ALTERATION AND CONVERSION OF CAPITAL

This topic will deal only with alteration or conversion of capital to the extent that one type of share is converted to another type or the special conditions attached to any one class of shares are varied or changed, and will deal with the following:

(a) conversion of par value shares to no par value shares and vice versa

(b) conversion of common (voting) shares to perferred or non voting shares with special rights and restrictions attached to them, and vice versa

(c) alteration of the special rights and conditions attached to any one class of shares

(d) conversion of shares to stock and from stock back to shares.

Conversion or alteration of the special rights attached to any one class of share or even conversion of these shares, can arrive at the instigation of the shareholders or, under the Alberta Act, at the instigation of creditors under the compromise and arrangement sections. The main problem in this area is the limitation of the right of the holders of the voting shares to alter, amend or vary these special conditions attached to a class of non voting shares. Presumably, no problem will arise where the holders of both class unanimously desire to alter, amend or vary the rights and restrictions attached to any one class of shares, but

the problem will arise where the holders of the voting shares wish to alter, amend or vary the special conditions attached to a class of shares which has no vote and whose holders do not wish to agree to the proposed variation.

THE PRESENT ALBERTA ACT

A conversion of par value shares to no par value shares or vice versa, or a conversion of common shares to preferred shares or to a class of shares described as common but with special rights or restrictions attached to them, or vice versa, or a conversion of shares to stock, and from stock back to shares, will necessarily involve an alteration of the memorandum association of the company. This is not necessarily true of an alteration in the special rights and conditions attached to any share since the Alberta Act does not require that these be set out in the memorandum of association. Under our Act these special rights and restrictions attached to any one class of shares may be set out in either the memorandum of association or the articles of association. This topic will deal only with alteration of capital of a company limited by shares and will not deal with the other kinds of companies which are permitted in corporation under the Alberta Act.

A company, under Section 30, can only alter its memorandum in the manner provided in the Act.

Power to alter memorandum

30. A company shall not alter the conditions contained in its memorandum, except in the cases and in the mode and to the extent for which express provision is made in this Act. [R.S.A. 1970, c. 60, s. 30]

Under the provisions of Section 36 (1)

> **36. (1) Alteration of share capital.**—A company having a share capital, if authorized by its articles, may by special resolution

and depending upon the provisions in its articles, a company may be special resolution of the shareholders, an ordinary resolution of the shareholders or by a resolution of directors, increase the maximum price or consideration for which shares without nominal or par value may be issued, where such maximum price or consideration has been stated in the memorandum or articles.

Under the provision of Section 37 (1) (a), (b), (c), (d)

> Consolidation, subdivision, etc., of share capital
>
> **37.** (1) A company having a share capital, if so authorized by its articles, may by special resolution alter the conditions of its memorandum as follows:
>
> (*a*) it may increase its share capital by the creation of new shares of such amount, or of such number of new shares without nominal or par value, as it thinks expedient;
>
> (*b*) it may consolidate and divide all or any of its share capital having a par value into shares of larger amount than its existing shares;
>
> (*c*) it may convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination, or without nominal or par value;
>
> (*d*) it may subdivide its shares having a par value, or any of them, into shares of smaller amount than its existing shares, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived.

and if so authorized by its Articles, a company may by special resolution substantially alter its existing capitalization but with the exception of the provisions contained in Section 37 (1) (c), it may not basically alter the total capital involved, it may simply create more of the same kind of shares with less value

or fewer of the same kind of shares with more. Section 37(1)(c) provides a dual mechanism in enabling a company with par value shares to convert to a company with no par value shares. The simple provision in the Ontario Business Corporations Act in this regard would seem to cover this situation in a far less complex manner. This Section is also the usual mechanism for 'going public' when an underwriting has been arranged even if the company had no par value shares before the alteration since the Section merely refers to paid up shares and does not state whether they must be no par value or par value. There seems to be no reason that a resolution combining the powers in Section 37 (a) and 37 (b) or (d) could not be used equally well for this latter purpose. Unlike Section 36, a resolution to accomplish the variations permitted under Section 37 can only be a special resolution of the shareholders no matter what provision may be contained in the Articles of Association of the Company.

Under the very broad provisions of Section 38 (1)

Reorganization of Share Capital

38. (1) **Powers of company to reorganize share capital.**—A company having a share capital by special resolution confirmed by an order of the court,

(a) may modify the provisions contained in its memorandum so as to reorganize its share capital in any way, and without prejudice to the generality of the foregoing power may modify or alter its memorandum so as to

(i) consolidate shares of different classes, or

(ii) divide its shares into shares of different classes, or

(iii) vary the rights attached to any class of shares, or

(iv) subject to section 39, convert shares of a fixed amount into shares without nominal or par value, or

(v) convert shares without nominal or par value into shares of a fixed amount,

but no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class and holding three-fourths of the share capital of that class, and every resolution so passed binds all shareholders of the class, and

(b) may alter its memorandum so as to reduce its share capital in any way, and without prejudice to the generality of the foregoing power may modify or alter its memorandum so as to

> (i) extinguish or reduce the liability on any of its shares in respect of share capital not paid up, or
>
> (ii) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital that is lost or unrepresented by available assets, or
>
> (iii) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital that is in excess of the wants of the company.

a company can by special resolution vary its capital structure in any conceivable manner providing it can obtain the approval of the Court to such a variation. There are two Sections in the Act which grant some protection to the holders of a special class of share. The first is the proviso at the end of Section 38 (1)(a) which requires that any special resolution interferring with the special right or privilege must be passed by a majority in number holding three fourths of the shares of that class. Section 69 (2) does not appear to grant quite the same protection although it does require confirmation of the resolution by the Court, since the requirement is the consent in writing of the holders of three fourths of the issued shares of that class or a special resolution of the shareholders of that class, which means 3/4 of those attending a meeting of which 21 day's notice has been given proposing the resolution. It is interesting to note that I can find no Alberta reported case in which the holders of the special class of shares appealed to the Court to dispute a variation of the rights under this Section. Under the Australian Act, 10% of the holders of the shares bearing a special right or privilege may apply to the Court for relief. There is a considerable body of reported law in this regard. This would seem to prove one of two things; either the protection afforded at present under these sections is not adequate, or, the Australian minority shareholder is a ~~must~~ MJC more aggressive beast.

An apparent conflict occurs in Section 136 (2) if even a contingent right to vote is given the holder of a special class

of shareholder and such right to vote is not set forth in the Articles rather than in the memorandum of association, since under that Section the only person who can demand a pool is a person who is entitled under the Articles to vote. It is suggested that this concept be abandoned and could be more adequately covered by a statutory provision.

Section 111 of the Act permits a Company to provide for convertible shares. However, it will be remembered that under the present Alberta Act that if a company has no par value shares, under the provisions of Section 69, it can only issue par value preference shares in $1 or multiples thereof. This Section has bothered the ingenuity of lawyers who do a great deal of tax planning, since in certain estate freezes they would like to have no par value common shares and a convertible preference share ~~which is~~ convertible into no par value common shares, upon the death of the holder of the common shares, and problems do arise on a one to one exchange. It is difficult to cast a formula for conversion that is not going to create trouble under the present Tax Act. Once again, it is recommended that this curiosity in the existing Act that insists on the par value preference shares where the common shares are no par value, should be abandoned so that convertible shares could be used with greater flexibility.

Compulsory conversion or alteration of capital under the compromise and arrangement section being section 154, or the reconstruction section, being Section 155, or the amalgamation section, 156, have been left to a later date since each of these is pretty well a topic in its own.

THE AUSTRALIAN AND B.C. ACTS

Section 62 of the Australian Act provides for the manner in which the memorandum of association can be altered with

respect to capital.

62. (1) Power of company to alter its share capital. A company if so authorized by its articles may in general meeting alter the conditions of its memorandum in any one or more of the following ways:—

(a) increase its share capital by the creation of new shares of such amount as it thinks expedient;

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(c) convert all or any of its paid up shares into stock and re-convert that stock into paid up shares of any denomination;

(d) subdivide its shares or any of them into shares of smaller amount than is fixed by the memorandum, so however that in the subdivision the proportion between the amount paid and the amount (if any) unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(e) cancel shares which at the date of the passing of the resolution in that behalf have not been taken or agreed to be taken by any person or which have been forfeited and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) **Cancellations.** A cancellation of shares under this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

(3) **As to share capital of unlimited company on re-registration.** An unlimited company having a share capital may by any resolution passed for the purposes of subsection (1) of section twenty-five—

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up; and

(b) in addition or alternatively, provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

(4) **Notice of increase of share capital.** Where a company has increased its share capital beyond the registered capital, it shall within fourteen days after the passing of the resolution authorizing the increase lodge with the Registrar notice of the increase.

(5) If any company fails to comply with the provisions of subsection (4) of this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: Fifty pounds. Default penalty.

These Sections look considerably more simple than ours but it must be remembered that the Australian Act does not ~~commit~~ PERMIT a no par value share.

The protection given to holders of special classes of shares are set forth in section 65 -

65. Rights of holders of classes of shares. (1) If in the case of a company the share capital of which is divided into different classes of shares provision is made by the memorandum or articles for authorizing the variation or abrogation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied or abrogated the holders of not less in the aggregate than ten per centum of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation or abrogation, may apply to the Court to have the variation or abrogation cancelled, and, if any such application is made, the variation or abrogation shall not have effect until confirmed by the Court.

(2) An application shall not be invalid by reason of the applicants or any of them having consented to or voted in favour of the resolution for the variation or abrogation if the Court is satisfied that any material fact was not disclosed by the company to those applicants before they so consented or voted.

(3) The application shall be made within one month after the date on which the consent was given or the resolution was passed or such further time as the Court allows, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they appoint in writing.

(4) On the application the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested, may, if satisfied having regard to all the circumstances of the case that the variation or abrogation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation or abrogation as the case may be and shall, if not so satisfied, confirm it, and the decision of the Court shall be final.

(5) The company shall within fourteen days after the making of an order by the Court on any such application lodge an office copy of the order with the Registrar and if default is made in complying with this provision the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Penalty: One hundred pounds. Default penalty.

(6) The issue by a company of preference shares ranking pari passu with existing preference shares issued by the company shall be deemed to be a variation of the rights attached to those existing preference shares unless the issue of the first-mentioned shares was authorized by the terms of issue of the existing preference shares or by the articles of the company in force at the time the existing preference shares were issued.

And as mentioned previously there seems to have been produced a considerable more body of reported law in Australia than we have in Alberta on the rights of the holders of special classes of shares.

The Australian Act under Section 66 requires that the rights of the holders of preference shares shall be set out in the memorandum ~~of~~ OR the Articles -

> **66. Rights of holders of preference shares to be set out in memorandum or articles.** (1) No company shall allot any preference shares or convert any issued shares into preference shares unless there is set out in its memorandum or articles the rights of the holders of those shares with respect to repayment of capital, participation in surplus assets and profits, cumulative or non-cumulative dividends, voting, and priority of payment of capital and dividend in relation to other shares or other classes of preference shares.
>
> **(2)** If default is made in complying with this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.
>
> Penalty: One hundred pounds.

Attached to this memo are Sections 237 to 252 inclusive of the British Columbia Act and the following will be noted:

1. Under Section 238 the Company can only alter the memorandum by filing a certified copy of the resolution with the Registrar and such resolution does not take effect until every other requirement of the Act has been completed.

Section 240 (1) contains the curious provision that in order to alter its articles, the company must have the power to do so contained in its memorandum.

Special rights attached to a class of shares can be created or varied under the provisions of Section 245 and 246 both of which are subject to the provisions of Sections 247 and 248 which provide the holders of such special class of shares the protection of requiring a three-quarter majority to consent to the change, and in the case of a reporting company, the commission has first consented to the resolution. Section 248 gives a right to object/not only the holders of not less than 10% of the class, but to the holders of not less than 10% of the shares of the company.

Section 251 sets forth the permissible alterations of the capital. It will be noted that there is no provision for conversion to stock and back to shares.

(*b*) fails to notify any person who, but for the restriction imposed under subsection (3), would be entitled to exercise the rights and receive the benefits restricted by the order,

is guilty of an offence.

(6) Where a share, debenture, or membership is issued in contravention of a restriction imposed by subsection (3), the corporation and every director and officer of the corporation who knowingly and willingly authorizes or permits such issue, is guilty of an offence. 1973, c. 18, s. 233.

(c) General

Exemption.

234. No inspector appointed under this Part shall require a barrister or solicitor to disclose any privileged communication made to him in that capacity, except as to the name and address of his clients. 1973, c. 18, s. 234.

Report as evidence.

235. A copy of the report of an inspector appointed under section 230, 231, or 233, signed by the inspector, is admissible in any legal proceeding as evidence of the opinion of the inspector. 1973, c. 18, s. 235.

Offence.

236. A person who fails to give information required of him under section 230, 231, or 233 or who, in giving the information, makes any statement which he knows or ought reasonably to know to be false in a material particular, or who recklessly makes any statement which is false in a material particular, is guilty of an offence. 1973, c. 18, s. 236.

PART 8

COMPANY ALTERATIONS

Division (1).—Memorandum and Articles

Meaning of "alter".

237. In this Part, unless the context otherwise requires, "alter" includes create, add to, vary, and delete. 1973, c. 18, s. 237.

Powers to alter memorandum.

238. (1) A company may only alter its memorandum by filing with the Registrar a certified copy of a resolution required by this Act altering the memorandum, in the cases and in the manner and to the extent for which express provision is made in this Act, but only if the memorandum as altered would, at the time of the filing, comply with this Act.

(2) A resolution to alter the memorandum of a company takes effect on,

(*a*) where every other requirement of this Act relating to the proposed alteration is complied with, the date that a certified copy has been accepted for filing by the Registrar; or

(*b*) the date specified in the resolution,

whichever is the later. 1973, c. 18, s. 238.

Copies to include alteration.

239. (1) Where the memorandum of a company is altered, every copy of the memorandum issued on or after the date the alteration takes effect shall contain the alteration.

(2) Every company that contravenes this section is guilty of an offence. 1973, c. 18, s. 239.

Powers to alter articles.

240. (1) Subject to the provisions of this Act and its memorandum, a company may, if the articles as altered would, at the time of the filing, comply with this Act, alter its articles by filing with the Registrar a certified copy of a special resolution altering the articles.

(2) A resolution to alter the articles of a company takes effect on,

(*a*) where every other requirement of this Act relating to the proposed alteration is complied with, the date that a certified copy has been accepted for filing by the Registrar; or

(*b*) the date specified in the resolution,

whichever is the later.

(3) Every alteration made in compliance with subsections (1) and (2) is valid as if originally contained in the articles. 1973, c. 18, s. 240.

Copies to include alteration.

241. (1) Where the articles of a company are altered, every copy of the articles issued on or after the date the alteration takes effect shall contain the alteration.

(2) Every company that contravenes this section is guilty of an offence. 1973, c. 18, s. 241.

Altering restrictions on business or powers.

242. Every company, other than a specially limited company may, by special resolution, alter its memorandum by altering any restriction upon the business carried on or to be carried on by it, or upon its powers. 1973, c. 18, s. 242.

Certain members may dissent.

243. Any member of a company may, not later than seven days after the special resolution was passed pursuant to section 242, give a notice of dissent to the company in respect of his shares and, in that event, section 228 applies. 1973, c. 18, s. 243.

Procedure and effect.

244. (1) Every company may, by special resolution, alter its memorandum by changing its name to a name approved by the Registrar.

(2) Upon the Registrar accepting for filing a certified copy of the resolution referred to in subsection (1), he shall issue a certificate showing the change of name and the date it is effective and shall publish in the Gazette a notice of change of name.

(3) No change of the name of a company affects any of its rights or obligations, or renders defective any legal proceedings by or against it, and any legal proceedings that may have been continued or commenced against it under its former name may be continued or commenced against it by its new name. 1973, c. 18, s. 244.

Division (2).—Capital

(a) Creation, Variation, and Abrogation of Special Rights and Restrictions

Creation of special rights and restrictions.

245. Subject to sections 247 and 248, a company may, by special resolution, alter its memorandum or articles by creating, defining, and attaching special rights or restrictions to any shares, whether issued or unissued. 1973, c. 18, s. 245.

Variation or abrogation.

246. Subject to sections 247 and 248, a company may, by special resolution, and by otherwise complying with its memorandum and articles, alter its memorandum or articles by varying or abrogating any special rights or restrictions attached to any shares, whether issued or unissued. 1973, c. 18, s. 246.

No interference with class rights without consent.

247. (1) No right or special right attached to any issued share shall be prejudiced or interfered with under any provision of this Act or the memorandum or articles unless members holding shares of each class whose right or special right is prejudiced or interfered with consent thereto by separate resolution requiring a majority of three-fourths of the issued shares of the class.

(2) No resolution to create, vary, or abrogate any special right of conversion attaching to shares of a reporting company shall be submitted to a general meeting, or a class meeting, unless the Commission has first consented to the resolution. 1973, c. 18, s. 247.

Right to apply to Court.

248. (1) The holders of

(*a*) not less than ten per cent of the shares of a company who voted, in person or by proxy, against a special resolution referred to in section 245 or 246; or

(*b*) not less than ten per cent of the shares of a class of shares of the company, whose rights are affected by a special resolution abrogating or altering special rights or restrictions attaching to any class of shares of the company, or approving of any arrangement, who did not, in person or by proxy, vote in favour of the resolution referred to in section 247;

other than as a proxy for a person whose proxy required an affirmative vote may, not more than fourteen days after the passing of the last resolution, apply to the Court to set aside the special resolution.

(2) The Court shall not hear the application referred to in subsection (1) unless notice thereof has been served upon the company and an affidavit of that service exhibiting the notice has been served upon the Registrar not later than fourteen days after the passing of the last resolution.

(3) The Court may direct that notice of the application be served upon any other person.

(4) Upon an application under subsection (1), the Court may

(*a*) set aside the special resolution and require a copy of the order to be filed with the Registrar;

(*b*) affirm the special resolution subject to such terms as the Court considers appropriate; or

(*c*) affirm the special resolution and require the company, subject to subsection (1) of section 257, or any other person, to purchase the shares of any member at a price and upon the terms to be determined by the Court,

and, in any case, the Court may make such consequential orders, including any order as to costs, and give such directions as it considers appropriate.

(5) The Registrar shall not accept for filing a special resolution referred to in subsection (1), unless

(*a*) he receives evidence satisfactory to him that every person entitled to apply to the Court under subsection (1) has waived that right; or

(*b*) the time for bringing an application under subsection (1) has expired, and the Registrar has not been served as required by subsection (2); or

(*c*) a copy of the order of the Court affirming the special resolution, together with evidence satisfactory to him that any consequential orders and directions of the Court have been complied with, has been filed with the Registrar,

and he receives a certificate of an officer of the company that the provisions of this Act have been complied with in relation to the special resolution.

(6) The rights granted by this section are in addition to those granted under section 221. 1973, c. 18, s. 248.

Exclusion.

249. Sections 245 to 248 do not apply to a compromise or arrangement under section 273. 1973, c. 18, s. 249.

(b) Increase of Authorized Capital

Power to increase authorized capital.

250. (1) Every company may, by such resolution of the members as the articles may provide or, in the absence of provision in the articles, by special resolution, alter its memorandum to increase its authorized capital by

(*a*) creating shares with par value, or shares without par value, or both;

(*b*) increasing the number of shares with par value, or shares without par value, or both; or

(*c*) increasing the par value of a class of shares with par value, if no shares of that class are issued.

(2) A company creating any new shares pursuant to this section shall comply with subsection (3) of section 21. 1973, c. 18, s. 250.

(c) Subdivision, Consolidation, and Change of Capital

Subdivision, consolidation, and change of shares.

251. (1) Every company may, by special resolution, alter its memorandum to

(*a*) subdivide all or any of its unissued, or fully paid issued, shares with par value into shares of smaller par value;

(*b*) subdivide all or any of its unissued, or fully paid issued, shares without par value so that the number of those shares is increased;

(*c*) consolidate all or any of its shares with par value into shares of larger par value;

(*d*) consolidate all or any of its shares without par value so that the number of those shares authorized is reduced;

(*e*) change all or any of its unissued or fully paid issued shares with par value into shares without par value;

(*f*) change all or any of its unissued shares without par value into shares with par value;

(*g*) alter the name or designation of all or any of its shares, whether issued or unissued; or

(*h*) delete the provisions as to the maximum price or consideration at or for which shares without par value may be issued.

(2) No alteration of the memorandum as to any part of the issued shares of any class is valid unless

(*a*) the consent required by section 247 is given; and

(*b*) the consent of members holding, in the aggregate, not less than three-fourths of the shares not to be changed of that class is given by separate resolution.

(3) The provisions of the articles of a company relating to a class meeting of the company or, to the extent the articles do not make provision for a class meeting, the provisions of the articles relating to the call and conduct of general meetings, apply, with the necessary changes and so far as are applicable, to a meeting to pass a separate resolution under subsection (2). 1973, c. 18, s. 251.