^6\) the directors' disclosure section in the area of company management.

These sections are generally classed in this paper as they were classified in their areas by the committee in its study report.\(^7\) Also, an attempt has been made to choose sections that represented major departures from the old act and that represented a fair "cross section" of the committee's choices. It is suggested that it might be said of all these sections as Bayless Manning said of the shareholder's appraisal remedy, that

\[\ldots\] here on a tiny glass slide, one may see, if he looks, something of the chemistry of the law—the interplay of past and present, stability and mutation, ideology and policy, market and myth, cold analysis and warm justice, good sense and silliness, Realism (4th C. B.C.) and Realism (20th C. A.D.), the cruciality of procedure, the needs of the practitioner, the demands of commerce and the eternal political contest between the many and the few.\(^8\)

THE HISTORY OF S. 40

S. 40, the shareholders' pre-emptive right is the one exception to the statement made in the last section of this paper in the provisions of the new act chosen for this study. The Committee did not classify it under the head of shareholder democracy in its study report. That is because at the time the report was written, it was not included in the act at all.

It will be recalled that the original draft bill of the Committee, Bill 66, was not the bill that ultimately was
enacted. During the delay between the two bills caused by the intervening election, the Corporate Legislation Section of the Canadian Bar Association, B.C. branch, prepared a lengthy critique of Bill 66. This critique was probably the most influential input by the public submitted to the committee. Certainly, when Bill 16 appeared in the house, a number of the changes suggested by the Association's report, particularly changes concerned with technical matters, were included in it. The one major change urged by the Association that was implemented by the Committee was their call for the inclusion of some kind of pre-emptive right for shareholders of a company.

At first glance, this inclusion may seem surprising. The Association's brief gave no real arguments supporting the addition, nor did it survey either the problem the right might be expected to overcome, the form the right should take, or any alternative solutions to the problem they evidently perceived. However, the Committee, although it had not made any sweeping commitment to shareholder democracy in any radical sense, had, by its own assessment in the study report, already included three sections in the act to strengthen the shareholders' voting rights. These sections provided for a ballot type proxy and increased access by requisitionists and by director nominees of shareholders to the proxy machinery. Clearly, these sections center around more effective exercise of the power already in the shareholders rather than around any new powers. The idea of a
pre-emptive right fitted neatly into this scheme. As will be discussed below, such rights are designed primarily to protect the proportionate voting strength of the shareholder that he is given by his holdings. If the right was acceptable to the community using the statute whose needs the committee had set as a paramount consideration, it is predictable that the right would be included.

Moreover, the right was also a step in the direction of increased self-regulation for companies, a concept also to which the criteria of the Committee committed them. Presumably, such a right, if properly drawn, would reduce the directors' opportunities for stock watering and similarly reduce the need for shareholders to call on outside intervention.

In any event, the section appeared in Bill 16 and was enacted with that bill. It was amended once, subsection (4) being altered from a sweeping carte blanche for any written waiver by shareholders to exclude the right to a more modest permission for exclusion by writing of the section for any specific offering. The amendment was undoubtedly prompted by the fear that subsection (4) as it stood would allow a general waiver of the right in the articles, which, by the statute, is a contract among all the members. This, of course, would have made the rule meaningless.

For convenience of reference, the pre-emptive right as it now stands amended is as follows:
s.40 (1) The directors of every company that is not a reporting company shall, before allotting any shares, offer those shares pro rata to the members; but where there are classes of shares, the directors shall first offer the shares by allotted pro rata to the members holding shares of the class proposed to be allotted and, if any shares remain, the directors shall then offer the remaining shares pro rata to the other members.

(2) The offer referred to in subsection (1) shall be made by notice specifying the number of shares offered and the time, which shall be not less than seven days, for acceptance.

(3) After the expiration of the time for acceptance of the offer referred to in subsection (1) or on receipt of written confirmation from the person to whom the offer is made that he declines to accept the offer, and where there are no other members who should first receive an offer the directors may, for three months thereafter, offer the shares to such persons and in such manner as they think most beneficial to the company, but the offer to those persons shall not be at a price less than, or on terms more favourable than, the offer to the members.

(4) A member may not waive generally his right to be offered shares referred to in subsection (1), but a member may, in writing, waive his right to be offered a specified allotment of shares.

BACKGROUND OF THE SECTION

The classification of a pre-emptive right under provisions related to shareholder democracy can be easily defended. The chief, indeed the only, incident of such democracy in today's corporation is the vote which most of the shares confer upon their holder. In a large corporation, the shareholders themselves have usually, to all intents and purposes, surrendered the effect of that vote. Both they and the company managers, regard
shareholders chiefly as investors, certainly not participants in the business in any real sense. Large and widespread holdings in these corporations make concerted shareholder action usually impractical. However, in the small company, usually in the B.C. terminology, non-reporting, shareholder voting can still exercise a real influence in the business, sometimes providing a considerable threat to the incumbent directors. In these companies, particularly, therefore, the temptation is great for directors to manipulate shareholdings so that the vote will be in their favour. This has often been accomplished by "stock watering", that is, by issuing shares to a group the directors would like to see acquire or maintain power in the company in sufficient numbers to ensure that consequence. Obviously, if this practise were to be unrestrained, the vote of the shareholders, in precisely those cases where it might be of real value to them would be worthless. It is the control of this practice that is the prime target and the major use of a pre-emptive right. In this portion of this chapter, the law regarding this dilution of voting strength will be examined as the matter stood in British Columbia before the inclusion of s.40 in the act.

In a B.C. company, the directors have usually had the opportunity to water the shares because they have usually had the authority to issue them. This has not been so as a matter of law. In Ontario, for example, the present Business Corporations Act specifically gives the directors power to allot the company's
shares to whom they see fit. The B.C. Act has never mentioned who was to have that authority. The division of power between the shareholders in general meeting and the board of directors was to be determined by the contract contained in the articles. This now has been incorporated into statute by s.140 of the new act which give the directors power generally to manage the business, but subject to the provisions of the act and the company's articles.

But it was never common for the articles to deal explicitly with the allotment of shares either. Instead, they usually contained simply the general power now found in s.140 of the act. Failing some more specific arrangements, allotment of shares would fall within this "management" section and belong to the directors.

Moreover, once the power belonged to the directors, it belonged to them exclusively and without further restriction by the shareholders, except, of course, where the shareholders could amend the articles. The Automatic Self-Cleansing case made it clear that where the articles gave a power to the directors, the general meeting could no longer interfere with its exercise. This then was the general system on which most B.C. companies operated.

Once the power was granted to the directors, the only restraint operating upon them was a general fiduciary duty to the company. This duty was expressed in Re Smith & Fawcett to be
that of acting bona fide in what they, the directors, not the court, consider the best interests of the company and not for any collateral purpose. "The company" was later defined in Martin v. Gibson\textsuperscript{25} to be the general body of the shareholders, the majority and the minority together.

As might be expected, this duty did prevent one situation in which share watering could often take place. Where the directors decided to issue shares to manipulate an anticipated vote so that the results would be to their liking without any regard as to whether that result would also be for the good of the company, the courts would interfere. This type of situation, for example, occurred in Punt v. Symons & Co. Ltd.\textsuperscript{26} The company's articles gave the governing director the power to remove and appoint directors. After his death, this power passed, again by the terms of the articles, to his trustees who proceeded to appoint two managing directors. When disputes arose between the trustees and one of these directors, the directors issued shares to new members for the sole purpose of obtaining a sufficient majority to alter the articles and deprive the trustees of their powers. This issue was held to have been made not bona fide, and the defendants were enjoined from holding a confirmatory meeting.

Having placed the test on the question of motivation, the fiduciary duty was less successful in dealing with other issues, just as harmful to the shareholders and in precisely the same way, but made because the directors honestly considered that a
vote for the position they supported would be best for the company. Obviously, the distinction in directors' state of mind is immaterial to the position of the shareholders. Their voting power is nullified just the same. However, if the test as to when the courts will prevent such dilution of voting is solely the bona fides of the directors, there is no protection from the tyrannical but well meaning board.

The law did make some fluttering moves to avoid this situation. The concluding words of the Re Smith & Fawcett\textsuperscript{27} test, "and not for any collateral purpose" were used as early as the Punt v. Symons\textsuperscript{28} case to suggest that every power given to the directors had in some vague sense that was never clearly defined, a "purpose" for which it had been given. Although the courts held that "it was not possible to put a precise limit on the peripheral considerations and the powers and duties of directors in respect to them,"\textsuperscript{29} two limits did exist. The directors could not, despite the best of motives, justify acts which simply maintained their personal position; further, they could not exercise an express power for purposes wholly unrelated to those for which the power was conferred.\textsuperscript{30}

The advantages of this formulation of principle are many. Without it being necessary to tie the hands of the directors, the court could yet exercise a general supervision of their behaviour and if it seemed to pass the bounds of what directors ought to be doing, their purpose could be classified as "collateral" and the
court could properly intervene.

Perhaps the best known of the cases that followed this line was Hogg v. Cramphorn Ltd. and Others.\textsuperscript{31} During a struggle for control of the company, the directors issued shares to employees who could be counted on to support their position. The court exonerated the directors completely from any unworthy motives. But, it declared that the primary purpose of the issue of shares was to secure additional capital. Directors were not entitled to use this power "merely for the purpose of maintaining their control over the company or merely for the purpose of defeating the wishes of the existing majority of shareholders",\textsuperscript{32} however pure their motives.

There is however a line of cases that have refused to adopt this useful, if vague, position, but have affirmed that the words "and not for any collateral purpose" are simply another way of expressing the bona fide test of the first clause. So in Australian Metropolitan Life Assurance Co. v. Ure,\textsuperscript{33} Issacs, J. of the Australian High Court said that a director's discretion "must be exercised bona fide--that is, for the purpose for which it was conferred, not arbitrarily or at the absolute will of the directors, but honestly, in the interest of the shareholders as a whole."\textsuperscript{34}

In British Columbia, Berger, J. in Teck Corp. Ltd. v. Millar et al.\textsuperscript{35} favoured the existence of one single test, that of bona fide. He considered that Hogg v. Cramphorn\textsuperscript{36} was an
infringement of the general Re Smith & Fawcett Rule, because it had suggested that shares could not be issued to defeat a controlling bid, even if such defeat was considered in the best interests of the company. He preferred dicta in the Spooner v. Spocner Oils decision where one judge said that there was nothing in Canadian law to "prevent an issue for the sole purpose of giving control if directors honestly believed on reasonable grounds that it was in the best interests of the company."  

The B.C. position, then, appears to be that a share allotment can be interfered with by the courts only when the directors have acted from motives of bad faith, not considering the interests of the company. This, as mentioned above, allows a matter of great interest to the shareholders to turn solely upon proof of the state of mind of the directors, a subject which, when confronted with a drastically weakened vote, is not likely to seem as significant to the victims. The problems of proof, as well, are so obvious as to require no elaboration.

As well as these difficulties, the courts have added another bar to effective intervention in cases of improper purpose. In some circumstances, at least, the general meeting of the company can cure the impropriety of a share allotment by a vote of ratification. This principle was first established in what was probably a departure both from English and Canadian law by Hogg v. Cramphorn. It will be recalled that in that case, the issue was not one of improper purpose, but of
collateral purpose, and the directors' good faith was not called into question. What made the allotment bad was the attempt by the directors to defeat the will of the existing majority. Of course, it makes logical sense to extend this principle to say that if the majority has in fact approved the issue, there is no basis for the action. This is precisely what Buckley, J. did. He held that "had the majority of the company in general meeting approved the issue of the 5,707 shares before it was made ... I do not think that any member could have complained of the issue being made, for in those circumstances, the criticism that the directors were by the issue of the shares attempting to deprive the majority of their constitutional rights would have ceased to have any force."^43

But this principle, which would not have affected the mala fide situation at all, was not left on that basis. In Bamford v. Bamford,^44 the English Court of Appeal seemed to deny the separate collateral purpose test and yet hold an improper allotment to be ratifiable. Thus Harman, L.J. said "the allotment ... was not made bona fide in the interests of Bamfords because it was a tactical move in a battle for control ... having as its primary purpose to make it more difficult for Excavators to obtain control."^45 And again: "these directors ... made this allotment in breach of their duty--mala fide, as it is said. They made it not with a single eye to the benefit of the company."^46 Gower is still able to say that "When, however,
directors do not act bona fide in the interests of the company, it seems to be impossible to ratify\textsuperscript{47} on the basis that in Bamford "not bona fide" was used only in the sense of "exceeding the directors' powers because they were not authorized to act for that purpose."\textsuperscript{48} But the fact remains that the English Court of Appeal, purporting to act on the assumption that an allotment had been made mala fides, held that that allotment was nonetheless ratifiable. It leaves the law, to say the least, in a very unsettled state, particularly for the minority shareholder about to see his minority reduced to a powerless fraction and perhaps left to the mercy of the majority, who may be the same or at least have the same interests as the allotting directors.

THE FIELD OF CHOICE FOR REFORM

Other jurisdictions have hesitated to find a solution to this problem in a direct pre-emptive right. It is not the perfect answer to share watering. There are circumstances, for example, where inflexible rules such as the B.C. provision provides can themselves work an injustice. If a company has several classes of shares and wants to issue more shares of one class only, the shares will have to be offered first to the persons already holding that class. It may be that the directors believe it would be unfair to produce the change in voting balance that would result if the holders of the one class take up all the shares to be allotted. However, unless they wish to alter their
plan to issue, in careful proportion, shares of all the classes, this may be the result. Directors who are truly determined on changing the share balance in a particular way may be able to use this inflexibility to their advantage. In this case, of course, the general standards for directors duty apply and the pre-emptive right has no effect.

The problem of flexibility can be solved if the right is not laid down in fixed rules, but is a general right in the shareholders to maintain their proportion of voting strength. This kind of pre-emptive right developed at common law in the United States, gaining recognition there as early as 1807 in the case of Gray v. Portland Bank. This doctrine required a separate decision on the capital structure of each company as to how the shares should be allotted to preserve the proportions of power existing in each shareholder. A fair price had also to be fixed in each situation. This right, applying as it did to all companies, became of necessity immensely complex as it was imposed upon equally complex capital structures of modern business. By 1971, it was admitted to be "impossible to find any method of allocating the additional shares that will preserve, in a practical manner, the shareholders' rights." 

With this different background and different problem, the choices of the American statutes are of little use to the Canadian situation. The sections of the American model act, for example, simply permit the common law right to be included,
excluded or limited by the articles. This, of course, solves the problem of too much flexibility. Where the corporation is large, its capital structure complex, and the right proportionately unnecessary and inconvenient, it may be eliminated. However, it may also be eliminated by the small company where the right is needed and simple to apply. The protection becomes simply a meaningless rule.

In England, the pre-emptive right was considered and rejected by the Jenkins Committee. They suggested that "a certain flexibility which it would be very difficult to provide in the act is necessary in its application." However, a pre-emptive requirement of the London Stock Exchange was approved because that body had the freedom to make special exceptions where desirable. But for the small company, not listed on the Exchange, and where the protection is more needed than in the large corporation, the Jenkins Committee proposed not a pre-emptive right, but a power in the general meeting to supervise share allotments. Directors were to be able to issue shares only on the approval of the shareholders. This approval was to be by ordinary resolution, either for a specific issue or for a general yearly mandate to make issues as the directors determined. Such a mandate could be subject to any conditions and was revocable at any time. This adds an additional safeguard to the directors' duty, but it is a weak one.

Gower, in his proposed companies act for Ghana, moves a
step closer to granting shareholders a pre-emptive right. A share issue must be approved by the ordinary resolution of the general meeting unless the directors offer the shares of any new issue to the existing shareholders or to the holders of the class or classes being issued in proportion to their present holdings. If the issue is to be to directors or past directors of the company or any associated company or their nominees or any body corporate controlled by them, it may not be made at all unless the shares have first been offered on the same terms pro rata to the members or, in the case of a public company, to the public. This amounts to a pre-emptive right that may be waived for all shareholders in most circumstances by a bare majority. Such a provision would be an improvement over the B.C. law before s. 40, since it would ensure that every unbalanced share allotment, would have to be submitted to the majority for approval. However, considering the usual relationship between the general meeting and the control over it exercised by the board of directors, this addition would be more of form than of substance.

In Canada, only the Federal proposals, the Dickerson Report, introduce a statutory pre-emptive right. They propose that "no shares of a corporation shall be issued unless shares have first been offered to shareholders of that class who shall have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class." The right is to be included in the company's articles unless specifically
excluded.

The only Canadian precedent then has two obvious and serious flaws. Like the American Model Act, the right provides no real protection because it can be excluded even in the situations in which it is most needed. The Dickerson Committee's hopes that the need to make a deliberate exclusion of the right if it is to be abandoned may deter such abandonment unless there is good reason are clearly untenable. The promoters of the company who approve the articles are usually not the shareholders who want the protection such a right could give. Moreover, the lawyers' standard form articles, pressed into service for many diverse situations, are unlikely to retain such a provision that clients will probably desire only in a few instances. Even if the right is not excluded, it is easily avoided. If the directors simply issue shares of a class not already issued, there will be no holders of the shares of that class to whom any offer need be made. The directors may offer the new shares to whomever they wish.

THE SELECTION OF THE COMMITTEE

It has already been observed that the concept of a pre-emptive right agreed well with at least one of the committee's fundamental criteria for change and with one of their areas of reform. That is, a pre-emptive right would tend to promote self regulation in company law and would protect the shareholder's
vote which the Committee decided, in some measure at least, to strengthen. But the lack of such a right in Bill 66 is nonetheless fully explicable. All the suggestions for reform to accomplish the purpose of pre-emptive rights just discussed offend against one criterion selected by the Committee. None of them provides a meaningful rule. Either, as in the case of the Jenkins suggestion, the protection has little real substance to improve the shareholder's lot, or, like the Dickerson and American Model Act proposals, it is so easily done away with as to be little more than "window-dressing".

Considering the methods of research of the Committee, which chiefly involved examination of legislation from other jurisdictions, its size and the primarily "conservative" criteria for change it had selected, it becomes quite predictable that lack of a precedent that was not in violation of the Committee's position would be a serious check. However, impetus was added by a direct request from a body representing a community that would be greatly concerned with the operation of the statute. Such a request indicated that a pre-emptive right was seen as a need of the community to which the act was addressed. The fact that that "community" serving as audience for the new act was only dimly perceived or analyzed by the Committee did not affect this conclusion. They viewed that community at least as encompassing those who were to "use the act", and the Bar Association was itself and might claim to speak for such a group. Another of the
criteria selected by the Committee had been activated in favour of the inclusion of a pre-emptive right.

This was sufficient to stir the Committee to include such a right. However, their selection illustrates that they did not include it without making efforts to eliminate the conflict with their criterion. They chose the true statutory pre-emptive right such as the Dickerson report used. This provided substantial protection and was the approach to the problem that had been requested by the Bar Association. But instead of allowing the provision to be excluded by the company, the Committee confined its operation to the small, or non-reporting company and made its operation mandatory. In this arrangement there may be seen a compromise which again is perfectly in accord with the Committee's criteria and methods of operation. Confining the mandatory right to the non-reporting company is an obvious solution to several of the problems that have beset the search for a meaningful pre-emptive right. It is in the small company, as explained earlier, that the protection is really necessary, because it is in such companies that real control in the shareholders may exist. This is quite consistent with the moderate approach to shareholder democracy espoused by the committee. Although four sections were added to the new act to improve the position of the shareholder who may wish to use his vote against the incumbent board, sweeping changes in this area were not part of the Committee's policy either in their selected criteria or in the areas they chose for
It is predictable that the Committee made, nor, in the inclusion of the pre-emptive right, was attempting to make any reversal of the trend in business for the large corporations' shareholders to slide into a position more closely akin to creditors than to owners.

Also, confining the pre-emptive right to the non-reporting company made it possible to have a mandatory provision. It is only in the large corporations in which such rights tend to become difficult to apply and productive of nuisance and delay, that the liabilities of a pre-emptive right might outweigh its desirable (in terms of the Committee's criteria) consequences.

Apparently, the Committee attempted to make the B.C. pre-emptive right less easily avoided than the Federal proposal. Putting in a general duty on directors to offer shares pro rata to the members and then discussing the situation where there are classes of shares appears to be an effort to tighten the provisions, which, in the Dickerson proposals, enabled the entire right to be avoided simply by creation of a new class of shares. Unfortunately, that portion of the section dealing with share classes still contains ambiguity. It is possible still to interpret the section as meaning that where there are share classes but there are no holders of the shares of that class being issued, then there is no one to whom such an offer must be made. It is also possible, of course, to argue that in this situation the general part of the section requiring shares to be offered to
the members generally pro rata, takes effect. However, it does appear from (3) that this latter result was the one the Committee at least intended. That subsection clearly anticipates some pre-emptive offer having to be made to someone in all cases where the directors wish to issue shares. The Committee seems to have wished to tighten the provision, even though it has done so rather ineptly. This effort again is predictable if the Committee is seen to be following its own policy.
FOOTNOTES, CHAPTER IV


3Ibid.

4Ibid.

5Ibid.

6Ibid.

7Supra, footnote 1. The one exception will be discussed later.


9See Chapter III, A Legislative History.


11For example, numerous changes in wording of s. 228.

12In fact, no background discussion was provided at all, even as to the nature of the protection desired.

13s. 133, 179 and 180 as they appear in the final Act. See the Study Report, supra, footnote 1, at p. 9-10.

14See the Study Report, Part Three, Fundamental Criteria, para. 1, at p. 7. Also, the discussion in Chapter IV of this paper for discussion.


16Amended Bill No. 115, 1973, Second Session B.C. Legislature, s. 1.

17Of course, shares need not be voting. See Part IX Table A, Companies Act for typical voting arrangements.
Actually, a company that is not a reporting company as defined s. 1 of the Companies Act.

Business Corporations Act, R.S.O. 1970, c. 53, s. 44.

See Barry Slutsky, The Relationship between the Board of Directors and the Shareholders in General Meeting, 1967-68 3 U.B.C.L. Rev. 81.


Of course, it must be kept in mind throughout this discussion that this was true only if the articles of the company made no other provision. Pre-emptive rights, in fact, were a standard clause in the standard form articles of some law firms.

[1942] Ch. 304 (C.A.).

[1907], 15 O.L.R. 623 (Ont. Sup. Ct.).

[1903] 2 Ch. 506 (Ch.).

Supra, footnote 24.

Supra, footnote 26.

Supra, footnote 24.

Supra, footnote 26.


Ibid., at p. 145.

[1967] Ch. 254 (Ch.).

Ibid., at p. 268.

(1923), 33 C.L.R. 199 (High Ct. of Australia).

Ibid., at p. 217.

(1972), 33 D.L.R. (3d.) 288 (B.C. Sup. Ct.).

Supra, footnote 31.

Supra, footnote 24.

39 Ibid., at p. 636.
41 Note Smith v. Hanson Tire & Supply, [1927] 3 D.L.R. 786 (Sask. C.A.); Martin v. Gibson, supra, footnote 25; Bonisteel v. Collis Leather Co. (1919), 45 O.L.R. 195 (Ont. Sup. Ct.). Note also Glace Bay Printing Co. et al v. Harrington et al, (1910), 45 N.S.R. 276 (N.S.C.A.) in which it seemed to be assumed that had ratification been accomplished, it would have been successful.
42 Supra, footnote 31.
43 Ibid., at p. 268.
45 Ibid. at p. 972.
46 Ibid.
48 Ibid.
49 (1807), 3 Mass. 364.
51 The Model Act provides two alternative sections. The first eliminates the pre-emptive right completely except as expressly included in the articles. The alternative provides a pre-emptive right except as limited by the act or the articles.
53 Ibid., para. 113.
54 Ibid.
55 Ibid., para. 122 (h).
57 Ibid., s. 202.
58 Ibid.
60 Ibid., s. 5.05.
61 Supra, footnote 50.
62 Supra, footnote 59, Vol. 1, para. 5.05.
63 This, it will be recalled, was one of the criteria selected by the Committee.
64 Supra, footnote 52.
65 Supra, footnote 59.
66 Supra, footnote 50.
67 See Chapter III.
68 The Canadian Bar Association.
69 See Chapter IV for a discussion of the Committee's first criteria—who was to need the act.
70 Study Report, Part III.
71 Supra, footnote 59.
72 See Chapter IV.
CHAPTER V

SHAREHOLDER PROTECTION AND THE DISSENT PROCEEDINGS

THE HISTORY OF S. 228

Unlike s. 40, the present s. 228 was included in the draft act when it appeared as Bill 66. In the Departmental Study report, this section was classed with those to increase shareholder protection. However, in the first draft, s. 232, as the dissent section was then numbered, was of a very restricted application. The sections in which dissent proceedings could be invoked were not listed in s. 232, but the only situations to which it applied were those in the then numbered sections 247, 269, 275, and 315. This meant that only persons who were members of the company at the time at which the act came into effect had any access to dissent proceedings if the restrictions on business in the memorandum were altered or if a specially limited company were converted to a company with a Form 1 memorandum; any member of an amalgamating company could dissent and require the company to purchase his shares in the case of an amalgamation; and the procedure lists available to all members who had voted against a special resolution authorizing the liquidator on winding up the company to accept shares, debentures or other interests of a corporation as compensation for a sale of the company being wound up if that transfer, sale or arrangement
involved payment or liability for payment of money by the members.

In these few circumstances, the member could give notice of dissent and once the resolution was passed and proposed to be acted upon, he could compel the company to purchase his shares at the fair market value. However, all this was subject to two further conditions. The section would not apply if the company were insolvent or if the purchase of the member's shares would render it insolvent nor would it apply in the vaguely defined circumstance of "the notice of dissent being made ineffective by an action of the dissenting member."10

By the time Bill 16 was introduced, the Committee had made several substantial changes to s. 232. Some of these changes were apparently in response to criticisms of the section made by the Canadian Bar Association brief,11 once again, a substantial influence on the final act. At their suggestion, the sections to which the dissent procedure, now s. 228, would apply were listed in that section. This clarification is consistent with the Committee's goals of producing as easily understandable an act as possible. Also resulting from the CBA comments, the condition of meeting a solvency test was dropped. At the same time, however, the court's power to fix the price and terms of the purchase or sale of the shares was made subject to the proviso that it be exercised "with due regard for the rights of creditors."12 The new section also extended the situations in
which the procedure could apply. S. 149 which required a special resolution of the company to authorize the directors to sell, lease, or otherwise dispose of the whole or substantially the whole of the undertaking of the company, was now included. The Canadian Bar Association had been of two minds regarding this particular extension. In the comments on s. 149, such extension was suggested; in the comments on s. 232, the idea was rejected.

The inclusion of s. 149 despite conflicting advice even from the same source was predictable from the policy criteria of the Committee once the matter had been brought to its attention. It would, of course, in widening the area of application of the section, presumably widen the protection of the shareholder. This, in at least a conservative measure, was a course of which the Committee approved. It was, as already mentioned, one of the primary areas toward which the Draft act was directed. But to omit s. 149 from coverage of the dissent proceedings was to reduce the meaningful nature of the protection already given. It is quite obvious that much of what is accomplished by an amalgamation of companies, a situation where the dissent proceeding is allowed, may also be accomplished by a sale of the undertaking. A company wishing to avoid the rights of its minority shareholders to dissent from an amalgamation would find little difficulty in setting the scheme in the form of a sale of one company's undertaking to the other, if the sale was free from the
encumbrances of the dissenters. This has indeed been the experience of certain jurisdictions in the United States where the dissent proceedings, or appraisal remedies as they are there called, have been in existence for some years. As McDonough notes in an article on the provisions in Iowa, the courts developed a de facto merger doctrine to cope with the availability of appraisal remedies for merger but not for sale. As he says, "The de facto merger doctrine has been utilized by the courts as a means to preserve appraisal rights for dissenting shareholders in cases where the transactions were effected under provisions of the state's corporation statute other than the merger provisions, such as the sale of assets, where there is no appraisal for such transactions." The inclusion of s. 149 simply eliminated what the experience of others had shown to be an obvious flaw in the scheme the Committee wished to adopt. To allow the flaw to continue would have been contrary to the Committee's expressed desire to avoid useless rules.

The application of s. 228 was also broadened by dropping the requirement that dissent was available when restrictions on business were altered or a specially limited company converted only to those who had been members of the company at the time of the coming into effect of the new act. These changes were once again in response to the comments of the Bar Association brief, and once again, they are provisions which broaden, rather than narrow, the protection afforded to the shareholder by the section.
The request of the Bar Association to narrow the effect of the section by eliminating any right of dissent during the liquidation of a company was ignored by the Committee.  

One further change was made in the section, apparently in the interests of clarity. The provision suggesting that a notice of dissent could be rendered ineffective by an action of the member was altered to exclude the section when a member, having filed a notice of dissent, acts inconsistently with that notice.

For convenience of reference, s. 228 in its final form was as follows:

228. (1) Where

(a) being entitled to give notice of dissent to a resolution as provided in sections 149, 243, 265, 270, or 310, a member of a company (in this Act called a "dissenting member") gives notice of dissent;

(b) the resolution referred to in clause (a) is passed; and

(c) the company or its liquidator proposes to act upon the authority of the resolution referred to in clause (a),

the company or the liquidator shall first give to the dissenting member notice of the intention to act and advise the dissenting member of his rights under this section.

(2) Upon receiving a notice of intention to act in accordance with subsection (1), a dissenting member is entitled to require the company to purchase all his shares in respect of which the notice of dissent was given.

(3) The dissenting member shall exercise his right under subsection (2) by delivering to the registered office of the company, within fourteen days
after the company, or the liquidator, gives the notice of intention to act,

(a) a notice that he requires the company to purchase all his shares referred to in subsection (2); and

(b) the share certificates representing all his shares referred to in subsection (2);

and thereupon he is bound to sell those shares to the company and the company is bound to purchase them.

(4) A dissenting member who has complied with subsection (3), the company, or, if there has been an amalgamation, the amalgamated company, may apply to the Court, which may

(a) require the dissenting member to sell, and the company or the amalgamated company to purchase, the shares in respect of which the notice of dissent has been given;

(b) fix the price and terms of the purchase and sale, or order that such price and terms be established by arbitration in either case having due regard for the rights of creditors;

(c) join in the application and any other dissenting member who has complied with subsection (3); and

(d) make such consequential orders and give such directions as it considers appropriate.

(5) The price to be paid to a dissenting member for his shares shall be the fair value thereof as of the day before the date on which the resolution referred to in subsection (1) was passed, including any appreciation or depreciation in anticipation of the vote upon the resolution and every dissenting member who has complied with subsection (3) shall be paid the same price.

(6) The amalgamation or winding-up of the company, or any change in its capital, assets or liabilities resulting from the company acting upon the authority of the resolution referred to in subsection (1) shall not affect the right of the dissenting member and the company under this section or the price to be paid for the shares.
(7) Every dissenting member who has complied with subsection (3) may

(a) not vote, or exercise or assert any rights of a member, in respect of the shares for which notice of dissent has been given, other than under this section;

(b) not withdraw the requirement to purchase his shares, unless the company consents thereto; and

(c) until he is paid in full, exercise and assert all the rights of a creditor of the company.

(8) Where the Court determines that a person is not a dissenting member, or is not otherwise entitled to the right provided by subsection (2), the Court may make such order, without prejudice to any acts or proceedings which the company, its members or any class of members may have taken during the intervening period, as it considers appropriate to remove the limitations imposed upon him by subsection (7).

(9) The relief provided by this section is not available if, subsequent to giving his notice of dissent, the dissenting member acts inconsistently with his dissent; but a request to withdraw the requirement to purchase his shares is not an act inconsistent with his dissent.

THE BACKGROUND OF THE DISSENT PROCEEDINGS

The British Columbia Dissent proceedings section is an expression of an idea that has existed in the United States for many years. The Appraisal Statutes, as American writers call them, provide a similar "out" for shareholders in certain corporate circumstances. In 1931, an American writer referred to the then existing appraisal statutes as "purely experimental", but by 1972, similar statutes existed in nearly every American jurisdiction.
The reasons for the popularity of the appraisal statutes are not difficult to trace in the United States where the provisions formed an integral part of the development of corporate government. At common law, many important corporate transactions required the unanimous approval of the shareholders. As the needs of corporate management for more freedom of action increased, and the unanimous approval requirements were steadily reduced, a certain degree of protection for the unwilling shareholder was retained by allowing him to compel the company to buy his shares.25 In turn, the very existence of the appraisal remedy helped to free the actions of American management further from its shareholders. Where the remedy existed, the courts became reluctant to grant injunctions requested by minority shareholders even on grounds where, before the enactment of the new remedy, such injunctions had been granted.26 In a thorough analysis of the basis for and effects of the appraisal statutes, Bayless Manning refers to their proliferation as evidence of "the general tendency in the corporate field to center within management all significant operational control, and to relegate the shareholder's claim of 'ownership' to the status of a fungible dollar claim."27 So, in the United States, where the remedy first developed, appraisal statutes came to serve, and were probably designed to serve, a dual purpose. They were to be both a "bulwark for the rights of the minority" and a "lubricant to speed the spread of majoritarianism."28
The introduction of the remedy into the laws of British Columbia, however, did not have this double aspect. Before the new Companies Act, "majoritarianism" was already the rule in all the circumstances but one that the dissent proceedings were designed to cover. In the old act, s. 50 allowed such alterations of the objects of a company as were permitted to be made by a special resolution confirmed by the court; s. 51 required only an ordinary resolution of the company or resolution of the directors to include or exclude the ancilliary powers granted in s. 22; conversion of a specially limited company could be accomplished under s. 69 by special resolution; and, as under the new act, amalgamation could be accomplished by special resolution plus a resolution of three quarters of the shares of each class, as was set out in s. 178.

Sale of the undertaking under the old act was an ancilliary power of the company which could be included or excluded from the memorandum. The contractual base of the division of powers between the directors and the general meeting has already been briefly discussed in an earlier chapter. There were no special statutory provisions regarding how the sale of the undertaking of the company was to be completed or authorized. In the absence of contractual agreement, the standard form articles in the Companies Act provided that the directors "may exercise all such powers of the Company as are not, by the Companies Act, or any statutory modification thereof for the time being in force, or by these
articles, required to be exercised by the Company in general meeting."

Unless the specific memorandum of the company made special provision for approving the sale of the undertaking, therefore, it, like all the other powers of the company, could be exercised by resolution of the directors.

The only exception to this lack of power in the single dissenting shareholder was in the restricted case where during winding up of the company, some or all of its property was to be sold for at least partial compensation of some interest in the purchasing company where this arrangement involved the payment or liability for payment of money by the members of the transferrer company. In that restricted case, a kind of dissent proceeding was provided for an objecting member whereby he could compel the liquidator either to abstain from carrying the special resolution authorizing this transaction into effect or to purchase the dis­­senter's shares. The choice was left to the liquidator. The new act continues the general effect of this provision by giving the shareholder in the situation just described the right of dissent. However, such a transaction could and still can be implemented on the authority of a special resolution.

The reasonable conclusion to this investigation of the background of the dissent proceeding might be that in British Columbia, where the majority was already in control of the corporation, the new remedy could have no other effect than to increase shareholder protection. However, this is a purely
superficial view. As a device for economic protection of the shareholder, the dissent proceedings have not proved very effective. A comment on the Iowa provisions, for example, suggests that the remedy provides "substantially effectual protection of the minority's economic interests" only in the case of closely held corporations. Manning has an even harsher assessment of the provision's usefulness. He suggests that if the company's shares have a market, the dissent proceedings will obviously be of no benefit to the shareholder, only delaying his payment which he could obtain with less difficulty by a simple sale. If there is not an active market, then the shareholder is faced with the problems of valuation. "After months of litigation and expense, the court may find a high valuation for the dissenter's stock. Or it may find a low one. The only things certain are the uncertainty, the delay, and the expense." The only situation in which he sees the appraisal remedy as economically beneficial is that in which an actively traded stock drops precipitately "in demonstrable reaction to the transaction the shareholder finds objectionable" in which case, the shareholder will be entitled to the value of his shares before their drop in value. This, however, is the American rule, not the British Columbian. Subsection (5) of the B.C. section provides, it will be remembered, that the value of the shares to which their owner is entitled will include the effect on that value of the anticipated events.

The background of the remedy once again explains the
seemingly inefficacious nature of this economic protection. The protections that appraisal remedies were intended to provide were not economic at all, but protections which nineteenth century theorists saw as essential to the nature of companies. A comment in the Harvard Law Review expresses this by stating that the "purpose of the sections was so that minority shareholders should not be compelled to accept a fundamental change in the nature of their investment." In the nineteenth century, legal comments abounded with articles concerned with the real nature of the corporation. Was it "real" or "fictional"? Similarly, it was said that corporations were inherently incapable of certain actions. There seemed to be some conceptual difficulties in dealing with an entity that had no characteristics except those imparted to it by statute. As Manning explains it, a horse could not moo and a corporation, by its very nature, must have certain characteristics like the whinny of a horse, that could be postulated from its very existence once the legislature had created it. For the same reasons, it offended the theorists to think that a man could own "a horse and suddenly find he owned a cow." So some escape mechanism had to be provided for shareholders in the event of certain traumatic changes in the corporation, affecting its very nature.

This is why the events traditionally triggering the appraisal remedy have been merger (by far the most popular and common to almost all American appraisal statutes), sale of the
undertaking and certain charter alterations. These are by no means the only events in corporate life to adversely affect the economic interests of the shareholder. In fact, their effect may be to increase the value of the shares. But they are all, either indirectly or in themselves, events producing the objectionable "horse-cow" transformation. Thus damage is irrelevant to the availability of the dissent procedure.

The B.C. provision is, it will have been noticed, triggered by the same kind of circumstances as is traditional in the American statutes. The exception seems to be the availability of the remedy on winding-up, where economic considerations are crucial. It is not the decision to accept interests in another company that activates the dissent procedure, but a combination of that decision together with financial liability for the company's members. Yet in another way, the circumstance is quite consistent with nineteenth century theory. The liability of the member of the corporation is limited. Normally, he is responsible for no more financial contribution than the price of his shares. It would be contrary to the nature of the corporation if the members could, by any kind of majority vote, change that characteristic for the unwilling member. Winding-up itself is a natural event to a corporation, as death is to a living creature. But, again, a change in character is not. 45

Thus the dissent procedure satisfies needs of the business community only insofar as those needs are conceived in terms
of nineteenth century style corporate theory. They protect the shareholder in terms of legal changes in the entity, not economic risk. This illustrates how impossible it is to discuss a provision in a new statute, even in terms of the criteria selected by the drafting body for its reform, without an analysis of the factors that interpret those criteria to the minds of the draftsmen. As was discussed in an earlier chapter, the size and nature of the Corporate Legislation Committee made it unlikely there would be any questioning of the concept of "corporateness." An analysis of its own discussion of its criteria for reform supported this hypothesis. Here are its results. Given the myths of the corporate personality in their totality, the dissent procedure is a procedure needed and a protection desired by the community of shareholders. But this is only so in the light of these myths. Without them, it becomes important to ask whether the present shareholders really perceive themselves any longer in terms of owners; whether they care about the legal entity of their corporation as long as they have fair protection for their investment; whether it is any longer useful to the business community to preserve the ideas of the "real" nature of a corporation. With the myths accepted, however, the dissent procedure became a natural choice of the committee. The field of choice for reform.

It was even more predictable that a dissent procedure would be accepted once account is taken of the heavy reliance of the Committee on changes in other jurisdictions. As already
mentioned, appraisal statutes, the American counterpart of the dissent procedure, are common in the United States. Such a section was included in the American Model Act. In Canada, the dissent procedure has suddenly gained great popularity. Both the new Ontario Business Corporations Act and the Federal Proposals contain some form of the provision. In this section, this paper will investigate the forms of the procedure adopted by the Model Act, the Ontario Act and the Federal Proposals, as providing models upon which the Corporate Legislation Committee could, and probably did, draw.

The Model Act provision is lengthy and the procedure complex. A right of dissent arises in the case both of merger and of sale. The proceedings are begun by the dissenting shareholder filing a notice of dissent before the meeting at which the matter is to be voted upon. Only shareholders of record may dissent and they may dissent for less than their recorded number of shares. Trustees for more than one person, therefore, are free to dissent or not on the instructions of each beneficiary. If the motion passes, then the shareholder must file his demand on the company within a fixed time. The remedy is exclusive of all others since the shareholders must either file their demand or be bound by the vote. Once the demand is made the shareholder has no other rights than the right to payment of the fair value for his shares unless his demand is withdrawn and the company consents to the withdrawal, or unless the proposed action is
abandoned, in which case, the shareholder is reinstated.

Within ten days of the corporate action's being effected, the company must make a written offer to the shareholder, and the two parties have thirty days to agree on a price. If the price is agreed upon, then there is a further time limit for payment. If the price is not agreed upon, the corporation must within sixty days file a petition to have the matter adjudicated by the court. Appraisers may be appointed. Interest shall be granted at a fair and equitable rate determined by the court. Costs are normally to be assessed against the corporation unless the actions of the shareholder have been arbitrary, vexatious or not in good faith. The costs will not normally include fees of counsel unless the corporation has not made a reasonable offer.

The shareholder must submit his shares certificates to the corporation for notation thereon that a demand has been made within twenty days of his demand or forfeit his rights at the option of the corporation.

The value to be paid the shareholder is to be the fair value at the date prior to the date on which the approving vote was taken, excluding any effect on that value of the anticipation of the vote.\(^{54}\)

The procedure under the Federal proposals is very like the American Model Act's. The remedy is available not only for merger (or amalgamation in Canada) and sale, but also for varying the restrictions on transfer of shares of a class, varying
certain rights or conditions of a class listed in the act and for a vote to continue the company under the laws of another jurisdiction. But the general scope of the section is narrowed in comparison to the American by adding a solvency condition. A shareholder may withdraw his notice of dissent if this condition exists or he has the option of taking a claim against the company before other shareholders, but below that of the creditors.55

Other points of difference from the American Act include one more notice provision than that act contains. The Company must notify shareholders who file notices of dissent when the resolution has been adopted. Apart from that, the pattern of notices and time limits is very similar. Once the offer has been made and the time for its acceptance has lapsed, the Canadian procedure for getting the matter before the court is slightly different. The company has a limited time in which it may, not must, make such a petition. If it fails to do so, the shareholder has an additional twenty days to apply. No special mention is made of apportionment of costs.

The provision allowing a trustee to dissent in respect to the shares of only one of his cestui que trustent is also included, but worded more tightly, to prevent the anomalous situation of permitting a shareholder to dissent with only half his shares as well.56 The value to be paid for the shares is, again, the fair value, but no mention is made of the effect on the value of the objectionable resolution. The problem of exclusiveness of
remedy is solved in the opposite direction to the American Act, providing that the right of dissent is in addition to any other right.

The simplest, by far, of these dissent statutes is that found in the Ontario Business Corporations Act.\textsuperscript{57} Perhaps the reason for its simplicity is that it applies only to corporations that are not offering shares to the public. Presumably, these corporations would usually be small and there would be no need for the elaborate procedures of the widely held company. The restriction does make a certain degree of sense, considering that, if dissent proceedings afford economic protection at all, they do so primarily in the "close" corporation. However, the transactions the Ontario act lists as triggering the procedure are those traditionally selected because of their legal trauma within the corporation. Sale of the undertaking, amalgamation and deletion of transfer restrictions provide the only circumstances in which the proceeding can be used. If it is economic protection the act is seeking, then it is inconsistent not to extend the dissent proceedings to other economically threatening events. If it is protection against drastic legal change, then it is inconsistent not to apply the proceedings to large corporations as well.\textsuperscript{58}

Moreover, the Ontario provision requires that the dissenting shareholder have voted against the confirmation of the resolution. Whatever the motive behind the dissent proceedings,
this restriction seems illogical. For it means that holders of non voting shares could never make use of the provisions and such shareholders are both legally and economically in as great need of the remedy as holders of voting shares.

The dissenting shareholder does not need to give any notice to the corporation until he makes his demand for purchase, unlike the other proposals considered in this section. Failure to require notice before the meeting in question could hinder the decision of the shareholders. An amalgamation, for example, might not be carried through if too many shareholders had given notice of intention to dissent before the vote. After the vote is taken, too many dissenters may place the company in an impossible position with respect to the action they have authorized.

Once the action is in effect, the company and the dissenter have ninety days to arrive at an agreement. There are no other time limits. If they fail to reach agreement in that time, the dissenting shareholder must apply to the court to fix the price. No shares are to be purchased if to do so would render the company insolvent.

The section makes no provision for costs of the proceeding, interest or value to be given for the shares. Nor does it have any provisions for withdrawal of the demand once it has been submitted. If the action is not carried out, the rights of the shareholder under the dissent provision ceases, but no provisions for restoring him to his rights are given. What the rights of
the shareholder are during the period between giving his dissent and the purchase of his shares is not specified.

THE CHOICE OF THE COMMITTEE

The decision of the Corporate Legislation Committee to include a dissent procedure has already been discussed. The terms in which the new procedure was drafted represent a compromise between the simplicity of the Ontario provisions which leave many questions unanswered and the strictly defined procedures of the American-Federal proposals which provide many pitfalls where the unwary may lose his rights. Thus there are few time limits in the B.C. provisions, but problems such as the effect of anticipated voting on the value of the shares, the rights of a dissenting shareholder while waiting for payment, and removal of the restrictions on the dissenting member's rights if for some reason he is dissentitled to dissent are dealt with.

Corresponding to relative simplicity of procedure in the B.C. Act compared with the American, is the far greater discretion and scope given to the court under s. 228. Neither the award of costs nor interest is mentioned in the section, but the Court is given a general power to "make such consequential orders and give such directions as it considers appropriate."61 As observed in Chapter IV of this paper, a desire to make a self-regulating companies act, combined with an increase in power and protection to the shareholders is likely to expand the discretion
and powers of the Courts, just as self-regulation combined with a conviction that directors should generally have complete control over corporate affairs is likely to constrict their powers.\(^{62}\) Moreover, if procedural rules are to be kept to a minimum, so that the act can be used, at least in some circumstances, by those without professional advice,\(^ {63}\) some mechanism must be provided to work out necessary details, such as interest payable and costs, on a reasonably just basis in each individual case. The courts are quite accustomed to being assigned such tasks. The general pattern of s. 228 appears to be to confine the time limits and procedural intricacies to the main point of getting the value for the shares and leave surrounding problems to be solved by the courts.

But in dealing with the bare procedure, the B.C. Act undeniably has numerous faults. The basic scheme is, although somewhat pared down, a system of notices and cross-notices like the American system. However, in the B.C. Act, many of the triggering transactions have different time limits in which the shareholder must first file his notice of dissent. For a sale, for example, the notice must be filed two days before the vote.\(^ {64}\) In case of an amalgamation, the shareholder has until five days after the agreement has been adopted to file his notice.\(^ {65}\) Particularly in these transactions, there seems no rational explanation for the difference. The undue hardship imposed on the company by allowing it to act before it is aware of possible
dissenters has been mentioned. Moreover, although the CBA comments persuaded the Committee to enumerate the triggering transactions in s. 228, the times within which the notices of dissent must be filed are left in the sections describing the transactions. Surely clarity would be much aided by placing all the procedural requirements for dissent in the same section, even if that involved repeating them. Excessive repetition may not be good literary style, but it is a useful and necessary drafting technique, particularly when the statute is directed to the layman. These flaws are not consistent with the Committee's criteria of clarity and simplicity. However, perfect clarity in drafting cannot be expected from a Committee with other responsibilities and demands on their time. Within their concepts of the corporation and their own demands for simplicity, the Corporate Legislation Committee has produced a meaningful remedy for the shareholder.
FOOTNOTES, CHAPTER V

1 Companies Act, Stats. B.C., 1973, c. 18, hereafter referred to as s. 228, or the B.C. dissent procedure.

2 Companies Act, Stats. B.C., 1973, c. 18. The preemptive right, see Chapter V.


5 Ibid.

6 s. 247(2), Bill 66.

7 s. 269, Bill 66.

8 s. 275, Bill 66.

9 s. 315, Bill 66.

10 s. 232 (9)(b).


12 s. 228 (4)(b).

13 Companies Act, Stats. B.C., 1973, c. 18. The section had the same numbering in Bill 66.

14 Supra, footnote 3. The Comments are listed in the body of the Report by the section numbers to which they relate. Comments of this Committee will be listed here by the section numbers in whose discussion they appear.

15 Ibid.

16 Chapter IV, Introduction.

17 For example, see Lee H. Parrish, Corporations-Stockholders, Appraisal Rights, (1966), 35 U. Cin. L.R. 704.

19 Ibid., p. 25.


21 Supra, footnote 3, comments on s. 232.

22 Ibid.

23 Ballantine, Questions of Policy in Drafting a Modern Corporation Law, (1931), 19 Calif. L.R. 465, at p. 482.


25 Comment, Dissenting Stockholders—Right to Demand Purchase of Shares--N.Y. Stock Corp. Law, (1955), 1 N.Y.L.F. 80. Also see Manning's article, Infra, footnote 27.


27 Manning, op. cit., p. 230.

28 Ibid.

29 Companies Act, R.S.B.C. 1960, c. 67.

30 Ibid.

31 Ibid.

32 Ibid.

33 Ibid.

34 s. 22 (1)(1). s. 22 (1) provided that a company had these ancilliary powers unless they were specifically excluded.

35 See Chapter V, footnotes 20-23.

36 Supra, footnote 29, First Schedule, Table A, s. 56.

37 Ibid., s. 225 (2) of the Act.

Comment: Right of Shareholders Dissenting from Corporate Combinations to Demand Cash Payment for Their Shares, (1959), 72 Harv. L.R. 1132 at p. 1143.

Supra, footnote 24. Nearly all American jurisdictions include merger. The triggering transactions for each state are found in the American Model Act.

Again, the question is: What is inherently natural to a corporation?

See Chapter IV, Limitations on the Criteria.

Supra, footnote 24, s. 80 and s. 81.

Business Corporation Act, R.S.O. 1970, c. 53, s. 100.


Supra, footnote 24.

Ibid., s. 81. There is no time limit on this notice as long as it is submitted before the meeting.

Ibid., s. 81.

As mentioned in the comments following the section.

These provisions are all included in the Model Act, supra, footnote 24, s. 81.

Supra, footnote 49. B.C.'s provision is the only one of these discussed actually to give the dissenting shareholder the rights of a creditor. Nevada is, according to Zabriskie, Appraisal Statute, an Analysis of Modern Trends (1952) 38 Va. L.R. 915 the only American State to take this view. Other approaches to securing the dissenter's right to payment are discussed by him at p. 928.
The section reads "14.17 (4) A dissenting shareholder may not claim under this section with respect to less than all the shares of a class registered in his name and held on behalf of any one beneficial owner."

Supra, footnote 48.

The corporate myth does not distinguish in nature, it will be recalled, between private and public corporations. They both share the nature of "corporateness".

For a discussion of the negative vote in American jurisdictions see Zabriskie, supra, footnote 55 at p. 922.

In American jurisdictions with this problem, elaborate "kick out" provisions are inserted in intra-corporate agreements to provide for circumstances where there are too many dissenters to make the action feasible.

s. 228 (4)(d).

See Chapter IV, Criteria Selected for the discussion of the Committee's criterion of self-regulation.

This contingency was, it will be recalled, specifically mentioned in the criteria.

s. 149 (5).

s. 270 (3).

See Dickerson, Fundamentals of Legal Drafting.

Criteria Selected, Chapter IV, ideas (6) and (h).

"Meaningful", at least, within the Committee's own terms of reference.
A requirement that directors disclose any interest, direct or indirect, that they had in any contract proposed for their company was found in the old B.C. Companies Act. Disclosure of the nature of this interest was to be made to the board either at the first meeting at which the contract was discussed or, if he was not then interested, at the first meeting after he became interested. A general notice that the director was a member of any specified company or firm and was to be taken as interested in any of their contracts, was to be a sufficient declaration of interest. However, this duty was in addition to, not in derogation from, the general common law rules regarding interested directors contracts. This section was worded in much the same way as the requirement for disclosure of interest included in the English act of 1929.

The new act in s. 143 does little more than clarify the old rule. It provides that the nature and extent of the interest be disclosed, not merely the nature. Whether or not this alteration makes any change in the substantive effect of the law is debatable, but it does clarify to some extent, the question of
how much must be disclosed. However, the general notice provision has not been significantly altered by the new act. Thus, in many cases, simple disclosure of membership in a particular company will be sufficient to satisfy the section and an increase in disclosure requirements from "nature" to "nature and extent" will be meaningless. Other objectionable aspects of the disclosure section that have been unfavourably commented upon by writers like Gower\(^8\) have also remained. Thus, disclosure is still made to a director's "cronies" on the board, and not to his fiduciary, the company as a whole.

In two specific circumstances, the new act declared the director to be deemed not to be interested, presumably because in the two situations named, there is no conflict between the interests of the two parties involved. Both when the company in which he has an interest has guaranteed repayment of a loan made to the company of which he is a director and the transaction proposed relates to that loan and when the company in which he has an interest is a holding company or subsidiary of which he is also a director, and the transaction proposed is with that company, actual conflicts of interest will be rare.

The new act adds sections\(^9\) mitigating the common law, relating both to the accountability of the directors for profits made in transactions in which they have an interest and to the validity of the impugned contract. The changes made by these sections will be discussed in the next section of this chapter.
This chapter will primarily deal with an assessment of s. 143, and not the directors' liability section 144, and 145, the section affecting the validity of the contract. However, because both validity of the contract and directors' accountability for profits are brought into question by the general topic of interested directors, and both are inextricably tied to the duty of disclosure, many references will be made to these sections.10

There is no substantial difference between the sections 143, 144 and 145 and the corresponding sections in Bill 66.11 This was in spite of objections by the Canadian Bar Association brief,12 requesting a rethinking of s. 143, and an alteration of the "fair and reasonable" provisions of s. 144 on the model of the Federal Proposals discussed below in the section on Field of Choice. S. 145 was also criticized by the CBA as likely to be productive of litigation. Once again, the Committee's reaction to these comments was predictable. These objections are different in nature from those discussed in earlier chapters of this thesis to which the Committee responded favourably.13 They do not deal with omissions or oversights of the Committee, nor with technical changes, nor with slight alterations in an acceptable general scheme. They are all general criticisms, requiring, if accepted, an "about face" by the Committee on matters which they had already decided. Given a Committee with a fixed criteria for change, major alterations in decisions already made in accordance with those criteria are unlikely. Directions with policy
implications must reach the Committee, it seems, before they formulate their own criteria. Otherwise, unless the criticisms are made in such a way as to convince the Committee that the new suggestions are more in accord with the established criteria, they may be rejected. Other criticisms of the Canadian Bar Association discussed previously, illustrate one aspect of this proposition. They were expressed in terms obviously promoting the criteria accepted by the Committee. The comments on these sections were not, and, predictably, they were ignored.

The new sections dealing with interested directors are for convenience of reference set out as follows:

143. (1) Every director of a company who is, in any way, directly or indirectly interested in a proposed contract or transaction with the company shall disclose the nature and extent of his interest at a meeting of directors.

(2) The disclosure required by subsection (1) shall be made

(a) at the meeting at which a proposed contract or transaction is first considered; or

(b) if the director was not, at the time or the meeting referred to in clause (a), interested in a proposed contract or transaction, at the first meeting after he becomes interested; or

(c) at the first meeting after the relevant facts come to his knowledge.

(3) For the purpose of this section, a general notice in writing given by a director of a company to the other directors of the company to the effect that he is a member, director, or other officer of a specified corporation, or that he is a partner in, or owner of, a specified firm, is a sufficient disclosure of interest to comply with this section.
(4) A director of a company shall be deemed not to be interested or not to have been interested at any time in a proposed contract or transaction by reason only,

(a) where the proposed contract or transaction relates to a loan to the company that he or a specified corporation or specified firm in which he has an interest has guaranteed or joined in guaranteeing the repayment of the loan or any part of the loan; or

(b) where the proposed contract or transaction has been or will be made with, or for the benefit of, a holding corporation or a subsidiary corporation, that he is a director of that corporation.

144. (1) Every director referred to in subsection (1) of section 143 shall account to the company for any profit made as a consequence of the company entering into or performing the proposed contract or transaction, unless

(a) he discloses his interest as required by section 143;

(b) after his disclosure the proposed contract or transaction is approved by the directors; and

(c) he abstains from voting on the approval of the proposed contract or transaction;

or unless

(d) the contract or transaction was reasonable and fair to the company at the time it was entered into; and

(e) after full disclosure of the nature and extent of his interest therein it is approved by special resolution.

(2) Unless the articles otherwise provide, a director referred to in subsection (1) of section 143 shall not be counted in the quorum at any meeting of the directors at which the proposed contract or transaction is approved.
145. The circumstance that a director is, in any way, directly or indirectly interested in a proposed contract or transaction, or a contract or transaction with the company shall not make the contract or transaction invalid, but, if the matters referred to in clauses (a), (b), and (c), or in clauses (d) and (e), of subsection (1) of section 144 have not occurred, the Court may, upon the application of the company or any interested person, enjoin the company from entering into the proposed contract or transaction, or set aside the contract or transaction, or make any other order that it considers appropriate.

THE BACKGROUND OF S. 143, 144 AND 145

At Common law, directors, it will be recalled, had a position somewhat analogous to a trustee. At least, like a trustee, they stood in a fiduciary position to their company as a trustee did to his cestui que trust. This duty was early interpreted to mean that a company was entitled to the disinterested opinions of its directors, and directors were thereby prohibited from placing themselves in situations where their personal interests could or did conflict with those of their fiduciaries. The situations of possible conflict, in which the director is said to be "interested" are many. They cover such interests as "interest in property on the security of which a company proposes to make a loan to outsiders and any shareholders in a corporation with which the company in question wishes to contract" as well as the obvious cases where the contract is made directly with the director.

The consequences of entering into a contract where one or more of the contracting company's directors were thus "interested"
were severe for everyone. Unless there were some provisions to the contrary in the articles, the contract could be invalid. If it had been authorized at a meeting of directors where the interested director was needed to make up a quorum, then it was not properly authorized and was invalid.\(^{20}\) If it had been approved by a majority of a quorum of disinterested directors, then the company could, at its option, vote to set the contract aside.\(^{21}\) The company could, of course, elect to affirm the contract or it could be estopped from recission by acquiescence in it.\(^{22}\) An affirmation of the contract by majority vote was valid as long as the action was not oppressive.\(^{23}\) And, simply because the majority shareholder was also the interested director did not make the action oppressive.\(^{24}\)

The position of the interested director was simpler, but that was little solace. He was accountable for all profits made by him because of the contract.\(^{25}\) Neither disclosure of his interest nor failure to vote on the question of the contract's adoption nor even staying away from the meeting altogether relieved him of this liability.\(^{26}\) And, as the Privy Council held in Gray v. New Augarita Porcupine Mines,\(^{27}\) "even if the contract is not avoided, whether because the company elects to affirm it or because circumstances have rendered it incapable of recission, the director remains accountable to the company for any profit that he may have realized by the deal."\(^{28}\) These rules were absolute and did not depend on any consideration of the fairness of
The ability of the company to make its own arrangements through provisions in its articles to alter or eliminate these consequences has been mentioned. Lord Radcliffe in Gray\textsuperscript{30} was following well established authority when he said, describing the effects of an interested contract, that "it is open to companies to make such provisions as they please for the purpose of modifying the incidence of this general principle."\textsuperscript{31} Articles excepting directors from liability for any contracts in which they had an interest and validating all such contracts became widespread. In 1929, they were so prevalent, and to such wide effect that in England, the government introduced the requirement that directors disclose any interest in contracts before the board.\textsuperscript{32} Whatever freedom the company's articles allowed its directors, at least the board would have to be informed of the adverse interest. But the disclosure section did not alter the law any further.\textsuperscript{33} If the company's articles allowed directors to enter into contracts where they had an interest, then so long as they disclosed the interest, the articles still governed. If there were no special provisions in the articles, disclosure or not, the equitable rules requiring an accounting from the director and permitting avoidance of the contract by the company were brought into operation simply by virtue of a director's interest. This was the scheme that was adopted in B.C. and continued in force until the new act.
In the United States, disclosure also became a requirement. However, there the duty to disclose developed through the case law and was allowed to affect the validity of the impugned contract. The various states developed the concepts relating to interested directors in several ways. In New York, the courts began in 1865 with the strict English rules. By 1886, it was established that a contract with director interest was "repugnant to the great rule of law which invalidates all such contracts . . . at the election of the party . . . represented." This line of cases was never really over-ruled. However, by 1895, a competing test was established for determining the binding nature of the contract based on good faith. A third test, an examination of the fairness of the contract, was proposed by Judge Cardozo, as he then was. In California, on the other hand, there arose a distinction between contracts made between companies with interlocking directors, which were void or voidable, and contracts between the director and his corporation which, if approved by a disinterested majority, were voidable only in the event of unfairness, unreasonableness or fraud. Generally, standards of fairness were supported in determining the validity of contracts in many American jurisdictions.

Disclosure was also introduced and considered by the American courts in a variety of ways. The breaking of the strict rules by the vague "fairness" test left the courts free to consider a variety of factors. In determining this "fairness", case
law referred to matters such as whether the director who was interested was also the negotiator for his corporation; whether or not the consideration given for the contract was adequate; whether or not the transaction was necessary to the corporation; and whether or not full disclosure of interest was made. The relationship between disclosure of interest and the fairness test was expressed by H. C. Barragar in the Oregon Law Review, providing an accurate summary of most authorities, as follows:

The fairness test is now followed by most courts in evaluating the conduct of corporate directors in conflict-of-interest situations. As previously noted, its application has not been uniform. Its use allows flexibility in corporate dealings but gives rise to uncertainty in some transactions because of its indefiniteness and subjective nature. A director is discouraged from placing himself in a position where his personal interest will conflict with that of the corporation only to the extent that disclosure of interest discourages self-dealing. Even under the fairness test, the requirement of disclosure is generally given prophylactic application with nondisclosure invalidating a transaction, regardless of fairness. Decisions under the rule have been made on a case-to-case basis, and, with the possible exception of the requirement of disclosure, there is little in the way of crystallized standards to guide the interested director in his conduct.

In England (and B.C.) and in the jurisdictions of the
United States, then, disclosure assumed some importance in the law. Disclosure of interest, in England, was an added duty of the director, but having no further effect; in most American jurisdictions, it became important at common law as a method of ensuring the validity of the contract in question.

THE FIELD OF CHOICE FOR REFORM

If some alterations were to be made in the law relating to directors' disclosure of interest as it stood in B.C., there were many models from which to choose. Basically, there were two patterns. The Committee could do as the Jenkins Report recommended in England and simply modify the directors' duty confining the need for disclosure to material interests only and extending it to interests in all contracts entered into by the company whether or not they came before the board. The other alternative was to follow the American approach and extend the results of disclosure to some scheme for the modification of the consequences at law of contracts where a member of the board had an interest. In the United States, this approach developed by their courts was being codified with some alterations. In Canada, both Ontario and the proposed Federal act were following the American style of provision. In this section, a few of the suggested forms of legislation will be considered.

The American Model Act proposal, while it differs in some respects, from most of the states' legislation, has the same
basic pattern as them all.\textsuperscript{48} It deals solely with the validity
of the contract made and disclosure is required in that context.
Neither the financial interest of a director in a contract, nor
the fact that he was present at the meeting at which the contract
was authorized, approved or ratified, nor the fact that his vote
was counted at such meeting is to make the contract either void
or voidable if one of three conditions exist. The section will
only apply if the interest was known to the approving board and
the contract was approved by a sufficient vote without counting
the vote or the interested director; or if the interest is known
or disclosed to the shareholders entitled to vote and they approve
the contract; or if the contract was fair and reasonable to the
company. The interested director may be counted in the quorum of
the approving meeting.\textsuperscript{49}

The Federal proposals claim to be a melange of the pro-
visions of New York, Delaware, California and England.\textsuperscript{50} The
American acts all have a basic structure like the model act de-
cribed above.\textsuperscript{51} The influence of the United Kingdom Act is shown
by the formulation of the section in terms of a duty of directors
to disclose. This is still the major emphasis unlike the
American statutes where the stress is placed upon ways of assur-
ing the contract's validity. This disclosure duty is placed only
upon directors who are parties to the contract or have certain
specified interests in any person who is a party to the contract.
These interests include being a director or officer of any
contracting company or having a material interest in the person contracting. The restriction to "materiality" of interest comes out of the Jenkins Committee recommendations. However, used in this way, these restrictions on disclosure to specified situations may have left a wide gap in the law. The later protections offered by the section are only extended to the directors with the interests named in the section. But the common law did not restrict the accountability of directors to contracts in which they had such important interests. In 1927, for example, in the case of Victors Ltd. v. Lingard, the equitable principles were applied to directors who issued a debenture to secure the company's debt which the directors had guaranteed. No interest requiring disclosure in the Federal proposals is here present. More generally, even a trivial interest in a contract, if it were of an adverse nature, would make the contract voidable and the director accountable for any profits. Under the proposed Federal act, these consequences could still follow for such trivial interests that do not have to be disclosed. Only interests the section required to be disclosed and therefore only material interests would be protected.

The circumstances under which the equitable rules will not apply are the legacy from the American acts considered by the Federal proposals. A director is liable to account for profits unless he has disclosed his interest, the contract has then been approved by a majority of a disinterested quorum of directors and
the director shows that the contract was reasonable and fair to the corporation when entered into by it. These are the same circumstances as are usually present in the American statutes, but the first two and the last are usually alternatives. That is, the consequences are avoided if there has been disclosure and disinterested approval or if the contract is fair and reasonable. However, commentators seem to agree that when the effect of the old law in American jurisdictions and the statute are considered together, fairness of the contract will still be a consideration even if there has been disclosure. An unfair contract, it appears, could not be relieved from the full effects of the old law even if the director had disclosed his interest in it. In Canada, where the principles were different before statutory modification, the phrasing of the section in terms such as are found in the American statutes would mean that disclosure would suffice to relieve a director of the consequences of the equitable principles even in the case of an unfair contract. This would, of course, be subject to an action against the director by the company for general breach of his duty to act in good faith and in the best interests of the company. Therefore, it was thought necessary to require the director in Canada to establish both disclosure and reasonableness "to preclude mutual back-scratching by directors who might otherwise tacitly agree to approve one another's contracts with the corporation."

But although this alternative does result in an effect
very like the combination of American common law and statute, the burden of proof is different. Under the unaltered American case law, there was some doubt as to who had the burden of establishing fairness or unfairness of the contract. The most common solutions appeared to be that either the director had to establish that the contract was fair or that if some evidence was given of unfairness, then the director had to prove that it was fair. The first of these situations is like the present solution of the Federal proposals. However, when the American Statutes were introduced, although the disclosure duty was considered not to have excluded considerations of fairness, it was only to the extent that disclosure would not save an unfair contract. Once disclosure was made, therefore, the company had to establish that the contract was unfair before the equitable principles applied.

Also differing from the American pattern is the lack of emphasis placed on the effect on the contract. The Federal proposals concentrate on relieving the interested director of his duty to account for profits, leaving the validity of a contract almost to an afterthought. The only reference to the contract at all is subsection (6) which provides that where a director has not complied with the section, an interested person may apply to the court which may set the contract aside. According to the comments on the subsection, the purpose of this is to "ensure that a contract beneficial to the corporation will not be
declared void because of the interest of a director.\textsuperscript{62} Also according to the comment "subsection (6) makes it clear that such contract is valid until the corporation or some interested person opts to set the contract aside."\textsuperscript{63} It is suggested that subsection (6) has no such clear effect. No mention at all is made of what happens to the contract if the director does comply with the section. At common law, the equitable principle of voidability applied despite disclosure, fairness or approval by the directors.\textsuperscript{64} Only approval by the shareholders could save it. Nothing in the section abrogates this effect. Nor is the court given the exclusive power to set such contracts aside. Whether the director has or has not complied with the section, nothing precludes the shareholders from voting themselves to avoid the contract. Subsection (6) might well be interpreted simply as giving additional authority to avoid the contract to the court.

Like the English section, the Federal proposals apply even to contracts not requiring approval by the shareholders or the board and there is a provision for general disclosure by a general notice of interest in a company.

The Ontario\textsuperscript{65} provisions borrow similarly from both the American and English. Like the Federal proposals, they are formulated into a disclosure section with the effects on the liability of the director and on the contract dependent upon that disclosure. What must be disclosed is, however, broader in scope. Every interest, direct or indirect in a contract or
transaction other than one relating to his remuneration must be disclosed. However, interests that are not material need not be disclosed. The problems with the Federal concept of materiality are avoided by other provisions in the section abrogating the equitable principles in general terms. It is not just contracts with interests that must be disclosed that are affected by the section, but all contracts in which the director has an interest. There is no general provision for notification of interest in a particular company.

Dealing with the equitable principles, the Ontario section copies the American legislation in that it softens their application through the duty of disclosure. It deals with both director liability and the effect on the contract, but in a more balanced way than the Federal proposals do. Equal attention is given to each. In all cases, the director, to be relieved of his liability to account, must have been acting honestly and in good faith at the time the contract was entered into and the contract, not to be voidable, must have been in the best interest of the corporation. Applying the "best interest of the corporation" test as the overriding criterion for preserving the validity of the contract, introduces a concept that is likely to have the same effect as the American fairness test when combined with the American statutes. Fairness of the contract will undoubtedly form part of the inquiry, and presumably, the burden of proving a contract not in the best interests of the corporation will have
to be born by the party alleging the contract should be voidable. As for the director, he must have been fulfilling only his standard duties of good faith, although obvious unfairness of the contract could clearly become an issue in this circumstance as well, where it could point to mala fides.

If these all-pervasive criteria are fulfilled, then the director is not liable to account and the contract is not voidable if one of two sets of circumstances has occurred; either there must have been disclosure of interest and approval by a disinterested majority at the directors' meeting; or there must be disclosure of interest in an information circular to shareholders calling a meeting and at that meeting the contract must be confirmed or approved by a two-thirds majority. This last provision is more severe than were the remedial provisions for contracts before the statute. There, the contract could be approved by simple majority. This provision, in supplanting the equitable principles, leaves no doubt as to the power of the shareholder's meeting, as did the Federal proposals and adds a strong incentive to the director to disclose his interest to the board in compliance with the section. But once again, there is an hiatus in the law. Suppose the interested director cannot muster a two-thirds majority to approve the contract, but has sufficient votes to prevent a majority voting to avoid it. If the interested director was not included in the quorum at the meeting that passed the contract, then it is merely voidable, and
not void. But then, a majority of shareholders' votes is needed to avoid it. Presumably, if the interested director controls the simple majority, he might stall the avoidance of the contract until such time as the company is too far committed to allow rescission. The requirement for the two-thirds majority is in this circumstance, ineffective.

THE CHOICE OF THE COMMITTEE

Of the four major areas for change designated by the Committee in their study report, the area they list as "company management" is the only one whose very description does not indicate some particular bias in policy. The others—shareholder democracy, shareholder protection, protection for those dealing with companies, as they list them—all include some word with particular connotations for change. But the "company management" heading has nothing to indicate the aims of the committee for the direction of its change. In their discussion of the topic, the Committee lists fifteen changes made in this area. Of those, eight are described by the Committee itself as dealing either with "simplification" and "clarification". Two others, they describe as "eliminating most of the complication" inherent in a graduated fee schedule and reducing the number of filings. These two are also obviously directed toward the goals of simplicity and clarity in the act. The sections being discussed in this chapter are typical of the Committee's responses in the
company management area. They are classified by them as being chiefly for purposes of clarification.

Simplicity and clarity are, it will be remembered, important portions of the criteria selected by the committee. The other choices of the Committee in other areas made these criteria almost the only ones that could be applied in the company management sections. Any major changes in company management would mean either strengthening or weakening the powers of the board to manage the company. Neither of these alternatives was palatable to the committee. Strengthening the powers of the board, perhaps lessening their responsibilities, would have been a blow to shareholder democracy which the committee was obviously not prepared to strike. It would have meant some abandonment of the concept of the shareholder as owner which they were committed to erode no further. Weakening the powers of the board would have meant either a major increase in shareholder democracy which they were clearly not prepared to undertake, or an increase in government interference which was in direct opposition to their commitments as well. Their only real scope for change here was clearly within the status quo, but clarified and improved as much as possible. Too much alteration in company management in substantive terms would have produced too many side effects in the other areas of change in which the committee had already taken a policy stand.

All the Canadian and American precedent was in favour of
altering the equitable principles affecting contracts with director interest. It was a step that could, if carefully effected, increase both the freedom of the directors and the actual protection of shareholders. Increased pressure could be put on the directors to disclose interest through extending protection to them from the results of this interest if they disclosed. The shareholders would have more opportunity to learn what was happening if disclosure was encouraged, and deals that were actually destructive to the company's interest would be more easily discovered and less readily concealed.

The general pattern followed by the Committee was the standard Canadian structure. The United Kingdom disclosure duty was retained, in this case even unaltered by a narrowing of the duty to material interests only. This, of course, eliminated the possible gap left in the law by the Federal proposals where significant interests, if declared, might not affect a contract, but trivial ones might leave the director liable to the company. Then certain conditions were set out in which the equitable provisions will be mitigated.

The conditions selected for the B.C. act have obvious roots in the American, Federal and Ontario suggestions. From the American statutes, the Committee adopted the alternative conditions of disclosure or proof of fairness of the contract. As discussed at some length, the effect of this alternative in Canada is not the same as in American jurisdictions. However,
the alternative is strengthened by the coupling of the requirement to show a fair and reasonable contract with the subsequent requirement of disclosure and approval by a special resolution. This will tend strongly to encourage the fulfillment of the first set of conditions, that is, disclosure to the board and approval by a disinterested majority of directors. Otherwise, disclosure will have to be made anyway and a two-thirds vote of approval may be hard to obtain. This idea is clearly borrowed from Ontario, but the hiatus there produced by failure of the Ontario act to alter the common law requirement for a simple majority to avoid a voidable contract has been filled in the B.C. act. S. 145 makes it clear that even if the preceding sections have not been complied with, only a court can set the contract aside.

The idea that the contract should not in any event be voidable by the company, but only by action of the court was taken from the Federal proposals. Once again, however, the B.C. act makes improvements. It is clear that the court has the exclusive jurisdiction to set the contract aside. Unfortunately, it is not clear precisely what circumstances will permit such action. The words "if the matters referred to in clauses (a), (b), and (c) or in clauses (d) and (e) . . . have not occurred" could be interpreted to mean "if neither of these two groups of circumstances has occurred" or "if either one of these two groups of circumstances has not occurred". Generally, however, the B.C. act is clearer, simpler and more meaningful than the other
proposals of the same type. Criticisms can be made of its general import. As was mentioned, the disclosure made only to cronies on the board has been criticized.\textsuperscript{77} So might the provisions for a general notification of interest be regarded as too lenient. They do maintain what was the status quo in British Columbia, in the United Kingdom and what was being proposed for the Federal act.\textsuperscript{78} This was, as drawn from the preceding analysis, the most probable course to be followed by the Committee in dealing with company management. Basically, they took the old disclosure section and added to it new consequences, making those consequences as tight and simple as possible.
FOOTNOTES, CHAPTER VI

2 Companies Act, R.S.B.C. 1960, c. 67, s. 111.
3 Ibid., s. 111 (2).
4 s. 111 (3).
5 s. 111 (5): Nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company.
6 Companies Act, 18 & 19 Geo. 5, c. 17.
7 Gower, op. cit. infra footnote 8, in interpreting the U.K. requirement for disclosure of the nature of the interest appears to believe that this requires disclosure of the extent of the interest as well, although not all the material facts, p. 530. At least one Canadian authority, however, is of the opinion that a requirement to disclose the nature does not include disclosure of the extent of the interest. See Ziegel, Studies in Canadian Company Law, 1972, c. 12, p. 377.
9 Supra, footnote 1, s. 1, 144 and 145.
10 This duty, as will be seen, developed in B.C. separately from the mitigating sections, but was made the basis for them when they were included. In new Canadian proposals, discussed below, what appears in the B.C. act as three sections, usually appears as one. Therefore, the three B.C. sections, for comparison purpose, will often be treated as a unit.
11 The same numbering also appears in Bill 66.
12 Report of the Committee on Corporate Legislation, Canadian Bar Association, B.C. Branch, (1972), comments on s. 143, 144, 145.
13 See the History of the pre-emptive right section, for example, in Ch. V.
The CBA comments, and, indeed, most of the substantial outside comments did not reach the Committee until a draft bill had been produced. See Ch. III and IV.

For example, the pre-emptive right, improving shareholder democracy by protecting their vote.

Percival v. Wright, [1902] 2 Ch. 421 (Ch.).

For example, see North-West Transportation Co. Ltd. & James Hugh Beatty v. Henry Beatty (1887), 12 App. Cas. 589 (P.C.).


Ibid., at p. 373; supra, footnote 8, at p. 526-527.

See Lingard, Directors: The Conflict of Interest and Duty (1960) 24 Convey. 170, at p. 174 for a discussion of the directors approving the contract without a quorum of disinterested directors. Also, for the effect of this rule combined with the indoor management principle of the Royal British Bank v. Turquand (1855), 5 E & B. 248.

Ibid.; also supra, footnote 17, at p. 593-94: "Any such decline or engagement may, however, be affirmed or adopted by the company, provided such assentance . . . is not brought about by unfair or improper means."

Gray v. New Augarita Porcupine Mines, [1952] 3 D.L.R. 1 at p. 13 (P.C.) Lord Radcliffe gives at this page a brief summary of the law to which, binding as it is on Canadian courts, little can usefully be added.

Supra, footnote 17.

Ibid.

Supra, footnote 22. Also Gower, op. cit., p. 527.

Ibid., also, Imperial Mercantile Credit Asscn. v. Coleman, (1871) L.R. 6 Ch. App. 558 at p. 567.

Supra, footnote 22.

Ibid.
For Canadian authority, see Armstrong Trading Co. v. Grenon, 1921 1 WWR 1225 (Man. C.A.) at p. 1231 per Fullerton, J.A. The traditional English authority is Aberdeen Railway v. Blackie, (1854) 1 Maqc. H. L. 461 at p. 471.

Supra, footnote 22.

Ibid. at p. 13. For a general discussion of the power of the company to contract as they pleased see Lingard, supra, footnote 20, at p. 171-172; also Costa Rica Ry. Co. Ltd. v. Forwood, 1901 1 Ch. 746 (C.A.) at p. 763 per Vaughn Williams, L.J.

See Gower, op. cit. at p. 529 for a history of the section.

Ibid.

Saint James Church v. Church of The Redeemer, (1865), 45 Barb. 356 (N.Y. Sup. Ct.).


Ibid., at p. 358.

Genesee Valley & Wyo. Ry. v. Retsof Mining Co. (1895), 36 N.Y.S. 896 (Sup. Ct.).


See, for example, the summary of the law in the comments on s. 41 of the Model Corporation Act Annotated, 2nd ed., Vol. 1 s. 1-47, Committee on Corporate Laws, 1971, at p. 842-843: "The development of standards on a case to case basis has not led to uniformity. There have evolved a number of general tests ... the trend is to give greater weight to the fairness test than to those related to procedure."

42 H. C. Barragar, Note and Comment, (1962), 42 Oregon L.R. 61 at p. 74; also, supra, footnote 40; footnote 41. However, see contra, Comment, Ford. L.R., supra, footnote 39, at p. 668, where the author apparently considers disclosure and fairness mutually exclusive tests.


44 Ibid., s. 99 (1).


47 Model Corporation Act Annotated, 2nd ed., Vol. 1, s. 1-47, Committee on Corporate Laws, 1971, s. 41.

48 See the review of differences from state legislation of the Model Act contained in the comments on the section, supra, footnote 47, at p. 845-846.

49 The Canadian legislation usually requires that the director not be counted in the quorum. However, the articles contained in Table A of both the old and new B.C. Companies Act allow the quorum to be set by the directors. The new act adds that this may be done "from time to time."


51 Supra, footnote 47.

52 Supra, footnote 46, s. 9.17 (1).

53 See above text accompanying footnote 43.

54 [1927] 1 Ch. 323.

55 Todd v. Robinson (1884) 14 Q.B.D. 739.

56 s. 9.17 (3), which refers to the relief of directors from the liability to account for profits expressly applies only to "A director referred to in subsection (1)", that is, only a director whose interests come within those required to be disclosed.

This point also receives mention in the Federal proposals, supra, footnote 46, Vol. 1, p. 79, para. 228.

Ibid.

See the comment in the Fordham L. Rev., supra, footnote 39, at p. 664 for a discussion of these three alternatives.

Ibid., at p. 660: "Accordingly it seems likely that courts will . . . allow the fairness of the transaction to be challenged; whether disclosure has been made or not. Under this interpretation, unfairness would have to be shown by the party seeking to avoid the transaction where disclosure is made."

Supra, footnote 46, Vol. 1, p. 80, para. 233.

Ibid.

See text supra, The Background of the Section.

Supra, footnote 45.

Ibid., subsection (1).

Ibid., subsection (4), (5).


Ibid., p. 17-18.

Ibid., p. 18, para. (f).

Ibid., p. 19, para. (m).


Some increases in shareholder democracy were to be made. See the Study Report, Part Four.

But these increases were limited only to a very few sections.

See the Study Report, p. 7, para. 3 and the discussion of self-regulation Ch. IV of this paper.

See above discussion, The Background of the Section.

Supra, footnote 8.

Only the Ontario act omits them.
CHAPTER VII

PROTECTION FOR THOSE DEALING WITH COMPANIES
AND THE COMPANY RECORDS

HISTORY OF S. 186 AND 187

The old Companies Act\(^1\) required the company to keep at its registered office its registers of members,\(^2\) directors,\(^3\) debentureholders\(^4\) and books of account;\(^5\) the minutes of all general meetings, class meetings,\(^6\) and directors' meetings;\(^7\) and copies of all mortgages created and assumed by the company.\(^8\) The register of members, the register of directors and managers, and the register of mortgages were open to inspection by all.\(^9\) Copies of mortgages could be inspected in addition by members, creditors and debentureholders and proceedings of general meetings could be examined by the members.\(^10\) These provisions were scattered widely throughout the act.

The new act required the keeping of fifteen additional records at the companies records office. Some of these, it has been pointed out, particularly the certificate of incorporation, the memorandum, the articles, copies of documents filed with the Registrar, of certificates issued by the Registrar and of orders of the minister or Registrar relating to the company, were probably already kept in addition to the required documents.\(^11\) However, in Bill 66, these all became part of the necessary records.
for the company, as did some ten further documents that, apparently, were not generally kept by the company at its registered office.\textsuperscript{12}

Bill 66 included in the list of essential records, all copies of court orders, copies of prospectuses and take over bid circulars issued by the company or any subsidiary and copies of all information circulars issued by the company or any subsidiary. In Bill 16, copies of court orders no longer appeared in the list. Also, in response to a protest by the Canadian Bar Association\textsuperscript{13} as to the volume of material that would now have to be handled for every company, the copies of prospectuses, take over bid circulars and of all documents approved by the directors and information circulars had to be maintained only for ten years.

The new act also collected together and expanded the rights to examine documents. In the form of its first draft, s. 187, then numbered s. 189, listed with reference to the preceding section, the documents that each class of person in each kind of company was to be allowed to see and copy. Directors could examine and copy all the records. Members or debenture holders could examine all records except the minutes of all directors' meetings and the documents approved by the directors and mortgages. Any person had this same right to the documents of a reporting company except that he could be charged a fee. A non reporting company's documents were similarly open to public view except for the additional withholding of audited financial
statements of the company. One type of record, the register of members, had a special restriction. No one, other than a director, could take extracts from that register unless he furnished a statutory declaration with his name, address and occupation and his assurance that the list would be used only for purposes connected with the company. All these changes, except for the restriction on the taking of extracts from the register of members had the effect of making a far greater volume of material available to a far greater number of people.

Some further changes were made in Bill 16. Where the company was not a reporting company, the general public had no right to be permitted access to the minutes of general and class meetings. Also, no statutory declaration, as had been proposed in Bill 66, was required for taking extracts from the register of members. This declaration was however retained in a later section requiring it of any person requesting a list of the names and addresses of either members or debenture holders.

For convenience of reference, the list of records required of the company is set out below.

s. 186. (1) Every company shall keep at its records office
(a) its certificate of incorporation;
(b) a copy of its memorandum including every amendment thereof;
(c) a copy of its articles including every amendment thereof;
(d) its register of members, except as provided by s. 67;

(e) its register of transfers, unless the register of members is kept elsewhere as provided by section 67;

(f) its register of directors;

(g) its register of debentureholders, except as provided by section 86;

(h) its register of debentures;

(i) its register of indebtedness;

(j) its register of allotments, unless the register of members is kept elsewhere as provided by section 67;

(k) the minutes of every general meeting and class meeting of the company;

(l) the minutes of every meeting of its directors;

(m) a copy of every document filed with the Registrar;

(n) a copy of every certificate issued to it by the Registrar;

(o) a copy of every order of the minister or the Registrar relating to the company;

(p) a copy of every written contract under which the company has allotted any shares for a consideration other than cash;

(q) a copy of every other document and instrument approved within the preceding ten years by the directors;

(r) a copy of every mortgage created or assumed by the company whether or not required to be registered;

(s) a copy of every audited financial statement of the company and its subsidiaries, whether or not consolidated with the financial statement of the company, including the auditor's reports;
(t) where the company is an amalgamated company,

(i) every record, document or instrument described in clauses (a) to (j), (m) to (p) and (u) to (w);

(ii) every record, document or instrument described in clauses (l), (q) and (r); and

(iii) every record, document or instrument described in clauses (e) and (s);

of each of the amalgamating companies;

(u) where the company is being wound up, the minutes of every meeting of its creditors;

(v) a copy of every prospectus and take over bid circular issued within the preceding ten years by the company or any subsidiary; and

(w) a copy of every information circular issued within the preceding ten years by the company or any subsidiary.

THE BACKGROUND OF THE SECTIONS

Since Limited liability companies were solely a creation of the legislature, the records they were required by law to keep were also prescribed by statute. In the Act of 1844, companies were required to keep a register of shareholders. Since then, the requirements have been steadily growing.

Certain rights of inspection may have existed in England before they were incorporated into statutes. The right of the shareholders to inspect the register of members has been traced back to the law allowing the tenants the right of inspection of the rolls of the manor. However that may be, as early as the 1844 Act, this right was given the shareholder by statute. In
In 1862, this right was extended to all persons. This extension was treated as a device to assist in the protection of creditors dealing with the company. So Lord Cranworth said in 1867 that "when the Legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of that amount as should remain unpaid, it is obvious that no creditor could safely trust the company without having the means of ascertaining, first, who the shareholders might be, and secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world." It had been several times held by the English court, moreover, that in exercising the right given by the act, the motives of the shareholder for wanting the inspection of the register could not be inquired into. A New Zealand case, In re Wellington Trust Loan and Investment Co. Ltd., applied this principle to all persons entitled to inspection since the statute conferred an absolute right on them.

The development of the rights to inspection and the record keeping requirements was somewhat different in the United States. One American commentator, William T. Blackburn gives a brief, but accurate survey of this history by saying that "the common law right became well established in this country prior to the beginning of this century. The rule was generally stated as being that the shareholder had the right to inspect the books of
the corporation at reasonable times, if the inspection was in
good faith and for a proper purpose . . . Many state legislatures,
evidently feeling that the shareholder should have more power
over that which he partially owns, enacted statutes that usually
gave the shareholder an unqualified right to inspect the corpor­
ate books. The more recent history of the inspection right has
been an effort on the part of the legislatures and the courts to
put reasonable limitation upon its use, but still to allow the
right to persons using it for socially desirable purposes.\textsuperscript{22}

These reasonable limitations have usually taken the form
of a restoration of the requirement for a proper purpose for the
inspection, although often with the burden of proving improper
purpose shifted to the corporation opposing the demand.\textsuperscript{23} The
proper purpose doctrine is quite compatible with the inspection
right given to the American stockholder. It is a right that is
given only to shareholders and that is given its only justifica­
tion in the protection it can afford to the shareholder's econ­
omic interest in the corporation.\textsuperscript{24} For this reason, the docu­
ments that may be examined by the shareholder are not strictly
confined. The general rule has been stated to be that "if the
shareholder has a right to the knowledge he seeks, he can have
access to whatever corporate records will give him the informa­
tion, provided that the inspection will not result in substantial
harm to the corporation."\textsuperscript{25} Thus, even certain correspondence of
a corporate president has been held subject to inspection.\textsuperscript{26}
But for the same reasons, the right of inspection of records has never been extended to the general public. The difference in attitude evidenced by the American provisions as opposed to that expressed by Lord Cranworth in the passage quoted above is illustrated in a very recent article entitled the "Public's Right to Know: Disclosure in the Major American Corporation." 27 In his discussion of corporate records and the information available through their inspection, the author sees the future of inspection of documents other than the shareholders' list as very limited indeed. For the large corporation, even a limited number of shareholders exercising their inspection right is described as a significant threat to the efficient and proper carrying on of business. 28 Partly, this attitude may be the result of the large scope of materials the shareholder has the right to inspect; partly, it may be due to the complexity of the right when a "proper purpose" must in every case be a subject of consideration; but, partly, too, it is undoubtedly the result of the lessening of the shareholder as owner concept. As that concept weakens, so too do the rights that shareholders have to control the business. And in the United States, inspection of records is so closely tied to the interest of the shareholder in the corporation, it is predictable that its extent will decline as the principles that gave the right its only significance continue to become more and more a formality.

In simplified form, then, there are two major
philosophies of corporate record inspection: it may be a device solely useful to support the shareholder in his role as owner of the economic enterprise; or it may be a tool to assist also in the protection of those persons generally who must deal with the corporation. In the first case, it is more a nuisance as the shareholder is less a factor in decision-making; in the second, it is part of the price the corporation must pay for the protection at law of limited liability.

THE FIELD OF CHOICE

The American provisions have already been generally described with respect to corporate records. Although, as usual, there are differences between the statutes of the various states, they all have the similarity of the basic pattern. The Model Act provision\(^{29}\) is fairly typical of this pattern. The only records specifically required of a corporation are books and records of account, minutes of shareholders' and directors' meetings, and the record of shareholders. These records may be examined by holders of record of shares or of voting trust certificates, who have been holders for six months or hold five percent of the shares or certificates of the corporation if the demand is made in writing and is for a proper purpose. However, if a holder of shares or voting trust certificates proves proper purpose, there is a residual power in the court to compel the production of the records despite the failure to fulfill this time qualification.
The Canadian precedents give more recognition to their heritage from the United Kingdom act. The new Ontario act requires corporations to keep copies of their articles, and by-laws, register of security holders and of directors, proper accounting records setting out all financial and other transactions of the corporation, and the minutes of shareholders, directors and executive committee meetings. These records, except the accounting records, resolutions of directors and minutes of executive committee and directors' meetings are to be available for inspection by shareholders and creditors of the corporation. There is a restriction on taking any copies of any portion of the security holders' list unless an affidavit is filed containing an assurance that the list is required for "purposes connected with the corporation."

This act, therefore, allows access to the records by shareholders and creditors, acknowledging a dual purpose for the inspection of corporate records. However, the records to which even the shareholders have access are restricted, not including, as the American provisions did, access to books of account and other financial documents. Something very like the American proper purpose doctrine has been introduced with respect to copies of the security holders' list, although, it will be noted that the right to examine the lists is an absolute one.

The proposals for a new Federal Act divide the records to be kept by a corporation into two classes. In one class, are
the articles and by-laws, the minutes of shareholders' meetings, the register of directors and the securities register. These may be examined free of charge by shareholders and creditors or a corporation and upon payment of a reasonable fee by any other person. The other class of records comprises the minutes of directors and of executive committees and accounting records. These may be examined only by the directors. Copies of a shareholders' list are also obtainable by any person upon payment of a fee, but he must supply in addition an affidavit stating that the list will be used only to influence the voting of the shareholders or to make an offer to acquire the companies share.

These provisions are, in effect, very like those of the Ontario statute, with two significant differences. The first is the closer relationship with the United Kingdom statutes where inspection of records was intended to assist all persons dealing with corporations. Under the Federal proposals, no interest in the corporation, not even that of a present creditor, is required to make inspection available to the member of the public. In this way, of course, prospective creditors may examine certain corporate documents before becoming financially interested in the corporation, presumably, for their greater information and, therefore, for their greater protection. Secondly, although something similar to a "proper purpose" doctrine has again been introduced, this applies only to complete shareholders' lists, not to extracts from those lists to which any person has a right.
upon payment of a fee.

THE CHOICE OF THE COMMITTEE

The choice of the committee follows the English pattern of legislation and is therefore closer to the Federal proposals in form than to any of the others considered. As they were in the early companies acts of the United Kingdom, the inspection provisions extend not only to shareholders, but to all persons. The committee itself classed these sections as among those provided to afford protection for those dealing with companies. Out of this purpose grows an increase in the rights of inspection, despite the shareholder's weakening role as owner of the company. Shareholders, like other persons in the community, fall into the class of those who deal with corporations and their protection needs therefore to be at least as great as that provided for creditors, actual or potential. This connection was recognized by the committee when it stated in its criteria that there must be mechanisms available for "shareholders and creditors to know what is occurring"\(^ {34} \) in the company. Shareholders' position as owners does not directly affect the major provisions of the section. The emphasis is different.

This emphasis is precisely what might have been expected from the committee and had effects that might also have been predicted. The study committee had already in its report recognized the close ties with the United Kingdom legislation\(^ {35} \) and as just
mentioned, the rights of creditors to information. Despite its remark that the demands of uniformity with other Canadian jurisdictions were not to be considered paramount, it has already been illustrated how the tendency of the new acts in all the major Canadian jurisdictions was to lessen the differences among them.\footnote{36} Both in the Ontario\footnote{37} legislation and in the Federal proposals,\footnote{38} the British emphasis, rather than the American had been followed to a greater or lesser degree. All the inclinations of the Committee pointed it toward this pattern of legislation.

However, the legislation that actually emerged was much more far reaching than either of the similar proposals here examined. Many more records have to be kept by the corporation and the rights of inspection are therefore correspondingly broader. Moreover, in the B.C. act, shareholders of all companies and members of the public in respect to reporting companies are given access through the right of inspection of documents to financial records. Many of the documents that were once kept by the government must now be kept by the corporation and the facilities for inspection similarly provided by them.

This extension was probably due chiefly to three factors. First, it is a logical expansion of the principle inherent in the British inspection provisions that this and the keeping of records were a part of the price paid by the incorporators for the protection of limited liability. The American attitude that the whole affair was little more than a hindrance to efficiency
never gained ground. Since the B.C. legislation was also following the British pattern, it was not surprising that little concern was given to placing burdens on the company who is gaining the benefit of incorporation and removing them from the government. Impetus for this move was provided by the additional commitment of the committee to self-regulation of companies, by which they evidently meant primarily a lessening of government involvement with the functioning of the company. Although it was part of the government's role to provide a safe repository for documents, it was no part of their responsibility to provide facilities for the inspection of corporate documents necessary to protect the creditor and shareholder. Finally, the desire to make the act simpler and clearer, as it led to the collection of what records had to be kept all in one section instead of scattering them throughout the act, also probably led to the idea that simplicity for the layman would be much assisted by the keeping of company records together in one place. This would reduce the need for the searching of various registers for specific information, registers which the layman might not even know existed.

But the final, and perhaps the most significant influence on the committee, both to adopt the British pattern and to extend it further might well be found in its commitment to public scrutiny as a means of securing compliance. None of the factors discussed in the preceding paragraph could be operative without
the over-riding sense that disclosure, in itself, is right. The widespread nature of this sense of "rightness" has already been described. Unless some stringent reasons were given to oppose the record keeping provisions, the theoretical influences were all on their side.

These reasons have since been provided by many practi-
tioners. It has been found expensive both to establish and to maintain the records office that the act requires. Most law firms, in Vancouver, at least, have found few benefits from the sections. Evidently, there have been few searches by members of the public in the records offices. There has been a general feeling reported that, especially for the small company, the changes in the record keeping provisions are unreasonably expen-
sive, in terms of the burden on the company compared to the utility of the results.

However, no amendments of the provisions have been forth-
coming. Moreover, the protests of the profession have not taken sufficient account of the theoretical arguments supporting the provisions. These arguments described in this section were almost certain to weigh more heavily with the Committee, separ-
ated in its structure and its procedure, from the immersion in economic facts that characterizes the practitioner. If a law firm argues that it will cost fifty dollars per year to maintain a records office for each company, the assessment must still be made. Is that "unreasonably expensive?" If the Committee had
had no previously established pressures towards disclosure gener-
ally and expanded records kept by the company in particular, the
answer might have been in the affirmative. However, this was not
the case. The procedure of the committee had established such
predisposition. Economic effects unless they could be shown to
be much more than mildly disproportionate, were not likely to
influence their assessment.
FOOTNOTES, CHAPTER VII

2. Ibid., s. 82.
3. Ibid., s. 115 (1).
4. Ibid., s. 142 (1).
5. Ibid., s. 156 (1).
6. Ibid., s. 176 (1).
7. Ibid.
8. Ibid., s. 142.
9. Ibid., s. 83 (1), s. 115 (1), s. 143 (1).
10. Ibid., s. 143 (1), s. 177 (1).
12. Ibid., p. 209. Bill 66, 1972, s. 188.
16. Ibid., s. 49. s. 50 gave the shareholder the right to inspect the records.
18. Companies Act 25 & 26 Vict. c. 89, s. 32.
20 For instance, Davies v. Gas Light and Coke Co. [1909] 1 Ch. 708 (C.A.).

21 [1959] N.Z.L.R. 1189 (Sup. Ct.).

22 Supra, footnote 17, at p. 61.

23 Supra, footnote 17, at p. 76; Model Corporation Act Annotated, 2nd ed., Vol. II, s. 48 - end, Committee on Corporate Laws, 1971, s. 52, p. 129.


25 Supra, footnote 17, at p. 65.

26 Otis-Hidden Co. v. Scheirich (1920), 219 S.W. 191 (Kentucky C.A.).

27 Supra, footnote 24.

28 See Ibid., at p. 1051: "It is evident that a relatively small number of stockholders seeking to enforce their right of inspection of books and records of major American Corporations could create serious difficulties.

29 Supra, footnote 24.

30 Business Corporations Act, R.S.O. 1970, c. 53, s. 156 - s. 165.

31 Ibid., s. 163. Section 164 (b) defines "purposes connected with the corporation as including "any effort to influence the voting of shareholders at any meeting thereof, any offer to acquire shares in the corporation or any effort to effect an amalgamation or reorganization."

32 Proposals for a New Business Corporation Law for Canada, (1971), s. 4.02, 4.03.

33 No broad "proper purpose" provision is included. However, s. 4.03 (3) (d) provides that shareholders' lists obtained under the subsection were to be used only for an effort to influence voting of shareholders or an offer to acquire shares in the corporation.

35 Ibid., p. 2. See the discussion of this influence in Chapter IV.

36 Supra, Chapter IV.

37 Supra, footnote 30.

38 Supra, footnote 32.

39 Supra, footnote 28.

40 See the discussion of who is to regulate by self-regulation in Chapter IV.

41 Supra, footnote 34, p. 7.

42 Ibid.

43 See discussion, Chapter IV.

44 Mr. R. R. Dodd of Swinton & Co. reports that they have had no searches of the records offices in the eight months in which the new act has been in operation. Ladner-Downs has reported two searches. Most firms, from inquiries made on the floor of the 1974 Vancouver Bar Association Conference report similar experiences.

45 Charges for maintaining the records office seem to vary from $50 - $100 per company per year.
CHAPTER VIII

CONCLUSION

The conclusions of a paper such as this cannot be other than tenuous. The background of detailed research built up methodically over many years has been lacking in the study of law reform. Certainty of conclusion will arrive only when many tentative and partial conclusions have been reached. It remains only to summarize what has been deduced from the study here undertaken and to point to some of the generalities that may one day warrant further investigation.

A pattern for the work of the corporate legislation committee has emerged from the examination of the sections of the statute and its criteria. The criteria themselves were selected chiefly from studies of theory. They had little input from the public, or from the legal community. This set them in the mainstream of company law reform and isolated them from much contact or concern with the changing economic realities of the corporate structure. Once those criteria were established, there developed a remarkably tight relationship between them and the final document. Acceptance or rejection of a suggestion made in other proposals for company law reform or by outside groups was usually based on its conformity to and lack of conflict with the criteria selected. This made the resulting act cautious in terms of broad conceptual reform, reckless in terms of practical economic
repercussions. It also meant that the relevant time for meaningful public discussion was before, not after, the criteria were selected. Otherwise, the success of the proposals was dependent upon the ability of the proposer to convince the Committee that the change would be in keeping with its criteria.

This pattern bears the unmistakable stamp of "ad hocery" -- of a small committee with too little time to make a thorough investigation of underlying principles. However, it also bears successfully the burden of producing a statute that could be supported and sponsored by two political parties with widely divergent opinions. It is a statute with limited goals for change but that, in a workman-like way, fulfills those goals unwaiveringly and, for the most part, well. The apparent fluctuation between over-cautious and over-reckless reforms is part of the price paid for the inconsistencies in the theory of company law itself. Had the government wanted a statute that resolved those inconsistencies and set company law on a realistic economic basis, "ad hocery" could not have served its purpose at all. Different methods with far wider research scope would have had to be employed in the first development of the criteria.

The questions to which these conclusions provide some of the answers for one specific type of law reform body have already been asked earlier in this paper. And their importance has been stressed. When these questions are answered for many kinds of
law reform bodies some systematic study of the process of law
reform will have been begun.

In the meantime, the conclusions of this paper may be
summarized as follows:

The Committee, composed of civil servants, did not rely
heavily on public opinion. This was to be expected, especially
considering the technical nature of the legislation.

The Committee confined itself strictly to the parameters
of the problems it was given. Far reaching consequences and
solutions were not considered.

Also, however, civil servants did not encounter diffi­
culties with interference or hostility from the departments
primarily responsible for administration of company law and were
able to have their proposals accepted readily by the government.

The policy selected by the committee strongly influenced
the legislation enacted.

That policy fulfilled many of the criteria set out in
what is called by political scientists, the strategy of dis­
jointed incrementalism. Thus, policy choices were made at the
margin of the status quo, selected from a small number of alter­
natives and from incremental or small changes in the status quo.
Further, these policy choices and the legislation that followed
were designed to remedy a negatively perceived situation, rather
than to reach a preconceived goal.

The legislation produced drew heavily upon already tried
remedies in other jurisdictions both because of the conservative nature of the policy choices and the method of procedure of a small committee.
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