

The Company Seal

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I. Introduction

Medieval English law recognized various types of corporations such as boroughs, towns, guilds and ecclesiastical bodies. These bodies were created by parliament, by royal grant, and up until the time of the reformation could be conferred upon an ecclesiastical body by the Pope. The corporate bodies thus created were granted the use of a corporate seal, which, by the time of Blackstone, was held to be a necessary attribute of every corporation. Blackstone and his contemporaries assumed that the corporate seal was a single implement. The corporate seal served two main functions; it not only solved the problem of illiterate signing officers of the corporation, but also served to distinguish the acts and contracts of the corporate body from the acts and contracts of its members, a distinction which is still a fairly common subject of litigation. Illiteracy not being quite the problem that it was 500 years ago, the main concern in this paper is to determine whether the use of a corporate seal is an adequate or desirable method of clarifying this distinction between the acts of the corporation and the acts of its de facto management.

II. Whether Seal is Required by a Statute

A. The Alberta Companies Act (A.C.A.)

Upon incorporation, under the provisions of section

28, a company has a common seal. The Alberta Act therefore requires a company to have a seal.

28. Effect of incorporation.—From the date of incorporation mentioned in the certificate of incorporation the subscribers, together with such other persons as may from time to time become members of the company, are a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act. [R.S.A. 1955, c. 53, s. 27]

The provisions of Table A with respect to the company seal deal only with the officers authorized to affix the seal.

B. Canada Business Corporations Act (C.B.C.A.)

R.W. V. Dickerson in his proposals for a new business corporations law for Canada discussed corporate seals in para. 96 as follows:

96. At one point we considered abolishing the whole idea of the corporate seal, an anachronism carried over from a less literate age. The amount of money spent every year in buying and storing this redundant ironmongery must be substantial. In the end, however, we concluded that we would probably create more trouble than we would save by abolishing the seal. Many people, bank managers in particular, are devoted to the seal and would be very upset if its use was prohibited. The law need not deprive people of such simple and harmless pleasures. The Draft Act, in s. 4.05, therefore continues to recognise the seal; it even lays down a rule of evidence giving prima facie validity to a document which is impressed with a corporate seal. However, the Draft Act also makes it clear that the use of a seal is voluntary, and documents signed in the ordinary way by authorized corporate officers are completely valid.

Admittedly illiteracy is not a problem it once was, but this comment fails to deal with the other essential characteristic of the corporate seal in law, namely, as a means to distinguish the acts of the company from the personal acts of its members or de facto managers. However, Mr. Dickerson's recommendations were carried into the Act and the only reference therefore

in C.B.C.A. to the corporate seal is contained in section 23 and is an oblique reference indeed.

Corporate seal **23. An instrument or agreement executed on behalf of a corporation by a director, an officer or an agent of the corporation is not invalid merely because a corporate seal is not affixed thereto.**

There is of course no such thing as Table A under the C.B.C.A. since what is filed under the Act are the "articles" and the by-laws are not filed with the director.

C. Ontario Business Corporations Act (O.B.C.A)

The Lawrence Committee apparently felt no need to consider the problem at all. The O.B.C.A. therefore follows the traditional route and under the provisions of section 13 of the Act, a company must have a corporate seal:

SEAL AND HEAD OFFICE

13. (1) Corporate seal.—A corporation shall have a seal which shall be adopted and may be changed by resolution of the directors.

(2) Idem.—The name of the corporation shall appear in legible characters on the seal. 1970, c. 25, s. 13.

The O.B.C.A. is similar to the C.B.C.A. in that the by-laws are not filed and there is no draft set of by-laws attached to the Act.

D. A British Columbia Companies Act (B.C.C.A)

The wording of section 36 of the former British Columbia Companies Act (c. 67 R.S.B.C. 1960) is, for the purposes of this topic, identical to section 28 of the A.C.A.

Effect of incorporation.

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36. From the date of incorporation mentioned in the certificate of incorporation the subscribers, together with such other persons as may from time to time become members of the company, are a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with the powers and with the liability on the part of the members mentioned in this Act. R.S. 1948, c. 58, s. 36.

At first glance section 14 of the new British Columbia Act appears to be identical with the former section 36, but it will be noted that the words used are "and the right to a common seal", not, "having a common seal".

Effect of incorporation.

14. The subscribers, together with such other persons as may, from time to time, become members of the company are, on and from the date of incorporation mentioned in the certificate of incorporation, a body corporate with the name contained in the memorandum, capable forthwith of exercising the functions of an incorporated company, having perpetual succession and the right to a common seal, with the powers and with the liability on the part of the members provided for in this Act. 1973, c. 18, s. 14.

It is apparent that this wording is permissive rather than mandatory when the wording of section 128(2) is considered

128 (2) Where a company has a common seal, it shall have its name engraven in legible characters on it.

In its submission to the Attorney General's Corporate Legislative Committee, the British Columbia Bar made no comment whatsoever upon the shift from a mandatory to a permissive provision regarding the company seal.

Article 14 of B.C.C.A., Table A deals with the seal but is entitled "Execution of Instruments" and will therefore be reproduced later in this paper.

E. The Ghana Companies Act

The Ghana Companies Act follows the English Company Act in that a company is required to have a corporate seal. There is no section similar to section 13(1) of the O.B.C.A. or section 28 of the A.C.A. which specifically states the requirement, but it becomes apparent from the provisions of other sections in the Act. Thus in section 53(1) share certi-

ificates of a company must be issued under the common seal of a company (once again following the English provisions), and under the provisions of section 121(1)(b) the company must have its name engraved in legible characters on its seal.

The Ghana Act provides a Table A for private companies and a Table B for public companies. The provisions with respect to the corporate seal are identical in each and will be referred to later in this paper.

F. South Africa Companies Act

The Act deliberately avoids all possible reference to a corporate company or common seal, with the exception of section 50(1)(b) which reads as follows:

Every company shall have its name engraved in legible characters on its seal (if any)

The South Africa Act follows the scheme of the Ghana Act in that it has a Table A for private companies and a Table B for public companies. Neither has any provision whatsoever dealing with the corporate seal.

G. The U.S. Model Act

The U.S. Model Act in section 4(c) confers upon a company the right to have a corporate seal.

§ 4. GENERAL POWERS

Each corporation shall have power:

. . . (c) To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.

¶ 2. COMMENT

The statutes of every jurisdiction include, among the powers possessed by a corporation, the power to have and use a corporate seal, sometimes called a common seal, and to alter or change it at pleasure. It is no longer the law, however, as Blackstone said, that a common seal is a necessary attribute of every corporation and that a corporation act and speak only by its common seal. Blackstone and early corporation statutes assumed that the corporate seal was a single implement. Many older corporations adhere to this concept and have not surrendered to progress which recognizes multiple implements and facsimiles. It is now generally accepted that corporate acts can be sufficiently evidenced by the signatures of officers or agents. No corporation statute now requires that a corporation have a corporate seal; many permit but do not require its use except in certain state filings, and a few are silent on the entire matter.

The Model Act is permissive and the provision is included largely because of requirements of other statutes, such as conveyancing statutes, in some states. The Model Act earlier required verification by a corporate officer in lieu of a seal in certain instances, but even verification was eliminated in 1962.

The corporate seal may be of some utility, either by statute or case law, as prima facie evidence of authority and genuineness.

The power to have and use a corporate seal should include the power to use a facsimile as has been done in section 4(c). Otherwise the use of a seal on large issues of stock certificates or bonds, if desired or required, would not be feasible.

¶ 3. STATUTORY PROVISIONS

¶ 3.01 Identical and identical in substance

Colorado, Delaware, Georgia, Illinois, Iowa, Mississippi, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, Wisconsin, Wyoming and the District of Columbia have provisions identical to the Model Act.

Alaska, Michigan, Missouri, North Carolina and Texas have provisions which are identical in substance.

¶ 3.02 Comparable statutory provisions

Arkansas, Louisiana and New Mexico have a provision comparable to the Model Act. These jurisdictions add to the Model Act text that the use of the seal by the corporation is optional and failure to affix the seal to a corporate document will not affect the document's validity.

H. General and Summary

The question of the necessity for a company to have a seal has not been one of pressing importance and while my research has not been exhaustive, I have not on a cursory review of the periodicals, been able to find any articles dealing with the problem arising from a permissive provision with respect to a company seal. Neither the Iacobucci Report nor the recent report Proposed Company Law Reform in New Brunswick, deal in any way with the problem of the corporate seal.

I. Recommendations

1. If it is decided that a corporate seal should be mandatory I recommend the clear and straight forward wording of the O.B.C.A. section 13.

2. If we are going to stick with tradition we might as well go whole hog and any reference to the "seal" in the Act or in Table A should use the expression "common seal" which will also help to distinguish the seal referred to from the seal of the registrar of companies (should we decide that he should have one).

3. While not particularly relevant to this paper I think we should re-examine the topic of articles of association and perhaps consider the uses of a Table A and a Table B such as are used in Ghana and the South African Act.

III. The Necessity To Have the Share Certificates Issued Under Seal

A. Alberta

There is no statutory necessity under the Alberta Companies Act for a company to issue share certificates under seal. The only requirement, contained in s. 62(1), is that the certificate be signed by the proper officers in accordance with the companies articles. Article 4 of Table A simply states that a member is entitled, without cost, to a share certificate signed by the secretary and one other officer of the company, and makes no mention of the seal.

B. The Canada Business Corporations Act

As we have seen the seal is not required and is purely permissive.

C. The Ontario Business Corporations Act

Section 49 to 51 of the Ontario Act deal with the requirements of a share certificate and no where in these sections, or any where else in the Act is there any requirement that share certificates must be issued under the seal of the company. I understand from discussions with some Ontario lawyers that it is fairly standard practice in Ontario to provide in the by-laws of the company that share certificates be issued under seal.

D. The British Columbia Companies Act

Since there is no mandatory requirement for a company to have a seal, sections 46 to 52 which deal with the requirements of share certificates and their issuance do not require that share certificates of a company be issued under the seal.

of a company. Article 2 of the Table A articles of the B.C. Act does not state that certificates are to be issued under seal.

E. The Ghana Companies Code

Under section 53(1) a share certificate must be issued under the common seal of the company. Article 14 of the Table A, which is identical to Article 14 of Table B, simply states that shares shall be issued in accordance with section 53 of the Code. This follows the English provisions (2)

F. South Africa

Once again since the use of the seal is permissive rather than mandatory there is no mention in the act that share certificates must be issued under seal. Table A simply states that share certificates shall be issued in such form as the directors may from time to time adopt so long as they conform and comply with the Act.

G. U.S. Model Act

If a corporation does have a seal the share certificates may be issued under seal or under a facsimile under the provisions of section 23

§ 23. CERTIFICATES REPRESENTING SHARES

The shares of a corporation shall be represented by certificates signed by the president or a vice president and the secretary or an assistant secretary of the corporation, and may be sealed with the seal of the corporation or a facsimile thereof. The signatures of the president or vice president and the secretary or assistant secretary upon a certificate may be facsimiles if the certificate is manually signed on behalf of a transfer agent or a registrar, other than the corporation itself or an employee of the corporation. In case any officer who has signed or whose facsimile signature has been placed upon such certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation with the same effect as if he were such officer at the date of its issue.

A close check of the various state corporation laws (frankly a chore hardly worth the doing) reveals that five states require the corporate seal to be affixed to share certificates, namely, Hawaii, Missouri, Nebraska, Oklahoma and Pennsylvania. The earlier comment in connection with section 4(c) of the Model Act is therefore not completely accurate.

H. The Problems

1. The forged or unauthorized use of the seal

Under the authority of Ruben v. Great Fingall Consolidated Ltd., [1906] A.C. 439, where the certificate in question had been signed by the secretary of the company, who had affixed the seal as he was authorized to do, but had forged the names of two directors of the company to the certificate; and South London Greyhound Racecourses Ltd. v. Wake [1931] 1 Ch. 496 where the share certificate had been sealed with the company seal, had been signed by the secretary and had been signed by one director but without the authority of a resolution of the board of directors, the holder of the share certificate in each case was held to have no claim against the company. These cases and an earlier case Bank of Ireland v. Trustees of Evans' Charities established the following principles: (1) affixing the corporate seal with intent to defraud is a forgery (2) there is no duty upon the directors or the company to provide for safe custody of the seal; (3) there was no representation by the company to the holder of the share certificate that the certificate was genuine and therefore there was no estoppel.

2. Double issue

This can arise, as it did in the Ruben case where the share certificate was created out of the air by means of a forged transfer from a fictitious shareholder (which was not true in the Wake case) or can arise where A being the holder

of shares sells to B but cannot find his share certificate. He therefore complies with the companies requirements and obtains a new certificate to replace the one he lost and complete his transfer to B. Later on he finds his original certificate and sells the shares represented thereby to C. On the authority of Longman v. Bath Electric Tramways Ltd. [1905] 1 Ch. 646 and Rainford v. James Keith and Blackman Ltd. [1905] 2 Ch. 147. C has no remedy against the company since the company has not made any false statement or representation to him and there was no continuing representation of the validity of the share certificate simply because it bore the companies seal.

I. Comments

It is true in a sense that these cases are dealing with the distinction between the acts of the company and the acts of its officers and directors, but the more practical problem in modern time is the negotiability of share certificates in order to facilitate stock exchange and commercial transactions. Part VI of the C.B.C.A. comprising section 44 to 76 of the Act set forth a comprehensive code which strikes a balance between the concept of negotiability and registration. Registration gives assurance to a bona fide purchaser that the registered holder is the owner of the security and gives assurance to him that when registered his ownership of a security cannot be disputed. Negotiability between registration dates makes it clear that a security certificate is similar to any bill of exchange. This is a shift in the law from that set forth in the above cases since it favours the bona fide purchaser instead of the original owner.

J. Recommendations

1. A statutory requirement that the company or the directors must provide for the safe custody of its seal, if it chooses to have one. Whatever the law may be the appearance

of the company seal upon the document creates an aura of authenticity and could certainly be used to commit a fraud upon the untutored. If a company can look after its cash and its other valuables I can see no unnecessary hardship in imposing upon the company a duty to look after its corporate seal.

2. Any statutory provision to permit the use of a printed or facsimile seal on security documents to avoid the one implement concept and to facilitate large public issues.

3. Inclusion of a section similar to section 53 of the C.B.C.A.

Un-
authorized
signature

53. An unauthorized signature on a security before or in the course of issue is ineffective, except that the signature is effective in favour of a purchaser for value and without notice of the lack of authority, if the signing has been done by

- (a) an authenticating trustee, registrar, transfer agent or other person entrusted by the issuer with the signing of the security, or of similar securities, or their immediate preparation for signing; or
- (b) an employee of the issuer or of a person referred to in paragraph (a) who in the ordinary course of his duties handles the security.

modified somewhat to include the unauthorized use of the seal as well as an unauthorized signature.

4. Consideration of Part VI of the C.B.C.A. as a very fine model indeed to cover the problem of negotiability between registration.

While it seems unlikely that any new Act will go so

far as to absolutely prohibit corporate seals, since I am sure there are some companies who use the corporate seal as a control mechanism, the above recommendations apply whether the seal was mandatory or permissive.

IV. The Necessity of the Companies Seal to Certify or Authenticate Documents

Of the Companies Acts which have previously been listed in this paper, only the O.B.C.A. requires the corporate seal to be affixed when certifying or authenticating a document of a corporation, under the definition section 1(1)(7) which reads as follows:

1. (1) 7. "certified copy" means,
- i. in relation to a document of a corporation, a copy of the document certified to be a true copy under the seal of the corporation and signed by an officer thereof,

The remaining acts either have no such requirement or specifically state there is no such requirement.

Alberta Companies Act

290. Authentication of documents.—A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorized officer of the company, and need not be under its common seal. [R.S.A. 1955, c. 53, s. 271]

C.B.C.A.

There is no section dealing with authentication or certification of documents by the company.

British Columbia Companies Act, Section 123

Authenticat
tion of
documents
by company.

123. A document that requires authentication or certification by a company may be authenticated or certified by a director, or officer of the company, or by the solicitor for the company, and need not be under its common seal. 1973, c. 18, s. 123.

The Ghana Companies Code, Section 146

146. A document or proceeding requiring authentication by a company may be signed on its behalf by an officer of the company and need not be under its common seal.

Authenticat
of Documen

South Africa Companies Act

The South Africa Act has adopted a somewhat unusual provision contained in section 1 (the definition section) of the Act, which states that "certified" means certified in the manner prescribed by the minister to be a true copy or a correct translation.

U. S. Model Act

The U. S. Model Act does not deal in any way whatsoever with authentication or certification of documents. Presumably whenever this question arises, the practicing bar have worked out some sort of satisfactory method of their own to handle the situation.

SUMMARY

No matter what kind of act we finally end up with, it is difficult to work out many of the mechanics of alteration of the framework of a company without providing for the filing with the Registrar of Companies (or whatever we may call him) of certified copies. In the interests of precision the effective date of any change can only be fixed by the date of filing. Some statutory provision should clearly set out whether the seal is required or not to authenticate or certify a company document. The present Alberta Companies Act does so in section 290, just as the O.B.C.A. does so, with the opposite effect, in section 1(1)(7). The only two arguments I can work out for the necessity of the company seal to certify or authenticate documents are firstly, it does represent a sort of solemn and considered act to affix the company seal, and secondly it can provide prima facie evidence that the document is a true copy of what it purports to be. It seems doubtful to me that these outweigh the administrative bother of having someone in the company's branch check to make sure that the company seal has been impressed on the copy and returning it when it has not.

RECOMMENDATION

Even if we decide that a company must have a common seal, I recommend that we retain a provision similar to the present section 290 of the Alberta Companies Act.

V. A Seal for Use Outside of the Province

The Canada Business Corporations Act, the South Africa Companies Act, and the U. S. Model Act contain no statutory provision whatsoever dealing with this matter. Of the three acts which we have examined, Alberta, British Columbia

and Ghana make specific provisions for a corporate seal to be used outside of the incorporating jurisdiction. They are as follows:

Alberta, Section 152

152. (1) Official seal for use outside Province.—A company whose objects require or comprise the transaction of business outside the Province may, if so authorized by its articles, have for use in any other province, state, or country an official seal, which shall be a facsimile of the common seal of the company, with the addition on its face of the name of the province, state, or country where it is to be used.

(2) A company having such an official seal may, by writing under its common seal, authorize any person appointed for the purpose in any province, state or country outside the Province to affix the same to any deed or other document to which the company is party in that province, state, or country.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed binds the company as if it had been sealed with the common seal of the company. [R.S.A. 1955, c. 53, s. 137]

British Columbia Companies Act, Section 37

Official seal
for use out-
side the
Province.

37. (1) A corporation created within the Province may, if so authorized by its articles, have an official seal for use in any other province, state, territory, or country, which shall contain the name of that province, state, territory, or country.

(2) A corporation having an official seal may in writing authorize an agent appointed for the purpose to affix it to any deed or other instrument to which the corporation is party.

(3) The authority of an agent appointed under subsection (2) shall, as between the corporation and a person dealing with the agent, continue during any period mentioned in the instrument conferring the authority; and, if no period is mentioned, until notice of the revocation or determination of the authority of the agent has been given to the person dealing with him.

(4) Every agent affixing an official seal shall, by writing under his hand, on the deed or other instrument to which the seal is affixed, certify the date and place of affixing the seal.

(5) Every deed or other instrument to which an official seal is duly affixed shall bind the corporation. 1973, c. 18, s. 37.

Ghana Companies Code, Section 148

148. (1) A company whose objects require or comprise the transaction of business in countries other than Ghana may, if authorised by its Regulations, have for use in any territory, district, or place not situate in Ghana, an official seal which shall be a facsimile of the common seal of the company with the addition on its face of the name of the territory, district or place where it is to be used.

Official Seal for use Abroad.

(2) Every document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

(3) The company may, by writing under its common seal, authorise any agent appointed for that purpose to affix the official seal to any document to which the company is a party in the territory, district or place.

(4) Any person dealing with such agent in reliance on the writing conferring the authority shall be entitled to assume that the authority of the agent continues during the period, if any, mentioned in the writing or, if no period is there mentioned, then until that person has actual notice of the revocation or determination of the authority.

(5) The person affixing any such official seal shall, by writing under his hand, certify on the document to which the seal is affixed, the date on which and the place at which it is affixed.

The Ontario Business Corporations Act, makes no provision whatsoever for a seal to be used outside the province. Contracts which are to be executed outside of the province can only be executed under the provisions of section 19 of the Act:

19. Power of attorney.—A corporation may, by writing under seal, empower any person, either generally or in respect of any specified matters, to execute, as its attorney and on its behalf in any place within or outside Ontario, documents to which it is a party in any capacity and that are required by law to be under seal, and every document signed by such attorney on behalf of the corporation acting within the scope of his authority, express or implied, and under his seal binds the corporation and has the same effect as if it were under the seal of the corporation. 1970, c. 25, s. 19.

The Ghana Code provides an alternative to section 148, that is similar to the Ontario section 19, in that section 147 of the Code

147. (1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney to execute deeds on its behalf in any place outside Ghana. Executed Deeds

(2) A deed signed by such an attorney on behalf of the company and under his seal shall bind the company and have the same effect as if it were under its common seal.

It will be noted that in both the attorney must execute the document under his seal.

The Canada Business Corporations Act, the South Africa Act and the U. S. Model Act make no mention whatsoever of any such provision as they really don't regard the seal of any great importance in any of these three Acts.

SUMMARY

The only necessity for statutory provisions regarding this matter arises from the ancient one implement concept, which, if omitted from the Act, could arise to haunt those Alberta companies that have used the provisions of the present section 152 to facilitate their business in other provinces than Alberta. I can see no real necessity for the seal to have the name of the area in which it is going to be used as provided in sections 152(1) of the Alberta Act, section 37(1) of the B.C.C.A. and section 148(1) of the Ghana Act. The provisions of the Ontario Act are a logical consequence of the one implement concept, but frankly seem to me to be unduly restrictive for any company that is carrying on business in more than one jurisdiction.

RECOMMENDATION

1. Whether the corporate seal is mandatory or permissive there should be a statutory provision for the use of a seal outside of the province.
2. I cannot see the need for any special characteristic of such a seal.

VI. The Physical Requirements of the Corporate Seal

The only requirement with respect to the nature or contents of the corporate seal in the Alberta Act is set forth in section 74(1)(b).

- 74. (1) Display of company name.—**Every company
- (a)** shall paint or affix, and keep painted or affixed, its name on the outside of its registered office and every other office or place in which its business is carried on in a conspicuous position and in easily legible letters,
 - (b)** shall have its name engraven in legible characters on its seal, and
 - (c)** shall have its name set forth in legible characters in all notices, advertisements, and other official publications of

The C.B.C.A. contains no provisions whatsoever with regard to the nature or requirements of the corporate seal. The O.B.C.A. in section 13(2) which is set forth previously in this paper has a similar requirement that the company must have its name engraved in legible characters on its seal. The B.C.C.A. under section 128(2) simply states that where a company has a common seal it shall have its name engraved in legible characters on it. The Ghana Act in section 121(1)(b) states that every company shall have its name engraved in legible characters on its seal. Neither the South Africa or the U. S. Model Act have any requirement whatsoever with respect to the corporate seal. The U. S. Model Act permits a company to adopt and to alter its seal as do most of the state Acts. Only Nevada prescribes the contents of the corporate seal namely the name of the corporation and the year of the issuance of the certificate of incorporation by the Secretary of State.

RECOMMENDATIONS

1. Whether the seal be mandatory or permissive the name of the company should appear on its corporate seal for the simple purpose of identification. This should not be exclusive so that any company with a company logo could have the logo appear on its seal as well as its name if it so desired. Since logos change with advertising trends a company should have the statutory right to alter its seal providing always however that the company name appears on it.
2. In practice I have seen both metal indent and rubber stamps used as seals, both of which would be permissible under our present Act. I can see no need to restrict this in a new Act. If a company wished to use old fashioned sealing wax and an old fashioned seal there should be no reason to prohibit it from doing so.
3. As mentioned previously there should be a provision for a facsimile or printed seal for use in connection with security issues.

VII. Safe Custody of the Seal

None of the Acts have any statutory provision in this regard. Of the Acts which do have a Table A only Ghana in Article 78 makes any mention whatsoever that the directors should provide for safe custody of the seal.

SUMMARY

As we have seen the English common law did not impose any duty upon the directors to provide for safe custody of the company seal. This appears to me to be faulty if the seal is to have any value or use whatsoever. Certainly the directors are in the best position to provide for safe custody of the seal.

RECOMMENDATIONS

1. If the common seal is to be mandatory, and I can see no reason to have it so unless it is to be some effect, then the statute should impose a reasonable duty upon the directors with respect to the safe custody of the seal.
2. If the common seal is to be permissible but not required then I cannot think of any instance in which the company seal will have even a prima facie evidentiary value: its safe custody therefore is not of any great importance.

VIII. The Necessity for a Company to Execute Certain Deeds or Documents Under Seal

A. By Virtue of Statutory Provisions

Section 149(1)(a) of the Alberta Companies Act does not actually require a company to execute a contract under its common seal which if made between private persons would be required to be under seal. This section has been judicially interpreted in Pyramid Construction (Calgary) Ltd. v. Fiel and Fiel, (1957) 22 W.W.R., N.S. 497, in which Mr. Justice Riley pointed out the repeated use of the word "may" and that

the section was permissive not mandatory. The section reads as follows:

Division (12)—Contracts

149. (1) Powers of company to contract.—Contracts on behalf of a company may be made as follows, that is to say,

- (a) any contract that if made between private persons would be by law required to be in writing, and if made according to the law of the Province or of the Dominion to be under seal, may be made on behalf of the company in writing under the common seal of the company, and may in the same manner be varied or discharged.

The C.B.C.A. has no similar provision. The O.B.C.A. has a similar, and equally permissive provision, in section 18(1) of the Act:

Contracts

18. (1) Contracts in writing under seal.—A contract that if entered into by an individual person would be by law required to be in writing and under seal may be entered into on behalf of a corporation in writing under the seal of the corporation.

The B.C.C.A. contains a similar provision in section 122(1):

(a) Contracts and Loans

Form and
effect of
contracts

- 122. (1)** Every contract that, if made between natural persons would by law required to be in writing and under seal, may be made on behalf of a company in writing under seal and may, in the same manner, be varied or discharged.

The Ghana Code is equally permissive in its section 144(a):

144. Contracts on behalf of any company may be made, varied or discharged as follows:—

- (a) Any contract which, if made between individuals would be by law required to be in writing under seal, or which could be varied or discharged by writing under seal only, may be made, varied or discharged, as the case may be, in writing under the common seal of the company.

Neither the South Africa or U. S. Model Act contain any similar provision whatsoever.

The document in question in the Pyramid case was not a document which would have been necessary to execute under seal had it been executed between private persons. In considering whether the section should be left as it is, made mandatory, or abandoned completely we should perhaps consider the instances in the present law of Alberta where private persons would be required to execute a document under seal. There is now no difference in the statutory limitation period for a specialty debt or a contract debt under our present Statute of Limitations, so this distinction is no longer of importance. Both the English and Canadian courts have held that a share certificate is not a deed and the Alberta courts have held that a transfer of land under the Land Titles Act is not a deed.

At common law a man's writing was required to be authenticated by his seal, therefore a deed was necessary for every transaction required to be evidenced in writing. The ceremony of sealing, when one considers melting the wax and all, coupled with delivery was deemed to bring home to him whose deed it was the awesome consequences of his act; hardly comparable to the usual practice in a modern law office where the lawyer's secretary usually affixes a red wafer seal before the document is signed. In Alberta, rightly or wrongly, the Appellate Division of the Supreme Court of Alberta in B. A. Oil Company v. Ferguson [1951] 2 D.L.R. 37 held, although not part of the ratio of the case, that the fact that a bond was given under seal did not prevent the court from exercising its equitable jurisdiction to enquire into the question of consideration. In the leading Alberta case Chilliback v. Pawliuk 17 W.W.R., N.S., 534, Egbert, J. specifically held that while a seal imported consideration this is only a prima

facie presumption and the court in the exercise of its equitable jurisdiction can determine whether there has been any consideration or not. If there has been none the court, in Alberta, will not enforce the deed in spite of the fact that it has been executed under seal and with a testimonial clause. In the face of this decision which is quite clearly contrary to the English law, one wonders just how any contract given without consideration can be made to be enforceable in Alberta today. Under the common law in Alberta as it now stands, there seems to be no instance in which a seal has any efficacy or effect with regard to enforceability of a contract.

While enforceability of a deed given without consideration under seal is a doubtful proposition in Alberta, there are two other aspects of deeds given under seal, providing there is consideration, which have so far not been erased by the Alberta courts. Firstly, only the parties to a deed under seal may sue or be sued upon the deed. The undisclosed principle, if discovered before or after the action is commenced, cannot be joined as a party to the action. Secondly, if a document is executed under seal with blanks, the blanks cannot be completed except by a person authorized to do so under seal unless the document is returned to the maker and he ratifies it.

RECOMMENDATIONS

Since the provisions of section 149(1)(a) are permissive and not mandatory, the only function they serve is to make it clear that a company does not have to execute a document under seal which private persons would perhaps have to. I have no strong views on this and while I cannot see any great deal of use in the section it does, considering it has been judicially interpreted, make clear that corporations do not have to use their corporate seal where private

individuals might be required to do so. Just when this would be true in Alberta in light of our existing decisions, I have not yet been able to imagine.

B. By Virtue of Other Statutory Provisions

Section 139(2) of the Companies Act requires that a proxy given by a company must be executed under seal.

(2) A proxy shall be executed by the shareholder or his attorney authorized in writing or, if the shareholder is a corporation, under its corporate seal or by an officer or attorney thereof duly authorized, and ceases to be valid one year from its date.

Just how a British Columbia company or a company incorporated under the C.B.C.A., which does not have a corporate seal and is the shareholder of an Alberta company, gives a valid proxy, I have not yet been able to determine and obviously something will have to be done with this section in view of the permissive provisions of both the B.C. and the Canada Act.

C. Consequential Amendments to Other Statutes

If the seal is to be permissive the provisions of section 158 of the Land Titles Act will of necessity have to be amended.

Attestation of Instruments

158. (1) Other than notifications referred to in section 31, instruments under the seal of any corporation, caveats, orders of a court or judge, executions, or certificates of any judicial proceedings, attested as such, every instrument executed within the limits of the Province and requiring to be registered under this Act, shall be witnessed by one person, who shall sign his name to the instrument as a witness and who shall appear before the Inspector of Land Titles Offices or the Registrar or Deputy Registrar of the registration district in which the land is situated, or before a judge, magistrate, notary public, commissioner for taking affidavits, or a justice of the peace in or for the Province, and make an affidavit in Form 33 in the Schedule.

(2) Any document executed by a corporation, notwithstanding anything to the contrary in the Act, statute, charter or memorandum and articles of association incorporating the corporation, shall for the purposes of this Act be deemed to be sufficiently executed if it is sealed with the corporate seal of the corporation and countersigned by at least one officer of the corporation. [R.S.A. 1955, c. 170, s. 158]

The combination of subsection 2 of the above section and the form of affidavit of attestation (execution) make it mandatory for a company to execute any documents to be found under the provisions of the Land Titles Act, under seal. The Builders Lien Act refers to the requirements of the Land Titles Act.

Neither the Bills of Sale Act nor the Conditional Sales Act requires execution by a corporation under seal, nor does the Garagemen's Lien Act. I have not at this time examined all of the other Lien Acts such as the Woomdman's lien, Warehouseman Lien etc. but this is a matter which can be left until we have made up our minds whether seal is to be mandatory or permissive.

RECOMMENDATIONS

(1) If the seal is to be permissive we will have to examine a complete list of the other Acts of the province and compile a list of consequential amendments.

(2) We cannot of course provide consequential amendments with regard to statutes of other jurisdictions and certainly with the provisions contained in the O.B.C.A., it is almost certain that there are other statutes in that province which will require the use of the corporate seal. There are therefore reasons beyond a simple longing for established patterns in at least permitting companies to have a seal since it may require one in other jurisdictions.

The whole topic of execution of contracts will be dealt with in another paper.

Article 14 of the B.C.C.A., Table A, and Article 78 and 79 of Table A and B of the Ghana Company Code, both previously referred to in this paper, are as follows:

Part 14.—Execution of Instruments

14.1 The directors may provide a common seal for the Company and for its use and they shall have power from time to time to destroy the same and substitute a new seal in place of the seal destroyed.

14.2 Subject to the provisions of the *Companies Act*, the directors may provide for use in any other province, state, territory, or country an official seal, which shall be a facsimile of the common seal of the Company, with the addition on its face of the name of the province, state, territory, or country where it is to be used.

Part 15.—Dividends

The Seal

78. The directors shall provide for the safe custody of the seal, which shall only be used by authority of the board of directors or of a committee of the directors authorised by the board of directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director, and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose.

79. The company may exercise the powers conferred by section 148 of the Code with regard to providing an official seal for use abroad, and such powers shall be vested in the board of directors.

IX. Summary of Recommendations

A. If the corporate seal is to be mandatory, the Act should:

(1) Contain a clear simple statement, such as is contained in section 13 of the O.B.C.A., setting forth the requirement to have a corporate seal, the right to offer it, and the necessity to have the company's name appear upon it.

(2) Permit the use of a printed or facsimile corporate

securities, but require the corporate seal to appear on them.

(3) Retain the provision permitting the use of an official seal for use outside of the province with the exception of the requirement of the name of the province, state or country in which it is to be used.

(4) Retain the provision of section 149(1)(a) of the present Act.

(5) Change the provisions contained in section 290 of the present act to make it a statutory requirement that the corporate seal is required to certify or authenticate documents.

(6) Give the corporate seal a prima facie evidentiary value that the document executed or issued under the corporate seal is what is purpotes to be.

(7) Impose a reasonable standard of care upon the directors and officers of the company to provide for safe custody of the corporate seal.

(8) Examine carefully the provisions of part 6 of the C.B.C.A. to determine whether the mandatory corporate seal would alter the effect of these sections in any way. It will certainly be my recommendation when we come to deal with corporate securities that these sections be almost adopted in toto. This seems to me to be one area in which uniformity is most desirable.

(9) No consequential amendments are necessary.

B. If the corporate seal is to be permissive, the Act should:

(1) State so clearly in a manner similar to section 13 of the O.B.C.A..

(2) Contain a positive statement that the corporate seal has no evidentiary value, need not appear on share certificates, and is not necessary to authenticate or certify documents.

(3) Prepare a list of the necessary consequential amendment.

C. In either event, whether the seal is mandatory or permissive, the act should;

(1) Adopt the recommendations contained in A-2, 3 and 4.

(2) Alter section 139(2) of the present act so that companies incorporated in other jurisdictions that do not require a seal, and which have not got a corporate seal, can execute a proxy as share holders of an Alberta company.

CONCLUSIONS

The use of a seal as between private contracting persons or in the execution of a deed pole by an individual, seems to be nearly a thing of the past in Alberta. Other than the occasional statutory requirement such as section 158 of the Land Titles Act, which can easily be amended, there really does not seem to be any necessity for a company to have a corporate seal in modern times in this province. I cannot however get over the feeling, shared I am sure by all laymen and 90 per cent of the practising bar, that a document bearing a corporate seal has a ring of authenticity. At the least we must permit a company to have a corporate seal since it may wish to do business in another jurisdiction that requires it use. The precentage of Alberta companies that

would adopt a corporate seal if they did not have to is pure conjecture and speculation on this matter will not serve any useful purpose, but undoubtedly there will be some who will. Once we have made our choice and I feel we should adopt a pertinent recommendation. . My personal feeling is that the corporate seal still serves two useful functions, firstly to distinguish between the acts of the company and the acts of its management, and secondly, the very old fashion purpose of a solemn act in connection with the execution of a document that makes the plea of non est factum all but impossible except in cases of forgery. Certainly if the Act is going to require a corporate seal then it must have some effect and the directors and officers must be required to look after it carefully. I confess that I find the balance of these two useful purposes, as against practical business convenience, very difficult, but on the whole I am inclined towards retaining the corporate seal to serve the two useful functions which I have mentioned.

Re: Company Seal

Panorama Developments (Guildford) Ltd. v. Fidelis Furnishing Fabrics Ltd. [1971] 3 All. E.R. 16. This is the case that Bernard Davies referred to in our discussion regarding seals. A fraudulent secretary named Bayne hired cars from a hire purchase company, the appellant, and asked that they be charged to the account of his employer, the respondent. The contracts were not under seal so the question of the fraudulent seal did not arise. However from the strong wording of the three judges of the Court of Appeal, Lord Denning and Lord Justice Salmon with whom Magaw agreed, it is doubtful that Ruben v. Great Fingall Consolidated would have been decided in the same manner before this more modern court. They unhesitatingly found that the secretary of the company was an officer of the company held out to do a good number of statutory and other acts on behalf of the company, and was thus clothed with ostensible authority to act on behalf of the company. Lord Denning pointed out that it was the company who had put Bayne in the position in which he as company secretary was able to commit the frauds, and so found the company liable. I suspect that the decision would have been the same with respect to a contract under seal. Bonds seemed to be the only answer.