METHOD OF INCORPORATION

I. Introduction

II. Present Law in Alberta

III. Comparision with other jursidictions.

IV. The problems and alternatives.

V. Recommendations and commentary.

I. INTRODUCTION.

There are three (3) methods of incorporation presently in use in Canada and possibly a fourth since I have not checked the Quebec statutes. The oldest form is the grant of letters patent, now used by New Brunswick, Prince Edward Island and Manitoba. The most common form at present is the registration of memorandum and articles currently used by British Columbia, Alberta, Saskatchewan, Nova Scotia and Newfoundland. The newest form is that used in the OBCA and CBCA, namely, the registration of articles of incorporation. The proposed new Companies Acts for Saskatchewa and Manitoba adopt this newest form.

The main criticisms of the letters patent company were two-fold, firstly, the grant was an exercise of the prerogative of the Crown and was therefore the subject of ministerial discretion, a criticism more theoretical than real in practice. Secondly it was slow and cumbersome because ministerial approval did have to be obtained. A more minor citicism was that while change was possible it was a cumbersome and time consuming affair. The main advantage of the form was that neither the doctrine of ultra vires nor constructive notice applied to these companies. It should be remembered that the by-laws, which roughly

correspond to our articles of association and deal with matters of internal management, did not have to be filed as public documents.

The memorandum and articles form follows the various English Companies Acts. Its advantages were briefly that incorporation was a matter of right providing the documents conformed with the enabling act, and in some jurisdictions, with the law; and secondly it was presumed to be considerably more speedy. In actual fact and because of the practical problem in obtaining clearance for a name, this was not always so until incorporation by number was permitted. It did have the advantage of enormous flexibility once the company was incorporated, with the possible exception of the Alberta Act of the somewhat ambiguous wording of section 34 regarding the alteration of objects of a company. The form did carry with it the disadvantage of all of the English law in relation to the doctrines of ultra vires and constructive notice. The Acts all provided a Table A set of articles which were to be the articles of the company unless other articles were filed with the memorandum or subsequently.

The articles of incorporation method as used in the OBCA and CBCA, and in most if not all American jurisdictions, is an attempt to obtain the best of both worlds. Incorporation is a matter of right providing that the articles conform to the Act, and a time limit is imposed upon the Registrar of Companies to accept or reject the documents. If he rejects a speedy method of appeal is granted. The two acts using this method and the two acts proposing to use this method all provide, with great clarity, for the abolition of the doctrine of ultra vires and constructive notice. Once the company has been incorporated there is no question that a maximum flexibility compatible with minority shareholders rights, to alter the constitution of the company, is granted. The practical problem of the name still remains but both of the Acts in existence and the two proposed Acts all provide for incorporation by number.

...2

II. THE PRESENT LAW IN ALBERTA

In order to incorporate a company in Alberta, the incorporators must:

1. File with the Registrar of Companies a memorandum of association in the form required under section 16 (1) showing the name of the company, the objects of the company, a statement that the liability of the members is limited, and the particulars of the share capital with which the company proposes to be incorporated. Under the provisions of section 15 (4) the memorandum must be signed by each subscriber in the presences of at least one witness and each subscriber must write opposite his name the number and class of shares that he takes.

2. He must either adopt Table A articles, which the incorporators may do by simply not filing any articles at all, or file articles of association. In the event that the incorporators file their own articles of association the articles must be printed or typewritten and divided into numbered paragraphs, and must be signed by each subscriber to the memorandum in the presences of at least one witness. Curiously enough the printed or typewritten provision does not appear in the sections dealing with the memorandum but is dealt with indirectly, as mentioned later, in section 286.1.

3. File with the Registrar a notice of registered office under the provisions of section 73 (2) (a).

4. If the company is a public company, file with the Registrar the consent of the first directors if they have not signed the articles (Section 75).

5. Pay the Registrar his fees. (Section 287 (1))

The Registrar is granted discretionary power to refuse registration in two incidences, namely:

1. Under section 15 (3) if the company is being formed for the purposes of a club.

2. Under section 286.1, which reads as follows:

Refusal to register documents

286.1 Where a document submitted for registration to the office of the Registrar

(a) is not in all respects legible, or

(b) is for any reason, in the opinion of the Registrar, not capable of being copied by microfilm, mechanical duplicating or other similar process, or

(c) is in any manner insufficient in the opinion of the Registrar for the purpose of registration,

the Registrar may refuse to register the document.
[1972, c. 21, s. 13]

The Registrar is also granted one further discretionary power after the company has been incorporated, under the provisions of section 26 (2), under which he may require a company, if the memorandum and articles as registered do not in fact comply with the requirements of the Act, to cure the defect.

While it is the common practice to submit the memorandum, the articles, and the notice of registered office in duplicate, there is no statutory requirement saying that this must be done.

Once the necessary documents have been filed and the fees paid the Registrar will issue his certificate of incorporation, and at the cost of the applicant, publish a notice of incorporation in the Alberta Gazette. The certificate of incorporation is conclusive under the provisions of section 27.

Conclusiveness of certificate

27. A certificate of incorporation given by the Registrar in respect of a company is conclusive proof that all the requirements of this Act in respect of registration and of matters precedent and incidental to incorporation have been complied with, and that the company is a company authorized to be registered and duly registered under this Act.
[R.S.A. 1970, c. 60, s. 27]

It is not entirely clear as to just what the Registrar discretion is under section 11, the section which deals with names of a company.

Name of company

11. (1) A company shall not be incorporated and an extra-provincial company shall not be registered under a name,

(*a*) that is known by the Registrar to be the same as the name of an existing corporation, or

(*b*) that suggests or implies a connection with the Crown or any member of the Royal family or the Government of Canada or the government of any province or territory of Canada or any department, branch, bureau, service, agency or activity of any such government without the consent in writing of the appropriate authority, or

(*c*) that includes the word "co-operative" or any abbreviation or derivation thereof, or

(*d*) that in the opinion of the Registrar is objectionable.

(2) A company shall not be incorporated under this Act under a name that is known by the Registrar to be the same as that of a dissolved corporation.

(3) A company shall not be incorporated or registered under this Act under a name that is known to the Registrar to be similar to the name of any other corporation if the use of that name by the company would be likely to deceive, unless the corporation consents in writing to its name being given in whole or in part to the company and, if required by the Registrar, undertakes to dissolve or to change its name within six months after the incorporation of the company.

(4) A company shall not be incorporated or registered under this Act under a name that is known to the Registrar to be the same as or similar to the name of a business or association if the use of that name by the company would be likely to deceive, unless the business or association consents in writing to its name being given in whole or in part to the company and, if required by the Registrar, undertakes to cease to carry on its business or activities or to change its name within six months after the incorporation of the company.

(5) Where a company other than an extra-provincial company, through inadvertence or otherwise, has been or is given a name that is the same as or is similar to the name of any other company, business or association that has previously been carrying on business or been incorporated or registered in the Province or that is objectionable for any reason, the Registrar, after he has given notice to the company of his intention to do so, may by order change the name of the company.

(6) On application of any person and on payment of the prescribed fee the Registrar may reserve a company name for a period of 45 days, and the name may be held for the use of the applicant or his nominee within that period if it is otherwise acceptable under this section.

(7) Subsections (1), (3) and (4) do not apply to a company incorporated by or under an Act of the Parliament of Canada.

(8) In this section "business or association" means an individual carrying on business, an association or a partnership. [R.S.A. 1970, c. 60, s. 11]

There is not much problem with sections 1 and 2. The problems seem to arise in connection with how makes the decision that a name "would be likely to deceive" under subsections 3 and 4. It might be pointed out however section 12 grants a speedy right of appeal from the Registrar's decision, to the Court by way of originating notice of motion.

There are two cases dealing with the exercise of the Registrar's discretion one English and one in our Court. The first is Rex vs The Registrar of Companies, Ex Party Paul [1912] 3 K.B. 23. The incorporators applied for mandamus to compel the registration of a company using a name which the Registrar had refused as being similar to the name of an existing company. The Court consisting of Lord Alverstone, Pickford J. Avory J. were unanimous that while the statute did not contain the words " in the opinion of the Registrar" after the words "likely to deceive" the statutues should be read as though the words were in fact there. Mr. Justice Avory laid down the principle that the Registrar discretion could only be upset if the applicants could show one or more of three things: either that the Registrar had not in fact exercised any discretion in the particular case, or that he had exercised upon some wrong principle of law, or that he had been influenced by extraneous considerations which

...6

he ought not to have taken into account. He pointed out that this was an application for mandamus and was not an appeal since the English act at that time did not grant any right of appeal from the Registrar's discretion.

While there are a good number of cases regarding the Registrar's discretion with respect to names, the most recent of which is the decision of Mr. Justice Laycraft in Action Plumbing vs The Registrar of Companies and Action Auger Drain Cleaning Company Ltd., there are no cases dealing directly with the Registrar's discretion to refuse to register a company on grounds other than the name. The only case which deals with this matter even peripherally is an Alberta decision of Mr. Justice McLaurin in the case of Re Crown Lumber Co. Ltd. [1943] 2 W.W.R. 679. In this case the company had been incorporated originally in 1905 under the Companies Ordinance of 1901, which required the incorporators to file separate articles unless they adopted all of Table A. The memorandum as filed proported to adopt Table A with alterations and qualifications, and the company was inadvertently registered in this manner. In 1943 the company sought to amend its articles, but in order to do so it had to alter its memorandum. Obviously the Registrar opposed the procedure and the company was forced to make an application to the Court by way of petition. The case does not therefore deal precisely with the point of the Registrar's discretion to refuse registration of a company but is concerned with the Registrar's refusal to permit an amendment to the memorandum of association. However, Mr. Justice McLaurin did in fact use very broad wording stating that the jurisdiction of the Court was of the widest scope and that the Court should not be astute to fetter commerical enterprises by a narrow construction. The principle that seems to be evolving in the various name cases seems to be that expressed by Mr. Justice Laycraft, that the Court should not readily interfere with the decisions of an experienced administrator such as the Registrar of Companies. It is submitted therefore that if the name has been approved and the documents are in order in that they comply with the law and are capable of reproduction by microfilm under section 286.1, the Registrar really has no discretion to refuse registration.

...7

III. COMPARISION WITH OTHER JURSIDICTIONS

A. The Canada Business Corporations Act.

The CBCA instituted a complete change in the method of incorporation. Formerly companies were incorporated under the Canada Corporations Act by application to the Secretary of State for Letters Patent. Apparently the concept was that this would provide some control over incorporations, however, the Dickerson Report points out that quality of controls to be effective should be imposed upon the conduct of corporate enterprise rather than upon its creation. Under the CBCA a company is incorporated by filing with the director:

1. Articles of Incorporation as required by Section 6 (1).

> 6. (1) **Articles of incorporation.**—Articles of incorporation shall follow the prescribed form and shall set out, in respect of the proposed corporation,
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> (a) the name of the corporation;
>
> (b) the place within Canada where the registered office is to be situated;
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> (c) the classes and any maximum number of shares that the corporation is authorized to issue, and
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> (i) if there will be two or more classes of shares, the rights, privileges, restrictions and conditions attaching to each class of shares, and
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> (ii) if a class of shares may be issued in series, the authority given to the directors to fix the number of shares in, and to determine the designation of, and the rights, privileges, restrictions and conditions attaching to the shares of, each series;
>
> (d) if the right to transfer shares of the corporation is to be restricted, a statement that the right to transfer shares is restricted and the nature of such restrictions;
>
> (e) the number of directors or, subject to paragraph 102(a), the minimum and maximum number of directors of the corporation; and
>
> (f) any restrictions on the businesses that the corporation may carry on.

additional provisions may be inserted in the articles as provided for in Section 6 (2) and 6 (3).

2. A notice of registered office under section 19 (2).

3. A notice of directors under section 101 (1).

4. A fee of $200.00 under section 82 of the regulations. There is no fee for filing the notice of registered office or the notice of directors.

The documents under regulation 5 of the regulations, must be on white paper 8 1/2" x 11" in size, printed or typewritten, and legible and suitable for mirco-filming and photocopying. Under regulation 6 paragraphs should be numbered consecutively and there are other minor matters dealing with the format contained in regulations 7, 8, 9 and 10.

Under the provisions of section 255 all of the above documents must be submitted in duplicate, and upon registration the Registrar marks them both, retains one copy and returns the other.

It was the intention of the Act that if the documents submitted complied with the Act the Registrar would have no discretion to refuse registration. Article 52 of the Dickerson proposals makes this clear and compares the situtation to the memorandum and articles jurisdictions. The article does quote as authority for the statement that the Registrar has no discretion to refuse, the case of Reuss vs Bos (1871) 5 House of Lords 176. However, a reading of this case reveals that the Registrar's discretion on incorporation was not in question since the company had been incorporated, and it was sought to dissolve the company by way of mandamus to compel the Registrar to deregister the company. The House of Lords unanimously rejected this notion, but pointed out that if there were proper grounds for dissolution, such as insolvency, an application could be made on that basis.

Upon receipt of the above documents and his fee the director is required, under section 8, to issue a certificate of incorporation in accordance with section 255.

255. (1) "Statement" defined.—In this section, "statement" means a statement of intent to dissolve and a statement of revocation of intent to dissolve referred to in section 204.

(2) Execution and filing.—Where this Act requires that articles or a statement relating to a corporation shall be sent to the Director, unless otherwise specifically provided

(a) two copies (in this section called "duplicate originals") of the articles or the statement shall be signed by a director or an officer of the corporation or, in the case of articles of incorporation, by the incorporators; and

(b) upon receiving duplicate originals of any articles or statement that conform to law, any other required documents and the prescribed fees, the Director shall

(i) endorse on each of the duplicate originals the word "Filed" and the date of the filing,

(ii) issue in duplicate the appropriate certificate and attach to each certificate one of the duplicate originals of the articles or statement,

(iii) file a copy of the certificate and attached articles or statement,

(iv) send to the corporation or its representative the original certificate and attached articles or statement, and

(v) publish in the *Canada Gazette* or in the periodical referred to in section 123 notice of the issue of the certificate.

(3) Date of certificate.—A certificate referred to in subsection (2) issued by the Director may be dated as of the day he receives the articles, statement or court order pursuant to which the certificate is issued or as of any later day specified by the court or person who signed the articles or statement.

It will be noted that section 255 (3) deals specifically with the date of the certificate. Section 9 of the Act states simply:

"a corporation comes into existence on the date shown in the certificate of incorporation."

Under section 238 (1) if the director refuses to file any articles within twenty (20) days after his receipt of them or twenty (20) days after he receives any approval that may be required under any other Act, he is bound to give written notice of his refusal to the person who sent the articles or the documents, stating his reasons, within twenty (20) days after he recieves them. Under section 238 (2) if he does not file or give notice of refusal within the twenty (20) days he is deemed to have refused to file, and under section 239 his decision may be appealed to the Court.

Section 258 contains a provision which permits the Director, if a certificate containing an error has been issued to a corporation, to require the corporation to do whatever is necessary to make the corrections, whereupon a corrected certificate will be issued. It is interesting to note that the corrected certificate bears the date of the original certificate and one can see the merit of this in as simple a matter as the certificate of incorporation since the company may have proceeded to enter into various contracts the day following its original certificate.

Provision for incorporation by number is allowed, and the Registrar may direct a corporation to change its name, but these are more properly the subject of the paper on names, which is one of the first papers we dealt with.

It is interesting to note that the Act is named the Canada Business Corporations Act, and the continuance provision prohibit any not for profit company being continued under the Act, but there is no specific prohibition either in the application of the Act sections or elsewhere, that a club could not be incorporated under this Act. The implication is probably there in the interpretation section, section 4, the name of the act, and in the provision section 6 (1) (f) requiring any restrictions on the business that the corporation may carry on. Not for profit companies are specifically prohibited from continuing under the new Act but there is no specific prohibition in the Act which prevents any company being incorporated to operate a club.

There is no provision in the Act which requires or permits the by-laws of the corporation to be filed. It may be recalled that the by-laws were not filed under the old Canada Corporations Act, and this situation has not changed.

...11

B. The Ontario Business Corporations Act

The Lawrence committee discussed the two existing alternatives in Canada at the date of its report, 1967, and while they were not happy with the letters patent method they felt that the alternative, namely the memorandum and articles method, was over one century old in English law and was showing signs of age. They did not however say what the signs of age were. Whatever prompted their fellings that the memorandum and articles method was a geriatric case, they recommended adoption of a method similar to that used in the New York Business Corporation Law, namely, filing articles of incorporation. It must be pointed out that this did have some attraction to them since " articles" or "by-laws" were not filed in New York, and thus matched the previous Ontario system.

The OBCA, under section 2 (2) (a) does not apply to any company which within the meaning of the Corporations Act has objects in whole or in part of a social nature and therefore would prohibit the incorporation of a club. Paragraph 13 of the regulations passed pursuant to the Act, specifically states that the objects of a corporation shall not include that of horse racing or that of dog racing. Presumably these must be control under other legislation and were omitted from the application section, section 2.

In order to incorporate a company in Ontario therefore, the incorporators must file articles of incorporation, the contents of which are set out in section 4 (2).

(2) **Contents of articles.**—The articles of incorporation shall set out:

1. The name of the corporation to be incorporated.
2. The objects for which the corporation is to be incorporated.
3. The place in Ontario where the head office of the corporation is to be located, giving the municipality and the county or district or, where the head office is to be located in territory without municipal organization, the geographic township and district and the address giving the street and number, if any.
4. The authorized capital, the classes of shares, if any, into which it is to be divided, the number of shares of each class, and the par value of each share, or, where the shares are to be without par value, the consideration, if any, exceeding which each share may not be issued or the aggregate consideration, if any, exceeding which all the shares of each class may not be issued.

5. Where there are to be special shares, the designations, preferences, rights, conditions, restrictions, limitations or prohibitions attaching to them or each class of them.
6. The restrictions, if any, to be placed on the transfer of its shares or any class thereof.
7. The number of directors of the corporation and the names in full and the residence address, giving the street and number, if any, of each person who is to be a first director of the corporation.
8. The class and number of shares, if any, to be taken by each incorporator and the amount to be paid therefor.
9. The names in full, and the residence address, giving street and number, if any, of each of the incorporators.
10. Any other matter required by this Act or the regulations to be set out in the articles.

The following differences between the above section and the Canada Business Corporations Act are noted:

1. The CBCA requires any restrictions on the objects, whereas the OBCA must set out the objects.

2. There is no enormous difference in practice between registered office and head office but the two acts do use different names.

3. The address of the head office under the OBCA must be set out in the articles of incorporation. The address may be changed within the same municipality by simply notifing the Registrar, but if the head office is to be moved from one municipality to another, the consent of the Minister must be obtained and it will require restated articles. Under the CBCA a new notice of registered office is filed.

4. The number and class of shares taken be each incorporator is required under the OBCA but not under the CBCA.

5. While the OBCA requires the full name, address and signature of the incorporators as part of the section. The CBCA simply requires this material in form 1 attached to the Act.

6. Under the OBCA the signatures of each incorporator and of each first director must be verified by affadavit, and the affadavit must also set out that each is of the age of eighteen (18) years or more.

7. Where the articles name a person as a first director who is not an incorporator under the OBCA, that person must execute a written consent in the form set out in the regulations.

In addition to these required items, under section 4 (3) the articles may set out any provisions authorized by the Act or any provisions that could be the subject of a by-law of the corporation. Since both the head office and the first directors must be named, there is no necessity to file a spearate notice with regard to either of these items, upon submitting the articles of incorporation to the Registrar. The Registrar's fees however must be paid before he issues his certificate of incorporation. The articles must be filed in duplicate and the Registrar keeps one and returns the other together with the certificate of incorporation.

The corporation comes into existence upon the date set forth in its certificate of incorporation and the certificate of incorporation is conclusive proof that all conditions presently required to be performed by the incorporators have been complied with and that the corporation has been incorporated. The Minister does have a extraordinary power under section 250 of the Act which reads as follows:

> **250.** Cancellation of certificate, etc., by Minister.—Where sufficient cause is shown to the Minister, he may, after he has given the corporation an opportunity to be heard, by order, upon such terms and conditions as he thinks fit, cancel a certificate of incorporation or any certificate issued by him under this Act, and,
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> (a) in the case of the cancellation of a certificate of incorporation, the corporation is dissolved on the date fixed in the order;
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> (b) in the case of the cancellation of any other certificate, the matter that became effective upon the issuance of the certificate ceases to be in effect from the date fixed in the order. 1970, c. 25, s. 250.

Section 251 deals with dissolution by the Minister for failing to file annual returns, so apparently section 250 is a broader power. I have not been able to find a case where the power has been exercised.

Under the provisions of regulation 1 of the regulations, all documents delivered to or filed with the Minister shall be printed typewritten of reproduced legibly upon one side of a 8 1/2" x 11" paper, and must be clearly neatly and legibly typewritten or printed in a manner suitable for photographing or micro-filming.

Under section 267 (1) if the Minister refuses to file any articles he must give written notice to the person who delivers the articles specifing his reasons. Under subsection (2) he is not deemed to have refused unless six (6) months, as opposed to the twenty (20) days after the date in which he received it under the CBCA transpires. Under section 268 the Minister's decision may be appealed by way of a notice of motion. The appeal goes to the Court of Appeal. But section 268 (6) contains the following unusual provisions:

> "Notwithstanding an order of the Court of Appeal, the Minister has power to make any further decision upon new material or where there is a material change in the circumstances, and every such desicion is subject to this section"

One gets an uneasy picture of the Minister perpetually rejecting order of the Court and further appeals being taken from his rejection.

Under section 264 the Minister shall cause notice to be published in the Ontario Gazette of the issue a certificate of incorporation and other matters set out in that section.

C. The British Columbia Companies Act.

The BCCA retained the memorandum and articles format, which was the method of incorporation used in British Columbia before the 1973 Act. Since specially limited companies are retained under the Act there is a slight difference in the forms used for their incorporation. I have not however paid any attention to these since it is the recommendation of the committee to date that this form of company be abandoned.

Under the provisions of Section 7 one or more natural persons may form a company by subscribing their names to a memorandum and complying with the requirements of the Act. The memorandums must contain the material set out in section 7 (2).

> (2) The memorandum shall
> (*a*) be in Form 1 in the Second Schedule or, in the case of a specially limited company, in Form 2 in the Second Schedule;
> (*b*) be printed or typewritten;
> (*c*) be divided into paragraphs numbered consecutively;
> (*d*) set forth opposite the name of every subscriber the number of shares, and, where there are shares of different kinds and classes, the number of shares of each kind and class taken by him;
> (*e*) contain the agreement of each subscriber to be a member of the company; and
> (*f*) contain every restriction upon the business to be carried on by the company or upon the powers of the company. 1973, c. 18, s. 7.

The company must also have articles of association and it may use separate articles or may adopt Table A, under the provisions of section 8. The articles, similar to the memorandum, must be printed or typewritten and divided into paragraphs number consecutively. Under the provisions of section 9 both must be signed by every subscriber and their signatures attested by a witness who is not a subscriber.

The only additional form required is a notice of offices. It must be remembered that under the British Columbia Act there is a registered office and a records office which may be different so that the notice of offices is plural rather than singular as it is in the other Acts.

Under the provisions of section 10, upon the Registrar receiving the memorandum, the articles, a notice of offices, and the prescribed fees he will register providing that he is satisfied that the Act has been complied with, and upon registration will issue the cerificate of incorporation and publish a notice in the Gazette of the incorporation of the company. Under the provisions of section 351 the certificate is conclusive evidence that the requirements of the Act have been complied with. The Act remains silent about the actual date of the certificate and does not contain the precise sections dealing with this matter that are contained in both the CBCA and OBCA. Section 13 seems to say almost the exactly as section 351 except that it refers specifically to a certificate of incorporation.

Under the provisions of section 12 if the Registrar, by inadvertance, registers a memorandum and articles that do not comply with the Act and issues a certificate of incorporation, he may request the company by registered mail to pass such resolutions and file with him such documents as he requires in order that the memorandum and articles do comply with the Act. He can also call in the certificate of incorporation and make corrections to it.

There is no requirement for the company to register a notice of directors upon incorporation. Under section 132 the subscribers to the memorandum are the first directors. Since one of the main thrusts of the BCCA is to require the company to keep a good number of documents that were formerly kept by the Registrar of Companies, a company is required to keep a register of directors showing who the directors are at any one time, and showing the date upon which any former directors retired from office. This therefore is part of the material which must be kept at the records office and is not kept at the office of the Registrar of Companies.

Section 359 of the Companies Act reads as follows:

Registrar may refuse to accept filing.

359. (1) The Registrar may, where he is of the opinion that any document submitted to him

(*a*) contains matter contrary to law;

(*b*) by reason of any omission or mis-description, has not been duly completed;

(*c*) does not comply with the requirements of this Act; or

(*d*) contains any error, alteration, or erasure,

refuse to receive or register the document and request that the document be appropriately amended or completed and resubmitted, or that a new document be submitted in its place.

(2) Any person aggrieved by the refusal of the Registrar to receive or register any document may appeal the refusal to the Court, which may confirm or reverse the refusal and give such directions as it considers appropriate. 1973, c. 18, s. 359.

This section is of course broad enough to include the memorandum or the articles. While a right of appeal is given it will be noted that the Registrar is not bound to make his refusal by any specified period of time.

The B.C. Bar in their submission to the Attorney General Corporate Legislation Committee made no particular comment on any of these sections other than section 7 in which they complained about the words "the memorandum shall be in form 1 in the second schedule" which they felt was to inflexible it must be pointed out however that they were terribly pressed for time, they did not get part 9 - Dissolution and Restoration, done at all and had very little time indeed for the administrative sections which include sections 359.

D. Other Jurisdictions generally.

This does not seem to me to be an area in which much further is to be gained by a close examination of other United Kingdom jurisdictions, American jurisdictions, or European jurisdictions. Briefly the American jurisdictions are the basis for the articles of incorporation method used in the OBCA and CBCA. The remaining commonwealth jurisdictions, without exception that I am aware of, use the memorandum and articles method. Generally European jurisdictions require an application to a tribunal and various approvals to be obtained both as to name and other aspects of the company, before incorporation is granted. It is almost invariably a more cumbersome procedure and is of course coupled with the fact that a minimum paid up capital is required in almost all European jurisdictions other than England and Ireland, whether the company be public or private.

CONCLUSION AND RECOMMENDATIONS

As has been noted in our committee meetings there is really no point in change for the sake of change and we should have some valid reason for changing if we are going to do so. I don't know what the "signs of age" are that the Lawrence committee referred to with regard to memorandum and articles companies since the South African Act, so recently amended, and the result of five years of research, did not see fit to change. It is my recommendation therefore that this method of incorporation be retained. There is one problem in Alberta at present, namely, should the Registrar refuse to register memorandum and articles submitted to him together with the notice of registered office, or simply fail to register, there is no easy way and quick remedy available under the present Act. The only major recommendation I would have therefore would be that the Act provide for a right of appeal to the tribunal in the case of actual or deemed refusal. Before setting the time limit as low as twenty (20) days after he receives the documents, as is set forth in the CBCA, or as long as six (6) months, as set forth in the OBCA, I would like to discuss these two time parameters with Mr. Thomas. At present in Alberta if the Registrar refuses to register the applicants only recourse is by way of mandamus and he can only do this with the

consent of the Attorney General for Alberta. If incorporation is to be a matter of right I think it should be enshrined in the statute.

OTHER RECOMMENDATIONS:

1. Documents should be required by statute to be submitted in duplicate. The Registrar to retain one copy and the other to be returned to whoever sumbitted it.

2. While Table A contains a provisions that the subscribers to the memorandums shall be the first directors of the company, and I have seen this provision in other articles of association, I think that this should be set forth in statute so that the company upon incorporation has a registered office, which it is required to do now, and directors.

3. Our section 26 (2) is not as broad as section 258 of the CBCA, and when we come to the actual drafting if maybe that we should adopt the broader wording with respect to the powers of the Registrar, and his procedures if he has issued a certificate containing an error.

4. I would not like to see the Registrar have the powers that he has under the B.C. Act to make corrections without notifying anybody about them. If he is going to make corrections he should at least notify the company.

5. A brief note on fees paid to the Registrar upon incorporation. Under the CBCA the fee is $200.00 and this includes every filing up to that point. Under the BCCA the fee for registration of a company under the Act is $125.00 and the fee for registration of a foreign company is $250.00, another reflection of the parochial outlook in British Columbia. Under the Ontario Act the minimum fee is $125.00 for an aggregate capital of $40,000.00 or less. If the aggregate capital exceeds $40,000.00 but does not exceed $100,000.00 it is $1.25 for every thousand or fractional part thereof in excess of $40,000.00. From $100,000.00 to $500,000.00 it is $0.65 per thousand, from $500,000.00 to $2,000,000.00 it is $0.30 per thousand and exceeding $2,000,000.00 it is $0.25 per thousand.

It may well be that the fee which increases with the amount of the authorized capital, would discourage companies from being incorporated with very large numbers of no par value shares. There is no particular point in having a maximum value per share or a maximum amount in the aggregate for no par value shares unless fees are to be regulated in this manner. The spectre of frivolous incorporations with excessive numbers of no par value shares authorized, does not seem to have been of any great concern to either the Federal Government or the British Columbia Government. While the Alberta Act has dispensed with a good number of nuisance charges I would recommend that the fee upon corporation, and the annual report fee both be increased, and that as many of the other fees as possible be abandoned. It is a losing proposition to try and bill for $2.00 items.