ALTERATION AND COVERSION OF CAPITAL

Ghana Act

A. Variations Permitted

Section 22 of the Ghana Act specifically provides for the variations permitted and the subsections with which we are concerned in this topic are subsections (2) and (5) which are as follows:

22. A company may by special resolution alter or add to its Regulations or adopt new Regulations: Alter Regul

Provided that—

(2) The number of the company's shares may be altered in accordance with the provisions of sections 11, 57 to 63, 75 to 79, 218, or 231 of this Code but not otherwise.

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(5) If at any time the shares of the company are divided into different classes the rights attached to any class may be altered in accordance with section 47 or 231 of this Code but not otherwise.

The topics dealt with under the various section numbers listed in 22(2) are as follows: Section 11-refers to conversion of a company limited by shares into a company limited by guarantee. Sections 57 to 63-with the exception of section 57 which is discussed later, the remainder of these sections deal primarily with redemption of redeemable shares and a company purchasing its own shares. Next is section 75 to 79 deal with reduction of capital, shares or liability. Next section 218, this is the section providin for a remedy against oppression by an order of the court. Section 231 ~~this~~ is the arrangement and amalgamation section of the Ghana Act.

Section 22(4) provides that no alteration or addition shall be made which conflicts with any order of the court under section 218, and 22(6) is really a clarifying section which states that in the event that

the "regulations" of the company restrict or exclude the company's power to alter any of its regulations and the only way in which its regulations can be altered is under the provision of section 231 of the Act.

Section 57(1)(b) gives a company the power to consolidate its existing shares into a smaller number of shares.

Alteration of number of shares.

57. (1) A company may by alteration of its Regulations:

(a) increase the number of its shares by creating new shares;

(b) reduce the number of its shares by cancelling shares which have not been taken or agreed to be taken by any person or by consolidating its existing shares, whether issued or not, into a smaller number of shares.

(2) On any consolidation of shares the amounts paid, and any unpaid liability thereon, and any fixed sum by way of dividend or repayment to which such shares were entitled shall be consolidated likewise.

Section 47 of the Act, which is referred to in section 22(5) reads as follows,

Variation of class rights.

47. (1) If at any time the shares of a company are divided into different classes, the attached to any class may not be varied except to the extent and in the manner provided Regulations.

(2) If the Regulations shall expressly forbid any variation of the rights of a class, o contain provisions regarding such variation and shall expressly forbid any alteration o provisions, the rights or the provisions for variation may not be altered except with the sa of the Court under a scheme of arrangement in accordance with section 231 of this Code.

(3) Except as provided in subsection (2) of this section a company may by special r tion alter its Regulations by inserting therein provisions regarding the variation of the rights class or by modifying the terms of any such provisions, but any such alteration shall requi prior written consent of the holders of at least three-fourths of the issued shares of each cl the sanction of a special resolution of the holders of the shares of each class and shall be de for the purposes of subsections (5) to (8) of this section to be a variation of the rights of each

(4) Notwithstanding any provision in the Regulations the rights attached to any cl shares first issued after the commencement of this Code may not be varied except with the v consent of the holders of at least three-fourths of the issued shares of that class or the sanct a special resolution of the holders of the shares of that class.

(5) Any resolution of a company the implementation of which would have the eff diminishing the proportion of the total votes exercisable at a general meeting of the compa the holders of the existing shares of a class or of reducing the proportion of the dividends c tributions payable at any time to the holders of the existing shares of a class, shall be deem be a variation of the rights of that class.

(6) If the rights of any class of shares are varied the holders of not less in the aggreg than 15 *per cent* of the issued shares of that class may apply to the Court to have the variati cancelled, and where such application is made the variation shall not have effect unless and un it is confirmed by the Court.

(7) An application to the Court under subsection (6) of this section shall be made within days of the date on which the variation was effected and may be made on behalf of the shareholde entitled to make the application by such one or more of their number as they may appoint in writir If such an application is made the company shall forthwith deliver to the Registrar for registrati notice in the prescribed form of that fact. The Court after hearing the applicant and any oth persons who apply to the Court to be heard and appear to the Court to be interested in the applic tion shall if it is satisfied that the variation would unfairly prejudice the shareholders of any cla cancel the variation and shall, if not so satisfied, confirm the variation.

(8) The company shall within 28 days after the making of an order by the Court on su application deliver a copy thereof to the Registrar for registration.

(9) If a company makes default in delivering to the Registrar the notice or order refer to in subsection (7) or (8) of this section, the company and every officer of the company who is default shall be liable to a fine not exceeding £G10.

This section deals specifically with three prime problems:

(a) Under subsection (1) a variation must be permitted by the regulations or if it is not permitted by the regulations then variation can only occur by order of the court under Section 231. Apparently the practice ~~hav~~ grown drawn up in some English jurisdictions that if no right t vary was contained in the original "regulations" or articles and memorandum then the first step was to pass a special resolution of the voting shareholders providing for alterations. Since this did not in itself affect the rights of the preferred shareholders there was a body of law which took the view that the preferred shareholder could not object at that point in time since their rights had not actually been affected at that point in time and it was only when the actual variation took place that they could be heard to object. The effect of subsections (1), (2), (3) and (4) cover these problems.

(b) Subsection (5) defines specifically two areas as the "variation of rights" which removes some conflict that had arisen as to whether they were in fact variations of rights.

(c) Subsections (6) and (7) provide for a right of dissent by the holders of 15% of the issued share of the class.

The resolution is effective on the Registrar issuing his certificate and the resolution must be deliver to the Registrar under the provisions of Subsection (8) within 28 days.

A special resolution under the Ghana Act, Section 168, is a resolution passed by a three-quarters majority.

THE ONTARIO BUSINESS CORPORATIONS ACT

The sections of the Ontario Act dealing with alteration or amendment of articles does not start out with the firm and rigid ruling of all of the other Acts to date in that an amendment may only be accomplished under the provisions of this Act. Presumably such firm wording is probably not actually required but certainly the opening wording of Section 189 of the Ontario Business Corporations Act seems much more permissive and since the subsections actually run from (a) to (m) they are enormously flexible. Section 189(1) and (2) read as follows:

REORGANIZATION

Amendment of Articles

189. (1) Amendments.—A corporation may, from time to time, amend its articles of incorporation to,

(e) redivide its authorized capital into shares of lesser or greater par value;

(f) consolidate or subdivide any of its shares without par value;

(g) change any of its shares with par value into shares without par value;

(h) change any of its shares without par value into shares with par value;

(i) redesignate any class of shares;

(j) reclassify any shares with or without par value into shares of a different class;

(k) delete or vary any provision in its articles;

(l) provide for any other matter or thing that is authorized by this Act to be set out in the articles or that could be the subject of a by-law of the corporation;

(2) Authorization.—An amendment under clauses (a) to (l) of subsection (1) shall be authorized by a special resolution.

Section 36 provides for various different types of conversion of par shares to par shares, par shares to no par shares, no par shares to par shares, no par shares to no par shares, and of special shares. Since the Ontario Act provides for both par value shares and no par value shares this Section is clear as to the results of any alteration or variation of the share capital.

36. (1) **Conversion: of par shares to par shares.**—The articles of a corporation shall not provide for the conversion of shares with par value into shares with par value if the aggregate par value of the shares being converted is not equal to the aggregate par value of the shares into which they are converted.

(2) **par shares to no par shares.**—Where, in accordance with the articles, shares with par value are converted into shares without par value, the issued capital of the corporation attributable to the shares resulting from the conversion shall be equal to the aggregate par value of the shares converted.

(3) **no par shares to par shares.**—Where the articles provide for the conversion of shares without par value into shares with par value, no such share shall be converted unless that part of the issued capital attributable to the shares being converted is equal to the aggregate par value of the shares resulting from the conversion.

(4) **no par shares to no par shares.**—Where, in accordance with the articles, shares without par value are converted into shares without par value, the issued capital shall remain unchanged.

(5) **of special shares.**—Where special shares of a class are converted into the same or another number of shares of another class or classes, whether special or common, the shares converted thereupon become the same in all respects as the shares of the class or classes respectively into which they are converted and the number of shares of each class affected by the conversion is changed and the articles are amended accordingly. 1970, c. 25, s. 36.

Section 189(4) provides protection to the holders of a special class of shares with respect to any proposed amendment which would vary their rights and reads as follows:

> (4) **Additional authorization for variation of rights of special shareholders.**—If the amendment is to delete or vary a preference, right, condition, restriction, limitation or prohibition attaching to a class of special shares or to create special shares ranking in any respect in priority to or on a parity with an existing class of special shares, then, in addition to the confirmation required by subsection (2), the resolution is not effective until it has been confirmed,
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> (a) by 100 per cent of the holders of the shares of such class or classes of shares in writing; or
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> (b) in writing by at least 95 per cent of the holders of the shares of such class or classes of shares holding at least 95 per cent of the issued shares of such class or classes and after twenty-one days notice of the resolution and confirmation has been given by sending the notice to each of the holders of shares of such class or classes to his latest address as shown on the records of the corporation and only if at the expiration of twenty-one days none of the holders of such class or classes has dissented in writing to the corporation; or
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> (c) if the articles so provide, by at least two-thirds of the votes cast at a meeting of the holders of such class or classes of shares duly called for that purpose or such greater proportion of the votes cast as the articles provide,
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> and by such additional authorization as the articles provide.

It will be noted in 189(4)(a) and (b) the very high percentage of the holders of the special class which must consent. The only exception to this is subparagraph (c) which apparently removes most of this protection if the articles provide for a special resolution being passed by a two-thirds majority, which is the required majority for a special resolution under the Ontario Act. It is conceivable that if the voting of shareholders wish to alter the rights of the holders of the special shares, they could first pass a special resolution amending the articles to provide for the two-thirds majority required in subparagraph (c). It would seem to be a moot point as to whether this would be a variation of the special shareholders' rights.

Section 190(1) details the mechanics by which an amendment is made effective, and Section 190(1) details the duties of the Minister although precisely why the Minister does this under the Ontario Act, as he does in some of the other Sections, rather than the Registrar of Companies would seem to be a simply hangover from the concept of the right to incorporate being at the pleasure of the Crown.

190. (1) **Articles of amendment.**—For the purpose of bringing an amendment to the articles into effect, the corporation shall deliver to the Minister, within six months after the resolution has become effective, articles of amendment in duplicate, executed under the seal of the corporation and signed by two officers, or by one director and one officer, of the corporation and verified by affidavit of one of the officers or directors signing the articles of amendment, setting out,

(a) the name of the corporation;

(b) a certified copy of the resolution;

(c) that the amendment has been duly authorized as required by subsections (2), (3) and (4) of section 189; and

(d) the date of the confirmation of the resolution by the shareholders.

Section 191(2) makes clear the effect of the certificate once it has been issued.

(2) **Effect of certificate.**—The amendment becomes effective upon the date set forth in the certificate of amendment and the articles of incorporation are amended accordingly. 1970, c. 25, s. 191.

The provisions of Section 190(4) are unique in that they do not appear in any of the other Companies Acts which I have examined to date. One can see their obvious relevance in a case of a reduction of capital. To anyone who has had the experience of dealing with a company that has been in existence for many years and has restructured its capital on many occasions it is suggested there is an equal relevance. Under the present Alberta Act in the case of a reduction of capital, there is a requirement to

> **(4) Pro forma balance sheet.**—Where the articles of amendment are to make any change in the authorized or issued capital, the articles of amendment shall, if required by the Minister, be accompanied by a *pro forma* balance sheet after giving effect to the proposed change. 1970, c. 25, s. 190.

file "a minute" signed by the judge which is a concise statement as to the capitalization of the company following the approval of the special resolution reducing the capital. In the interest of simplicity such a precise statement of the capital of the company after giving effect to the resolution would indeed be a blessing.

It is of interest to note that the Interim Report of the Select Committee on Company Law did not deal in any way with amendments to memorandum or articles of association and apparently did not consider any of the questions with regard to the variation of the rights of the holder of a special class of shares.

Bill C-29

Under the proposed new Canada Corporations Act an alteration of capital is a fundamental change since it involves an amendment of the articles. Under Section 167(1)(d),(e),(f),(g),(h),(i),(j) and (k), the company is given wide powers to amend its capital structure. It must be remembered that under the proposed Act there are only No par value shares, and that a dissenting shareholder is given a right under Section 184 to demand that the company purchase his shares. Presumably this is the reason for subsection (2) of Section 167. Under Section 184(26) a company cannot make a payment to a dissenting shareholder if after such payment it would be unable to pay its liabilities as they become due or the realizable value of its assets would be less than the aggregate of its liabilities. If a sufficient number of the shareholders dissented to create such a situation then the directors could revoke the resolution.

PART XIV

FUNDAMENTAL CHANGES

Amendment of articles

167. (1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to

(*a*) change its name;

(*b*) change the place in which its registered office is situated;

(*c*) add, change or remove any restriction upon the business or businesses that the corporation may carry on;

(*d*) change any maximum number of shares that the corporation is authorized to issue;

(*e*) create new classes of shares;

(*f*) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(*g*) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

(*h*) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(*i*) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(*j*) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(*k*) revoke, diminish or enlarge any authority conferred under paragraphs (*i*) and (*j*);

(*l*) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 102 and 107;

(*m*) add, change or remove restrictions on the transfer of shares; or

(*n*) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

(2) The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment under this section, revoke the resolution before it is acted upon without further ap-

Under Section 169 the directors or any shareholder may make a proposal to amend the articles. There seems to be no specific provision in the Act which would prohibit a shareholder from proposing an amendment and then dissenting from the actual resolution so that the company would be forced to buy him out.

Proposal to amend

169. (1) Subject to subsection (2), the directors or any shareholder may in accordance with section 131 make a proposal to amend the articles.

Notice of amendment

(2) Notice of a meeting of shareholders at which a proposal to amend the articles is to be considered shall set out the proposed amendment and, where applicable, shall state that a dissenting shareholder is entitled to be paid the fair value of his shares in accordance with section 184, but failure to make that statement does not invalidate an amendment.

Section 170 provides some protection to the holders of a special class of shares if the resolution proposed to amend the articles will in any way affect their rights.

Class vote

170. (1) The holders of shares of a class or, subject to subsection (2), of a series are entitled to vote separately as a class or series upon a proposal to amend the articles to

(*a*) increase or decrease any maximum number of authorized shares of such class, or increase any maximum number of authorized shares of a class having rights or privileges equal or superior to the shares of such class;

(*b*) effect an exchange, reclassification or cancellation of all or part of the shares of such class;

(*c*) add, change or remove the rights, privileges, restrictions or conditions attached to the shares of such class and, without limiting the generality of the foregoing,

(i) remove or change prejudicially rights to accrued dividends or rights to cumulative dividends,

(ii) add, remove or change prejudicially redemption rights,

(iii) reduce or remove a dividend preference or a liquidation preference, or

(iv) add, remove or change prejudicially conversion privileges, options, voting, transfer or pre-emptive rights, or rights to acquire securities of a corporation, or sinking fund provisions;

(*d*) increase the rights or privileges of any class of shares having rights or privileges equal or superior to the shares of such class;

(*e*) create a new class of shares, or make any class of shares having rights or privileges inferior to the shares of such class, equal or superior to the shares of such class;

(*f*) effect an exchange or create a right of exchange of all or part of the shares of another class into the shares of such class; or

(*g*) constrain the issue or transfer of the shares of such class or extend or remove such constraint.

170. Limitation (2) The holders of a series of shares of a class are entitled to vote separately as a series under subsection (1) only if such series is affected by an amendment in a manner different from other shares of the same class.

Right to vote (3) Subsection (1) applies whether or not shares of a class or series otherwise carry the right to vote.

Separate resolutions (4) A proposed amendment to the articles referred to in subsection (1) is adopted when the holders of the shares of each class or series entitled to vote separately thereon as a class or series have approved such amendment by a special resolution.

Sections 171, 172 and 173 set out the actual mechanics and the effect of compliance with the mechanics.

Delivery of articles **171.** (1) Subject to any revocation under subsection 167(2) or 168(4), after an amendment has been adopted under section 167, 168 or 170 articles of amendment in prescribed form shall be sent to the Director.

Reduction of stated capital (2) If an amendment effects or requires a reduction of stated capital, subsections 36(3) and (4) apply.

Deemed reduction of capital (3) For the purposes of subsection (2), an amendment to the articles that

(*a*) makes redeemable any issued shares that were not previously redeemable,

(*b*) makes convertible into redeemable shares any issued shares that were not previously convertible, or

(*c*) increases the redemption price or aggregate redemption prices or advances the time for redemption of any issued redeemable shares

is deemed to effect a reduction of stated capital.

Certificate of amendment **172.** Upon receipt of articles of amendment, the Director shall issue a certificate of amendment in accordance with section 255.

Effect of certificate **173.** (1) An amendment becomes effective on the date shown in the certificate of amendment and the articles are amended accordingly.

Rights preserved (2) No amendment to the articles affects an existing cause of action or claim or liability to prosecution in favour of or against the corporation or its directors, officers, or any civil, criminal or administrative action or proceeding to which the corporation or its directors or officers is a party.

New York State Business Corporations Act

The power to amend is very broad indeed under this Act and in fact a company can do anything that it was lawfully entitle to do when making its original application for a certificate of incorporation. The certificate of incorporation referred to in the Act contains more or less the same material that our memorandu of association would contain. Section 801 reads:

> **§ 801. Right to amend certificate of incorporation**
>
> (a) A corporation may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired, if such amendment contains only such provisions as might be lawfully contained in an original certificate of incorporation filed at the time of making such amendment.
>
> (b) In particular, and without limitation upon such general power of amendment, a corporation may amend its certificate of incorporation, from time to time, so as:
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> (7) To increase or decrease the aggregate number of shares, or shares of any class or series, with or without par value, which the corporation shall have authority to issue.
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> (8) To eliminate from authorized shares any class of shares, or any shares of any class, whether issued or unissued.
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> (9) To increase the par value of any authorized shares of any class with par value, whether issued or unissued.
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> (10) To reduce the par value of any authorized shares of any class with par value, whether issued or unissued.
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> (11) To change any authorized shares, with or without par value, whether issued or unissued, into a different number of shares of the same class or into the same or a different number of shares of any one or more classes or any series thereof, either with or without par value.
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> (12) To fix, change or abolish the designation of any authorized class or any series thereof or any of the relative rights, preferences and limitations of any shares of any authorized class or any series thereof, whether issued or unissued, including any provisions in respect of any undeclared dividends, whether or not cumulative or accrued, or the redemption of any shares, or any preemptive right to acquire shares or other securities.
>
> (13) As to the shares of any preferred class, then or theretofore authorized, which may be issued in series, to grant authority to the board or to change or revoke the authority of the board to establish and designate series and to fix the number of shares and the relative rights, preferences and limitation as between series.

Section 802 deals specifically with a reduction of stated capital by amendment and does not concern us at this point.

Section 803 requires a simple majority of the shareholders entitled to vote for authorization of the amendment. It will be noted that the items under 803(b) are not matters of fundamental change.

§ 803. Authorization of amendment or change

(a) Amendment of the certificate of incorporation may be authorized by vote of the holders of a majority of all outstanding shares entitled to vote thereon at a meeting of shareholders.

(b) Alternatively, any one or more of the following changes may be approved by or pursuant to authorization of the board:

(1) To specify or change the location of the corporation's office.

(2) To specify or change the post office address to which the secretary of state shall mail a copy of any process against the corporation served upon him.

(3) To make, revoke or change the designation of a registered agent, or to specify or change the address of its registered agent.

(c) This section shall not alter the vote required under any other section for the adoption of an amendment referred to therein, nor alter the authority of the board to authorize amendments under any other section. L.1961, c. 855; amended L.1962, c. 834, § 56; L.1963, c. 748, § 7, all eff. Sept. 1, 1963.

Section 804 reads as follows:

§ 804. Class voting on amendment

(a) Notwithstanding any provision in the certificate of incorporation, the holders of shares of a class of series shall be entitled to vote and to vote as a class upon the authorization of an amendment and, in addition to the authorization of the amendment by vote of the holders of a majority of all outstanding shares entitled to vote thereon, the amendment shall be authorized by vote of the holders of a majority of all outstanding shares of the class or series when a proposed amendment would:

(1) Exclude or limit their right to vote on any matter, except as such right may be limited by voting rights given to new shares then being authorized of any existing or new class or series.

(2) Change their shares under subparagraphs (b) (10), (11) or (12) of section 801 (Right to amend certificate of incorporation) or provide that their shares may be converted into shares of any other class or into shares of any other series of the same class, or alter the terms or conditions upon which their shares are convertible or change the shares issuable upon conversion of their shares, if such action would adversely affect such holders, or

(3) Subordinate their rights, by authorizing shares having preferences which would be in any respect superior to their rights.

(b) If any proposed amendment referred to in paragraph (a) would adversely affect or subordinate the rights of the holders of shares of only one or more series of any class, but not the entire class, then only the holders of each series whose rights would be adversely affected or subordinated shall be considered a separate class for the purposes of this section. L.1961, c. 855; amended L.1963, c. 748, § 8, both eff. Sept. 1, 1963.

The protection given to the holders of special shares or special class of shares is contained in this section. Under the provisions of Section 806(6) the holder of any adversely affected shares who does not vote for or consent in writing to the taking of such action shall have the right to dissent and to receive payment for such shares if the amendment:

(a) alters or abolishes any preferential right;

(b) creates, alters or abolishes any provision with respect to redemption;

(c) alters or abolishes any pre-emptive right;

(d) excludes or limits the right of the holder to vote

on any matter other than an exclusion in effect before the amendment.

While the mechanics of filing the amendment differ in form they are not substantially different in substance than in the Acts which we have examined. The amendment must be filed to be effective and a certificate is issued upon its approval on filing.

U.S. Model Business Corporation Act

Sections 58, 59 and 60 of the Model Act are as follows:

§ 58. RIGHT TO AMEND ARTICLES OF INCORPORATION

A corporation may amend its articles of incorporaton, from time to time, in any and as many respects as may be desired, so long as its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation at the time of making such amendment, and, if a change in shares or the rights of shareholders, or an exchange, reclassification or cancellation of shares or rights of shareholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification or cancellation.

In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation, from time to time, so as:

(d) To increase or decrease the aggregate number of shares, or shares of any class, which the corporation has authority to issue.

(e) To increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued.

(f) To exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued.

58.

(g) To change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, limitations, and the relative rights in respect of all or any part of its shares, whether issued or unissued.

(h) To change shares having the par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares without par value, whether issued or unissued, into the same or a different number of shares having a par value.

(i) To change the shares of any class, whether issued or unissued, and whether with or without par value, into a different number of shares of the same class or into the same or a different number of shares, either with or without par value, of other classes.

(j) To create new classes of shares having rights and preferences either prior and superior or subordinate and inferior to the shares of any class then authorized, whether issued or unissued.

(k) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared.

(l) To divide any preferred or special class of shares, whether issued or unissued, into series and fix and determine the designations of such series and the variations in the relative rights and preferences as between the shares of such series.

(m) To authorize the board of directors to establish, out of authorized but unissued shares, series of any preferred or special class of shares and fix and determine the relative rights and preferences of the shares of any series so established.

(n) To authorize the board of directors to fix and determine the relative rights and preferences of the authorized but unissued shares of series theretofore established in respect of which either the relative rights and preferences have not been fixed and determined or the relative rights and preferences theretofore fixed and determined are to be changed.

(o) To revoke, diminish, or enlarge the authority of the board of directors to establish series out of authorized but unissued shares of any preferred or special class and fix and determine the relative rights and preferences of the shares of any series so established.

§ 59. PROCEDURE TO AMEND ARTICLES OF INCORPORATION

Amendments to the articles of incorporation shall be made in the following manner:

(a) The board of directors shall adopt a resolution setting forth the proposed amendment and, if shares have been issued, directing that it be submitted to a vote at a meeting of shareholders, which may be either the annual or a special meeting. If no shares have been issued, the amendment shall be adopted by resolution of the board of directors and the provisions for adoption by shareholders shall not apply. The resolution may incorporate the proposed amendment in restated articles of incorporation which contain a statement that except for the designated amendment the restated articles of incorporation correctly set forth without change the corresponding provisions of the articles of incorporation as theretofore amended, and that the restated articles of incorporation together with the designated amendment supersede the original articles of incorporation and all amendments thereto.

(b) Written notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders. If the meeting be an annual meeting, the proposed amendment of such summary may be included in the notice of such annual meeting.

(c) At such meeting a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon.

Any number of amendments may be submitted to the shareholders, and voted upon by them, at one meeting.

§ 60. CLASS VOTING ON AMENDMENTS

The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the provisions of the articles of incorporation, if the amendment would:

(a) Increase or decrease the aggregate number of authorized shares of such class.

(b) Increase or decrease the par value of the shares of such class.

(c) Effect an exchange, reclassification or cancellation of all or part of the shares of such class.

(d) Effect an exchange, or create a right of exchange, of all or any part of the shares of another class into the shares of such class.

(e) Change the designations, preferences, limitations or relative rights of the shares of such class.

(f) Change the shares of such class, whether with or without par value, into the same or a different number of shares, either with or without par value, of the same class or another class or classes.

(g) Create a new class of shares having rights and preferences prior and superior to the shares of such class, or increase the rights and preferences or the number of authorized shares, of any class having rights and preferences prior or superior to the shares of such class.

(h) In the case of a preferred or special class of shares, divide the shares of such class into series and fix and determine the designation of such series and the variations in the relative rights and preferences between the shares of such series, or authorize the board of directors to do so.

(i) Limit or deny any existing preemptive rights of the shares of such class.

(j) Cancel or otherwise affect dividends on the shares of such class which have accrued but have not been declared.

It will be noted that the two opening paragraphs of Section 58 are very broad indeed and are apparently designed to make absolutely sure that a doctrine of "vested rights" is buried forever. It will be noted in 59(c) that the amendment requires only a simple majority vote. While my reading of both the Model Act of the New York have not by any means been exhaustive as yet neither seems to have concept of a special resolution as opposed to a simple majority vote no matter what the purpose of the resolution is. Section 60(j) is specifically designed to cover what has been by far the most common battle apparently with regard to special rights attached to any shares, namely, the accrued but undeclared and unpaid dividend and whether this can be cancelled as a variation of the rights attached to the special shares.

The curious thing about the Model Act is that under Section 80 the right of a shareholder to dissent only arises in the event of any plan of merger or consolidation or a sale or exchange of all or substantially all of the property and assets of the corporation not made in its usual and regular course of business. Section 80 also provides a right to a shareholder to dissent with respect to less than all of his shares so that he can compel purchase of part of his shares and retain the remainder. It will be noted that Bill C-29 specifically prohibits this and that any right to dissent must be exercised with respect to all and not less than all of the shares held by the dissenting shareholder.

SUMMARY AND CONCLUSIONS

Presuming that incorporation is a matter of right the only argument against permitting amendments as a matter of right is the principle referred to in English law as entrenched rights

and in American law as vested rights. English law has been slow to change and in certain respects the power of a company to amend its memorandum and articles has only been available since the English Act of 1948. In the United States the doctrine of vested rights was confirmed by the Supreme Court ~~and~~ IN the Dartmouth College case in 1819. In this case the State of New Hampshire sought to take over the management of Dartmouth College but were blocked from doing so by the Supreme Court's holding that a corporate charter was a contract and the State could not alter the contract unilaterally. The same reasoning was the basis for the English principle with regard to entrenched rights. It is still possible under the English Act to block any amendment to the memorandum of association with respect to the rights attaching to a class of shares by inserting the rights in the memorandum and expressly providing that they shall be unalterable.

Both in England and in the United States (with the exception of New Jersey) and in Canada, the courts have refused to consider the fairness of any amendment and will only intervene where fraud or bad faith has been established. Although the proportionate majority required for an amendment may vary from jurisdiction to jurisdiction once that proportion has been obtaine the minority shareholder is faced with the tyranny of the majority ~~with~~ AND little or no remedy. As we have seen the American and more modern Canadian Acts attempt to give some relief from this tyranny by a right of dissent.

1. No problem arises where there is neither an interference with the existing rights of class shareholders, nor a reduction of capit and maximum flexibility should be permitted in all such cases.

2. The problems to be considered in cases other than those fallir within the above paragraph are apparently the following:

(a) Who can propose a resolution?

It will be noted that in Bill C-29 it is the directors (plural) or a shareholder but seemingly a director who was not a shareholder could not propose any such amendment. Is it wise to permit any one shareholder to propose an amendment or should it be a minimum number such as 10% of the shareholders.

(b) When dealing with a variation of class rights should any attempt be made to define what is a variation?

Should special rights be given to a dissenting shareholder only if the variation affects his rights adversely or substantially and adversely.

(c) What protection can be given to the holder of a special class of shares that has no voting rights other than the requirement that that class of shares must vote on any proposed alteration of its rights?

It is conceivable that situations would arise where the holders of the voting shares held a sufficient majority of the special shares to be affected and that the proposed amendment would benefit them to a very great degree. Under these circumstances should there be a right to dissent and to compel the company to purchase the dissenting shareholder's shares at "appraised value" or should there be a reference to the court if there is any question as to whether the proposed amendment is in the best interests of the company? None of the Acts seem to provide any reference to the court to a decision as to whether a dissenting shareholder has any just grounds for complaint or not.

(d) What procedure does the shareholder use to get to the Courts?

Is he liable for costs? Can he be required to put up security for costs? Should there be any limitation on his right to appeal?

Insofar as the mechanics and the effective date of the amendment are concerned this does not at first glance appear to present any great problem. Whatever the requirements of the Act are they must be proved to the Registrar's satisfaction and presumably he will then issue a certificate. I would recommend a section as to the effect of the certificate and for the sake of simplicity and ease of third parties dealing with the company I would like to see a requirement that a brief minute be filed starting out "After giving effect to the special resolution of the shareholders dated the _____day of _____, the authorized capital of the company is _____ _____(and perhaps a statement as to what the issued capital is.)"

One further question remains for consideration as to whether there should be any difference between the private or closely held corporation and the public corporation. The private or closely held corporation is really subject to practically no supervision whereas the public corporation comes under the scrutiny of the Securities Commission unless it is an exempt transaction. While the bogy of the unscrupulous manipulator of publicly traded stocks is more prominent in the public mind I suspect that some of the real abuses in variation of class rights have taken place in privately or closely held corporations and I wonder whether the simple right to dissent is

sufficient protection against such an abuse.