WHO CAN INCORPORATE

PRESENT ALBERTA LAW

Section 15 of the Companies Act provides that any three or more persons associated for any lawful purpose permitted by this Act may, . . . form an incorporated company. (In the case of a private company any two or more persons will do.)

In the definition section of the Act there is no definition of the word "person". By reason of no definition one may assume, incorrectly, that "person" means natural person or body corporate. There would seem to be no requirement that the person be of sound mind, of the age of majority, or not bankrupt.

By section 51 of the Act, which describes the Memorandum of the Company, a subscriber shall be deemed to become a member of the Company. There is no limitation as to the qualification or capabilities of members.

In Schedule A, paragraph 61 it is provided that a Director will be disqualified from holding office if he becomes bankrupt or is found lunatic or becomes of unsound mind.

BILL C-29

PROPOSED FEDERAL LEGISLATION

Section 5 of the proposed Federal Act provides:

"One or more individuals, no one of whom

(a) is less than 18 years of age;

(b) is of unsound mind and has been so found by a court in Canada or elsewhere or;

(c) has the status of a bankrupt may incorporate an incorporation by sending Articles of Incorporation and complying with section 7

5(2) One or more bodies corporate may incorporate a corporation by signing Articles of Incorporation and then complying with section 7.

By section 2(1) of the Act an "individual" is defined as a natural person and "body corporate" is defined to include a company or other body corporate whereever or however incorporated.

The rationale for reducing the number of incorporators from three to one and the removal of the present limitation that applicants for incorporation must be individuals is explained in paragraphs 48 and 49 of Dickerson's proposal for a new business corporation law for Canada.

48. Section 2.01 makes two important changes in the present law. The minimum requirement of three incorporators (s.5 of the present Act) is reduced to one. This is consistent with legislation in other jurisdictions (eg. Ontario Act, s. 4). The legality of the "one-man" corporation has been acknowledged since the landmark decision in *Salamon* v. *Salamon & Co.* [1897] AC 22, and the formal requirements of the present Act are invariably met by the use of "dummy" incorporators, usually stenographers in lawyers' offices. The minimum membership requirement affords no significant protection to creditors, nor does it present any serious obstacle to irresponsible incorporation. Its abandonment will therefore expose creditors to no greater risks than those to which they are at present subject and, in accordance with a policy followed consistently in the Draft Act of dispensing with meaningless formalities, the requirement in the present Act of three incorporators is abolished.

49. Section 2.01 also removes the limitation contained in s. 7(1) of the present Act that the applicants for incorporation should be individuals. The Draft Act thus eliminates the artificiality of insisting upon human intermediaries in the formation of subsidiary corporations.

QUESTIONS FOR CONSIDERATION

1. What are the arguments for and against retention of the present rule: that three persons are required to sign the Memorandum of Association.

2. Are there any arguments to support the proposition that a body corporate may not incorporate its own subsiduary?

3. What is the nature of a Memorandum of Association? Is it some form of contract, entirely different in nature from the application for Letters Patent?

4. Is it because of the contractural nature of the Memorandum of Association that the Federal Act restricts infants, bankrupts and persons of unsound mind, so found, from applying for incorporation?

5. What duties are placed on the Registrar to see that the applicants are not within the prohibited classes?

6. What is the effect of a Certificate of Incorporation where one of the parties is an infant?

From a quick reading of the index to Bill C-29 it does not seem to provide for the conclusiveness of a Certificate of Incorporation such as is found in section 27 of the Alberta Companies Act which provides:

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. 1955, c. 53, s. 26]

There is much English case law on the subject of what happens when infants are involved in the incorporation of companies.

See in Re Royal Naval School. Seymour against Royal Naval School, [1910] 1 Chancery 806. See also in Re Laxton [1892] 3 Chancery 555 and Hamilton and Flamborough Road Company against Townsend (1886), 13 O.A.R. at 534.

7. Does such incapacity raise the whole issue of void and voidability of incorporation?

8. If we wish to exclude mentally incapacitated persons, those to which the provisions of the Mentally Incapacitated Persons Act, R.S.A. 1970 c. 232 apply, what about mentally disordered persons under the Mental Health Act, R.S.A. 1970 c. 231?

9. What about bankrupts? Under section 170 of the Bankruptcy Act, it is an offence for an undischarged bankrupt to engage in trade or business without disclosing to all persons that he is an undischarged bankrupt. It is also an offence for an undischarged bankrupt under the same section to obtain credit other than for necessities. There seems to be no other section which prevents a bankrupt from conducting business. Should he be excluded from incorporating companies?

10. Are there any other questions or matters which we should consider with regard to those who might seek incorporation?