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SCHEMES OF ARRANGEMENT, RECONSTRUCTION AND AMALGAMATION

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SCHEMES OF ARRANGEMENT, RECONSTRUCTION AND AMALGAMATION

For the purpose of this paper I have chosen the title adopted by Halsbury's Laws of England Fourth Edition as being descriptive of the area of discussion.

In addition to the three words used in the title which are in our Companies Act we use the word "compromise" and "scheme or contract". None of these words or phrases are defined either in English Companies Act of 1948 nor in the Alberta Companies Act. As may be expected the provisions of the Alberta Companies Act relating to reconstruction of a company, compromises, amalgamation, arrangement were drawn from the company Law of England and these terms remain in the 1948 Act.

Before embarking on a review of the substantive law of the subject matter it might be useful to refresh your understanding of the meaning of the terms. To do this I will refer to the text book meanings which give an established description derived from the statutes and interpreted by the Courts. I think this is preferable to synopsizing and paraphrasing.

England

Halsbury's Laws of England 5th Ed. p. 855 par. 1539

855 *Companies Regulated by the Companies Acts 1948 to 1967* **Para. 1539**

1539. **Meaning of "reconstruction" and "amalgamation".** Neither "reconstruction" nor "amalgamation"[1] has a precise legal meaning[2]. Where an undertaking is being carried on by a company and is in substance transferred, not to an outsider, but to another company consisting substantially of the same shareholders with a view to its being continued by the transferee company, there is a reconstruction[3]. It is none the less a reconstruction because all the assets do not pass to the new company, or all the shareholders of the transferor company are not shareholders in the transferee company, or the liabilities of the transferor company are not taken over by the transferee company[4].

Amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the share-

holders in the company which is to carry on the blended undertakings[5]. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company[5]. Strictly "amalgamation" does not, it seems, cover the mere acquisition by a company of the share capital of other companies which remain in existence and continue their undertakings[6], but the context to which the term is used may show that it is intended to include such an acquisition[7].

Palmer's Company Law 21 Ed. Chap. 70 p. 695 prefers to discuss sections 206-209 of the Companies Act 1948 under the sub-title Arrangements and Reconstruction.

Arrangements and reconstructions

The terms "arrangement" and "reconstruction," although used in the Act by way of sub-title to sections 206 to 209, are nowhere defined in the Act, and have no precise legal meaning. Generally speaking, however, they may be regarded as describing any form of internal reorganisation of the company or its affairs, as well as schemes for the amalgamation of two or more companies.

Palmer then goes on to discuss re-organization of the capital structure of a company, arrangements with creditors and amalgamations. He does go so far as to distinguish the difference between a compromise and an arrangement by saying there can be no compromise unless there exists some dispute which should be resolved in the best interests of the company.

Pennington 3rd Edition p. 450 devotes a chapter with the title Compromises and Arrangements and at p. 770 a separate chapter to Reconstructions and Amalgamations Divisions.

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A compromise has been described (*b*) as an agreement terminating a dispute between parties as to the rights of one or both of them, or modifying the undoubted rights of a party which he has difficulty in enforcing. An arrangement, as the expression is used in the Companies Act, 1948, embraces a far wider class of agreements, and it need be in no way analogous to a compromise (*c*), so that it will include agreements which modify rights about which there is no dispute, and which can be enforced without difficulty.

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The words reconstruction and amalgamation are commercial terms which denote two operations which are similar in form but different in purpose. By a reconstruction a company transfers its assets to a new company in consideration of the issue of the new company's shares to the first company's members, and if the first company's debentures are not paid off, in further consideration of the new company issuing debentures to the first company's debenture holders. The result of the transaction is that the new company has the same assets, members and debenture holders as the old one, and the old company has no undertaking to manage and is therefore wound up. Reconstructions were far commoner at the end of the last century and the beginning of this than they are today. The reasons for carrying them out were usually one of the following, namely:—(a) to extend the objects of the old company by incorporating a new company with the wider objects desired; (b) to alter the rights attached to different classes of the old company's shares or debentures by the new company issuing shares or debentures with those different rights; or (c) to compel the members of the old company to contribute further capital by taking shares in the new company on which a larger amount was unpaid than on the shares of the old company. The first two of these purposes can now be achieved without a reconstruction (*a*), and the third is now quite rightly regarded as a species of coercion (*b*) and is strongly disapproved of by the stock exchanges and the court (*c*). Consequently, reconstructions for these reasons do not now occur. The only reconstructions which do take place nowadays are transfers of the undertakings of wholly-owned subsidiaries to their holding companies or to fellow subsidiaries. These are not true reconstructions, of course, but merely transfer of assets to or by the direction of the only person who is beneficially interested in them.

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In form, an amalgamation is merely the reconstruction of several companies by which all of them transfer their respective assets to one of their number or to a new company formed for the purpose, in consideration of the allotment of the transferee company's shares or debentures to their members and debenture holders in agreed proportions.

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A division of a company takes place when part of its undertaking is transferred to a newly-formed company all of whose shares are allotted to certain of the first company's shareholders, and the remainder of the first company's undertaking continues to be vested in it and its shareholders are reduced to those who do not take shares in the new company. In other words, the company's undertaking and shareholders are divided between the two companies. A division is treated as a distinct type of operation from a reconstruction, unless the shareholders who do not participate in the new company are confined to dissentients or a class of shareholders (such as preference shareholders) whose interests are otherwise satisfied; in these excepted cases the scheme may still qualify as a reconstruction (*e*). Because of the difference between divisions and reconstructions the provisions of the Companies Act, 1948, relating to reconstructions and amalgamations (*f*) do not apply to divisions. On the other hand, a division is merely one of the many kinds of arrangement a company may enter into with its members and creditors, and so may be effected under provisions in the Companies Act, 1948, relating to arrangements generally (*g*), and also it would seem under those relating to reduction of capital by repayment (*h*).

C. B. Gower - Modern Company Law under the title Reconstructions and Take-Overs states at p. 615:

It will have been apparent from the previous chapters that investors, and especially shareholders, are highly vulnerable to the machinations of those controlling the company. But certain of their rights are entrenched; for example, class rights are subject to some measure of protection, and debentureholders are normally secure. Even these entrenched rights are, however, liable to be modified or abrogated if exceptional procedure is adopted. Such exceptional changes are variously described as reconstructions, reorganisations, schemes of arrangement, amalgamations, mergers or take-overs, but none of these expressions is a term of art with a clearly defined and distinguishable legal meaning. In general, the expression "reconstruction," "reorganisation" or "scheme of arrangement" is employed when only one company is involved and the rights of its investors and, sometimes, of its general creditors are varied—the last expression being more commonly employed when creditors' rights are affected. Under an amalgamation, merger or take-over two (or more) companies are merged, either *de jure* by a consolidation of their undertakings, or *de facto* by the acquisition of a controlling interest in the share capital of one by the other or of the capital of both by a new company. Where this occurs in the case of large companies the provisions of the Monopolies and Mergers Act 1965, to which brief reference is made below,[1] may be relevant.

Canada

Zeigel - Canadian Company Law does not give any definitions in his paragraph Arrangements and Reconstruction. As for Amalgamations he says p. 525:

> Used in its legal sense the term "amalgamation" means "either the statutory creation of a new company and the transfer by operation of law of assets and liabilities of two or more companies to such new company or the fusion of two or more companies and their continuance as one company".[53]

Fraser's - Handbook on Company Law at Chap. 17 p. 395 uses the title Arrangements and Compromises, does not give a specific definition of either word but I note that it says at p. 396 "the term re-organization is commonly applied to a plan for the adjustment or modification of the rights of shareholders (or creditors) under the procedures above outlined". He is referring to procedures effecting a compromise or arrangement by the submission of a scheme to the shareholders and the sanctioning of that scheme by the court.

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> The transfer of the assets (or the major part thereof) of one company to a new company formed for that purpose in exchange for shares in the new company which are distributed among the shareholders of the old company is properly termed a reconstruction. The term reorganization is commonly applied to a transaction of this nature.

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> Amalgamation is a term loosely applied to various forms of union of interests of two or more companies.

Special Lectures Law Society of Upper Canada 1950 p. 91 by David G. Guest - Company Re-organization.

> Reorganization is not a word of exact legal meaning but is a general term used to describe a transaction by which the rights of creditors or shareholders, or both, against the company and among themselves, are adjusted with the agreement of the majority of each group or class concerned. In order to make such an agreement binding on minorities, whether dissenting or merely silent, some statutory or contractual authority must be found.
>
> These authorities do not usually refer to reorganization, but use such terms as "arrangement", "compromise" and "modification of rights", all of which have been given a liberal interpretation by the Courts; I shall refer to them later.

You will notice here the writer uses the expression "Modification of Rights" which does not appear in any of the statutes to which I will refer. Its meaning is best reflected from an extract from the judgment of Lord Justice Lindley in Mercantile Investment and General Trust Company Limited v. International Company of Mexico 1891 7 Times Law Reports 616.

> "Powers given to majorities to bind minorities are always liable to abuse, and whilst full effect ought to be given to them in cases clearly falling within them, ambiguities of language ought not to be taken advantage of to stretch them and make them applicable to cases not included in those which they were apparently intended to meet . . . the power to modify the rights of the debenture holders against the company does not include a power to extinguish all their rights; the power to compromise their rights presupposes some dispute about them, or difficulty in enforcing them, and does not include a power to exchange their debentures for shares in another company where there is no such dispute or difficulty. It is a mistake to suppose that a power to compromise a claim for money includes a power to accept less than 20 shillings in the pound if the debt is undisputed and the debtor can pay; a power to compromise does not include a power to make presents."

At page 98 Guest states:

> The word "arrangement" has, I think, a broader meaning although there is remarkably little authority on it. In *Re Guardian Assurance Company*, [1917] 1 Ch. 431, Mr. Justice Younger, who first heard the application for sanction, sought to interpret "arrangement" as merely another word for "compromise." However, the Court of Appeal (at p. 447) said that there was no sufficient ground for so limiting the meaning of the word; and while no definition was attempted by the members of the Court, they seem to suggest that if a transaction affecting the proprietory rights of a shareholder could be carried out by agreement between the company and all the shareholders, then it can be carried out by an arrangement under the section.

The Canada Corporations Act 1970 R.S.C. Chap. C-32 Section 134 had a section dealing with Arrangements and Compromises between a company and its shareholders or any class of them. An arrangement between a company and its creditor would come under similar provisons of the Companies' Creditors Arrangement Act 1970 R.S.C. Chap. C-25. This section construes the word arrangement in s.s. 4 as

> (4) The expression "arrangement" as used in this section and section 135 shall be construed as extending to any reorganization of the share capital of the company including without limiting the foregoing the consolidation of shares of different classes, the division of shares into shares of different classes, the conversion of shares into shares of another class or classes and the modification of the provisions attaching to shares of any class or classes and as including an amalgamation or reconstruction as hereinafter defined;

The words "Amalgamation or Reconstruction" mean

. the expression "amalgamation or reconstruction" means an arrangement pursuant to which a company (in this subsection called "the transferor company") transfers or sells or proposes to transfer or sell to any other company (in this subsection called "the transferee company"), the whole or a substantial part of the business and assets of the transferor company for a consideration consisting in whole or in part of shares, debentures or other securities of the transferee company and, either, any part of such consideration is proposed to be distributed among shareholders of the transferor company of any class, or, the transferor company proposes to cease carrying on the business or part of its business so sold or transferred or proposed to be sold and transferred. R.S., c. 53, s. 126.

The term "Reorganization" is defined in section 185 of the CBCA and is a term that is at some variance with its usage at common law. Section 234 is the oppression section.

185. (1) "Reorganization" defined.- In this section, "reorganization" means a court order made under

(a) section 234;
(b) the Bankruptcy Act approving a proposal; or
(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

As the CBCA presently stands it has no section dealing with compromise or arrangement hence there is no interpretation of these and other terms discussed above. By a proposed amendment to the Act s. 185.1 this will bring into it an "arrangement provision". The term "arrangement" includes

rrangement Defined

185.1 (1) In this section, "arrangement" includes
(a) an amendment to the articles of a corporation;
(b) an amalgamation of two or more corporations;
(c) a division of the business carried on by a corporation;
(d) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate;

(e) an exchange of securities of a corporation held by security holders for property, money or other securities of the corporation or property, money or securities of another body corporate that is not a take-over bid as defined in section 187;
(f) a liquidation and dissolution of a corporation; and
(g) any combination of the foregoing.

You will notice (e) which could be a reconstruction section goes beyond the traditional meaning of a reconstruction and permits a money consideration to pass which seems more in keeping with modern times.

Ontario

Business Corporations Act R.S.O. Chap. 53 s. 193.

As is the situation in the above mentioned Canada Act the provisions with respect to arrangements are applicable only between the company and its shareholders or any class of them. The interpretation section is as follows:

193. (1) Interpretation.—In this section and sections 194 and 195, "arrangement" includes a reorganization of the authorized capital of a corporation and also includes,

- **(a)** the consolidation of shares of different classes;
- **(b)** the reclassification of shares of one class into shares of another class;
- **(c)** the variation of the designations, preferences, rights, conditions, restrictions, limitations or prohibitions attaching to shares of any class; and
- **(d)** a reconstruction under which a corporation transfers or sells, or proposes to transfer or to sell, to another body corporate the whole or a substantial part of its undertaking for a consideration consisting in whole or in part of securities of the other body corporate and under which it proposes to distribute a part of that consideration among its shareholders of any class, or to cease carrying on its undertaking or that part of its undertaking so transferred or sold or so proposed to be transferred or sold.

(2) Arrangement.—Subject to section 195, a corporation may make an arrangement,

- **(a)** that affects the rights of all its shareholders; or
- **(b)** that affects the rights of only holders of a particular class of its shares.

(3) Subsidiaries.—Where a corporation proposing an arrangement has one or more subsidiaries, any one or more of the subsidiaries may join in the arrangement with the holding corporation in one scheme. 1970, c. 25, s. 193.

British Columbia

British Columbia Companies Act 1973 Chap. 18 s. 273 is a section similar to that in the Alberta Act pertaining to compromise and arrangement but it has no definition or interpretation of the words.

Alberta

The Companies Act R.S.A. Chap. 60 s. 154 (1).

The side note in the statute is the one word "Compromise" but no where is it defined. s.s. (1) however does interpret the word arrangement.

> Compromise **154. (1)** In this section "arrangement" shall be construed as extending to a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

s. 155 deals with Reconstruction and Amalgamation but does not define these terms.

The Alberta Corporation Manual p. 3519 has this to say:

> The word "compromise" presupposes some dispute but the word "arrangement" is a word of the widest signification. By definition it extends to "a reorganization of the share capital of a company by the consolidation of shares of different classes or by the division of shares into shares of different classes . . ."

United States

The Model Business Corporation Act does not provide for compromises, arrangements, etc., hence we do not find any definitions. It does however in #65 provide for Mergers and Consolidations. The term merger is synonymous to amalgamation in our Act and consolidation is used in the same sense as reconstruction.

Ghana

Final Report of the Commission of Enquiry into The Working and Administration of the Present Company Law of Ghana, otherwise known as the Gower Report.

In this Professor Gower has attempted to do away with the fine distinctions between corporate restructuring and to lump them all in two words ' "Arrangement and Amalgamation".

In this Code—

(a) the expression "arrangement" means any change in the rights or liabilities of members, debentureholders or creditors of a company or any class thereof or in the Regulations of a company, other than a change effected under any of the foregoing sections of this Code or by the unanimous agreement of all the parties affected thereby;

(b) the expression "amalgamation" means any merger of the undertakings or any part of the undertakings of two or more companies or of the undertakings or part of the undertakings of one or more companies and one or more bodies corporate.

General

As will be seen from the above there is a lack of precision in terminology used in the areas of reorganization be it arrangement, reconstruction, consolidation, amalgamation merger, or division, which leads to confusion. The Select Committee Ontario in its report(discussed below) coined yet another phrase intended to embody all meanings which bring two or more companies together by some means or procedures. The phrase is "business combination". The lack of uniformity in terminology found in text books writing and statutes is rather extraordinary. It raises the question whether Alberta in a new act should adhere to the traditional terms inherited from Common Law and English

Statutes which are generally known and understood in Alberta or should it follow the American pattern, or create something new by definition which may further confuse the legal profession within and outside of Alberta.

SECTIONS 206 - 209 COMPANIES ACT 1948
and
SECTIONS 153 - 156 ALBERTA COMPANIES ACT

Any consideration of a revision of sections 153 - 156 of the Alberta Companies Act calls for an examination of English statutory law from which it derived. In the interest of brevity I believe this can be adequately covered by a look at the current provisions still in effect in England by the Act of 1948. Sections 206 - 209 and Sections 153 - 156 above, are reproduced in toto in Schedules A & B. To aid in the discussion sec. 206 of the English Act and sec. 154 of the Alberta Act are as follows:

Arrangements and Reconstructions

206. Power to compromise with creditors and members

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under subsection (2) of this section shall have no effect until an office copy of the order has been delivered to the registrar of companies for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3) of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one pound for each copy in respect of which default is made.

(5) *(Applies to Scotland.)*

(6) In this and the next following section the expression "company" means any company liable to be wound up under this Act, and the expression "arrangement" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of diffe[illegible] classes or by both those methods.

154. (1) In this section "arrangement" shall be construed as extending to a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

(2) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(3) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company.

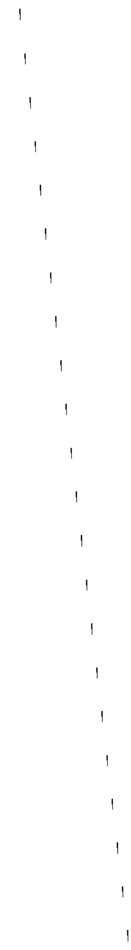
(4) Where an order is made under this section, an office copy thereof shall be filed with the Registrar within 15 days from the date of the order or within such further time as the court may allow, and the compromise or arrangement does not take effect until a copy has been so filed.

(5) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(6) If a company makes default in complying with subsection (5) it is guilty of an offence.

[R.S.A. 1970, c. 60, s. 154]

A comparison of s. 206(1) (2) to sec. 154(2) (3) of the Alberta Act, the operative parts of the sections show them to be almost identical. Subsection (5) applies to Scotland and subsection (6) is similar to ss(1) of the Alberta Act. These words in the English subsection were not included in the Alberta Act.



> In this and the next following section the expression "company" means any company liable to be wound up under this Act.

Why they were omitted in the Companies Act 1929 Alberta raises a problem of interpretation.

Does it mean that the section is applicable to only those companies which are insolvent and which could therefore be wound up or do the words express a jurisdictional restriction. The wording of the Ontario Business Corporations Act also caused me to wonder,because in its arrangement section it does not include an arrangement or compromise with creditors.

Stroud's Judicial Dictionary Fourth Ed. 3, pg. 1531

> **LIABLE.** (1) "Liable" "is generally regarded by purists as a word of modern English, and not having any existence in ancient documents. It means very little more than 'under an OBLIGATION'" (per Kekewich J., *Re Chapman* [1896] 1 Ch. 323), and shortly afterwards the same learned judge said it "must mean, to some extent, 'under an obligation'" (*Re Hill* [1896] 1 Ch. 962. "Liable" in a legal context means that a person is responsible at law (*Littlewood* v. *George Wimpey & Co.* [1953] 2 Q.B. 501). See also *Collinge* v. *Haywood*, 8 L.J.Q.B. 98, cited INDEMNIFY.
>
> (2) But sometimes "liable" does not, necessarily, connote an existing liability;

The dictionary then gives 19 additional illustrations of the manner in which the courts have ruled on its meaning in the circumstances of each case.

The Encyclopedia of Words and Phrases Legal Maxims 2nd ed. page 375 quotes the case Re Laurance (1923) 25 OWR 482. This was a case arising out of a claim of preference in a bankruptcy proceeding. The words "personal property liable to seizure for taxes" required interpretation by the court. Orde J. stated "Liable" is not a legal term and has no technical meaning. Its

exact meaning may vary according to the context. "Liability" is primarily referable to the existence of the oblication and is not to be confined to the present right to enforce it.

English case law on petitions under s. 206 certainly are not confined to instances where the petitioner is liable to be wound up in the sense that the companies were insolvent. Two of many illustrations are found in these cases.

Re National Bank Ltd. 1966 1 All E.R. 1006 and In re Anglo-Continental Supply Company, Limited 1922 2 Ch. Law Reports 723.

I come to the conclusion that the words "any company liable to be wound up" are merely descriptive of the type of company that may proceed under section 206. The only reference to these words I have been able to find are in a footnote to a discussion on schemes of arrangement in Handbook on Joint Stock Companies by Gore-Browne at p. 784. The footnote is "Any company liable to be wound up (sub-section 6): see sections 218, 220, 399, 400". Sec. 218 is headed up by the title

(ii) Winding Up By The Court
Jurisdiction

This section starts out in this manner "(1) The High Court shall have jurisdiction to wind up any company registered in England. The remainder of the section sets out the various courts in different parts of England which shall have jurisdiction.

Halsbury at p. 437 Section 461 entitled Application to Northern Ireland provides: "Nothing in this Act, except

the provisions thereof which relate expressly to companies registered or incorporated in Northern Ireland or outside Great Britain, shall apply to or in relation to companies registered or incorporated in Northern Ireland." Sections 220 and 221 specifically preserves the right to wind up companies registered in Scotland by the court in Scotland.

It would seem from these sections that the questioned words of section 206 are doubtless in that Act for a specific jurisdictional purpose, historically created between England, Scotland & Ireland. It has no significance to Company law in Canada and the words were properly omitted from the Alberta Act in 1929.

At this point it should be remembered that this paper is not dealing with the well established powers of a company contained in its articles or memorandum to effect a change in its share capital structure by the passing of a special resolution confirmed by an order of the Court. The results obtained by proceeding in this manner say under sec. 38 Alberta Companies Act, a "reorganization of share capital" could also be achieved under the arrangement section 154. This same situation exists under the English statute. I suppose only circumstances within the company in relationship to its creditors and members would dictate which route to follow. It would seem for example that where the articles or terms of the debentures themselves or the trust deed provide that the rights of the holders may be varied with the assent of a certain majority of their number this might be the simplest manner of achieving the result and in the best interests of the company.

Under English law there may be a variation of shareholders rights where provision is made therefor in the companies' memorandum or articles and where the specified proportion of the holders of the issued shares of that class sanction the resolution passed at a meeting of the shareholders. There is

also provision for an application to the court to cancel the variation by holders representing not less than 15% of the issued shares of that class.

A compromise or arrangement or reconstruction under secs. 206 and 154 casts a much wider net and provides the company, its shareholders and creditors with an infinite variety of possibilities to resolve problems with the company's share structure financial difficulties, creditors and shareholders or debenture holders. Under the CBCA comparable sections are not available.

Examples of schemes approved by the court, Pennington Company Law, pp. 453-454:

Examples of schemes approved by the court

Within the limits set out above, the court will allow companies the greatest freedom in devising schemes to suit their requirements, and will approve those schemes if they are fair to all whose interests are affected. The court has deliberately laid down no rules to which schemes must conform in order to obtain the court's approval, and has thus left companies free to initiate schemes of the widest variety. Nevertheless, the kinds of schemes which are proposed in practice do fall into three broad categories.

Insolvent and capitally insufficient companies

The first category comprises schemes which modify the rights of a company's members or creditors when the company becomes insolvent, or when its assets, if realised, would produce less than the amount of its debts and share capital. Such schemes often provide for the payment of the company's unsecured trade debts in full or part, even though its debenture debt is to be partly cancelled or converted into share capital (*c*); or the scheme provides for the payment of part of the company's unsecured trade debts and for the conversion of the remainder into secured indebtedness, which is usually made to rank after the existing debenture debt (*d*). Although this involves a reversal of the normal order of priority between creditors, it is acceptable to the court, because the purpose of the scheme is to enable the company to continue carrying on its business and avoid being wound up, and if the company continued carrying on business without there being any scheme at all, its unsecured trade creditors would probably be paid in point of time before its debenture debt matured or before its debenture holders became entitled to enforce their security. As between the unsecured creditors themselves, it has been suggested that the same priority should be given as in a winding up to creditors whose debts

would then rank as preferential payments (*e*), but the court has never laid this down as a binding rule. Other ways in which debenture holders' rights are sometimes modified is by making accrued or future debenture interest payable only out of profits (*f*), or by converting part of the debenture debt into a deferred class of debentures with interest payable only out of profits (*g*), or, where the company needs fresh capital, by empowering the company to issue a new class of debentures to the public which will rank before the existing debentures (*d*). Even though a company is insolvent, the scheme need not throw the whole of the loss on the shareholders. Thus, schemes have been approved by which the debenture holders' rights have been seriously modified in order to allow the paid up share capital to be only partly reduced (*h*), or not reduced at all (*g*).

Reorganisations

The second category of schemes comprises those where the company's assets are worth more than the total of its debts and its share capital, and the scheme is designed to modify shareholders' or debenture holders' rights merely in order to meet an eventuality which has occurred, or to enable the company to raise new capital, or to reorganise its existing capital structure. Thus, the court has approved schemes which released the guarantor of a company's debenture debt because of his insolvency (*i*); which empowered the company to issue debentures ranking in priority to its existing debentures (*k*); which consolidated its issued ordinary and deferred shares into one class of ordinary shares (*l*); and which divided its partly paid ordinary shares into a class of fully paid preference shares and a class of ordinary shares with a correspondingly smaller amount paid up (*m*).

Reconstructions and amalgamations

The third and final category of schemes comprises reconstructions and amalgamations, but this is a subject in itself, and is therefore dealt with separately in Chapter 27.

Section 207 of the English Act was put into the 1948 Act and in my view was a most important addition. The Alberta Act was not amended in line with this change as it should be if a decision is made to retain s. 154.

207. Information as to compromises with creditors and members

(1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under the last foregoing section there shall—

(*a*) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons; and

(*b*) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

(2) Where the compromise or arrangement affects the rights of debenture holders of the company, the said statement shall give the like explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement explaining the effect of the compromise or arrangement proposed can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the statement.

(4) Where a company makes default in complying with any requirement of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding five hundred pounds, and for the purpose of this subsection any liquidator of the company and any trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company:

Provided that a person shall not be liable under this subsection if that person shows that the default was due to the refusal of any other person, being a director or trustee for debenture holders, to supply the necessary particulars as to his interests.

(5) It shall be the duty of any director of the company and of any trustee for debenture holders of the company to give notice to the company of such matters relating to himself as may be necessary for the purposes of this section, and any person who makes default in complying with this subsection shall be liable to a fine not exceeding fifty pounds.

My only comment on this section is that it gives the shareholders information that he should have before him in order that he may make a judgment for or against a scheme. He may also appreciate the advantages that would accrue to the directors or others as opposed to his own interests. This disclosure goes far beyond that supplied by a special resolution that creates a fundamental change by altering the articles and shareholders rights.

Section 208 sets out the powers of a court where an application is made under section 206 for sanctioning a compromise or arrangement in connection with a scheme for reconstruction of any company or companies or the amalgamation of any two or more companies. This section is almost identical to sec. 155 of the Alberta Act. I note, in passing, that an amalgamation may be achieved through the operation of sections 154 and 155 or by an agreement under section 154.

Ancillary to a scheme under sec. 206 whereby one company acquires shares of another company of not less than 9/10 of the value of the issued shares of the company and wishes to acquire the balance from shareholders who have dissented against the scheme or not responded one way or another, one goes to the procedure in s. 209. This section enables the outsider, or transferee company, to expropriate the shares not previously acquired under the scheme. S. 209 is substantially the same as s. 153 of the Alberta Act apart from drafting changes. In Alberta and most Canadian jurisdictions schemes by which shares are purchased to gain control or ownership of all of the shares of a company do not proceed under s. 154, but rather under Part 9 of the Securities Act Take Over Bids.

If it is decided to retain s. 153 in a new Act I would suggest that the words "Where a scheme or contract involving the transfer of shares, etc." be reworded by eliminating the words "scheme or contract" as being archaic. I know what is meant by the word 'scheme' but not what circumstances would give rise to a contract between the transferee and say a group of shareholders.

This phrase is discussed in a case going to the High Court of Australia on appeal from the Supreme Court of Tasmania; Australia Consolidated Press Limited and Australian Newsprint Mills Holdings Limited, Commonwealth Law Reports, Vol. 105, 1960-1961, p. 473. The facts, though unimportant, involved an offer by the transferee company to buy the whole of the issued shares of the respondent company. The offer was accepted by 9/10 in value of the shares in the transferor company. The appellant dissented as a shareholder under the appropriate section which was a redraft of s. 209 of The English Act. It was argued by the appellant that an offer to purchase all of the issued shares of the transferee was not a scheme or a contract and therefore the section was inoperative in the circumstances. Dixon C.J. at pp. 479-80 wrote:

Section 130B was transcribed from a badly drawn provision, untechnical and imprecise in its expression and exhibiting no very certain purpose or policy. Of "contract" in the present case, except with the individual shareholders who accepted the offer by completing the transfer of their shares, it is impossible to discover any trace. The respondent "transferee company" does not way there was a "kcontract". What it says is that there was a "scheme" and the scheme involved the transfer of shares. It will be noticed that sub-s. (1) of s. 130B speaks of "a scheme or contract involving the transfer of shares or any class of shares". Moreover it speaks of the "approving" of the contract or scheme. The transfer must be of shares in one company to another company. The first company is designated the transferor. From these factors the appellant asks the Court to conclude that the transfer of shares must be an incident consequence or fulfilment of the contract or scheme and not the think itself, that the approval must be by the shareholders as such and accordingly it must be given at a meeting of the transferor company. It is pointed out that if the offer is to the individual holders of shares there can be no certain time when it was "made" from which the four months run. Shareholders may be scattered, and, as it is said, the offer is not "made" till it is received and it may be impossible to say when a given shareholder received the offer or if he did so at all. On the other hand, an offer to the "transferor" company for submission for approval may be made at a time fixed with certainty. All this is a not unattractive reconstruction of the provision. But what basis for it, that is not simply speculative, can be discovered in the language of the provision itself? The answer must be that the reasons assigned form no solid ground for the interpretation sought. "Scheme"is a vague and elastic word. Doubtless it connotes a plan or purpose which is coherent and has some unity of conception. But the rest of the section shows that it is dealing with some plan, proposal or project which contemplates the acquisition of the whole of the shares in the "transferor" company by the "transferee" company or the whole of a specific class of such shares. That seems enough

> in itself to warrant the application of the word "scheme" to the proposal. The word "involves" has of course a very wide and imprecise meaning and if the transfer of the shares is the object of the "scheme" the transfer from each shareholder may surely be described as "involved" in the scheme. We seem to be dealing with commercial rather than juristic English and ifit is the very word one would expect. The word "approve" then used in relation to a specified percentage of shares in value appears really to require the definite expression of assent by each shareholder until the required percentage is made up. However awkward it is to establish the date of the offer on the footing that it must be communicated to the shareholders, it is awkward to obtain the definitive approval of the required shareholding by proceeding by means of a meeting of members of the "transferor company".
>
> Finally, the meaning which the appellant seeks to place on the part of the provision seems inconsistent with the practice prevailing in England so far as it may be collected from the facts of the reported cases. None deals with the point but in the reported cases the offer was made to the shareholders of the transferor company and not to the company; and no objection on that score was raised.

Having in mind a contract entered into between the two amalgamating companies under s. 156 then these words seem appropriate. The difficulty seems to arise because there is no statutory amalgamation procedure in England as we have in our own Act.

The Ghana Code

The Gower Report on Company Law of Ghana 5234 at p. 174 has adopted the basic English section without the use of the words "scheme or contract". The simplicity of the language covers the case of an offer arising out of an arrangement as well as what we term a 'take over bid'.

> 234(1). Where a body corporate, whether a company within the meaning of this Code or not (in this section referred to as "the transferee company"), has made an offer to the holders of shares in a company (in this section referred to as "the transferor company"), then, provided that the conditions specified in subsection (2) of this section are duly fulfilled, the transferee company may compulsorily acquire the shares in the transferor company in the manner specified in this section

A review of the Report leaves me with the impression that Professor Gower places a great deal of importance upon the usefulness of a type of section like 206 in the English Act. He is also a champion of minority rights for shareholders. Because the CBCA has in its present form, except for the oppression section, abandoned the protection afforded by a court approved variation of a companies' articles, which in turn affect the rights and privileges of its members, I think it worthwhile to look at the Ghana proposals. Relevant sections are reproduced in Schedule B.

Section 22 provides that a company by special resolution may alter or add to its regulations or adopt new regulations provided that the changes are made in accordance with sections 218 and 231; section 21 in the code is an oppression section giving the Court wide powers over the capital structure of a company where there might be proven unfairness or oppression to a shareholder. Sec. 231 is the section dealing with arrangements and amalgamation where changes must be sanctioned by that court. The other section referred to in s. 22 under which alterations or additions may be made to the regulations are not such as could prejudice the rights of the shareholders or debenture holders.

Sec. 47 which deals with variation of class rights provides, apart from the machinery and right of appeal to the court, that the only manner in which a variation of rights may be accomplished, when forbidden by the regulations is under a scheme of arrangement under sec. 231.

Part S: Arrangements and Amalgamations

229. In this Code— *Meaning of Arrangement and Amalgamation.*

(a) the expression " arrangement " means any change in the rights or liabilities of members, debentureholders or creditors of a company or any class thereof or in the Regulations of a company, other than a change effected under any of the foregoing sections of this Code or by the unanimous agreement of all the parties affected thereby;

(b) the expression " amalgamation " means any merger of the undertakings or any part of the undertakings of two or more companies or of the undertakings or part of the undertakings of one or more companies and one or more bodies corporate.

The definitions of the words arrangement and amalgamation are expressions adopted by Prof. Gower no doubt after considerable thought in preference over terms used by others, e.g. compromise, reorganization, restructure, merger. If thought desirable in a new Alberta Act these terms and definitions should be acceptable.

Comments (3) (4) p . 169

3. The definition of arrangement emphasises that something needs to be done which cannot be or is not effected under the previous sections (such as a variation of shareholders' rights in accordance with section 47) or by obtaining the unanimous agreement of those affected thereby. In particular it will include a compromise with creditors or members which is to bind all concerned even though all may not have agreed. It will also include alterations of the Regulations beyond the power of the company under section 22.

4. The definition of amalgamation indicates that it involves the merger of undertakings -- though some of the bodies involved need not be companies within the meaning of this Code. A "merger" by acquisition of shares -- which does not directly affect the company itself -- is excluded except for the purposes of sections 234 and 235.

If it is decided to retain the equivalent of s. 155 (Reconstruction and Amalgamation) in a new Alberta Act then a revision might be considered in the light of s. 229.

S. 230. Enables a company to effect an arrangement or amalgamation without recourse to the court for sanction; and it provides for a type of appraisal to a dissenting shareholder who may demand to be bought out. This section is modeled after s. 287 of the English Act and is similar as well to s. 249 of the Alberta Act in the course of a winding up. In the Ghana section where price cannot be agreed upon the President of the Association of Accountants shall name a single arbitrator who in effect will determine the price to be paid to the dissenting shareholder. In the English and Alberta sections the price is determined by arbitration, a procedure originating in the Companies Clauses Consolidation Act 1845. I wonder if this section in the Alberta Act is used and if so if it is an efficient method of determining price. Perhaps those on the committee with practical experience can answer this.

S. 231 is based on s. 206 (English) and similar to s. 154 Alberta (the compromise and arrangement section) but with certain innovations.

231. (1) Where any arrangement or amalgamation is proposed, whether or not involving a compromise between a company and its creditors or members or any class or classes of them, the Court, on the summary application of the company or any member or creditor of the company or, in the case of a company being wound up, of the liquidator, may either order that meetings of the various classes of members and creditors concerned be summoned in such manner as the Court directs or that a postal ballot be taken of the various classes in manner provided by subsection (6) of section 170 of this Code.

(2) If a three-fourths majority of each class of members concerned and a majority in number representing three-fourths in value of each class of creditors concerned shall approve the said arrangement or amalgamation the same shall be referred to the Registrar who shall appoint one or more competent reporters to investigate the fairness of the said arrangement or amalgamation and to report thereon to the Court. The remuneration of the reporters shall be fixed by the Registrar and it and the proper expenses of the investigation shall be borne by the company or such other party to the application as the Court shall order.

(3) If the Court, after considering the said report, shall make an order confirming the arrangement or amalgamation (with or without modifications) the same as confirmed shall be binding on the company and on all members and creditors thereof and its validity shall not subsequently be impeachable in any proceedings.

(4) Upon the hearing by the Court of the application to confirm the arrangement or amalgamation any member or creditor of the company claiming to be affected thereby shall be entitled to be represented and to object.

(5) The Court may prescribe such terms as it shall think fit as a condition of its confirmation including a condition that any members shall be given rights to require the company to purchase their shares at a price fixed by the Court or to be determined in manner provided in the order.

(6) An arrangement or amalgamation may be carried out in accordance with the provisions of this section notwithstanding that it could have been accomplished under the previous section or any other provisions of this Code but the provisions of section 75 to 79 of this Code shall also be complied with if the arrangement or amalgamation is one which, by virtue of section 75 requires the confirmation of the Court in accordance with such sections.

(7) An order made under subsection (3) of this section shall have no effect until an office copy of the order has been delivered to the Registrar. The Registrar shall register the order and cause the same to be published in the *Gazette*. A copy of the order shall be annexed to every copy of the company's Regulations issued by the company after the order has been made and if a company makes default the company and every officer of the company who is in default shall be liable to a fine not exceeding £G5 in respect of every copy in respect of which default is made.

(1) Where any arrangement or amalgamation is proposed the court may either order that the various classes of members and creditors concerned be summoned to meetings, or that a postal ballot be taken of the various classes in the manner provided by ss. 6 of section 170 of the code. Section 170 sets out voting procedures to be followed at meetings. Where a poll is demanded (a) by the Chairman, (b) by at least 3 members present in person or by proxy (c) by any member or members representing not less than 1/20 of the voting rights--the Chairman in lieu of taking a poll may direct that voting shall be by ballot. ss(6) of sec. 170 sets out the procedure for a postal ballot and this is what the Court may order under sec. 231.

(2) If the proposal is approved by 3/4 majority of the members and 3/4 in value of the creditors the results will be reported to the Registrar "who shall appoint one or more competent reporters to investigate the fairness of the said arrangement or amalgamation and to report thereon to the Court." This appointment of reporters is the normal practice followed in Scotland.

Professor Gower comments at p. 172:

> I regard this safeguard as a valuable one. There is no doubt that both under reductions and schemes of arrangement grave injustice has, under the English procedure, been done to certain classes—especially perhaps, preference shareholders. The need for the Court's sanction is intended to ensure that no unfair schemes are passed, but it has certainly not proved effective. This is largely because Courts who operate under an " adversary " system are necessarily ill-equipped to carry out the economic and accounting inquisition needed in order to assess fairness. In the U.S.A., under Federal Legislation, the Securities and Exchange Commission act as advisers to the Courts in matters of this sort. I do not suggest that anything as elaborate as an S.E.C. is needed in Ghana but I do think it would be useful if the Court could have the advantage of an expert and impartial report before deciding whether to confirm.

A classic example of a situation where such a procedure would have been invaluable is illustrated in the case of Folger v. Norcan Oils Ltd. 1964 47 N.W.R. 257 a decision by the Court of Appeal of Alberta and 1965 S.C.R. p. 36. The Supreme Court reversed the decision of the Court of Appeal on a procedural basis rather than the merits. The facts of the case are over-simplified by saying that Norcan Oils Ltd. entered into an amalgamation agreement with Gridoil Freehold Leases Ltd. Both companies were controlled by the same group of Calgary promoters and the directors were the same persons. They controlled 58.6% of the issued shares of Gridoil and 61.6% of the issued shares of Norcan. Excluding the shares in Gridoil held by the promoters over 90% of the issued shares were held by Americans and the shares were listed on the American Stock Exchange. The agreement made under s. 140(a) now s. 154 with the support of the promoters shares naturally received overwhelming support.
Folger, a New York attorney and a shareholder of Gridoil objected to the valuation placed on his shares which meant he would get one share of Norcan for a share of Gridoil. Mr. Folger appeared in person on his own behalf on the application for approval before Mr. Justice Cairns who heard the parties and granted the order without reasons.

The evidence analyzed by Mr. Justice Porter, a jurist with considerable experience in both corporate law and the oil business, was most critical of the information given or not given to the shareholders of Gridoil upon which they were asked to determine whether to vote for or against

the proposal, e.g. a revaluation of Gridoil's oil reserves and presence of a tax credit of 2,000,000 standing to its credit, market value, book values, etc. made available to the amalgamated Norcan only. The Court unanimously refused to approve the amalgamation.

In his decision Mr. Justice Porter points out that under s. 138 (s. 153 in current Alberta Act) if over 90% of the shares have been acquired by the transferee company then the transferee company is entitled and bound to acquire the remaining shares unless the Court thinks fit to order otherwise. The Court is given absolute discretion without any guidance as to principles upon which he should direct otherwise. Sec. 140a (now s. 156 Alberta. This statutory amalgamation section was added to the Companies Act in 1959) provides in ss(8) for an obligation on the Court to approve the amalgamation and to consider the rights and interests of all parties including the dissident shareholders and creditors.

Porter J.

> It is clear that sec. 140*a* (8) requires the judge to review the facts and circumstances and approve of the transaction if, in his opinion, it is fair and provident. To exercise that discretion he must decide whether a prudent man properly informed would regard the transaction as provident.
>
> There are some precedents which furnish some guidance for the considerations which ought to weigh with a court in such circumstances: *Re Bugle Press Ltd.; Greby's Application; Re Houses and Estates Ltd.* [1961] 1 Ch 270, [1960] 2 WLR 658, per Buckley, J. at p. 276:
>
> > "In all commercial matters, where commercial people are much better able to judge of their own affairs than the court is able to do, the court is accustomed to pay the greatest attention to what commercial people who are concerned with the transaction in fact decide."
>
> The judgment goes on to point out, however, that the case is very different when the body making the offer is not distinct from the body to which the offer is made. In the *Bugle Press* case 90 per cent of the holding was vested in two persons in the buying company. It points out that the views of shareholders with substantial interests in both sides of the transaction cannot serve as a guide to its propriety as would the

opinion of a majority of shareholders interested in only one of the amalgamating companies: See too *Rathie v. Montreal Trust Co. and B.C. Pulp & Paper Co.* [1953] 2 SCR 204, reversing (1952) 6 WWR (NS) 652, per Rand, J. at 213.

In the present case, those proposing the amalgamation hold a beneficial interest in 61 per cent of the capital stock of Norcan and 58.6 per cent of Gridoil, and one owns $235,000 of 5½ per cent Gridoil convertible notes which attain a new value by reason of the provisions for their sinking fund which arise out of the amalgamation.

In these circumstances, the court is unaided by the opinion of the majority who voted for the transaction because the conflict of interest deprives them of the capacity to have an independent view about the value of the shares of Gridoil. There is, therefore, a clear obligation on the court to review all of the facts going to make the transaction in order to come to a conclusion about its merits. That is especially so in this case where, leaving aside the votes of the promoters, the amalgamation was approved in the case of Gridoil by about 12 per cent of the outstanding shares of the company and, in the case of Norcan, by about 18 per cent. There is no evidence of the number of shareholders who voted. With so small a percentage of the disinterested shareholders voting, the first inquiry for the court should be to determine whether the information which was given to the shareholders prior to the meeting was such as to enable them to form a judgment as to whether they should or should not attend the meeting. Did the circular issued to the shareholders disclose sufficient information to enable them to judge of the fairness and propriety of the scheme? *In re I.C.I.* [1937] AC 707, 106 LJ Ch 129 (*sub nom. Carruth v. I.C.I. Ltd.*) [1937] 2 All ER 422.

Downgraded as Gridoil was by the contents of the circular, many shareholders may well have elected to stay away from the meeting and take their loss.

What I think the Learned Judge had in mind was the principle upon which courts acted on application under s. 206 in England by which amalgamations are effected, re National Bank Ltd., 1966, 1 All E.R., p. 1006, at p. 1012, Plowman J. states

The principles on which the court acts in an application under s. 206 are well settled and are stated in BUCKLEY ON THE COMPANIES ACTS (13th Edn.) p. 409 as follows:

"In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with [I interpolate there that no question arises with regard to that matter]; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent [nothing arises on that] and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."

I comment there that in fact very nearly four thousand shareholders did approve. Then the passage goes on:

> " The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting unless, either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."

Though this section of the paper is devoted to a review of the Ghana Code I thought it was appropriate to digress to take a look at the law in Alberta on the same subject matter. If the current sections 153-156 are to be retained in Alberta it should be considered if the dissident shareholder is properly protected.

s. 232. This section is taken from s. 208 of the English Act and is identical to s. 155 of the Alberta Act except as to drafting and one other small but important change.

232 (4) In this section the expression " property " includes property rights and powers of every description and the expression " liabilities " includes duties of every description notwithstanding that such rights powers and duties are of a personal character which could not under the general law be assigned or performed vicariously.

155. (1) In this section "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

It is established at common law that contracts for personal services are non-assignable. Nokes v. Doncaster Amalgamated Collieries Limited, 1940, A.C., p. 1014. Professor Gower in his draft used words to overrule the effect of the above case which makes good sense to me. Service contracts today are of immense importance and might be one of the most important assets or liabilities of an amalgamating company. Such is hardly the same as the duty owed by a miner to his employer under the terms of his hiring

as was the "Nokes" case. Today's founder of the business, expert employee, and top flight executive may be integral arms of a business or industry and indispensible. By the same token a company which has long term and costly contracts with employees should not be able to divest itself of this liability by amalgamating into another company. The Ghana chance to English section leaves no doubt that the benefit or burdens of contracts of a personal nature are transferred to the amalgamated company.

I am of the opinion that if we retain our sections we need the additional words, "notwithstanding that such rights, powers and duties of a personal character which could not under the general law be assigned or performed vicariously" or some variation in our Act.

S. 233 is based on s. 207 of the English Act with two changes. It sets out as does 207 Information required to go to shareholders as to the arrangement or amalgamation. Where notice of a resolution to approve an arrangement or amalgamation is sent out, it will include a statement explaining the effect of the arrangement or amalgamation and in particular stating any material interests of the directors or members or creditors of the company or otherwise and the effect thereon of the arrangement or amalgamation insofar as it is different from the effect on the like interests of other persons.

If a notice is given by advertisement it shall state where the statement may be obtained. In case debenture rights may be effected the statement given holders will be similar but shall give the like information as respects the trustees of any deed for securing the debentures as is required as respects of directors. It is the duty of the directors and trustees to provide the company with the information needed for the statement as respects himself.

Professor Gower has made this section applicable to both an arrangement under s. 230 and an amalgamation under s. 231. In England this information is only required with respect to an amalgamation. The professor's logic appeals to me.

By ss(4)(b) something else is added to the English version

> (b) nothing herein contained shall derogate from the power of the Court under section 217 or 218 of this Code to declare ineffective any special resolution passed pursuant to section 230 of this Code.

If subsequent to an order under s. 231 settling an amalgamation information come to light of some illegality or oppression a Court can declare the order ineffective.

Section 234 of the Ghana Code is based on s. 209 English Act and covers the case of an amaglamation by virtue of a take-over bid and gives the right to a compulsory acquisition of shares owned by those who did not respond to the offer of purchase and those dissenting. This section may be compared to section 153 discussed above and results from a scheme or more generally a take-over bid b a company for all the shares of another company.

The concept of take-over bids such as we have in the U.S. and Canada is somewhat different to that in England and Ghana. In this country a take-over bid may be and often is a means of purchasing control deemed to be 20% of the outstanding equity shares. There is no tought of a merger or amalgamation. In other instances a take-over bid may be made for all of the shares of a company by a cash or share exchange or a combination of the two, the ultimate end result might be to make the transferor company a subsidiary of the transferee company which made the offer. An individual as opposed to a corporation may also make a take-over bid for all of the shares of a company but it would be unusual. S. 153 would not be available to an individual because, where there is provision for compulsory acquisition of shares it arises only out of a scheme or contract, or whatever, between two corporations.

Prof. Gower in his comments sets out the powerful arguments which have been advanced both for and against compulsory acquisitions From his examinations of the cases he felt that minorities "have had a rather raw deal and have had little help from the courts, which have tended to take refuge in the rather facile argument that since the terms have been accepted by more than 9/10ths they must be fair." In the Ghana sections 234 and 235 based on s. 209 of the English Act the right to compulsory acquisition has been deliberately made more restrictive. They apply only in the case where a real merger is intended. The offer must be to all shareholders of the company whose shares are to be acquired. The consideration is by an exchange of shares between the shareholders of the two companies but a shareholder may be given an option to take cash in lieu of shares.

One very important difference is found in sec. 234(4)(5). A shareholder may make an application to the Court within 2 months of receiving notice of compulsory acquisition in which case the Court is given much more power than the English section or s. 153 Alberta. "If the Court thinks that the circumstances do not justify compulsory acquisition of the applicants' share it may so order. If it thinks that compulsory acquisition is justified but the terms are unfair it may prescribe different terms. Before making a decision the Court may obtain a report on the offer from an impartial expert." This section gives a dissenting shareholder a right to apply to the Court for an order compelling the transferee company to acquire his shares, so that he may not be locked in. This is an appraisal right. If s. 153 is retained in a new Act consideration should be given to a similar change which places a definite obligation on a Court to consider the plight of a minority shareholder.

MODEL ACT

In this part and the one following referring to the California Code I endeavor to just touch on sections of particular interest as they reflect on fundamental changes somewhat parallel to appraisal rights in the C.B.C.A.

Section 71 Procedure for Merger

Any two or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this Act.

The Board of Directors of each corporation shall by resolution adopted by each board, approve a plan of merger.

Section 72 Procedure for Consolidation

The same procedure is followed for a merger except that the name of the new corporation is to be given in the plan instead of the remaining name in the case of a merger.

Section 73 Plan submitted to shareholders at an annual or special meeting. A copy or summary of the plan shall be sent with the notice of the meeting. The plan may be approved by a majority vote.

Section 74 Articles of merger or consolidation as the case may be which contain the plan and results of the vote are sent to Secretary of State for issuance of a certificate of merger or consolidation.

Section 75 A merger of a subsidiary into its parent company can be achieved by the parent board passing a resolution and

applying for a certificate; provided the parent owns at least 90% of the outstanding share (s) of the subsidiary company.

Section 77 Covers the merger or consolidation of a domestic and a foreign corporation (meaning one incorporated in another state).

Section 70 Sale of Assets Other Than In Regular Course of Business

The procedure is somewhat the same as for mergers. The Board passes a resolution recommending the sale of the companies' assets, to be voted on at an annual or special meeting of the shareholders. The vote at the meeting requires only a majority. This appears to be a feature of the Model Act. It has abandoned the 3/4 vote required under English and Canadian practice where resolutions which create a fundamental change in the rights of security holders and creditors calls for more than a majority vote.

Section 80 Rights of Shareholders to Dissent

> Any shareholder of a corporation shall have the right to dissent from any of the following corporate actions:
>
> (a) Any plan of merger or consolidation to which the corporation is a party; or
>
> (b) Any sale or exchange of all or substantially all of the property and assets of the corporation not made in the usual and regular course of its business, including a sale in dissolution, but not including a sale pursuant to an order of a court having jurisdiction in the premises or a sale for cash on terms requiring that all or substantially all of the net proceeds of sale be distributed to the shareholders in accordance with their respective interests within one year after the date of sale.
>
> A shareholder may dissent as to less than all of the shares registered in his name. In that event,

> his rights shall be determined as if the shares as to which he has dissented and his other shares were registered in the names of different shareholders.
>
> This section shall not apply to the shareholders of the surviving corporation in a merger if a vote of the shareholders of such corporation is not necessary to authorize such merger. Nor shall it apply to the holders of shares of any class or series if the shares of such class or series were registered on a national securities exchange on the date fixed to determine the shareholders entitled to vote at the meeting

This section applies to a plan of merger or consolidation or any sale or exchange of assets.

The shareholder is given the right to dissent as to part only of his shares. This right is also contained in the "Ghana Code" but not in the English Act.

Of particular interest is ss (b) 3rd paragraph which says that the section shall not apply to the shareholders of the surviving company in a merger if a vote is not required to authorize the merger or if the shares are listed on a national stock exchange.

This provision takes us outside the philosophy of the English and Canadian law. Section 206 English Act and S156 ss (4) Alberta Act.

As section 73 appears to require a vote of the shareholders in each company the reference of a non-vote by the shareholders would apply to some special circumstance such as where the merger is a vertical one between the parent company and its subsidiary. Note the second part of the exception which takes away the right to dissent if the shares in the merging corporation are listed upon a national exchange.

The danger of such an exception can be illustrated by two examples. Say the shares of both merging companies are listed in the American Stock Exchange. Company A is in a strong position and has supported the market in its shares, and kept it up to its price earnings potential so that the market reflects a fairly accurate measure of the shares' value. Company B however one of equal value and potential to A has failed to support the market in its shares so that they are trading for half their potential. The ordinary shareholder of B company does not know that, and upon receiving a plan of merger or consolidation that bases the exchange valuation on the market prices of the respective shares or something slightly in favour of the price of B shares will probably go along with the plan. A knowledgeable shareholder would see otherwise but have no recourse as he has no right to dissent .

Another illustration could be based on the supposition that the shares of only company B are listed for trading and the market is depressed. If a valuation of the shares in A company are based in whole or in part on the over the counter market or on an appraisal market shareholders of A could dissent. This would create a lop-sided situation for shareholders in B, who would have no right of dissent. These illustrations are only two of many variations which could work to the disadvantage of minority shareholders.

I suppose the reason for this provision is because it was felt that a shareholder who did not like the proposed merger could get out by selling in the open market. If you, a shareholder in Company B had bought shares at $1.00 and they were now quoted at 35 cents in a depressed market and when the company still had growth potential and hope for a recovery of the market you would be pretty bitter about selling in the market.

A real case in point is found in Re Wall v. Redekop Corp. et al 1974, 50 D.L.R. (3d) 733 which reviews the problems in establishing a fair value for the dissenters' shares - even where they are listed on a stock exchange.

Section 81 outlines the rights of dissenting shareholders. It is a long and involved section as there are procedural difficulties where mergers cross state jurisdictions. The section speaks of the "fair value" of the share of the dissident, and there are attempts to give some guidance on the question of fairness and upon an appraisal.

For example, the fair value shall be fixed as of the day prior to the date upon which the vote was taken approving the proposed corporate action, excluding any appreciation or depreciation in anticipation of such corporate action.

In another paragraph it provides that within ten days after the corporate action is effected the Corporation, i.e. the merged corporations or new corporation shall make a written offer to the dissenting shareholders presumably the offer would be based upon previously established value or maybe slightly more. The notice and offer must be accompanied by a balance sheet of the corporation as of the latest date and not more than 12 months prior to the making of such offer, and a profit and loss statement of such corporation for the 12 month period ended on the date of such balance sheet.

This may be valuable information to the shareholder if the balance sheet and profit and loss statement was prepared subsequent to the annual financial statement available to all shareholders, otherwise it is not the end all. As we all know accounting procedures used from year to year may change with auditors, with varying results, and the uninitiated may be misled.

This section then goes on to provide that where the offer is not accepted the shareholder may request an appraisal by the Court and the Company shall within 60 days or at its own election petition the Court for a determination of fair value. If the Corporation fails to petition the shareholder may do so. The Court may, if it wishes, appoint one or more appraisers to assist him.

We are then faced with the problem of fixing a fair price for the shares if they are not listed upon an exchange. McFarlane J. in the above case Re Wall v. Redekop Corp. at page 736 stated

> Although the Maryland Court in the *American General* case chose the net asset value or hypothetical liquidation method, it is clear from the decision that there are at least three ways of determining the fair value of shares in any given corporation. That value may be determined by reference to the market value of the shares on the stock exchange, by calculating the net asset value or the amount to be obtained upon a hypothetical liquidation, or the investment value of the shares based on a capitalization of the earnings of the company. This becomes more clear as one continues to examine the American authorities.

and at page 739

> It is to be noted that in most of the cases to which I have referred the question of appraisal of the shares was referred by the Court to experts for report. I think that would be an appropriate course to follow here. The material before me at this time does not enable the Court to fix the price of the shares nor, indeed, to decide which method should be applied in determining that price. Whatever method is employed the dissenting shareholder is to be paid for his proportionate interest in the company as a going concern on the day before the resolution was passed *including* any appreciation or depreciation in anticipation of the vote upon the resolution. It is to be observed that the latter consideration was excluded in the *Roessler* case, *supra.*

General Corporation Law (New) - Corporations Code, AB 376
California Statutes 1975 Chapter 682 eff. Jan. 1 1977

The revision of the California Corporations Code above, was initiated by the Assembly Select Committee jointly with the Committee on Corporations of the State Bar. Their studies were undertaken from March of 1973 through to September 1975. The purpose of the project was "to modernize and streamline the general Corporation Law so as to embody principles and procedures designed to facilitate the conduct of business in a modern economy while maintaining and expanding upon this state's traditional protection of the rights of shareholders and creditors. Additionally, the Committee strived to present the revised law in a clear, logical and concise manner." (Report of the Assembly Select Committee On The Revision Of The Corporations Code) pg. 1.

Section 1001 - As in the case with the Model Act the Code has a special section on "The Sale of Assets" Chapter 10, section 1001. The section provides that a corporation may sell, lease, convey, exchange, transfer or otherwise dispose of all or substantially all of its assets when the principal terms are approved by the Board and the outstanding shares, where the sale etc. is not in the usual course of business. As with the Model Act a majority vote is sufficient approval.

The exception to this is interesting "(d) If the buyer in a sale of assets pursuant to subdivision (a) of this section or subdivision (g) of section 2001 is in control of or under common control with the seller, the principal terms of the same must be approved by at least 90 percent of the voting power unless the sale is to a domestic or foreign corporation in consideration of the non-redeemable common shares of the purchasing corporation or its parent" ((g) above is the section giving the directors and officers the right to sell assets of the Corporation in the process of dissolution.)

Section 1101 - "Agreement of Merger"

According to the Report to the Assemby by the Select Committee the term "consolidation" was eliminated as an outmoded procedure though it remains in the Model Act s. 72.

The merger agreement approved by each Board provides for a change in the Articles of the surviving company and the new name may be the same or similar to the name of a disappearing domestic or foreign corporation.

Section 1110 deals with what is called a short form merger and appliesto a merger of a 90% or more owned subsidiary into the parent company. Where the corporation is 100% owned this is done by a resolution of the Board of the parent company and the filing of a certificate of ownership.

Where the parent owns not all but at least 90% of the shares outstanding a merger may be effected by resolutions adopted by the parent and subsidiary boards. A resolution of the board of the subsidiary shall approve the fairness of the consideration to be received for each share of the subsidiary not owned by the parent. This approval goes beyond the protection afforded by the Model Act but in either case the dissenting shareholder has the right to be bought out.
The definition of "Reorganization" in the new code is interesting.

Chapter 12 - Reorganizations

§ 181. Reorganization

"Reorganization" means:

(a) A merger pursuant to Chapter 11 (commencing with Section 1100) other than a short-form merger (a "merger reorganization");

(b) The acquisition by one corporation in exchange in whole or in part for its equity securities (or the equity securities of a corporation which is in control of the acquiring corporation) of shares of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (an "exchange reorganization"); or

(c) The acquisition by one corporation in exchange in whole or in part for its equity securities (or the equity securities of a corporation which is in control of the acquiring corporation) or for its debt securities (or debt securities of a corporation which is in control of the acquiring corporation) which are not adequately secured and which have a maturity date in excess of five years after the consummation of the reorganization, or both, of all or substantially all of the * * * assets of another corporation (a "sale-of-assets reorganization").

This definition seems to include, using our terminology, an amalgamation or merger, a takeover of ownership or control, and a sale of assets. It does not carry the same meaning as it would at common law. See Gower's comment above where he indicates the word reorganization is used when only one company is involved. Fraser and Guest, above, indicate a similar understanding. It is a far cry from the present definition in s. 185 of CBCA.

Section 1201 This section requires shareholder consent where there is a reorganization except where the merger involves a parent or subsidiary. This section as well as others I have reviewed are extremely difficult to interpret much less to understand.

Section 1300 - 1305 deal with dissenters' rights. Either the company or the shareholder can make an offer to buy or sell as the case may be, the basis being the fair market value of the shares as of the day before the announcement of the proposed reorganization. In the event an agreement cannot be reached the matter may be placed before the Court by either the company or two or more dissenting shareholders. The Court may appoint one or more impartial appraisers.

As is the case in the Model Act dissenting shares do not include those listed on a national stock exchange or listed on the list of O.T.C. margin stocks issued by the Federal Reserve System. If however demands for payment are filed with respect to 5% or more of the outstanding shares of that class they have the right to dissent and the resulting remedies.

PROVINCES

Alberta, Saskatchewan, Manitoba are not being dealt under a separate heading. References to the Alberta Act are interspersed throughout the paper in a comparison with the law in other jurisdictions and it would be repetitive to deal with it additionally.

Saskatchewan and Manitoba have followed the C.B.C.A. and therefore need no separate treatment.

Ontario - Business Corporations Act 1970 R.S.O. Chap. 53

Section 193 deals with arrangements, consolidations, reconstructions, and variations and reclassifications of shares all under the title "Arrangements" - The word is also defined which I think is most useful.

> **193. (1) Interpretation.**—In this section and sections 194 and 195, "arrangement" includes a reorganization of the authorized capital of a corporation and also includes,
>
> (a) the consolidation of shares of different classes;
>
> (b) the reclassification of shares of one class into shares of another class;
>
> (c) the variation of the designations, preferences, rights, conditions, restrictions, limitations or prohibitions attaching to shares of any class; and
>
> (d) a reconstruction under which a corporation transfers or sells, or proposes to transfer or to sell, to another body corporate the whole or a substantial part of its undertaking for a consideration consisting in whole or in part of securities of the other body corporate and under which it proposes to distribute a part of that consideration among its shareholders of any class, or to cease carrying on its undertaking or that part of its undertaking so transferred or sold or so proposed to be transferred or sold.
>
> (2) **Arrangement.**—Subject to section 195, a corporation may make an arrangement,
>
> (a) that affects the rights of all its shareholders; or
>
> (b) that affects the rights of only holders of a particular class of its shares.

Section 194 - A scheme of arrangement must be prepared in detail and submitted to the shareholders who in turn must approve the arrangement as proposed or as varied at the meeting by at least 3/4 of the shares of each class represented at the meeting.

s.s. (7) is interesting in that the Minister may appear by Counsel on an application to the Court to approve the arrangement.

s.s. (8) provides "The Court shall hear and determine the matter and may approve the scheme as presented or may approve it, subject to compliance with such terms and conditions as it thinks fit, having regard to the rights and interests of the dissentient shareholders, or any of them."

This section is of interest because it is quite similar to s. 156 (8) Alberta, the amalgamation section.

Neither in the arrangement nor amalgamation sections is there any reference to creditors. This is quite a material departure from the English philosophy which seeks to protect creditors as well as shareholders.

s. 196 This section provides for a statutory amalgamation of any two or more corporations including holding or subsidiary corporations as does the comparable section in the Alberta Act. This was a change from the Ontario Corporations Act of 1953, which permitted amalgamations only between companies having the same or similar objects.

There are five noteworthy differences between the current Alberta Act and the Business Corporations Act.

1) The provision in s. 196 (5) whereby there must be approval by holders of special shares of any deletion or variation of the rights attached to their shares as a result of the amalgamation just as though the company was amending its articles to effect this deletion or variation. This requirement is in addition to the required approval of the agreement by the shareholders.

2) No Court approval is required to an amalgamation.

3) Except in the case of a non-offering company, dissident shareholders are completely ignored and would appear to have no recourse anywhere to court appearance or the right to be bought out. In Alberta where an application is made to the Court to approve the agreement presumably the Court will give the dissident his "day in Court" and may then approve the agreement, reject it, or approve subject to terms and conditions which might be directed to dissidents' rights.

4) Creditors are ignored in the sense that they do not participate in the procedure for amalgamation.

5) Each amalgamating company must be solvent.

Ontario, Quebec, New Brunswick and Prince Edward Island all have specific provisions for amalgamations but they have no provisions for Court approval or the protection of dissenters. Ziegel - Canadian Company Law Vol. 1 526 remarks "This appears to be a serious gap in the general legislative scheme of protection to dissenting shareholders."

There is little or no protection afforded a shareholder in an offering company, or a creditor who is concerned with an amalgamation. It would appear that a dissenting shareholder

or a creditor in the event of an amalgamation has, in certain circumstances, one remedy, i.e. the right to apply to the Court fo an order to wind up the corporation "if it is just and equitable f some reason", s. 217. This is a "drastic remedy and very often it would defeat the purpose of the dissenter - to protect his investment by keeping the business enterprise viable and earning dividends."

A similar provision is found in the Alberta Act s. 197 but a petition may only be launched by the company or any contributor. The exception to this is in the event of the companies' failure to file an annual report or hold an annual meeting in which case a shareholder may present a petition.

Another form of relief available to a dissident shareholder or creditor in an amalgamation is an application to the Court under s. 261 headed Order for Compliance. This is not an oppression section and is only applicable when the corporation or any of its directors or officers fail to comply with provisions of the Act. It occurs to me to be a pretty innocuous section.

The expression used below in section 100 "a company that is not offering its shares to the public" is very imprecise. It would of course include a private company because as such it is prohibited from offering its shares to the public. What of a public company that did complete a public distribution but is not engaging in one at the time in question? What of a company which has completed an offering and whose shares are listed on an exchange? In this instance, by no measure can it be said that the company is offering its shares to the public even though there is a public market in the shares. In the context of section 100 I think the words are meant to include a company that cannot or has not made a distribution to the public and excludes companies whose shares are traded

either over the counter or on a listed exchange. A public company whose shares have no established market would seem to be in limbo. A more appropriate term might be the one in the bill for a new securities act in Ontario "reporting issuer", which by definition includes an issuer "to which the Business Corporations Act applies and which, for the purposes of that Act, is offering securities to the public."

100(1) Rights of dissenting shareholders. - If, at a meeting of shareholders or of any class of shareholders of a corporation <u>that is not offering its shares to the public</u>,

(a) a resolution passed by the directors authorizing the sale, lease or exchange or other disposition of all or substantially all the property of the corporation is confirmed with or without variation by the shareholders.

(b) a resolution passed by the directors authorizing an amendment to the articles to delete therefrom a provision restricting the transfer of the shares of the corporation or of any class thereof is confirmed with or without variation by the shareholders;

(c) a resolution approving an agreement for the amalgamation of the corporation with one or more other corporations is confirmed by the shareholders, or

(d) a resolution passed by the directors under section 199 is confirmed by the shareholders,

any shareholder who has voted against the confirmation of the resolution may within ten days after the date of the meeting give notice in writing to the corporation requiring it to purchase his shares.

100(2) On amalgamation or change of jurisdiction. - Within ninety days from,

(a) the date of the completion of the sale, lease, exchange or disposition;

(b) the date set forth in the certificate of amendment or amalgamation; or

(c) the date of celivery to the Minister of a request in writing for his authorization under section 199,

the corporation, or amalgamated corporation, shall purchase the shares of every shareholder who has given notice under subsection (1), and every such shareholder shall sell his shares to the corporation.

100(3) Saving. - The corporation shall not purchase any shares under subsection (2) if it is insolvent or if the purchase would render it insolvent.

100(4) Price of shares. - The price and terms of the purchase of such shares shall be as may be agreed upon by the corporation and the dissenting shareholder, but, if they fail to agree, the price and terms shall be as determined by the court on the application of the dissenting shareholder.

199(5) Sale of shares. - If the sale, lease, exchange or other disposition is not completed, the certificate of amendment or amalgamation is not issued, or the authorization of the Minister is not given, the rights of the dissenting shareholder under this section cease and the corporation shall not purchase the shares of such shareholder under this section.

New Brunswick

I am referring to New Brunswick in order to comment on the proposals of Richard W. Bird the Director, Company Law Project Law Reform Division Department of Justice, 1975.

On the question of mergers he recommended that the New Brunswick Act be changed to permit an amalgamation between any two or more companies such as we have in the B.C. Act, the Ontario Business Corporations Act and the Alberta Companies Act. He recommended that the shareholders approval should require at least 2/3 of the represented shares. As Mr. Bird says whatever percentage is required is an arbitrary figure. It may be that Alberta's 3/4 requirement is too high particularly when the amalgamation must be sanctioned by the Court which is not necessary in New Brunswick. Under their law however the amalgamating companies, once the shareholders gave their approval, had to apply to the Provincial Secretary for letters patent. Presumably there was a discretion in the Minister to grant or refuse. The Report recommends this be deleted from a new Act. His reasoning for not requiring a Court or Ministers approval, is that the dissenting shareholder will be sufficiently protected with appraisal rights.

I wonder if this reasoning is complete. True, dissenting shareholders may get out of the company and may receive a fair value for their shares, it still does not give them the right to object to the amalgamation, and to be heard. Apart from this I note that the report does not discuss or recommend an oppression section.

The Report refers to a short form merger which is provided for in the Model Act, the California Code, and the C.B.C.A.;

but, in the American context a holding company owning over 90% of its subsidiary may effect a short form amalgamation by a resolution of the respective boards of directors. By the Canada Act however the subsidiary must be 100% owned by its parent, and the articles of both companies must be the same. The articles of amalgamation must also be supported by a declaration of solvency. He does not recommend the American format because that small minority has no place to go, to be heard.

The Report indicates that tthere had been some difficulty interpreting s. 47(4) that defines arrangement. S. 47 (4) is now s. 48(4) R.S.N.B. c. 13.

The definition of arrangmeent includes a sale of assets or transfer of all or a substantial portion of the business and the report recommended its repeal as to the part referring to amalgamation or reconstruction as was done in the proposed draft Canada Business Corporations Act and in its place be substituted sec. 183 (2) entitled "Extraordinary sale, lease or exchange." This will be discussed later.

On the question of compulsory acquisition the Report recommen that New Brunswick should follow the several other provinces and Canada and have an acquisition section to take effect if the takeover bid results in the offeror acquiring over 90% of the shares of the offeree company.

The Report speaks favorably of adoptiong a section in the English Act 209(2) where there is a compulsory acquisition of shares. This section gives the small minority protection against being locked in if the offeror elects not to invoke the compulsory acquisition provisions. I will discuss the provisions in the B.C. Act and the C.B.C.A. following. So far as appraisal rights are concerned the report is favorable to it, but would limit the right to shares that are not publicly traded as is the case in Ontario, shares in a non-

offering company.

The report states:

> Generally, appraisal rights are granted only where the shares are not publicly traded on the theory that in those cases where there is a market for the shares, the shareholder may realize his investment in the market place on the happening of a fundamental change. It is recommended that in New Brunswick appraisal rights only be granted where there has been no offering of the shares to the public. The Select Committee on Company Law on Mergers, Amalgamations and Certain Related Matters suggested a procedure to be followed for appraisal. If our recommendation is adopted, the procedure outlined by the Select Committee could be used. It is reproduced in Appendix B.

You will note that Mr. Bird uses the expression "on the theory", and it is, in my opinion, theory only.

The report p. 273 discusses the "Sale of Assets" which will replace the old word reconstruction found in s. 48(4). I can see no reason why this should not be done though Ontario has retained the use of the word. The Report recommends the adoption of s. 183(2) of the C.B.C.A. in preference as the shareholders will have greater control of the destiny of the company; the sale etc., must be approved by the shareholders and dissenting shareholders are given appraisal rights.

The Companies Act, S.B.C. 1973, c. 18

British Columbia

The sections dealing with Company Alterations, Part 8, of the Act includes the provisions dealing with Reorganization: (a) Amalgamations, and (b) Compromise or Arrangement, and (c) Statutory Acquisitions. A section dealing with continuation was added to the Act by The Companies Amendment Act, 1976, c. 12. It is found in Part 2 "Incorporation"

as section 37A. The procedures to be followed by a dissenting shareholder are found in Part 7 "Proceedings" which is included with court proceedings (a) "relief from oppression" and (b) "Derivative Action".

There is some logic in the arrangement and location of the sections but I found it difficult and confusing. It is a far cry from C.B.C.A. and even our own sections.

Under "Division (4) Reorganization"

(a) Amalgamation

We have in sections 268-272 provisions for a statutory amalgamation. S. 269 the equivalent of our s. 156 has been drastically changed in the new Act but presents difficulty in interpretation in ss. (4). It also provides a type of short form of amalgamating companies with common ownership of shares but in all instances there must be court approval. Unlike the Alberta Act, a dissenting shareholder has the right to be bought out under s. 228 if the resolution of the amalgamation is passed by a 3/4 majority. The court may fix the term or price or may refer the matter to arbitration.

(b) Compromise or Arrangement

S. 273 Power to enter into compromise or arrangement-- is the equivalent of s. 154 (Alberta) but greatly improved as to draftsmanship. The expression in the Alberta section "Where a scheme or contract" has been dropped. The language in s. 273 is quite straightforward.

(b) Compromise or Arrangement

273. Power to enter into compromise or arrangement.— (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between a company and its members or any class of them, then, notwithstanding any other provision of this Act, if a majority in number representing three-fourths in value of those creditors, or that class of creditors, or three-fourths of the votes of those members, or that class of members, who are present and vote either in person or by proxy at a meeting convened in accordance with an order of the Court pursuant to subsection (2), agree to a compromise or arrangement, the compromise or arrangement, if approved by the Court and accepted for filing by the Registrar, is binding on every creditor or member as the case may be, and on the company.

(2) Where a compromise or arrangement referred to in subsection (1) is proposed, the Court may, on the application of the company, or of any creditor, or member of the company, or on its own motion on the application for approval, order that a meeting of the creditors, or any class of creditors or of the members, or any class of members to approve the compromise or arrangement be convened in such manner as the Court directs.

(3) No compromise or arrangement under this section takes effect until every requirement of this Act relating to the proposed compromise or arrangement has been complied with and a certified copy of the Court order has been accepted for filing by the Registrar.

(4) Where a Court order made under subsection (2) effects a change in the memorandum or articles of the company, the Registrar shall not accept it for filing, unless it is accompanied by a copy of the altered memorandum or articles certified by an officer.

(55) Every alteration in the memorandum or articles of a company as a result of this section is an alteration within the meaning of subsection (1) of section 239 and subsection (1) of section 240.

As other jurisdictions except Alberta have required information on the proposal be forwarded with the notice of the meeting so also does s. 274.

(c) "Facilitating reconstruction of companies", s. 375, lays down procedures where a reconstruction of a company is involved in a compromise or arrangement and is not unlike s. 155, Alberta.

(d) S. 276 "Statutory Acquisitions" varies somewhat from the Alberta s. 153 in that a dissenting shareholder may apply to the court to fix the price and terms of payment.

In the event that the company elects not to acquire the shares of dissenters then the dissenter by ss. (a) may require the company to acquire his shares on the terms set forth in the offer.

Continuation

Because we are considering appraisal rights, I make some comment on proceedings for continuation.

S.B.C. 1976, c. 12, s. 37A. This section provides the procedure for both an 'import' and 'export' continuation. In the case of an import continuation the Registrar is given a discretion in granting a certificate, with an appeal from his decision to the Lieutenant-Governor in Council. In the case of an 'export' the company must first be authorized by (a) a special resolution, (b) the minister, and (c) the laws of the other jurisdiction before making application to it.

A member who dissents is entitled to be bought out under s. 228 whereby the court fixes the price or terms or refers the matter to arbitration.

Division (2) - Dissent Proceedings

S. 228(a) gathers in the sections under which a shareholder is entitled to give notice of dissent to a resolution.

1. S. 149 where the directors are given power to sell the whole or substantially the whole of the undertaking of a company if approved by a special resolution of the company and the court.

2. S. 243 where by special resolution alters its memorandum by altering any restriction upon the business carried on or to be carried on by it, or upon its powers under s. 242.

3. S. 265 where a specially limited company is converted to a limited company under s. 264.

4. S. 270 where we have a statutory amalgamation under s. 269.

5. S. 310 where a company is being wound up and it is proposed to transfer the whole or part of its business or property to a corporation.

It is seen from the above that the B.C. provisions approach those of C.B.C.A. except that the resolution must be passed by a 3/4 majority as opposed to a 2/3 majority in the C.B.C.A., and the price fixed by the court may result from an arbitration if he so directs rather than through the use of an appraiser under the C.B.C.A.

The Corporate Legislation Committee of the Canadian Bar Association, B.C. Branch, in a submission to the Attorney General on the bill to enact the Companies Act noted that provisions in the bill only implemented to a limited extent the doctrine of fundamental change existing in the proposals for a new Canada Corporations Act. The Committee approved of dissent provisions in case of any fundamental change.

1973 Report on Merger Amalgamation and Certain Related Matters

The observations of the Select Committee of the House on Company Law in Ontario which reported in 1973 on Merger Amalgamations and Certain Related Matters are important. I would gather from the report that their committee is an on-going one from year to year. In 1971 it was reconstituted and its terms particularized to enquire into and review the law relating to mergers or amalgamations, the rights of dissenting shareholders in the event of fundamental corporate changes, etc. There was considerable imput into the Committee

by way of meetings at which it received briefs and heard oral evidence, and it travelled to England and received assistance from prominent people,and its own counsel. A goodly portion of the Report dealt with take over bids, but that part dealing with mergers an amalgamations and dissenting shareholders is pertiment. Recommendations made by the Committee have yet to find their way into legislation.

Under the title Sale and Purchase of Assets it is noted that in most instances in Ontario where there is a sale of all or substantially all of the property of the Corporation it is done under section 15(2)17 of the Ontario Act rather than under the "arrangement" section 193(1)(d)

> "a reconstruction under which a corporation transfers or sells, or proposes to transfer or to sell, to another body corporate the whole or a substantial part of its undertaking for a consideration consisting in whole or in part of securities of the other body corporate and under which it proposes to distribute a part of that consideration among its shareholders of any class, or to cease carrying on its undertaking or that part of its undertaking so transferred or sold or so proposed to be transferred or sold."

Section 15(2)17 is one of the powers of a corporation under the Act

> where authorized to do so by a special resolution and by such additional authorization as the articles provide, to sell, lease, exchange or otherwise dispose of all or substantially all the property of the corporation for such consideration as the corporation thinks fit.

In the Alberta Act we have a section 20(1)17 giving a general power to sell etc. all or any part of the property of the company but it does not include the words by special resolution. In Ontario if a company agrees to sell its assets or undertaking t another company it would appear that it can do so by passing

a special resolution under section 15(2)17 which resolution must be approved by at least two-thirds of the votes cast at a general meeting of the shareholders of the corporation called for that purpose. If on the other hand it proceeds under section 193 and 194 to accomplish the same purpose it must have a scheme of arrangement; the scheme must be placed before the shareholders by a notice, which shall contain a statement explaining the effect of the arrangement, the interests of any director etc; the scheme must be approved by at least three-fourths majority; if the scheme is adopted it must be approved by the court.

The committee seemed to think that section 193 achieved a sale with the same results as though done under section 15(2)17. Section 193 was perhaps a bit narrower as it appeared to apply only to sales inter corporate One of the maxims of construction in the interpretation of statutes is that where a statute bestows certain powers upon a company it will not be taken away by a subsequent change unless the later Act makes it clear that was the intention. Generally a later provision will be interpretated to take precedence over the first. The intent of the legislature when section 193 was added to the Ontario Act is to us interesting but academic, as the Committee recommended the situation should be clarified. As in almost all cases involving the sale by a corporation of its property section 15(2)17 was used, and therefore section 193 should be repealed.

As to the question of the vote which is appropriate the report states:

> The act has proceeded on the basis that a corporation may by special resolution effect various fundamental changes, such as the amendment of its articles, an amalgamation and sale of its property as an entirety or substantially as an entirety. There is in the opinion of the Committee no compelling reason why the sale of the property of a corporation as an entirety or substantially as an entirety should

> require any greater percentage vote of the shareholders than the vote required to amend the articles and no compelling reasons were advanced to the Committee that there should be any change in the present requirements.

The Report did not comment on the fact that if section 193 were repealed so would the necessity of court approval be gone. I assume that the Committee felt that the right of the minority to dissent and have appraisal rights under section 100 were enough protection, which as I have said may not be sufficient.

The Report comments on section 197(2) which requires that the articles of amalgamation be accompanied by evidence that establishes to the satisfaction of the Minister that each of the amalgamating Corporations is not insolvent. The Regulations under the Business Corporation Act sets out the form of evidence as being affidavits of two officers or one officer and one director stating their opinion that the corporation is not insolvent as defined in the Act. "For the purposes of this Act, a corporation is insolvent if its liabilities exceed the realizable value of its assets or if the corporation is unably to pay its debts as they become due." The Alberta Act has neither the solvency test or a definition of insolvency. The report says:

> There may well be cases where a corporation
>
> which was not solvent within the meaning of the definition of insolvency contained in the Act could be resurrected by an amalgamation. The Committee therefore recommends that section 197(2) of the Act be amended to provide that the articles of amalgamation be accompanied by the evidence now required that establishes that the amalgamated corporation is not insolvent and that no such evidence need be provided in the case of the amalgamating corporations.

Section 179(2) of the Canada Business Corporations Act also requires a solvency test and in addition a statutory declaration that there are grounds for believing that (a) no creditor will be prejudiced by the amalgamation or (b) adequate notice had been given to the creditors and no creditor objects other than on grounds that are frivolous or vexatious. The new British Columbia Act did not include a solvency test in their Act; perhaps thinking that where you require Court approval such a test is not necessary. This is a fact that will require some discussion and decision.

In discussing the effect of amalgamation the Committee found difficulty with the meaning of the words section 197 (4)(a) & (b):

> (a) the amalgamation becomes effective and the amalgamating corporations are amalgamated and continue as one corporation under the terms and conditions prescribed in the amalgamation agreement;
>
> (b) The amalgamated corporation possesses all the property, rights, privileges and franchises and is subject to all liabilities, contracts, disabilities and debts of each of the amalgamating corporations.

The difficulty was put this way:

> These sections, which seem clear enough on the surface, raise many difficult particularly about the continued existence, or lack of existence, of the amalgamating corporations. Is the effect of an amalgamation to create a new corporation with the amalgamating corporations disappearing or is an amalgamation a continuation of the amalgamating corporations in an amalgamated form and if so what then is the entity or identity of the amalgamting corporations. The difficulties may best be summarized in the language of Arnup J.A. in Re Black and Decker Manufacturing Company, Limited and the Queen [1973] 2 O.R. 460 at 463, where he says, in commenting on the substantially similar amalgamation provisions of the Canada

> Corporations Act, "Puzzling questions of great difficulty are raised by this section and particularly from the expressions "continue as one company"....."the amalgamating companies are amalgamated and are continued as one company" and the use of the word "possesses" in relations to rights and assets, rather than any words indicating a "transfer".".

Almost the same language is used in the Alberta section.

The Black and Decker case involved a prosecution under the Combines Investigation Act, the charge laid after the amalgamation but for action performed by one of the amalgamated companies before the amalgamation was also commented upon in the Report. The Witco Chemical Co., Canada Ltd. v. Town of Oakville 1973 2 O.R. 467 case involved a civil writ issued on behalf of one of the amalgamating corporations before the amalgamation. After the event an application was made to change the name of the company to the amalgamation corporation but by this time the period of limitation has run out. Arnup J.A. followed the decision of Lacourcier J. in the Black and Decker case but added,

> At the risk of making the matter even less clear by adding more expression of my own, it seems to me that in its simplest for one's conclusion must be: "What was there before is not here now". In short, for whatever purpose an amalgamating company continues to exist, without assets, liabilities, capital or shares, but with amended articles of incorporation, it does not exist for the purpose of issuing a writ for a cause of action which arose prior to the amalgamation.

In Quebec the amalgamated Corporation is considered a new corporation under the wording of provision of the Quebec Act.

The Supreme Court of Canada in an appeal by the Crown in the Black and Decker case laid to rest the doubts and difficulties as to the existence or non-existence of amalga-

mating corporation and reversed the Court of Appeal in that case. By inference it also determined that the result of the Witco case was wrong though the case was not before the Court. The Queen v. Black and Decker Manufacturing, 1975, 1 S.C.R. 411. Dickson J. refutes the arguments that the "old" corporations cease to exist and a "new" corporation come to life.

> "Provision is made under the Canada Corporations Act and under the Acts of the various provinces whereby two or more companies incorporated under the governing Act may amalgamate and form one corporation. The purpose is economic: to build, to consolidate, perhaps to diversify, existing businesses; so that through union there will be enhanced strength. It is a joining of forces and resources in order to perform better in the economic field. If that be so, it would surely be paradoxical if that process were to involve death by suicide or the mysterious disappearance of those who sought security, strength and, above all, survival in that union. Also, one must recall that the amalgamating companies physically continue to exist in the sense that offices, warehouses, factories, corporate records and correspondence and documents are still there, and business goes on. In a physical sense an amalgamating business or company does not appear although it may become part of a greater enterprise.
>
> It was also submitted that if the amalgamating companies continue in amalgamation, in all their plenitude, then ss. 137(13)(b) and 137(14) are mere surplusage. I would not so regard them. These sections spell out in broad language amplification of a general principle, a not uncommon practice of legislative draftsmen. If ss. 137(13)(b) and 137(14) are to be read, however, as other than merely supportive of a general principle and other than all-embracing, then some corporate incidents, such as criminal responsibiltiy, must be regarded as severed from the amalgamating companies and outside the amalgamated company. What happens to these vestigial remnants? Are they extinguished and if so, by what authority? Do they continue in a state of ethereal suspension? Such metaphysical abstractions are not, in my view, a necessary concomitant of the legislation. The effect of the statute, on a proper construction, is to have the amalgamating companies continue

> without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letter patent of amalgamation do not give absolution."

In the light of this decision it would not appear necessary to amend the comparable section in the Alberta Act.

At page 6 of the Report there is a discussion of a "short form" amalgamation. This type of amalgamation is not found in the Ontario or the Alberta Act. Though an amalgamation of a parent company with its subsidiary is authorized they are subject to the full requirements of the Act on an amalgamation. As was mentioned above a short procedure has developed in the United States for a merger between a parent and subsidiary. It has not been universalty accepted in the United States and has been the subject of some criticism. This is because the short form is used in cases where their is a minority group of shareholders and they have been stripped of their right to meet and consider a plan or to vote thereon. The Model Act where the Corporation owns at least 90% of the outstanding shares may merge with a subsidiary upon a resolution of the Board of Directors approving a plan of merger. Though the shareholders receive notice of the plan they do not approve it, and any shareholder dissenting does not even have any recourse by way of appraisal rights as in the case where the merger is not between parent and subsidiary.

In any event the Report does recommend a short form of amalgamation where the subsidiary is wholly owned. This appears to me to make sense.

The Report has a chapter on Interjurisdictional Amalgamation, that is amalgamation of an Alberta company in Alberta with a foreign company or an amalgamation of an Alberta with a foreign company in the jurisdiction of the foreign company. As it pointed out Canada Business Corporations Act, The Business Corporations Act Ontario, Alberta

Companies Act, The Corporations Act Manitoba. Recently, The Business Corporations Act 1977 Saskatchewan has a continuation section and by amendment to the British Columbia Companies Act in 1976 an continuation section was added so there is little or no problem as between these jurisdiction to effect an amalgamation.

The thing that bothered the Committee with the Ontario provision, apart from the jurisdiction problem of reciprocal legislation, was the use of a ministerial discretion on the right to emigrate. This is stated at page 19:

> Another difficulty considered by the Committee was the danger that a system for interjurisdictional amalgamation might enable an Ontario corporation to amalgamate with an extrajurisdictional corporation with the result that the rights of Ontario shareholders would become subject to a looser, more permissive body of corporation law with fewer protections for shareholders than they enjoyed when they had become shareholders of an Ontario governed corporation. However, this same problem has already been considered in the preparation of the emigration rules of section 199 and the solution that was adopted in that context was to make the right to "emigrate" conditional upon the approval of the Minister. Thus the Minister would have an opportunity to satisfy himself, if the amalgamated corporation were to be continued under the laws of another jurisdiction, that those laws afforded substantially similar rights and protections to those enjoyed by the shareholders of the Ontario corporation. While the Committee hesitates to introduce ministerial discretion, which the Act has sought carefully to eliminate, it considers that under the circumstances an interjurisdictional amalgamation should be conditional upon the approval of the Minister.

The Alberta Act does not require an application by a company to emigrate to another jurisdiction hence a decision on the merits will be necessary and will be discussed later. Chapter 8 of the Report deals with Court approval on the sale of assets or amalgamations.

The both sides of the issue are reflected in the Chapter:

1. The Committee has reviewed the advisability of imposing a requirement of court approval as a condition of the sale by a corporation of its property as an entirety or substantially as an entirety and in respect of an amalgamation. Consideration was given to the contention that such an addition would grant an added protection to the rights of the dissentient shareholder. On the other hand concern was expressed as to the expense and delay that would result from the imposition of such a requirement, and as to the resulting additional limitations that would be imposed upon a corporation's management.

2. The Committee had the benefit of the experience of the Registrar of the English Companies Court on the subject of the normal judicial approach under the compromise and arrangment sections of the English Act, which under section 208 of that Act can involve an amalgamation of two or more companies. It was apparent from his long experience that the practice of the judiciary was to ascertain that all statutory formalities in connection with the required meetings were observed, that proper notice had been given and that shareholders had been furnished with adequate information. Having been satisfied as to due compliance, the judiciary had traditionally been loathe to review the appropriateness of the price or terms of the pending sale, feeling that it was generally undesirable for the courts to sit as a sort of board of review of the decisions of management and of the appropriate majority. The Committee's observations were that the traditional approach of the Ontario courts to such problem has been the same.

3. The present law of Ontario entitles a dissentient shareholder to apply in the ordinary way to the courts for redress if he should establish that the management or directors or the majority of shareholders are acting in a way that is fraudulent or oppressive to him. This general right to seek redress from the courts in such circumstances will still be available to dissenters, even though no express requirement of court approval is added to the Act in respect of sales of assets or amalgamations.

4. The Committee had concluded, on balance, that no useful purpose would be served by requiring the approval of the court to the sale by a corporation of its property as an entirely or substantially as an entirety or to an amalgamation.

I have the feeling that the Committee treated this subject in a rather cavalier manner. I can certainly believe that the corporation viewpoint was put before it with the urging that Court approval was costly and would result in delay. Not having had any practical experience and perhaps speaking from ignorance I must say that I am more interested in the question of fairness in the amalgamation agreement, and securing protection for the minority shareholder.

No doubt the information passed on to the Committee as to the treatment given applications to the Court under section 206 is generally accurate and I would not doubt it for a moment. Where there are no dissenting shareholders an application would be dealt with in a prefunctory manner as described. What of cases where there are dissenting shareholders? In one English case Re Robert Stephen Holdings, Ltd. 1968 1 All E.R. at 196 where the company applied to the court to approval of a reduction of capital Plowman J. illustrated his perforance in the circumstances for the added safeguards afforded by using the procedure of section 206. In this case there was a proxy representing one very small amount of shares voting against the reduction but the dissenter did not appear on the application. He stated,

> I understand, however, that this is the first time, at any rate since s. 38 of the Companies Act, 1907, which applied the Joint Stock Companies Arrangement Act, 1870, to a company not in the course of winding-up, in which the court has been asked to confirm a reduction effected by paying off part of the equity shares where all the equity shareholders have not consented in the asbence of a scheme of arrangement.
>
> Whilst, as I have said, I propose to confirm the reduction in this case, I think it right to express the view that it is desirable in cases like the present to proceed by way of a scheme of arrangement, for although no doubt it is true that a dissentient minority shareholder can come to the court and object to confirmation of

> a reduction, nevertheless the interests of the minority shareholders are better protected under s. 206. The weakening of that protection is not, I think, a thing that court ought to encourage.

In the case of In Re Trix Ltd. 1970 1 W.L.R. 1421 we had a situation where the liquidation of a company in the process of winding up (one of a group of 12 associate compies involved) presented to the court a compromise agreement with the liquidator of one of the companies setting out a method of distributing the assets. Plowman J. said the distribution may or may not be in accordance with the respective rights of the creditors.

> I am, therefore, confronted with an important question of principle, namely whether it is right to authorise such a distribution, as I am asked to do, without either the consent of every creditor or a scheme of arrangement under section 206 which would bind apathetic creditors (of whom there are apparently a very large number here), and the dissentient minority, which in this case appears to be one.
>
> In my judgment, it is not right. The matter is one which the creditors should decide for themselves and on which they are entitled to express their views at a meeting or in court.
>
> However convenient it may be for the liquidators to have a compromise sanctioned by the court, it is in my judgment wrong in principle to allow that course to be taken, for none of the persons affected has had any opportunity of being heard to challenge it - indeed the whole object is to preclude such a challenge.
>
> On the other hand, if a scheme were brought in, every creditor would have an opportunity of voting for or against it and, if he thought fit, of challenging it before the court when the petition to sanction it was heard. Furthermore, the creditors would have the protection of the court at an earlier stage in relation to proper notice of the meetings to consider the scheme and the circular explaining it. Last and not least, the court would not have to be involved in the merits of the scheme unless some creditor thought fit to appear and oppose it, in which case the court would have the benefit of argument and evidence on both sides.

> The method which has been adopted here puts the burden on the court of deciding whether a particular method of distribution is fair in all the circumstances and should be accepted. In my judgment, this is an unjustifiable burden, first because, under the machinery provided by section 206, the creditors alone ought to be asked to decide it, and secondly because I have not had the benefit of hearing any alternative point of view.
>
> In my judgment, it would be unfair to non-assenting creditors to deal with the matter in the way proposed, since it deprives them of the opportunity of airing their views and of the protection of the court's control over meetings, advertisement and circular under section 206.

The cases from England no where suggest that the court will sit as a board of review as to the appropriateness of the decision of management and the majority. It will however on an application for sanction whether on an arrangement or amalgamation use the test approved in In re Anglo Continental Supply Co. 1972 Law Reports 2 Ch. 723.

> In exercising its power of sanction under s. 120 the Court will see: First, that the provisions of the statute have been complied with. Secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and, Thirdly, that the arrangement is such as a man of business would reasonably approve.

Certainly a dissentient shareholder has certain rights at common law if he is being defrauded and in other circumstances. If he is a shareholder in a non-offering company he has appraisal rights. Is this good enough, or should he be provided with a forum to air his grievances if he has any. It is a heavy burden to place on a small shareholder if he must take his case to court in the usual way.

Though the vast majority of applications for approval are routine and add some legal costs, I question if this is justification for dispensing with court approval. We may not have many cases where a dissenter appears at a hearing but where he does it is a matter of importance as was illustrated by the Folger v. Morcan Oils Ltd. case.

The Committee page 23 is critical of the lack of detail and nature of the information that should be furnished in an information circular, particularly in the case of an amalgamation. I quite agree that "In each of the forms of business combination - sale and purchase of assets, amalgamation and take over bid - there is a common factor, the need for the shareholder to be sufficiently well informed to make an intelligent judgment on voting or as to the adviseability of accepting the take over bid."

The information required of management in the case of a take over bid which comes under the Securities Act in the Province of Ontario is fairly adequate; as in Alberta's requirements under its Act.

Section 194 of the Ontario Business Corporations Act provides that in the case of an arrangement the corporation must prepare a scheme "prescribing in detail what is to be done and the manner in which it is to be effected" and "the notice calling the meeting shall contain a statement explaining the effect of the arrangement and in particular stating any interest of the directors of the corporation, whether as directors or as shareholders of the corporation or otherwise, and the effect thereon of the arrangement insofar as it is different from the effect on the like interest of other persons." The Alberta Companies Act is silent as to formation of a scheme or explanation. When we look at the statutory Amalgamation sections we find no mention of anything being given to the shareholders; only the agreement is placed before the meeting and its contents are detailed in the section. This obviously takes the

place of a scheme to be placed before the shareholders; but is it sufficient?

In Ontario however, apart from a scheme or an arrangement or an agreement on an amalgamation, we do have information circulars required for reporting companies, where management is soliciting proxies. The Committee considered the information required under the Securities Act to be adequate in the case of a take over bid but somewhat lacking in the case of a sale of assets or amalgamation. The information required on a solicitation is contained in Form 15 which is identical to Form 20 in the Securities Act required on a take over bid. The Committee thought the circular should spell out in greater detail the nature of the information that should be furnished particularly in the case of an amalgamation e.g. with respect to the business and properties of the other corporation to the amalgamation, with respect to the share exchange ratio, how this was arrived at by management, information as to the tax consequences to the corporations and the shareholders, the financial statements of each corporation.

I think no one could object to a requirement for better information to shareholders than presently exists in Ontario and Alberta. But what of non-offering corporations. As the Committee comments the circular requirements imposes an undue hardship in smaller corporations yet there could be non-offering corporations with a large number of shareholders who should have a circular. It recommended that the circular should be required for all shareholders except those where articles contain a restriction on the right to transfer shares, other than the special restriction in section 47(2)(a) or (b) of the Act, applicable to companies holding special government licences and privileges.

The Report comments on the fact that the Ontario Act contains no compulsory acquisition provisions as do most provincial and the federal act. It also commemts on the language used in the Alberta Act which follows the English

version as I have done above, and suggests it should be made clear that the compulsory acquisition section applies only after the results of a take over bid. The Compulsory acquisition should be available to both the corporation and the dissenting shareholder at each other's option. The Committee went even further than making a recommendation; it drafted changes in the take over bid requirements and provisions for a compulsory acquisition.

Chapter 18 of the Report deals with appraisal rights of a shareholders voting against the proposal. Section 100 Ontario only gives an appraisal remedy to shareholders in the case of a non-reporting corporation. This section was based on a recommendation of the Select Committee of the Legislature 1953. Its reasoning is interesting.

> "We are of the opinion that protection should be given to a shareholder of a private company who has voted against authorizing a sale of the assets of that company or against a conversion of such company into a public company, by requiring private companies, in either case, to purchase the shares of the dissenting shareholders of public companies and particularly the provisions for their protection contained in The Companies Act of Great Britain and in some of the Corporations Acts of certain States of the United States and in the model Act prepared by a committee of the American Bar Association. While we recognize that there is considerable merit in these provisions we do not feel that we should recommend the adoption of legislation requiring majority interests to purchase the interest of the minority in all similar cases. Our recommendations therefore are confined to minority shareholders of private companies as mentioned above."

Appraisal rights, except in cases of a voluntary winding up were until recently virtually unknown in Canada. I can think of no better presentation of the pros and cons associated with it than to quote the well written report including Appendix D.

I am confident that this discussion will be of value when we consider changes in the Alberta Act. As you will read it has no solution for the situations I have mentioned earlier.

5. The United Kingdom appears to allow the appraisal remedy only in one situation. Section 287 of the English Act provides, in effect, that, where a corporation is proposed to be, or is in the course of being, wound up altogether voluntarily and the whole or part of its business or property is proposed to be transferred or sold to another corporation, the liquidator of the first mentioned corporation may, with the sanction of a special resolution of that corporation, receive, in compensation or part compensation for the transfer or sale, shares for distribution among the members of the transferor corporation; if any member of the transferor corporation who did not vote in favour of the special resolution expresses his dissent, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in the manner provided by the section. The remedy so afforded is not confined to private corporations. This is a situation which would not appear to be one which gives rise to the appraisal remedy in the United States. The appraisal remedy may also be given in England indirectly by section 208 of the English Act, in connection with a compromise or arrangement proposed for the purposes of or in connection with a scheme for the amalgamation of two or more corporations. Under this section the court may by the order sanctioning the compromise or arrangement or by any subsequent order make provision, among other things, for the provision to be made for any persons, who within such time and in such manner as the court directs, dissent from the compromise or arrangement. The Committee understands that this is a rarely used power in the nature of an appraisal remedy.

6. Certain rights are also afforded in the United Kingdom in the case of a take-over bid, but these are not in the nature of an appraisal remedy. Section 209(2) of the English Act provides, in effect, that, where pursuant to a take-over bid a company acquires, together with shares already held by it or its nominee, nine-tenths in value of the shares of the target corporation, the holders of the remaining one-tenth may require the corporation making the bid to acquire their shares on the terms set out in the section.

7. The appraisal right is virtually unknown in Canada. Apart from Ontario, which gives appraisal rights in the case of corporations not offering their shares to the public, Alberta and Newfoundland grant appraisal rights only under the limited circumstances set out in section 287 of the English Act. Bill C-213, an Act respecting Canadian business corporations, would grant an appraisal right under circumstances substantially similar to those now permitted under the Act, but not limited to private corporations. Should then appraisal rights be granted to shareholders of all corporations incorporated in Ontario?

8. The United States is the haven of the appraisal remedy. It is idle to speculate on the reasons which may have led to the development of the appraisal right.[2] It is more important to consider the effect of such a right on the corporation concerned and its shareholders. Most of the corpora-

tion statutes in the United States provide that the dissenting shareholder is entitled to receive the "value" or the "fair value" of his shares. In the case of the shares of corporations listed on a stock exchange or actively traded in the over the counter market, what is such value? The experience in the United States would seem to indicate that the courts, in most instances, have refused to go beyond an enquiry as to the market price of the stock on the date determined to be relevant.[3] Where the shares of a corporation are not actively traded, or there is no market at all, the determination of value or fair value is more difficult and a court must then come up with its own estimate of value using whatever techniques for value it deems appropriate. If, in the case of a corporation whose shares are actively traded, the criterion of value or fair value is the price put on the shares by the market, one may question the value of an appraisal remedy except perhaps in the situation where the market has taken a sudden drop in reaction to the proposed transaction. While in theory the appraisal remedy may, in the case of shares which are actively traded, seem to give dissenting shareholders the benefit of an independent valuation, it is extremely doubtful that courts in Canada would do more than seems to have been the case in the United States, i.e., accept the value placed on the stock by the investing public.

9. The existence of an appraisal remedy can be a serious matter from the point of view of the corporation. In the first place, the corporation will never know in advance how many dissenters, if any, there will be in respect of a transaction which gives rise to the remedy. Even a relatively few dissenters might cause a severe cash squeeze if the transaction were proceeded with and the dissenters paid out. If a large majority of shareholders voted in favour of the transaction and a small number voted against, the cash requirements to pay off the dissenters may be such that the transaction ceases to be economically sound and might have to be called off. This would again appear to result in the oppression of the majority by the minority.

10. Those who argue in favour of the appraisal remedy mainly point to the fact that the taking of a corporate action which may lead to the appraisal remedy results in a fundamental change in the nature of the investment of the shareholder and that in such circumstances the unwilling minority should not have to abide by the decision of the majority and be content with an altered investment. There are, however, many factors, not the subject of appraisal rights in the United States or anywhere for that matter, which may change or have a significant effect on the nature of the investment of a shareholder. Some of these factors may be external, some internal, but the fact they have not been brought about by shareholder action seems to be the determining factor—not the fact the investment of the shareholder has been affected. No jurisdiction gives an appraisal right to trade creditors or holders of debt securities of a corporation (although the holders of such debt securities may derive some comfort from the instrument under which such securities may have been issued) even though they may be affected in the same manner as shareholders.

11. The Committee has decided that, on balance, it should not recommend the extension of the appraisal remedy to shareholders of a corporation whose shares are being offered to the public. In the view of the Committee the determining factor on which an appraisal remedy, if it should be granted at all, should rest is the presence or absence of a market. In the

case of the shares of a corporation which are actively traded, the remedy would not appear to be any more effective than if the shareholder were to sell his stock in the face of a triggering transaction and certainly not persuasive enough to compensate for the cash drain which may be caused a corporation, to the possible detriment of the corporation, its creditors and the majority or the possibility that a transaction might have to be called off, because of the cash drain in meeting appraisal rights, to the detriment of the majority of shareholders who had voted in its favour. The Committee agrees with the conclusion reached by Bayless Manning in his article on the subject where he concluded "Appraisal should be considered an economic substitute for the stock exchange and its use should be limited to situations in which the exchange, or some kind of a reasonable market, is not available."[4] The Committee has, accordingly, concluded that the rights granted by section 100 of the Act should not be extended to a corporation whose shares are being offered to the public.

12. Section 100 of the Act, in dealing with the procedure for the exercise of the appraisal right in those cases where it is available and which the Committee recommends should be retained, is in the opinion of the Committee, deficient in a number of respects. The procedure does not deal with a number of problems: when does a shareholder claiming the appraisal right cease to be a shareholder; the position of such a claimant with respect to other creditors; the relevant date as of which value is determined; and the steps that should be taken by the corporation and the dissenter in the determination of value. The Committee recommends that the procedure set out in Appendix D should govern the exercise of appraisal rights and the results that flow therefrom.

APPENDIX D

Suggested Procedure for Appraisal Rights

1. The notice of the meeting at which the transaction is to be proposed should refer to the right of the dissenting shareholder to claim appraisal of and payment for his stock and should describe briefly the procedure to exercise the right.

2. A shareholder would be considered as a dissenting shareholder if (i) he voted against the transaction at the meeting, or (ii) if prior to the meeting he filed with the corporation a written objection to the transaction and thereafter did not vote in favour of the transaction at the meeting. In the case of such a written objection, non-attendance and non-voting at the meeting would not extinguish the appraisal right.

3. A dissenting shareholder should be required to claim appraisal rights with respect to all shares registered in his name and held on behalf of any one beneficial owner.

4. A dissenting shareholder should be entitled to receive the fair value of the shares held by him in respect of which he dissents determined as of the day before the transaction is approved by the shareholders of

the corporation (such a valuation date will eliminate the effect of the transaction on the fair value of the shares).

5. Within 7 days after the meeting of shareholders, the corporation should notify each dissenting shareholder as to whether or not the transaction has been approved and, if it has, the corporation should include in such notice an offer to purchase the shares of the dissenting shareholder. The notice should be accompanied by a copy of the last audited financial statements of the corporation.

6. Within 10 days from the receipt of the notice from the corporation, the dissenting shareholder, in order to preserve his right of appraisal, shall notify the corporation (i) that he continues to claim for appraisal and purchase of his stock and (ii) whether or not he accepts the corporation's offer. Such notice should be accompanied by the certificates representing the shares in respect of which appraisal is demanded so that such certificates may be endorsed with an appropriate notice that the shares represented thereby are subject to appraisal rights. The certificates would then be returned to the dissenting shareholder.

7. A dissenting shareholder who fails to give the notice referred to in Item 6 or fails to surrender his certificates with said notice for endorsement as aforesaid shall forfeit his appraisal rights.

8. If the dissenting shareholder does not accept the offer of the corporation and if the corporation and the dissenting shareholder are not able to agree on price within 30 days after the giving of the notice by the dissenting shareholder referred to in Item 6, then either the corporation or the dissenting shareholder may at any time within 90 days after the expiration of the said 30 day period apply to the court for a determination of the fair value of the shares.

9. The court should be empowered to appoint one or more appraisers to assist it to determine the fair value of the shares.

10. If neither the corporation nor the dissenting shareholder applies to the court within the 90 day period, the dissenting shareholder would lose his appraisal rights.

11. A dissenting shareholder would cease to have any of the rights of a shareholder other than to receive the fair value of his shares when he gives the notice referred to in Item 6 duly accompanied by his certificates. If as a result of inaction the appraisal right is lost, the dissenting shareholder would be restored to the status of a shareholder at the end of the 90 day period during which application to the court can be made.

12. No purchase of shares should be made if (i) the transaction in respect of which a dissenting shareholder objected is not carried out, or (ii) if the corporation is insolvent or payment would render it insolvent.

13. The dissenting shareholder should be entitled to his costs of the court proceedings unless the court finds that his refusal to accept the offer of the corporation was arbitrary, vexatious or otherwise not in good faith.

14. No shares of the dissenting shareholder should be purchased by the corporation unless all the shares of such dissenting shareholder can be purchased without violation of the condition referred to in clause (ii) of Item 12.

15. The position of a shareholder who has claimed the appraisal remedy should not be the same as that of creditors of the corporation; the claim of such a shareholder should rank after all other creditors. A shareholder should not, by the simple expedient of dissenting and claiming an appraisal right, be able to elevate his position.

CANADA BUSINESS CORPORATIONS ACT

This Act has effected radical changes in the English and Canadian concept of procedures involving arrangements, compromises, amalgamations, restructuring or whatever terms you may wish to use. We are faced with the alternative between following the C.B.C.A. for the sake of modernism and uniformity or, upgrading the provisions of the Alberta Act where it is indicated above changes could be made. In the course of a short reveiw of its salient provisions, I will endeavor to give you what I perceive to be the pros and cons as we go along.

The sections dealing with arrangements, amalgamations, etc. in the Alberta Act are found buried in "Part 6 Division (13) - Miscellaneous". In the C.B.C.A., with the exception of a statutory amalgamation, we have no provisions similar to those in the Alberta Act, sidenoted by the words, "Acquisition of Shares" "Compromise" "Reconstruction of company or amalgamation" "Amalgamation" "Continuation of foreign company as an Alberta company". We have instead in the C.B.C.A. and I should judge more basically, a "Part XIV - Fundamental Changes", sections 167-185. The use of the word "Fundamental" appeals to me as being very aptly chosen. Part XIV is reproduced in Schedule C.

Melvin Aron Eisenberg - Writing in the California Law Review, January, 1969, described fundamental corporate actions as shareholder's matters under the control of shareholders rather than the directors or officers of a corporation.

Though there is some disparity throughout the U.S. as to what should be included in the term "fundamental change" generally it includes a certificate of incorporation change (name, address of corporation, capitalization, share structure), dissolution, sale of assets, mergers except short term changes, in by-laws or articles where shareholders rights are affected.

In order to fully appreciate the changes we have in Part XIV I found it useful if not necessary to read and reread parts of the Dickerson Report and in particular the opening paragraphs under the title "Fundamental Change". I believe one must start here if we are to accept what is in the Act.

> **344.** At common law, in the absence of specific statutory authority, a corporate charter could only be amended by the unanimous consent of the shareholders, a rule which was analoguous to the rule relating to the amendment of a partnership agreement. In those circumstances, a shareholder could be said to have a "vested right" from which the majority of shareholders could not derogate. Gradually the company laws were made more flexible so that in the United Kingdom a company could amend its articles of association and even, in certain cases, its memorandum of association. Implicit in these more flexible amendment rules was an abandonment of the vested rights doctrine, for it was clear that any rights acquired by a shareholder under the contract evidenced by the share certificate could be modified. The focus of attention then shifted away from the doctrine of "vested rights" to a determination of "equitable rights" of which a shareholder could not be deprived by the majority shareholders, irrespective of compliance with corporate law formalities.
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> **345.** After a century of considerable uncertainty, apparently only the common law of New Jersey has developed and applied equitable standards of "fairness" that protect the rights of a minority shareholder from encroachment in favour of majority interests. See *Ballantine on Corporations*, p. 656 and Hornstein, *Corporation Law and Practice*, s. 363. When considering cases where a shareholder alleges that his rights have been unfairly prejudiced, most common law jurisdictions refuse to consider the fairness of the amendment or other fundamental change in the corporation's business or affairs. Normally the court will intervene only where the plaintiff establishes fraud or bad faith. Jurisdictions as widely separated in philosophy as England and Delaware apply these general standards.
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> **346.** In this context, the courts in the United Kingdom have struggled in vain to refine this general policy and to arrive at a workable standard to govern the conduct of majority shareholders. The law is ambiguous. The

current rule is that majority shareholders cannot derogate from the rights of the minority shareholder, unless the proposed modification is "bona fide for the benefit of the corporation as a whole". In this context "corporation" means all the shareholders, implying that the majority shareholders cannot make fundamental changes that discriminate against minority shareholders. In addition, a further judicial qualification has been added to the rule: it is for the shareholders acting in good faith, not the court, to determine what is for the benefit of the corporation as a whole. In spite of these judicial refinements, the application of such a standard is very difficult. Judging from the reported cases, the present state of the common law is at best unsatisfactory, at worst downright unjust. See the discussion on the leading cases in Gower, *the Principles of Modern Company Law,* 3rd. ed., 1969, p. 561 ff.

347. For these reasons a basic change of policy is recommended in Part 14.00. Instead of relying on common law standards to restrict the conduct of majority shareholders who propose to make a fundamental change, the provisions in this Part confer upon a shareholder who dissents from the fundamental change the privilege of opting out of the corporation and demanding fair compensation for his shares. In short, if the majority seeks to change fundamentally the nature of the business in which the shareholder invested, and if the shareholder dissents from the change, he may demand that the corporation pay him the fair value of his shares as determined by an outside appraiser. Of course, if enough shareholders dissent, creating a heavy drain on the corporation's cash resources, the proposed change will be effectively blocked. Thus the general policy of the common law is not only changed but in fact reversed. Instead of placing the minority shareholder at the mercy of the majority, these provisions permit the minority shareholder to withdraw from the enterprise and, if enough minority shareholders are affected, to bar the proposed change. Nevertheless, the majority shareholders can, if they go through the proper formalities, and if they pay any dissenting shareholders, effect almost any fundamental change with impunity. The result is a resolution of the problem that protects minority shareholders from discrimination and at the same time preserves flexibility within the enterprise, permitting it to adapt to changing business conditions. Although the provisions vary substantially from one state to another, every state in the United States other than West Virginia gives a minority shareholder a statutory right to dissent and to demand the appraised value of his shares. See Hornstein, *Corporation Law and Practice,* s. 630.

348. While the right to dissent from a proposed fundamental change is the keystone, Part 14.00 also achieves several ancillary policy objectives. First, all the usual amendments to the articles of incorporation are consolidated in one section, providing a convenient although not exclusive checklist for the practitioner. Second, class rights are given specific protection. Third, this Part deals with all variations of fundamental change in one place, applying consistent rules to each. And fourth, uniform formalities are adopted, parallel with the formalities required to be complied with at the time of incorporation.

349. The provisions of this Part are technically too complex to be dealt with summarily, but the following table provides an overview of the system that makes clear its objectives:

Under this concept a dissenting shareholder is not able to block a change but at the same time is protected, in that he may withdraw from the company entirely and be paid a fair price for his shares. In the absence of fraud or bad faith upon the minority it may be said that the shareholders are the masters of their household with wide powers to effect fundamental changes in the business of the corporation, its capital structure and all incidents attaching to its shares without reference to the Court for sanction. The bulwark of protection in English and Canadian law to date has been dropped and in its place substituted appraisal rights for minority dissenting shareholders.

It was considered that s. 167 would give the shareholders wide enough scope to achieve any change without maintaining the old concepts of compromises, arrangements and reconstruction. It could all be accomplished by the passing of a special resolution of the shareholders and classes of shareholders. An exception is in the case of a statutory amalgamation which remained in the U.S.statutes and is retained in the C.B.C.A. The traditional type of amalgamation by statutory agreement was enlarged in the new act by following the "Model Act" in permitting both vertical and horizontal short-form amalgamations which are accomplished by a resolution of the directors of each amalgamating corporation s. 178. It should be noted however that there are certain restrictions imposed which appear to be innovative and not found in the U.S. counterpart i.e. the solvency requirement;and need for a declaration re creditors referred to below,this to be preceded by a notice to creditors.

The fundamental change section as a whole represents the U.S. approach and rather than simplifying the traditional

approach to arrangements, amalgamations, reconstructions, etc. I suggest that it creates as many problems as it solves. It is difficult to adjust to a new concept where appraisal rights are seemingly the answer to fair treatment of minority shareholders. The first crack in the C.B.C.A. image of modernism appears in a proposed amendment s. 181.1, below.

One of the most fundamental differences is the fact that in the Federal Act there is no provision for a compromise between a company and its creditors, or an arrangement which might involve creditors, who are acknowledged in English and some Provincial jurisdictions as having a right to vote in some cases and be heard. Since 1932 when the Companies' Creditors Arrangement Act came into force compromises or arrangements between a debtor corporation and its creditors was dealt with under this Act or in the case of winding up under the federal Winding Up Act.

It would seem that compromises under either of these Acts are much narrower than the wide provisions of the Companies Act (England) and our current Alberta Act. In those Acts you may have a compromise or arrangement with shareholders and creditors of any type <u>prior</u> to insolvency,winding-up or bankruptcy. Some reorganizations could involve creditors who may want the company to survive as a going concern. I suppose it is fair to say that in many cases a company involved might technically or temporarily be insolvent at a particular point in time and solvent the next day, week or month.

The Companies' Creditors Arrangement Act 1970 Chap. c-25 is rather restrictive in its application. A "debtor company" means:

"debtor company" means any company that is bankrupt or insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or is deemed insolvent within the meaning of the *Winding-up Act*, whether or not proceedings in respect of such company have been taken under either the *Winding-up Act* or the *Bankruptcy Act*, or has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act*, or is in course of being wound up under the *Winding-up Act* because the company is insolvent;

3. This Act does not apply in respect of a debtor company unless

(*a*) the debtor company has outstanding an issue of secured or unsecured bonds, debentures, debenture stock or other evidences of indebtedness of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee, and

(*b*) the compromise or arrangement that is proposed under section 4 or section 5 in respect of the debtor company includes a compromise or arrangement between the debtor company and the holders of an issue referred to in paragraph (*a*). 1952-53, c. 3, s. 4.

David G. Guest in a Special Lecture 1950 Law Society of Upper Canada on Company Reorganizations at pg. 94-95

(3) *The Companies' Creditors Arrangement Act, 1933,* a Dominion statute which provides similar procedure for effecting compromises or arrangements with the secured and unsecured creditors of any company, incorporated by the Dominion or any Province, or incorporated elsewhere and doing business in Canada, with certain minor exceptions, provided that such company is a debtor company as defined in the Act, which means for all practical purposes that it must be insolvent.

> There is no statutory provision enabling a solvent company, whether Dominion or Ontario, to enter into a compromise or arrangement with its bondholders or other creditors; a reorganization of this type can therefore only be carried out if 100% agreement is obtained or if there are available contractual provisions enabling a minority to be bound.
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> Before discussing such provisions, however, I should say that I understand a curtailment of the scope of *The Companies' Creditors Arrangement Act* to be in contemplation, possibly at this session of Parliament. Frequent use has been made of the Act to effect compromises with ordinary trade creditors where no bondholders or shareholders are involved and this is considered in some quarters to be an abuse of the Act. Consequently it is proposed to limit it to reorganizations where bonds or debentures issued under a trust deed are involved.

The action suggested by Mr. Guest was taken 1952-53 c. 3 by the addition of the above application section.

A letter reply from John Howard is enlightening and I quote from pg. 2-3.

> One further point. Under the Bankruptcy Bill, which we are currently polishing with a view to tabling in the House as soon as Parliament reconvenes in the autumn, we propose to repeal not only the present Bankruptcy Act but also the Companies' Creditors Arrangement Act and the Farmers' Creditors Arrangement Act. In addition, we make clear that the Winding-Up Act, to the extent it relates to *insolvent* corporations, is abrogated by the proposed Bankruptcy Act. (We could not repeal the Winding-Up Act because it relates to the liquidation and dissolution of CCA corporations not yet continued under the CBCA, special act federal corporations, and federal bank, trust, insurance, and loan corporations.)
>
> As a result, where an arrangement involves an *insolvent* corporation, it is probable that the correct procedure will be an arrangement under the Bankruptcy Act. The provisions in the provincial corporations acts concerning compromises with creditors by way of arrangements, which are based on the English Companies Act (that is also the English

> bankruptcy law applicable to companies), are now of very doubtful constitutional validity. Their validity will be all the more doubtful because the proposed new Bankruptcy Act provisions, enacted under the federal bankruptcy powers in the BNA Act, s. 91, have been designed to occupy completely the field of arrangements in respect of *insolvent* corporations.

In his reply he makes it clear that the new bankruptcy act will only apply to "insolvent" corporations which is as you know, within the Federal jurisdiction. There is however, the fact that creditors may be involved in some type of compromise e.g. postponement of the debt where it is part of an arrangement involving a company that is not really insolvent or may be only in a technical sense. Where will the new Bankruptcy Act leave us?

As I indicated above Ontario makes no provision for compromises or arrangements involving creditors except in its winding up provisions.

"A Reorganization" is defined in section 185 C.B.C.A. as Quote (1) pg. 124.

> **185. (1) "Reorganization" defined.—In this section, "reorganization" means a court order made under**
> **(a) section 234;**
> **(b) the *Bankruptcy Act* approving a proposal; or**
> **(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.**

This section then goes on to provide for a change in the Corporation's articles to effect the change ordered by the Court. This does not encompass reorganizations as the word has been traditionally used.

The C.B.C.A. to date has no provision for arrangements. John Howard explains it in his letter this way.

"In the original CBCA Proposals we had recommended against the inclusion of arrangement provisions on two grounds: (1) a corporation could effect any desired fundamental change in a one- or two-step transaction, employing the institutions (amendment, amalgamation, continuance, etc.) under Part XIV; and (2) an arrangement provision could be exploited to circumvent the shareholder's right to dissent under s. 184."

Section 184 is the one giving a dissenting shareholder the right to dissent. Though the English Act did not give an appraisal right as such it did give a dissenting shareholder perhaps equivalent protection. He was entitled to accept the companies' offeror an offer on negotiated terms, or as the Court on application sees fit to order. Ghana has bested this by special provision for an appraiser.

For your convenience I set out s. 167 under the title Fundamental Changes.

FUNDAMENTAL CHANGES

167. (1) Amendment of articles.—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) Termination.—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 approval of the shareholders.

Mr. Howard in his letter goes on to say

"Experience has demonstrated that our initial assumption about the use of the Part XIV institutions, while probably true in theory, is not workable in practice because of income tax laws and other extraneous factors. Indeed, during 1976 two fundamental change cases came to our attention - one a continuance (export) and the other a divorce after amalgamation - that could not be affected in any practicable manner under Part XIV."

The proposed draft section is as follows:

"185.1 (1) In this section, "arrangement" includes

(*a*) an amendment to the articles of a corporation;

(*b*) an amalgamation of two or more corporations; 5

(*c*) a division of the business carried on by a corporation;

(*d*) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate; 10

(*e*) an exchange of securities of a corporation held by security holders for property, money or other securities of the 15

(*b*) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs; 5

(*c*) an order permitting a shareholder to dissent under section 184;

(*d*) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct. 10

(5) An applicant under this section shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel. 15

corporation or property, money or securities of another body corporate that is not a take-over bid as defined in section 187; 20

(*f*) a liquidation and dissolution of a corporation; and

(*g*) any combination of the foregoing.

(2) For the purposes of this section, a corporation is insolvent 25

(*a*) where it is unable to pay its liabilities as they become due; or

(*b*) where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated 30 capital of all classes.

(3) Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of 35 this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

(4) In connection with an application under this section, the court may make 40 any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(*a*) an order determining the notice to be given to any interested person or 45 dispensing with notice to any person other than the Director;

(6) After an order referred to in paragraph (4)(*d*) has been made, articles of arrangement in prescribed form shall be sent to the Director together with the documents required by sections 19 and 20 108, if applicable.

(7) Upon receipt of articles of arrangement, the Director shall issue a certificate of arrangement in accordance with section 255. 25

(8) An arrangement becomes effective on the date shown in the certificate of arrangement."

55. Paragraph (*b*) of the definition "exempt offer" in section 187 of the said Act 30 is repealed and the following substituted therefor:

"(*b*) to purchase shares through a stock exchange or in the over-the-counter market in such circumstances as may be 35 prescribed,"

56. (1) Subsection 199(1) of the said Act is amended by adding thereto, immediately after the definition "dissenting offeree", the following definition: 40

""share" includes a share as defined in section 187 and a share to which no voting rights are attached;"

(2) Section 199 of the said Act is further amended by adding thereto, immediately 45

You will note that a dissenting shareholder is given appraisal rights under s. 184 in par. (3), above. The proposed amending section requires court approval of an arrangement where a fundamental change is effected. Where there is a change under s. 167, however, no Court approval is required.

A brief from The Tory firm in Toronto pointed out this deficiency in the draft act before its passing; and might so to speak show the other side of the coin .

6.04. Section 14.04(2) of the draft Act provides that if an amendment effects or requires a reduction of stated capital there must be submitted with the articles of amendment evidence that adequate notice has been given to all creditors of the corporation and no creditor objects to the amendment. This gives a veto power to a single creditor no matter how unreasonable that creditor's objection may be.[(78)] The draft Act provides no recourse for the corporation in this situation. The reorganization provisions set forth in Section 14.18 of the draft Act are not wide enough to allow an application to the court to rule on the reasonableness of a creditor's objection. Perhaps some mechanics similar to those set out in Sections 53 to 59 of the present Act should be included in the new Act.

6.05. The possibility of one single creditor frustrating an amendment to the articles of a corporation is not the sole problem a corporation may face. Section 2.02(3) of the draft Act provides that if the articles of incorporation or a unanimous shareholder agreement require a greater number of votes of directors or shareholders than required by the draft Act to effect any action, the provisions of the articles of incorporation or the unanimous shareholder agreement shall prevail. Consequently, a corporation may be prevented from amending its articles because of a requirement in its articles or a unanimous shareholder agreement requiring 100% approval of all shareholders. This could work great hardship to the detriment of the vast majority of shareholders. This would especially be so in those situations where a corporation with a unanimous shareholder agreement finds that the unanimous shareholder agreement is unrealistic but that it cannot be changed because all the shareholders cannot be located.[(79)]

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(78) Section 14.03(1)(c)(i) provides that a special resolution of a class of shareholders is all that is necessary to cancel or vary prejudicially rights to accrued dividends or rights to cumulated dividends. Yet at law, once a dividend is declared a shareholder is entitled to rank as a creditor vis-a-vis the dividend. Under Section 14.04(2) of the draft Act that single shareholder would have a veto power if the proposed amendment would result in a reduction of capital.

(79) Section 14.01(p) provides that a corporation may by special resolution amend its articles to add, change or delete any provision that is permitted by the draft Act to be set out in its articles. This, presumably, must be read subject to the provisions of Section 2.02(3) of the draft Act.

6.06. The new Act should contain provisions similar to those now contained in Sections 134 and 135 of the present Act. Under such provisions the court has complete discretion to protect minority shareholders. A dissenting shareholder under the provisions should not be given appraisal rights for the same reason that a dissenting shareholder under Section 14.18 of the draft Act is not given appraisal rights. (The oppression section, bankruptcy and winding up act.)

6.07. In paragraph 347 of Volume I of the Proposals a basic change of policy is recommended. Instead of relying on common law standards to restrict the conduct of majority shareholders who propose to make a fundamental change, the provisions in Part 14.00 of the draft Act confer upon a shareholder who dissents from the fundamental change the privilege of opting out of the corporation and demanding fair compensation for his shares. In short, if the majority seeks to change fundamentally the nature of the business in which the shareholder invests they run the risk of having to pay any dissenting shareholder fair compensation for his shares but may, none the less, if they go through the proper formalities, effect almost any fundamental change with impunity. The Proposals attempt to protect the minority shareholders from discrimination and at the same time preserve corporate flexibility to permit a corporation to adapt to changing business conditions. (80)

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(80) This change of policy could be frustrated by a unanimous shareholder agreement or a provision in the articles requiring 100% shareholder approval unless our suggestion as to Compromises or Arrangements is accepted.

s. 175 deals with statutory amalgamations carried out between two or more companies which enter into an agreement. It sets out the contents of the agreement. S. 177 provides for shareholder approval in each of the amalgamating companies. It is the duty of the directors to send a notice of a meeting of shareholders accompanied by a copy or summary of the amalgamating agreement and to notify him that he has appraisal rights under s. 185.

The meeting of shareholders may give the needed approval of the amalgamation by passing a special resolution and no

court approval is required. The majority required on vote for approval is 2/3 whereas a 3/4 majority is required in Alberta.

It is anomolous that the proposed amending section on arrangements includes in its scope (b) an amalgamation of two or more corporations. This means of course that where you effect an amalgamation by an "arrangement" you will need Court approval.

It seems to me that the amending section carries the law pretty well back to the English law which has long recognized that an infinite variety of situations can be resolved through an arrangement. The main differences which will exist if the amendment is made, are, that there is a discretion in the Court as to whether meetings of the shareholders will be held, and appraisal rights may be given to a dissenting shareholder. Creditors are ignored except in case of a statutory amalgamation where they are entitled to notice of the amalgamating corporations and may object s. 179 (2)(b)(ii). S. 200 preserves the rights of all creditors against the property, rights, and assets of a corporation amalgamated under s. 196 or continued under s. 198.

Mr. Howard, in his letter, comments:

> Note that this provision does not require previous shareholder approval. In our opinion, as reflected by the standard set out in ss. 185.1(3), an arrangement should always be characterized as an extraordinary procedure, in particular because - if a court so allows - it may be effected free of the constraint of the shareholders' right to dissent. To require previous shareholder approval has two undesirable effects: first, it may force an expensive formality that has no purpose in some cases; and second, it may influence a court to assume that the majority of shareholders concur and to authorize the arrangement without focusing on the motives of management and the interests of the corporation and its shareholders.

In most cases management will as a matter of course have a proposed arrangement approved by shareholders before the corporation applies to a court under s. 185.1. But because shareholder approval is not a statutory factor, the court is compelled to consider the merits of the case in applying the ss. 185.1(3) standard.

There may be some extraordinary instances e.g. where everyone agrees, except two lost shareholders, that a meeting should not be required where the Judge would not order a meeting of shareholders. Generally I should think a Court wohd require a meeting and would follow the edict recited aabove re National Bank Ltd. I don't quite agree with the reasoning of Mr. Howard in this respect.

S. 178 deals with "Vertical" and "Horizontal" short form amalgamations. This section commends itself to me. For convenience it is set out.

178. (1) Vertical short-form amalgamation.—A holding corporation and one or more of its wholly-owned subsidiary corporations may amalgamate and continue as one corporation without complying with sections 176 and 177 if

(a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation; and

(b) the resolutions provide that

(i) the shares of each amalgamating subsidiary corporation shall be cancelled without any repayment of capital in respect thereof,

(ii) the articles of amalgamation shall be the same as the articles of incorporation of the amalgamating holding corporation, and

(iii) no securities shall be issued by the amalgamated corporation in connection with the amalgamation.

(2) Horizontal short-form amalgamation.—Two or more wholly-owned subsidiary corporations of the same holding body corporate may amalgamate and continue as one corporation without complying with sections 176 and 177 if

(a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation; and

(b) the resolutions provide that

(i) the shares of all but one of the amalgamating subsidiary corporations shall be cancelled without any repayment of capital in respect thereof,

(ii) the articles of amalgamation shall be the same as the articles of incorporation of the amalgamating subsidiary corporation whose shares are not cancelled, and

(iii) the stated capital of the amalgamating subsidiary corporations whose shares are cancelled shall be added to the stated capital of the amalgamating subsidiary corporation whose shares are not cancelled.

S. 179 provides for the sending of articles of amalgamation to th director and in addition a statutory declaration by a director or officer of each amalgamating company establishing to th satisfaction of the Director that there are reasonable grounds for believing that the companies are solvent, no creditor will be prejudiced, and adequate notice has been given to each creditor and none objected.

This section raises an interesting point. What happens in the event that a creditor who has received notice objects under s. 179 (2)(b)(ii)

(ii) adequate notice has been given to all known creditors of the amalgamating corporations and no creditor objects to the amalgamation otherwise than on grounds that are frivolous or vexatious.

Who decides whether the grounds are frivolous or vexations, the declarents certainly in the first instance, but the declarations must establish it to the satisfaction of the Director. If the Director is not satisfied then what? Can he make a decision without something in the nature of a hearing which is nowhere authorized. Sec. 179 provides for sending articles of amalgamation to the Director together with documents and the declarations. By ss. 4 it provides - "Upon receipt of articles of amalgamation the Director shall issue a certificate of amalgamation in accordance with section 255." This administrative directive would seem to deprive the Director of any discretion whatsoever. The only conclusion I can reach is that the reference to an objecting creditor is window dressing and gives no real protection to the creditor so should be dropped.

The requirement of a declaration of solvency has received little comment, the Dickerson Report is itself silent on this. "The Iacobucci Report" has this comment:

> 4. Rights of Creditors
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> In a business combination, creditors of the combining corporations may be greatly affected by the fusion of the two entitles. The difficult question is to what extent their interests should be protected by the legislation and to what extent these should be determined by private ordering.
>
> One approach, which we reject, is to require that each of the amalgamating companies be solvent at the date of amalgamation with the presumed objective of creating a solvent combination. Such a restriction [sic] may not be desirable in all cases since it eliminates the possibility that the combination may be used to resurrect an insolvent company.
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> Instead of prohibiting the amalgamation of insolvent corporations or giving a voting right to creditors in a combination, it would be preferable to confer upon creditors the right to apply to the court for a review of the combination proposals and to empower the court to make an orders, the nature of which is discussed below; which will ensure that the interests of the creditors have been recognized. Therefore, creditors should be notified of an impending combination to allow them to bring their motions. Also, any negotiated rights of the creditor remain; thus, a secured or other preferred creditor might even have, for example, the right to veto a combination proposal.

In the Ontario Business Corporation Act s. 197 we have this,

> **(2) Evidence of solvency.**—The articles of amalgamation shall be accompanied by evidence that establishes to the satisfaction of the Minister that each of the amalgamating corporations is not insolvent and, if required by the Minister, a *pro forma* balance sheet after giving effect to the proposed amalgamation.

It seems to me that a case may be made out for this restriction on statutory amalgamations and if it is acceptable the wording of the Ontario section seems preferable to that in the C.B.C.A.

By section 183 in C.B.C.A. - In ss. (1) we have a provision for "Borrowing Powers" and in ss. (2) a provision for "Extraordinar sale, lease or exchange. I find the arrangements rather odd.

> **(2) Extraordinary sale, lease or exchange.**—A sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (3) to (7).

The use of plain language in this section is appealing and seems more appropriate than the use of the word "reconstructior This section appears to have been based upon s. 79 of the "Model Act". There is a slight difference in the operative words "a sale, lease, exchange, or other disposition of all etc. The underlined words do not appear in the comparable C.B.C.A. section likely because the draftsmen did not consider them necessary. In s. 185.1 the proposed amendment there is included in the definition of "arrangement" (d)

> (*d*) a transfer of all or substantially all the property of a corporation to another 10 body corporate in exchange for property, money or securities of the body corporate;

One would have thought that the language would have been the same as that in s. 183(2) i.e. sale lease or exchange, but instead the language is drawn from the English "Reconstruction" section.

Section 181 deals with continuation (import)

Mr. Harold Thomas of the Companies' Branch could recall only one application for continuation of a U.S. corporation in Alberta. This happened several years ago when a Florida company applied. Upon investigation it was learned that the company had been selling lots in an area which obligerated them during high tide. The corporation was under investigation by Florida

authorities and the S.E.C. at the time. The Registrar exercised his discretion and refused the application. There is no prior approval required for an Alberta company to continue under another jurisdiction be it Canadian or otherwise. There is not any solvency requirement in Alberta. The Ontario Business Corporation Act requires ministerial consent for both import and export continuations.

It would appear from s. 181 that an import appli-tion leaves no discretion in the Director to refuse a certificate of continuation if such is authorized by the laws of the jurisdiction of incorporation and articles in the required form and other required documentation are sent to the Director. An export continuation is another matter however. The applicant corporation must satisfy the Director that the move has been authorized by the shareholders; and establish to the satisfaction of the Director that its move to another jurisdiction will not adversely affect its creditors ahd shareholders. Note below that an export continuance must be approved by a special resolution to be passed by all of the shareholders whether or not the shares carry a vote. The prohibition section ensures that all the corporation's rights and obligations must follow it to the new jurisdiction otherwise it cannot effect a continuance.

> 182. (1) **Continuance (export).**—Subject to subsections (2) and (9, a corporation may, if it is authorized by the shareholders in accordance with this section, and if it establishes to the satisfaction of the Director that its proposed continuance in another jurisdiction will not adversely affect creditors or shareholders of the corporation, apply to the appropriate official or public body of another jurisdiction requesting that the corporation be continued as if it had been incorporated under the laws of that other jurisdiction.
>
> (2) **Continuance (export) of investment company.**—A corporation to which the *Investment Companies Act* applies shall not apply for continuance in another jurisdiction without the prior consent of the Minister of Finance.
>
> (3) **Notice of meeting.**—A notice of a meeting of shareholders complying with section 129 shall be sent in accordance with that section to each shareholder and 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 a discontinuance under this Act.

(4) **Right to vote.**—Each share of the corporation carries the right to vote in respect of a continuance whether or not it otherwise carries the right to vote.

(5) **Shareholder approval.**—An application for continuance becomes authorized when the shareholders voting thereon have approved of the continuance by a special resolution.

(6) **Termination.**—The directors of a corporation may, if authorized by the shareholders at the time of approving an application for continuance under this section, abandon the application without further approval of the shareholders.

(7) **Discontinuance.**—Upon receipt of notice satisfactory to him that the corporation has been continued under the laws of another jurisdiction, the Director shall file the notice and issue a certificate of discontinuance in accordance with section 255.

(8) **Rights preserved.**—This Act ceases to apply to the corporation on the date shown in the certificate of discontinuance.

(9) **Prohibition.**—A corporation shall not be continued as a body corporate under the laws of another jurisdiction unless those laws provide in effect that

(a) the property of the corporation continues to be the property of the body corporate;

(b) the body corporate continues to be liable for the obligations of the corporation;

(c) an existing cause of action, claim or liability to prosecution is unaffected;

(d) a civil, criminal or administrative action or proceeding pending by or against the corporation may be continued to be prosecuted by or against the body corporate; and

(e) a conviction against, or ruling, order or judgment in favour of or against the corporation may be enforced by or against the body corporate.

If we maintain the Companies Branch as a pure registration office who should hold the discretion under s. 182 and should he also hold a discretion on an import continuation. It is my view that the movement of corporations in and out of the province is something that may have economic significance and perhaps political implications. This in itself justifies bringing the Minister into the picture. The Report on Mergers and Amalgamations, etc. felt that the Minister should be involved for the better protection of shareholders of Ontario's corporations particularly where an inter-jurisdictional amalgamation was to follow the export continuance. Ontario has retained Ministerial discretion over both import and export continuances and it would not be amiss if Alberta did the same.

If one looks at the definition of Corporation s. 2(1) of the CBCA "corporation" means a body corporate incorporated or continued under this Act and not discontinued under this Act". It would appear that a Canada corporation and a foreign corporation i.e. one from a U.S. jurisdiction could amalgamate after the foreign corporation has been continued under s. 181.

The same appears to be the case where a foreign corporation is continued in Alberta. The definition of Company s. 2(1) "company includes any company incorporated under this Act and an existing company."

The Merger study, above, in its discussion of inter-urisdictional amalgamations clearly envisages only continuations of corporations from other provinces and a Canada corporation where there is reciprocal legislation. No mention was made of a corporation from a foreign country.

The Foreign Investment Review Act, Canada, 1973-74, Chapter 46 dealing with acquisition of control of a Canadian business. s.3 ss. 3(e) deals with acquisition of control by amalgamation which indicates it could be done presumably by continuation in Canada of a foreign corporation and amalgamation under the appropriate legislation.

The acquisition of shares following a take over bid for all the shares or all of a class of shares may be made under section 199, where the bid is accepted by not less than 90% in value of the shares covered by the offer. The section accomplishes the same thing as section 153 in the Alberta Act. Its language is more precise and the procedures to be followed are better detailed.

The words in s. 153 of the Alberta Act referred to above,"Where a scheme or contract" disappear, and in their place we find that the acquisition of shares is an adjunct to or follows after a take-over-bid.

A most important change is effected by the defintion of "take over bid" in 199(1)

> **"take-over bid".—"take-over bid" includes an offer to purchase shares of a corporation having fewer than fifteen shareholders.**

This seems to mean that where you have an offer to fewer than 15 shareholders to purchase shares by way of separate agreement, it is an exempt offer under s. 187(a); but for the purpose of section 199 you can acquire dissenting shares by making a take over bid to purchase all of the shares of the company even if there are fewer than 15 shareholders in the Corporation.

An "Exempt Offer" according to s. 187(c) means an offer

> **(c) to purchase shares of a corporation that has fewer than fifteen shareholders, two or more joint holders being counted as one shareholder, or**

A take-over-bid is defined in the same section as follows - "take-over-bid means an offer, other than an exempt offer made by an offeror to shareholders at approximately the same time to acquire shares that, if combined with shares already beneficially owned or controlled, directly or indirectly, by the offeror or an affiliate or associate of the offeror on the date of the take-over bid, would exceed ten per cent of the issued shares of an offeree corporation and includes every offer, other than an exempt offer, by an issuer to repurchase its own shares."

In section 199(1) however, "take over bid" - includes an offer to purchase shares of a corporation having fewer than 15 shareholders. This creates a contradiction of terms which is possibly a matter of draftsmanship. The purpose and intent as I see it is to permit an offer to all the shareholders be they less than 15 in numbers which will be a take over bid. This could come into play where it is known in advance that one or

more cannot be bought out by separate agreement, or one or more are missing and the only way to deal with them is to acquire the shares under s. 199. It seems to give an offeror the option to waive the exemption and I presume comply with the take over requirements but it is not so stated.

This apparent drafting problem may be somewhat solved as if and when Alberta has a new securities act. It is planned to introduce one in 1978 which without doubt would follow very closely Bill 20 before the Ontario Legislature.

In that bill we have the following definitions.

s. 90(1)(h)

(*h*) "take-over bid" means an offer made to security holders the last address of any of whom as shown on the books of the offeree company is in Ontario to purchase, directly or indirectly, such number of voting securities of a company that, together with the offeror's presently-owned securities, will in the aggregate exceed 20 per cent of the outstanding voting securities of the company. R.S.O. 1970, c. 426, s. 81; 1971, c. 31, s. 22, *amended.*

s. 90(2)

(2) A take-over bid is exempted from the requirements of this Part where,

(*a*) it is made through the facilities of a stock exchange recognized by the Commission for the purpose of this Part according to the by-laws, regulations or policies of the stock exchange; or

(*b*) it is an offer to purchase shares in a private company provided that the private company is not an insider of a reporting issuer. R.S.O. 1970, c. 426, s. 81; 1971, c. 31, s. 22, *amended.*

If it is thought desirable to exempt an offer to purchase shares in a private company one could also exempt an offer to shareholders in a public company where there are fewer than 20 shareholders rather than the 15 referred to in CBCA, i.e. if we reduce the number of shareholders in a private company from 50 to 20.

One thing neither this section nor s. 153 in the Alberta Act gives is the right of a dissenting shareholder to demand that the offeror purchase his shares. As it stands now the offeror's right to acquire the remaining shares is permissive only and he may not care to exercise this right; which could leave the dissenting shareholders locked in. The Merger Report for Ontario recommended this change for Ontario but it was not acted upon. B.C. did however make provision for the right in its Act.

s. 276(9)

(9) Every acquiring company shall, within one month after it becomes entitled to give the notice referred to in subsection (2), if it has not given that notice, give a written notice to each member referred to in subsection (2) that the member may, within three months after receipt of the notice, require the acquiring company to acquire the shares.

The same right is contained in s. 234(6) of the Ghana Code and of course s. 209 of the English Companies Act 1942. It seems to me to be the fairest approach.

Sec. 199 also has a new definition "dissenting offeree". In the previous federal act and in the Alberta Act the name is dissenting shareholder. The substitution of offeree is in keeping with the expression used in a take over bid

s.199(1)

"dissenting offeree".—"dissenting offeree" means, where a take-over bid is made for all the shares of a class of shares, a holder of a share of that class who does not accept the take-over bid and includes a subsequent holder of that share who acquires it from the first mentioned holder;

s. 199(3)(d)

(d) a dissenting offeree who does not notify the offeror in accordance with subparagraph (c) (ii) is deemed to have elected to transfer his shares to the offeror on the same terms that the offeror acquired the shares from the offerees who accepted the take-over bid;

The equivalent definition in the Albert Act 153(5)

> (5) In this section, the expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.
> [R.S.A. 1970, c. 60, s. 153]

It appears to me that the structure and language of the Alberta Act in this regard is much simpler but perhaps for the sake of uniformity the CBCA version might be adopted.

ss. (9) makes provision for an application to the Court to fix the "fair value" of the shares of the dissenting offeree ss. (10) if the offeror fails to make application then the dissenting offeree may make the application. (11) The venue for the application shall be made in the place where the corporation has its registered office or where the diseenting offeree resides in the corporation carrys on business in that province. (12) No security for costs is required of a disenting offeree. (13) All dissenting offerees shall be joined as parties. (15) The Court may appoint one or more appraisers.

The additional powers of a court are interesting

> (17) Additional powers.—In connection with proceedings under this section, a court may make any order it thinks fit and, without limiting the generality of the foregoing, it may
>
> (a) fix the amount of money or other consideration that is required to be held in trust under subsection (7);
>
> (b) order that that money or other consideration be held in trust by a person other than the offeree corporation;
>
> (c) allow a reasonable rate of interest on the amount payable to each dissenting offeree from the date he sends or delivers his share certificates under subsection (5) until the date of payment;
>
> (d) order that any money payable to a shareholder who cannot be found be paid to the Receiver General and subsection 220 (3) applies in respect thereof.

(d) strikes me as particularly interesting, perhaps the University could benefit as it does under the Ultimate Heirs Act.

S. 199 has taken us a long way from the rather obscure acquisition section in the Alberta Act. It has been updated in language and substance even over the comparable English section. By setting out detailed procedure it should be of assistance to corporations and their solicitors. The early reported Canadian cases showed a reluctance in the Courts to approve this compulsory acquisition of shares and the requirements were strictly interpreted. The tenor of the English cases was somewhat different than what is reflected in 199. A decision of Managhan J. in Re Hoare & Co., Ltd. 1933 All ER. pg. 105 at p. 1 discusses the rights of a dissenting shareholder on an application under s. 209 of the English Act.

> It gives the transferee company in that case power, within two months after the expiration of the period for accepting the offer, to give notice to the dissentients that it desires to acquire their shares, and where the notice is given the transferee company becomes entitled, on the one hand, and bound, on the other, to acquire those shares on the terms on which, under the scheme, the shares of the approving shareholders are to be transferred to the transferee company. But there is this phrase inserted as a sort of parenthesis after the verb "shall,"
>
> "unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise."
>
> I have some hesitation in expressing my view as to when the court should think fit to order otherwise. I think, however, the view of the legislature is that where not less than nine-tenths of the shareholders in the transferor company approve the scheme or accept the offer, primâ facie, at any rate, the offer must be taken to be a proper one, and in default of an application by the dissenting shareholders, which includes those who do not assent, the shares of the dissentients may be acquired on the original terms by the transferee company. Accordingly, I think it is manifest that the reasons for inducing the court to "order otherwise" are reasons which must be supplied by the dissentients who take the step of making an application to the court, and that the onus is on them of giving a reason why their shares should not be acquired by the transferee company.
>
> One conclusion which I draw from that fact is that the mere circumstance that the sale or exchange is compulsory is one which ought not to influence the court. It has been called an expropriation, but I do not regard that phrase as being very apt in the circumstances of the case. The other conclusion I draw is this, that again primâ facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may

> be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair. There may be other grounds, but I see no other grounds available in the present case for the interference of the court.

It would appear that the court on an application under 209 only had to consider that the offer was fair to the shareholders and the onus was on the dissenting shareholder to establish otherwise. The court did not consider the fairness of the price to him but only the fairness to all. s153(2) Alberta has a similar expression and I would expect it to be interpreted as it was in the "Hoare" case.

Section 199 CBCA however has left this principle behind and substituted the fair value principle regardless of whether the offer made was a fair offer to all the shareholders. It protects the dissenting shareholder from being locked in, makes access to the court simple and gives through the court, appraisal rights. One instance where the Court ordered otherwise was reported in Re Bugle Press Ltd., Re Houses & Estates Ltd. 1960 ch. 279. "The court upheld the objections of a dissenting shareholder where the holders of ninety percent of the shares in the transferor company held all the shares of the transferee company and the section was being used to enable majority shareholders to expropriate the minority." Under the circumstances of that case there was not a scheme or contract properly so called and the section was being improperly used. There were three shareholders in the transferor company who held 90% of the shares and the dissenting shareholder 10%.

In the Ghana code comments to s. 234 and s. 235. Professor Gower shows his dislike for compulsory acquisition of minority shares under section 209 of the English Act. He recites that minorities have received a raw deal in England and that Americans in particular were incensed that minority shareholders could be bought out after a take over bid. He therefore had an eye to investments in Ghana when he drafted the Code. He did not see too much problem when the bid was for an exchange of

shares bringing about a merger but in the case of a bid to buy particularly by an individual, this he disapproved of. In the end result he divided s. 209 into two sections and provided unlike the English section the offer under s. 234 must be one for all the shares of the transferee company whereas under s. 209 the offer could be made to acquire all the shares of a particular class of shares which might not necessarily result in a true merger.

The distinctions between s. 209 and s. 234, 235 of the Code are succinctly set out in Professor Gower's comments which bear repeating here rather than paraphrasing

8. Section 234, conferring powers of compulsory acquisition on the transferee company applies only when the conditions of subsection (2) are fulfilled. First, the offer must be made for *all* the outstanding shares, i.e., for all except those already held by the transferee company and its associated companies. This is not so under the English Act; there the offer may be limited to a particular class or classes. Since the basic object is to enable the transferee company to make the transferor company its wholly owned subsidiary—thus avoiding possible conflicts of interest and duty—I can see no justification for applying the section unless a bid is made for the whole of the shares.

Secondly, the consideration for the acquisition must be shares in the transferee company; the shareholder may be given a cash option but must also be given the option to take shares. As pointed out above, this too differs from the English position.

Thirdly, the same terms must be offered to all or, where there are different classes of shares, to all holders of shares of the same class. Under the English Act this is only so if the transferee company already holds some of the shares.

Finally, the offer must have been accepted within four months by the holders of nine-tenths of the shares for which offer was made *and* by the holders of nine-tenths of each class. And, furthermore, the accepting shareholders must be 3/4ths in number of such holders. Here again the conditions are stricter than in the English Act.

It should perhaps be pointed out that it is not necessary for the offer to have been open for acceptance for four months: *Re Western Manufacturing Ltd*. [1956] Ch. 436. Subsection (2) merely states that the section does not operate unless the requisite acceptance are obtained within four months.

9. If these conditions are fulfilled the transferee company may then serve a notice of compulsory acquisition under subsection (3). It is not compelled to do so but if it does not section 235 will operate.

10. If the shareholder in question takes no action his shares will then be transferred to the transferee company in accordance with the procedure set out in subsections (7) and (8). But within two months he may apply to the Court under subsection (4). If the Court thinks that the circumstances do not justify compulsory acquisition of the applicants' shares it may so order. If it thinks that compulsory acquisition is justified but that the terms are unfair it may prescribe different terms. Before making a decision the Court may obtain a report on the offer from an impartial expert: subsection (5) which should be compared with section 231 (2).

11. If the Court alters the terms the other shareholders are given the right to adopt the amended terms: subsection (6). This too is a novel provision of which there is no counterpart in the English Act. It seems to me that shareholders of the same class should be offered the terms which the Court has decided to be fair.

12. Subsections (7) and (8), which are virtually identical with subsections (3) and (4) of section 209 of the English Act, provide a simple machinery for accomplishing the take-over.

13. So much for section 234. I turn now to section 235 which is equivalent to section 209(2) of the English Act. This applies to a much wider range of cases than section 234 and comes into operation whenever as a result of an offer (whether for cash or shares) the transferee company has become entitled to 3/4ths of the shares of the transferor company or 3/4ths of the shares of any class. It enables the remaining shareholders, if they do not wish to be left as a small minority to insist on being bought out. The English section applies only when 9/10ths have been acquired, but this has been strongly criticised as unduly large.

There is one noteworthy change in the Ghana Code to which serious consideration should be given if we retain the English concepts in a new Act, and the following question asked.

Should we consider empowering the court to fix a value on the shares of a dissenting shareholder different from the value in the offering or by agreement and should the court be empowered to have an appraisal made for his assistance? This is an appraisal right in essence as in s. 199(14) except in the latter we have the expression "fair value."

The only case I have found to determine the meaning of the expression is A. G. Ireland v. Jameson 1905, 2 Ir. R. 218. The Lord Justices held, that in valuing shares in the Jameson Company now in the hands of the executor "The principal value (for taxation purposes) ought to be estimated at the price which, in the opinion of the commissioners of Inland Revenues, they would fetch if sold in the open market, etc."

I wonder if there is in substance any difference between the value which the court would place on shares under the English and Ghana statutes and the CBCA. Surely a court would look to fairness between the two conflicting parties and would consider as all importance the price which the shares would bring in the market place.

Protection of Minority Shareholders
Appraisal Rights

One of the most vexatious questions to me is whether Alberta should retain the tranditional protection of minority shareholders by the Court, where there is, or is proposed a fundamental change; or whether we should adopt the CBCA technique of relying upon appraisal rights for dissenting minorities. I find myself alternating my opinion as to which is preferable from day to day. This may be because I have always looked to the law and the Courts to protect one's interests, even though the system is not perfect and justice may not always be done. On my initial look at the "Fundamental Change" part I was most skeptical of it because the old concepts re arrangements and compromises were gone and I found myself somewhat at sea, as most lawyers who do not regularly practice in the corporate field would find themselves. Creditors are given a bare mention and must look to insolvency to give them the right to a compromise Modernism too has its pitfalls--witness the proposed amendment 185.1, above.

As yet the officials of the CBCA have had no experience with appraisal rights so we are left at the moment in an academic hiatus.

Support for appraisal rights is far from universal in the U.S. and some States have limited its operation to private or closely held corporations. Eisenberg, above, in a contribution to the California Law Review Jan. 1969 entitled "The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking" 57 California Law Review 1969, pp. 1-558 sets out his view that there is a place for the appraisal rights, and also the views of Dean Bayless Manning its chief critic.

In reviewing the statutory patterns governing the traditional fundamental changes, we saw that in many cases the statutes confer upon a shareholder the right to require the corporation to purchase his shares at an appraised price if it undertakes certain kinds of actions from which he dissents. If the corporate form of organization is viewed through the prism of any other form of business organization, this right must seem very unusual. Moreover, as already noted, no such right is reflected in the received legal model of the corporation. Is the appraisal right then aberrational, or does it have a place in a normative model of the corporation?

Within the last few years, the view seems to have been growing that it does not. For example, at one time the all but universal practice was to give appraisal rights to the shareholders of each constituent to any merger. However, within the last few years Ohio and Delaware have eliminated the appraisal right of the survivor's shareholders in those small-scale mergers which do not require approval of the survivor's shareholders,[232] Delaware has eliminated the appraisal right as to any stock which is part of a class registered on a national securities exchange or held of record by not less than 2000 shareholders,[233] and New Jersey has eliminated it as to any stock which is part of a class listed on a national securities exchange or regularly quoted on the over-the-counter market by one or more members of a national or affiliated securities association.[234] In large part, the assault on the appraisal right has found its intellectual justification in an extensive critique of the right by Dean Manning.[235] An examination of this critique will provide a starting point for analysis of whether the appraisal right does indeed have a place in a normative model, and if so, what that place should be.

The thrust of Dean Manning's critique of the appraisal right is twofold: that it ill-serves the shareholder who uses it, and ill-serves the corporation against which it is asserted.[236] On the shareholder side Manning notes that the procedure the shareholder must follow is highly technical, long, and expensive; that if the corporation's stock is publicly traded, the courts will not go beyond an inquiry into market price (a proposition which the cases do not fully support),[237] while if it is not publicly traded the amount of the award is unpredictable; and that when the award is finally made it will be taxable, whereas the

transaction dissented from may very well have produced tax-free benefits to the shareholder. Generally speaking, these criticisms are accurate, although many of them are equally applicable to many other legal rights which must be asserted through litigation. However, they are hardly dispositive, because in themselves they indicate not that the remedy is unsound, but merely that its usefulness, like the usefulness of all legal rights, may be limited by the boundaries of reality and legislative drafting.

But when he turns to the effect of the appraisal right on the corporation, Manning does conjure up problems intended to bring the very soundness of the right into question. First, he argues that the assertion of appraisal rights may wipe out the enterprise.

> Even a relatively modest number of shareholders claiming the appraisal remedy may constitute a severe economic threat to the corporate enterprise. . . . If some shareholders go the appraisal road, a sudden and largely unpredictable drain is imposed upon the corporation's cash position. This demand for a cash pay-out to shareholders often comes at a time when the enterprise is in need of every liquid dollar it can put its hands on.
>
> Some kind of corporate surgery is going on; the enterprise is much more apt to be in need of a blood transfusion than a leeching. . . . [T]he period following the closing will likely be a period of intense activity as a general reshuffling takes place in the administrative, productive, and distributional arrangements of the combined enterprise. The management hopes that in time these steps will prove economic; but in the short run many of them will require a cash in-put.[238]

The gravity of the "threat to the corporate enterprise" seems highly exaggerated. No evidence is adduced that corporations involved in mergers are "in need of a blood transfusion," and my own observation has been that most mergers involve two perfectly healthy enterprises. Even then, of course, there may be a short-run cash output, but it is unlikely to be material in terms of cash resources. Furthermore, in considering the appraisal right from the shareholder's point of view, Manning stresses that the procedure by which the right must be asserted is a long and weary one. If that is so, then by the time a dissenter is actually paid off the short-run period of adjustment will be far behind.

Second, Manning argues that the payments made to dissenters may lead creditors to start a run on the corporation's treasury.

> This may be a time, too, when uneasy trade creditors, suppliers, or banks may decide that they would be happier to have cash in their pockets rather than a claim against the still untried combined enterprise. The creditor of Corporation A suddenly finds an unknown horde of creditors of Corporation B standing equally beside him, and, typically, he knows little or nothing about the amount of liquidity of the assets that Corporation B has brought to the marriage. The creditors of Corporation B feel the same apprehension about Corporation A. Both are inclined to get a little itchy for cash. When, at precisely the wrong psychological moment, the corporation ladles out a dollop of dollars to its shareholders under the appraisal statutes, the reaction of creditors may be one of consternation and the run begins.[239]

Again, no evidence is adduced, and again my own observation has been that while the "trade creditors, suppliers, [and] banks" are indeed at the door following a merger, they are kneeling, not pounding. Their object is not to get out, but to get in—at best, to garner all the business of the reconstituted enterprise, at worst, to retain the business they had. Furthermore, the time when payment must actually be made to dissenting shareholders will, as Manning's earlier point emphasizes, lie in the dim, distant future.

Finally, Manning argues that the uncertainty as to how many shareholders will dissent may itself raise serious problems.

> Even though the company may be economically very strong, it may not be able to go ahead with the merger at all if the aggregated claim of dissenting shareholders under the appraisal statutes comes to a high figure. This means that for purposes of planning its course of action, and deciding whether to go ahead with the merger, the management needs to know as soon as possible what the total cash demand is likely to be. And here is the rub. The answer obviously depends upon the claim procedure prescribed in the appraisal statute. But under the procedures of many of the statutes, claimants are not required to file their claims until some time after the merger. The situation is both circular and dangerous.[240]

In practice, however, this potential uncertainty hardly ever turns out to be a real problem, because if the situation is threatening, the lawyers will insert in the relevant agreement a provision allowing one or both sides to back off prior to the closing if too many shareholders dissent.[241]

This quotation is followed by a rather severe criticism of Manning's position but then we find this query by the writer "But assuming that Manning's specific cricisms are not well-founded, we are still left with the larger question he raises: Is the appraisal right desirable? Does it have any real utility? Again, it is necessary to separate out privately and publicly held corporations."

1. Privately Held Corporations

To understand the real utility—and probably the real origin—of the appraisal right in the privately held corporation, we must once more go back to the partnership form. It will be recalled that absent contrary agreement decisions outside the scope of the partnership business can be made only by unanimous consent, new partners cannot be admitted without unanimous consent, and partnerships are normally short-lived and always easy to dissolve. These three partnership incidents, apparently disparate, are actually complementary. The absolute veto of each partner in matters outside the scope of the partnership business seriously restricts his copartners' freedom of action. This restriction might be intolerable, except for the fact that each partner has agreed to the identity of his fellow veto-bearers, and that in any event the timespan of the veto is ordinarily not a long one since the remaining partners can either dissolve the partnership or await the end of its term and then reform the enterprise along the desired lines.

But the corporation presents a very different face. Neither of the conditions making a veto tolerable in the partnership is normally present in the corporation: Duration is normally perpetual, and the identity of fellow shareholders is not necessarily within a shareholder's control. For these reasons, absent contrary agreement, a majority, or at least a two-thirds majority, should be able to make structural changes in the corporation even over the objection of minority shareholders. But just as the veto power might be intolerable in the corporation, so might be an unrestricted power in the majority to make structural economic changes unless some method was provided whereby minority shareholders would not be locked into the restructured enterprise over their objections. The minority, in other words, should have the right to say to the majority: "We recognize your right to restructure the enterprise, provided you are willing to buy us out at a fair price if we object to the new structure so that we are not forced to participate in an enterprise other than the one contemplated at the outset." In short, at least in the context of the privately held corporation, the appraisal right is a mechanism admirably suited to reconcile the need to give the majority members of a normally perpetual organization the right to make drastic changes in the enterprise to meet new conditions as they arise with the need in such an organization to prevent the minority from being involuntarily dragged along into a drastically changed enterprise in which it has no confidence.

2. Publicly Held Corporations

Absent special agreement, a shareholder in a privately held corporation ordinarily cannot withdraw from the enterprise unless he has an appraisal right: Either there will be no market at all for such shares, or the market will be too thin to be relied on. Since a shareholder in a publicly held corporation normally can withdraw by selling his shares on the market, his need for an appraisal right is certainly less compelling, as Manning has argued.[257] Furthermore, the expectations of many shareholders in publicly held corporations undoubtedly revolve around the market rather than the enterprise in any event.[258] Should the appraisal right therefore be eliminated in the case of publicly held corporations?

An initial problem would be to define publicly held corporations for these purposes. We have already seen the definitional difficulties raised by voting rights.[259] However, the voting rights problem is essentially one of measuring expectations, and the difficulty there arises in part from the fact that expectations cannot be easily quantified. The appraisal problem, on the other hand, may be viewed in terms of the marketability of a corporation's stock, rather than in terms of the expectations of its shareholders. Thus for appraisal purposes a publicly held corporation might be viewed as one whose stock is traded on a market which provides a ready means for dissatisfied shareholders to dispose of their stock at a fair price. This definition, in turn, is susceptible of quantification. For example, such a market might be deemed to exist in the case of stock listed on the New York or American Stock Exchanges, or held by some minimum number of shareholders, say 1000-2000. This approach was taken by the 1967 Delaware statute, which cut off appraisal rights in the case of stock held of record by 2000 shareholders or listed on a "national securities exchange."[260] The latter provision is, however, ambigous, since a number of exchanges (such as the Pacific Coast, Philadelphia-Washington-Baltimore, and Boston) are sometimes referred to as "national" because they are registered under the Securities Exchange Act of 1934, and at other times are referred to as "regional" because unlike the New York and American Exchanges, they are not economically national.[261] If the statute was intended to include these exchanges it achieves an unfortunate result, because they may provide a relatively thin market which is incapable of absorbing a significant amount of stock at a fair price. Even more unfortunate is the 1968 New Jersey statute, which denies appraisal rights whenever the stock in question is regularly quoted by even a single member of a national securities association.[262] Such quotations may be made on the basis of an extremely small amount of stock actually available for trading, and in such cases there would be little likelihood that a significant amount of stock could be disposed of at a fair price.

A second hurdle is not so easily leaped. While it is true that many shareholders in publicly-held corporations are market-oriented, it has already been seen that many others are likely to own an amount of stock sufficient to orient their expectations around the long-term prospects of the enterprise rather than around a market which tends to fluctuate severely over any given short-run period. It may be

questioned whether such shareholders should be remitted to the market to find relief from structural changes to which they object, unless the market to which they are remitted is not only continuous and deep, but is likely to reflect fairly the value of the enterprise. It seems clear, however, that the stock markets as presently constituted do not serve that function. As the Delaware Chancery court itself has pointed out:

> When it is said that the appraisal which the market puts upon the value of the stock of an active corporation as evidenced by its daily quotations, is an accurate, fair reflection of its intrinsic value, no more than a moment's reflection is needed to refute it. There are too many accidental circumstances entering into the making of market prices to admit them as sure and exclusive reflectors of fair value. The experience of recent years is enough to convince the most casual observer that the market in its appraisal of values must have been woefully wrong in its estimates at one time or another within the interval of a space of time so brief that fundamental conditions could not possibly have become so altered as to affect true worth. Markets are known to gyrate in a single day. The numerous causes that contribute to their nervous leaps from dejected melancholy to exhilarated enthusiasm and then back again from joy to grief, need not be reviewed. It would be most unfortunate indeed either for the consolidated corporation or for the objecting shareholder if, on the particular date named by the statute for the valuation of the dissentor's stock, viz., the date of the consolidation, the market should be in one of its extreme moods and the stock had to be paid for at the price fixed by the quotations of that day. Even when conditions are normal and no economic forces are at work unduly to exalt or depress the financial hopes of man, market quotations are not safe to accept as unerring expressions of value. The relation of supply to demand on a given day as truly affects the market value of a stock as it does of a commodity; and temporary supply and demand are in turn affected by numerous circumstances which are wholly disconnected from considerations having to do with the stock's inherent worth.[263]

That was written in 1934, but things have not changed much, in this regard, since then. To give a random illustration, the following are the highs and lows for 1968 among the first ten stocks, alphabetically, on the New York Stock Exchange, as recorded in the New York Times at hand as this passage is written (that of September 4, 1968):

Corporation	*High*	*Low*[204]
Abacus	17¾	15½
Abbott Lab	66⅞	41⅞
Abex Co.	42⅛	28
ACF Ind.	68⅜	39½
Acme Mkt.	44	36
Adam Ex.	18⅞	16
Ad Millis	30⅝	18¾
Address	91½	52
Admiral	25⅛	16½
Aeroquip	77	47¼

When fluctuations like these occur within a mere eight-month period, it seems arbitrary, to say the least, to remit an enterprise-oriented shareholder to the market for relief, let alone to an over-the-counter market as does the New Jersey statute.[265]

Furthermore, even assuming that the market fairly reflects the value of the stock in question in its normal operations, remitting a dissenting shareholder to the market will fail to adequately protect him where (1) his block is so large that the mere act of selling the block will depress the market—and it has already been seen that large blocks are common even in stock listed on the New York Stock Exchange—or (2) the very effect of the structural change, when it is announced, is to depress the market price, because the change is an ill-considered one. In other words, even in a well-functioning market, remitting the dissenting shareholder to the market place will be unsatisfactory in just those cases where the shareholder would seem most entitled to appraisal—where his shareholding is a large one, so that his expectations are likely to be oriented around the enterprise rather than the market, or where the structural change is ill-considered, so that the market price after the change is announced is lower than that prevailing before the announcement.

A final problem with eliminating appraisal rights in publicly held corporations is that in such corporations the appraisal right not only serves the function of permitting shareholders to withdraw under certain circumstances at a fair price, but also serves as a check on management. Granted that a certain proportion of shareholders in publicly held corporations will vote in favor of any management proposal, no matter how ill-conceived, and granted that management is not necessarily either highly skilled or disinterested in the making of structural changes, it may be appropriate to structure the decisionmaking process in publicly held corporations so that more than a bare majority or even a two-thirds majority is needed to carry management's decision. As Professor Folk has pointed out:

> [I]t is important to maintain some internal or external control to offset the power of the directors, unless one assumes that directors, especially when backed by a shareholder majority, should have unrestrained discretion. Appraisal rights . . . have, in the past, served as a countervailing power to force the insiders to tailor their plans to minimize the number of dissenters by getting the best deal possible. A high vote requirement (including a class vote) plays the same sort of role. When either weapon is removed, the insiders lack the real self-interest to fashion a plan acceptable to a sufficient number of shareholders.[266]

It has already been seen that the appraisal right presents many difficulties from the shareholder's perspective: It is always technical; it may be expensive; it is uncertain in result, and, in the case of a publicly held corporation, is unlikely to produce a better result than could have been obtained on the market; and the ultimate award is taxable. It is, in short, a remedy of desperation—generally speaking, no shareholder in a publicly held corporation who is in his right mind will invoke the appraisal right unless he feels that the change from which he dissents is shockingly improvident and that the fair value of his shares before the change will far exceed the value of his shares after the change.[267] But may not the existence of just such a right—a switch which will be pulled only in case of emergency—be desirable in connection with transactions of the utmost gravity, in which self-interest and lack of investment skills may seriously obscure management's vision?

In short, while it would not be irrational to eliminate appraisal rights as to shares which are traded under conditions which are likely to insure the existence of a continuous and relatively deep market, it seems more advisable to retain the appraisal right even in such cases, partly to protect the fair expectations of those shareholders whose legitimate expectations center on the enterprise rather than on the market, and partly to serve as a well-designed emergency switch to check management improvidence.

Ontario has chosen to restrict appraisal right to the holders of shares to a non-offering corporation, thereby assuming there is always a market of some depth for offering corporations. On the other hand C.B.C.A. has followed the advice of Eisenberg in his paragraph above.

Eisenberg makes a very strong case for an appraisal right in a private company. It is a fair manner of separating a dissenting shareholder from the other shareholders who cannot agree to a structural change in the Corporation. In some circumstances where a dispute arose in connection with a proposed change in the company the matter might be settled under an arrangement section, or by dissolution. I can see, howev

that the procedures might not exactly provide a satisfactory solution. A substantial shareholder in a small (partnership) company cannot sell his shares to the public, his other fellow shareholders may not be able to buy him out,but the company can. They cannot, however, agree to the fair value for his interest, so what do they do. The dissenting shareholder may not trust a judge to fix a price, but he would likely accept the price fixed upon an appraisal, if it were authorized by statute.

Eisenberg also makes a case for the appraisal right in a public company, above, but it is much weaker. I agree that in most cases a Court or appraiser would first look to the market value of a share in fixing a price. If there were a liquid market over a reasonable period of time that would likely be the price arrived at, even though markets were in a long period of depression. The price might be unfair but for most investers in public companies it is perhaps an incident or risk attached to their shares. They are probably not interested in the company per se, but only in the market. For those with substantial holdings the situation may be differer and perhaps an appraisal is the only fair solution. The questior is, do we attempt to include in an act a remedy for every contingency which might result in some unfairness to a shareholder. If the change from which he dissents is shockingly improvident perhaps the solution is an action under an oppression section, rather than appriasal as an emergency right. It is an idealistic in the extreme but completely impractible to try to reach perfection in this area.

It is said that the exercise of an appraisal is long and technical and this becomes apparent on an examination of s. 184 C.B.C.A. Rather than attempt to paraphrase the section I

refer you to the section in Schedule C as being more satisfactory as there are twenty-five subsections setting out the rights of the corporation and shareholders and the procedures they may follow to reach an appraisal and effect the structural change. Theoretically everything required of the corporation and dissenting shareholder is set out neatly and one would think there would be no need for regulations. There are none, so consider these problems.

As a lawyer for a corporation how would you advise it were the company to propose a fundamental change under s. 184. If the change is to be effected by a special resolution to amend the articles what sort of notice is required under s. 169(2).

> (2) Notice of amendment.--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.

It could be the bare bones of the above section or it could be an explanation of what a dissent would mean and what the shareholder would be required to do after he notifies the company of his decision. You cannot expect all shareholders, particularly if their holdings are small to go to a lawyer for advice on his rights and the consequences of dissent, the delay and perhaps cost to him upon exercising an appraisal right. It seems to me that the corporation should bear the onus of leading the dissenting shareholder through the various steps required including a dissenting shareholder's right to withdraw under s. 25 if the company cannot make payment because of insolvency. The Act does not require this however.

As a lawyer, other than an active specialist in corporate law, how would you advise a shareholder client if he came to you with the bare bones notice of a meeting to pass a

resolution to effect a fundamental change. In the absence of education in the area of appraisal rights and a body of Canadian or English law pertaining thereto I think you would find yourself in a difficult position.

I do not pose these questions to derrogate from the value of an appraisal right but rather to point out its adoption in a new Alberta statute could give rise to some difficulty amongst the legal profession. I wonder if C.B.C.A. moved too far too fast in this area.

The problems facing the Court on an application by a dissenting shareholder to fix a fair value on his shares is very well illustrated in the only appraisal type case in Canada I could find, Re Wall & Redekop Corpn. 1975 1 W.W.R. 623. This case arose out of an amalgamation where the company made an application to the court under s228(4) of the Companies Act 1973 (B.C.) c. 18. It is interesting that the shareholder appeared in person though he is not listed as a lawyer. The company argued that the proper value of the shares was the price the shares traded on the Vancouver Stock Exchange just before the passing of the special resolution at $2.40. The shareholder however pointed out that the market was extremely thin because almost all of the outstanding shares were held by the Redekops and their companies. He thought the shares should be valued at book value between $7 and $8 a share. Mr. Justice Macfarlane after reviewing the American appraisal cases stated:

> It is to be noted that in most of the cases to which I have referred the question of appraisal of the shares was referred by the Court to experts for report. I think that would be an appropriate course to follow here. The material before me at this time does not enable the Court to fix the price of the shares nor, indeed, to decide which method should be applied in determining that price. Whatever method is employed the dissenting shareholder is to be paid for his proportionate interest in the company as a going concern on the day before the resolution was passed *including* any appreciation or depreciation in anticipation of the vote upon the resolution. It is to be observed that the latter consideration was excluded in the *Roessler* case, supra.

> I will hear counsel for the applicant and Mr. Estlin at some time convenient to both of them on the question of who should be appointed as a referee and what instructions should be given to the person so appointed. I will also entertain submissions with regard to the question of costs. The reference which I intend to make will be pursuant to s. 16 of The Arbitration Act, R.S.B.C. 1960, c. 14, and to The Supreme Court Act, R.S.B.C. 1960, c. 374, s. 63 [am. 1966, c. 49, s. 6; 1974, c. 99, s. 6].

It would seem to me that a reference under the Arbitration Act would only result in extended delay and costs.

The English System vs. The CBCA

What are the distinguishing features of Appraisal Rights under the CBCA as opposed to the English law.

English

1. A shareholder who objects to a change in the articles or memorandum has no right to be bought out.

2. Where changes in the rights of shareholders are effected through arrangements, compromises, amalgamations, transfer of an undertaking, the resolution must be passed by a 3/4 majority.

3. Minority shareholders look to the courts to protect their rights through the statutory requirement that the Court must sanction arrangement, etc. as well as the Common Law against fraud and unfair dealing against a minority.

CBCA

1. It gives a shareholder a right to dissent if a corporation by special resolution passed by a 2/3 majority resolves to amend its articles.

184. (1) Right to dissent.—Subject to sections 185 and 234 a holder of shares of any class of a corporation may dissent if the corporation resolves to

(a) amend its articles under section 167 or 168 to add, change or remove any provisions restricting or constraining the issue or transfer of shares of that class;

(b) amend its articles under section 167 to add, change or remove any restriction upon the business or businesses that the corporation may carry on;

(c) amalgamate with another corporation, otherwise than under section 178;

(d) be continued under the laws of another jurisdiction under section 182; or

(e) sell, lease or exchange all or substantially all its property under subsection 183(2).

S.170 The holders of shares of a class or series are entitled to vote separately as a class or series upon a proposal to amend the articles which affect the rights of the holders of the shares.

2. No Court approval or sanction is required.

3. A dissenting shareholder may require the Corporation to buy him out at a fair value in accordance with the procedures in Section 184. Upon failure of the parties to agree the matter is resolved by the Court fixing a fair value with or without the assistance of appraisers.

4. The right to dissent applies to all corporations large and small or private.

5. A dissenting offeree to a take over bid for all the shares is entitled to have a court fix a fair value on his shares.

Advantages attributed to each system - English and the CBCA

English

1. The legal profession is familiar with the English concept and it would not be difficult to update the Alberta sections and perhaps adopt some of the Ghana innovations.

2. The Company law of England has served a great industrial and trading nation for many years. It is reviewed

by a Council headed by the Lord Chancellor every five years and should be acceptable in Canada.

3. We know what we have in the English system but we don't know what problems lurk behind the CBCA. The absence of an arrangement section illustrates a deficiency that surfaced very quickly.

4. The English law gives protection to creditors as well as minority shareholders.

5. Some parts of CBCA could not be adopted in Alberta as we don't have a Winding-up Act, take-over bids and insider reporting are regulated under Securities Acts.

CBCA

1. The arrangement of the Fundamental Change part XIV is appealing.

2. The modernization of the language and expressions is appealing.

3. By spelling out the rights of dissenting shareholders something worthwhile has been achieved.

4. The right of the shareholders to manage the structural affairs of the corporations have been reinforced. Changes can be effected by a special resolution and without the approval of the court. Corporations are thus able to make their own business decisions and determine what is good for the corporation. It is not the function of the court. This can now be accomplished with no detriment to a dissenting shareholder.

5. The oppression section is an added protection against fraud on the minority and unfair dealing by the majority.

6. If the s. 185.1 proposed as an amendment is included in the CBCA there can be little criticism of the "Fundamental Change" part of CBCA.

7. Perhaps the most compelling reason for adopting the CBCA format in this area, with some thought given to creditors, is uniformity. This is particularly needed in

Canada because as you will have observed, the law with respect to the subject matter of this paper has evolved in different jurisdictions in diverse ways. The result has been confusing and unsatisfactory. The CBCA with some amendment seems to give us a reasonable balance between the English and American concepts.

<u>SCHEDULE "A"</u>

Companies Act, 1948, England. Sections 206-209.

Arrangements and Reconstructions

206. Power to compromise with creditors and members

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under subsection (2) of this section shall have no effect until an office copy of the order has been delivered to the registrar of companies for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3) of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one pound for each copy in respect of which default is made.

(5) (*Applies to Scotland.*)

(6) In this and the next following section the expression "company" means any company liable to be wound up under this Act, and the expression "arrangement" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

207. Information as to compromises with creditors and members

(1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under the last foregoing section there shall—

- (*a*) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons; and
- (*b*) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

(2) Where the compromise or arrangement affects the rights of debenture holders of the company, the said statement shall give the like explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement explaining the effect of the compromise or arrangement proposed can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the statement.

(4) Where a company makes default in complying with any requirement of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding five hundred pounds, and for the purpose of this subsection any liquidator of the company and any trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company:

Provided that a person shall not be liable under this subsection if that person shows that the default was due to the refusal of any other person, being a director or trustee for debenture holders, to supply the necessary particulars as to his interests.

(5) It shall be the duty of any director of the company and of any trustee for debenture holders of the company to give notice to the company of such matters relating to himself as may be necessary for the purposes of this section, and any person who makes default in complying with this subsection shall be liable to a fine not exceeding fifty pounds.

208. Provisions for facilitating reconstruction and amalgamation of companies

(1) Where an application is made to the court under section two hundred and six of this Act for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company") is to be transferred to another company (in this section referred to as "the transferee company"), the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:—

(*a*) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(*b*) the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(*c*) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(*d*) the dissolution, without winding up, of any transferor company;

(*e*) the provision to be made for any persons, who within such time and in such manner as the court directs, dissent from the compromise or arrangement;

(*f*) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause an office copy thereof to be delivered to the registrar of companies for registration within seven days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(4) In this section the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

(5) Notwithstanding the provisions of subsection (6) of section two hundred and six of this Act, the expression "company" in this section does not include any company other than a company within the meaning of this Act.

209. Power to acquire shares of shareholders dissenting from scheme or contract approved by majority

(1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to another company, whether a company within the meaning of this Act or not (in this section referred to as "the transferee company"), has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company:

Provided that where shares in the transferor company of the same class or classes as the shares whose transfer is involved are already held as aforesaid to a value greater than one tenth of the aggregate of their value and that of the shares (other than those already held as aforesaid) whose transfer is involved, the foregoing provisions of this subsection shall not apply unless—

- (*a*) the transferee company offers the same terms to all holders of the shares (other than those already held as aforesaid) whose transfer is involved, or, where those shares include shares of different classes, of each class of them; and
- (*b*) the holders who approve the scheme or contract, besides holding not less than nine tenths in value of the shares (other than those already held as aforesaid) whose transfer is involved, are not less than three fourths in number of the holders of those shares.

(2) Where, in pursuance of any such scheme or contract as aforesaid, shares in a company are transferred to another company or its nominee, and those shares together with any other shares in the first-mentioned company held by, or by a nominee for, the transferee company or its subsidiary at the date of the transfer comprise or include nine tenths in value of the shares in the first-mentioned company or of any class of those shares, then—

(*a*) the transferee company shall within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement) give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class, as the case may be, who have not assented to the scheme or contract; and

(*b*) any such holder may within three months from the giving of the notice to him require the transferee company to acquire the shares in question;

and where a shareholder gives notice under paragraph (*b*) of this subsection with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as may be agreed or as the court on the application of either the transferee company or the shareholder thinks fit to order.

(3) Where a notice has been given by the transferee company under subsection (1) of this section and the court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferee company, and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares:

Provided that an instrument of transfer shall not be required for any share for which a share warrant is for the time being outstanding.

(4) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(5) In this section the expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

(6) In relation to an offer made by the transferee company to shareholders of the transferor company before the commencement of this Act, this section shall have effect—

(*a*) with the substitution, in subsection (1), for the words "the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary)", of the words "the shares affected" and with the omission of the proviso to that subsection;

(*b*) with the omission of subsection (2); and

(*c*) with the omission, in subsection (3), of the words "together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferee company" and of the proviso to that subsection.

SCHEDULE "B"

Alberta Companies Act. Sections 153-156.

153. Financial year of holding company and subsidiary

(1) A holding company's directors shall secure that except where **in their** opinion there are good reasons against it, the financial year of each of its subsidiaries shall coincide with the company's own financial year.

(2) Where it appears to the Board of Trade desirable for a holding company or a holding company's subsidiary to extend its financial year so that the subsidiary's financial year may end with that of the holding company, and for that purpose to postpone the submission of the relevant accounts to a general meeting from one calendar year to the next, the Board may on the application or with the consent of the directors of the company whose financial year is to be extended direct that, in the case of that company, the submission of accounts to a general meeting, the holding of an annual general meeting or the making of an annual return shall not be required in the earlier of the said calendar years.

154. Meaning of "holding company" and "subsidiary"

(1) For the purposes of this Act, a company shall, subject to the provisions of subsection (3) of this section, be deemed to be a subsidiary of another if, but only if,—

(*a*) that other either—

(i) is a member of it and controls the composition of its board of directors; or

(ii) holds more than half in nominal value of its equity share capital; or

(*b*) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

(2) For the purposes of the foregoing subsection, the composition of a company's board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove the holders of all or a majority of the directorships; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say—

(*a*) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as aforesaid; or

(*b*) that a person's appointment thereto follows necessarily from his appointment as director of that other company; or

(*c*) that the directorship is held by that other company itself or by a subsidiary of it.

(3) In determining whether one company is a subsidiary of another—

(*a*) any shares held or power exercisable by that other in a fiduciary capacity shall be treated as not held or exercisable by it;

(*b*) subject to the two following paragraphs, any shares held or power exercisable—

(i) by any person as a nominee for that other (except where that other is concerned only in a fiduciary capacity); or

(ii) by, or by a nominee for, a subsidiary of that other, not being a subsidiary which is concerned only in a fiduciary capacity;

shall be treated as held or exercisable by that other;

(*c*) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded;

(*d*) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary (not being held or exercisable as mentioned in the last foregoing paragraph) shall be treated as not held or exercisable by that other if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Act, a company shall be deemed to be another's holding company if, but only if, that other is its subsidiary.

(5) In this section the expression "company" includes any body corporate, and the expression "equity share capital" means, in relation to a company, its issued share capital excluding any part thereof which, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution.

155. Signing of balance sheet

(1) Every balance sheet of a company shall be signed on behalf of the board by two of the directors of the company, or, if there is only one director, by that director.

(2) In the case of a banking company registered after the fifteenth day of August, eighteen hundred and seventy-nine, the balance sheet must be signed by the secretary or manager, if any, and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors by all the directors.

(3) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated or published, the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty pounds.

156. Accounts and auditors' report to be annexed to balance sheet

(1) The profit and loss account and, so far as not incorporated in the balance sheet or profit and loss account, any group accounts laid before the company in general meeting, shall be annexed to the balance sheet, and the auditors' report shall be attached thereto.

(2) Any accounts so annexed shall be approved by the board of directors before the balance sheet is signed on their behalf.

(3) If any copy of a balance sheet is issued, circulated or published without having annexed thereto a copy of the profit and loss account or any group accounts required by this section to be so annexed, or without having attached thereto a copy of the auditors' report, the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty pounds.

SCHEDULE "C"

The Ghana Code. Sections 224-235.

Part S: Arrangements and Amalgamations

229. In this Code—

Meaning of Arrangement and Amalgation.

(a) the expression " arrangement " means any change in the rights or liabilities of members, debentureholders or creditors of a company or any class thereof or in the Regulations of a company, other than a change effected under any of the foregoing sections of this Code or by the unanimous agreement of all the parties affected thereby;

(b) the expression " amalgamation " means any merger of the undertakings or any part of the undertakings of two or more companies or of the undertakings or part of the undertakings of one or more companies and one or more bodies corporate.

COMMENT

1. It has often been said that one of the defects of the present Ordinance is that it provides little or no machinery for reorganisations and amalgamations. The following sections are designed to repair this omission.

2. It seems desirable to begin by defining our terms. Neither of the above definitions is particularly precise but both are believed to be sufficient for the present purpose.

3. The definition of arrangement emphasises that something needs to be done which cannot be or is not effected under the previous sections (such as a variation of shareholders' rights in accordance with section 47) or by obtaining the unanimous agreement of those affected thereby. In particular it will include a compromise with creditors or members which is to bind all concerned even though all may not have agreed. It will also include alterations of the Regulations beyond the power of the company under section 22.

4. The definition of amalgamation indicates that it involves the merger of undertakings—though some of the bodies involved need not be companies within the meaning of this Code. A " merger " by acquisition of shares—which does not directly affect the company itself—is excluded except for the purposes of sections 234 and 235.

5. By Part II of the Eighth Schedule I have sought to facilitate arrangements and amalgamations (including mergers by acquisition of shares) by exemptions from fees on increased stated capital on the lines of the U.K. Finance Act, 1927, section 55 (as amended by the Finance Act, 1928, section 31 and the Finance Act, 1930, section 41). I recommend that the Stamp Ordinance should also be amended so as to confer exemptions similar to those in section 55 on transfers of property and shares in connection with such schemes. I also recommend that consideration should be given to granting the wider concession conferred on inter-group transfers of property by the U.K. Finance Act, 1930, section 42 (as amended by the Finance Act, 1938, section 50).

Arrangement or Amalgamation by Sale of Undertaking for Securities to be Distributed.

230. (1) With a view to effecting any arrangement or amalgamation, a company may by special resolution resolve that the company be put into members' voluntary liquidation and that the liquidator be authorised to sell the whole or part of its undertaking or assets to another body corporate, whether a company within the meaning of this Code or not (in this section called " the transferee company ") in consideration or part consideration of fully paid shares, debentures or other like interests in the transferee company and to distribute the same in specie among the shareholders of the company in accordance with their rights in the liquidation.

(2) Any sale and distribution in pursuance of a special resolution under this section shall be binding on the company and all members thereof and each member shall be deemed to have agreed with the transferee company to accept the fully paid shares, debentures or other like interests to which he is entitled under such distribution:

Provided that—

(a) if within one year from the date of the passing of any such special resolution as is referred to in subsection (1) of this section an order is made under section 218 of this Code or for the winding up of the company under the Debtors and Creditors Protection Act, 196 the arrangement or amalgamation and the sale and distribution shall not be valid unless sanctioned by the Court;

(b) if any member of the company, by writing addressed to the liquidator and left at the registered office of the company within 28 days after the passing of the resolution, dissents therefrom in respect of any of the shares held by him, the liquidator shall either abstain from carrying the resolution into effect or shall purchase such shares at a price to be determined in manner provided by subsection (3) of this section.

(3) If the liquidator elects to purchase the shares of any member who has expressed his dissent in accordance with subsection (2) of this section the price payable therefor shall be determined by agreement or, in default of agreement, by a single arbitrator appointed by the President for the time being of the Association of Accountants in Ghana in accordance with the law relating to arbitration for the time being in force in Ghana. Such price shall be determined by estimating what the member concerned would have received had the whole of the undertaking of the company been sold as a going concern for cash to a willing buyer and the proceeds, less the costs of liquidation, been divided amongst the members in accordance with their rights. The purchase money shall be paid before the company is dissolved and raised by the liquidator in such manner as may be determined by the special resolution or, in default of any direction in the special resolution, in such manner as he may think fit as part of the expenses of the winding-up.

(4) Nothing in this section contained shall authorise any variation or abrogation of the rights of any creditors of the company.

(5) If any company otherwise than under the foregoing subsections of this section sells or resolves to sell the whole or any part of its undertaking or assets to another body corporate in consideration or part consideration of any shares, debentures or other like interest in that body corporate and resolves to distribute the same in specie among the members of the company (whether in a liquidation or by way of dividend), any member of the company may, by notice in writing addressed to the company and left at the registered office of the company within 28 days after the passing of the resolution authorising such distribution, require the company either to abstain from carrying the resolution into effect or to purchase any of his shares at a price to be determined in manner provided by subsection (3) of this section:

Provided that nothing herein contained shall authorise any company:—

(a) to purchase its shares except in accordance with sections 59 to 64 of this Code;

(b) to make any distribution to its shareholders except in accordance with sections 71 to 79 of this Code or in a liquidation.

COMMENT

1. This section is based on section 287 of the English Act (an amplified version of sections 151 and 152 of the present Ordinance) but redrafted in an attempt to make it clearer and in order to introduce a few amendments which seem to me to be desirable. It affords a means of bringing about an arrangement or amalgamation without resort to the Courts. The protection afforded members who dissent is that they are granted " appraisal rights " (to use American terminology)—that is to say, rights to be bought out at a valuation.

2. When used to effect an arrangement the *modus operandi* under this section is to form a new company (the transferee company), to put the old company into liquidation, and to authorise the liquidator to sell to the transferee company for securities in the transferee company which he then distributes among the members of the old company. The result is that the members end up with securities with rights different from those which they formerly had.

When used for the purposes of an amalgamation one or more companies may similarly sell their undertakings either to a new transferee company or to another existing one.

3. There are, however, certain limits on the extent to which this procedure can be resorted to:

(*a*) it cannot be used to vary the rights of creditors (*see* subsection (4)), who will have to be paid off or their individual agreement obtained to a novation;

(*b*) the distribution of the securities in the transferee company must be in strict accordance with the members' class rights on a winding up; if there is to be any variation of class rights this must first be effected under section 47;

(*c*) the shares in the transferee company must be fully paid. This is not so under section 287 of the English Act but it seems to me that it is obviously objectionable that unpaid shares should be forced on the members. The objection is not adequately answered by pointing out that they can exercise their appraisal rights, for in a public company there will always be some ignorant, apathetic, or untraceable shareholders who will not exercise their rights.

If an arrangement or amalgamation is to exceed these limits, resort must be had to the next section.

4. Subsection (2) provides first that the sale and distribution shall be binding on members who "shall be deemed to have agreed to accept" the shares (etc.). These last words are not in section 287 of the English Act with the result that members, even if they have not dissented, cannot be forced to take the shares. This has meant that members who take no action at all may be even more troublesome than those who dissent for they may deprive the company of the exemptions referred to in Comment 5 to section 229. Since, under this section, the shares must be fully paid (*see* above) it is possible to provide that those who have not dissented shall be deemed to have agreed to take the shares and accordingly the transferee company can enter them on the register. This will be a considerable advantage.

5. Proviso (*a*) to subsection (2) is designed to afford protection against unfair schemes. If, within a year, the Court orders the company to be wound up or makes an order under section 218 the scheme is ineffective unless the Court approves it. This follows section 287 (5) of the English Act except that that refers only to an order for compulsory liquidation and not to an order under the equivalent of section 218.

6. Proviso (*b*) provides for appraisal rights and is to the same effect as section 287 (3) of the English Act except that I have allowed 28 days instead of a mere 7 which seems quite inadequate. I have also altered the wording so as to enable a nominee to dissent in respect of some of the shares registered in his name and not in respect of others. The English Act has caused hardship in this respect.

7. Subsection (3) deals with the determination of price when a member exercises his appraisal rights. I have followed the English Act in providing for arbitration in default of agreement but have suggested that the arbitrator should be appointed by the President of the Accountants' Association. The formula adopted in most Commonwealth Acts is merely "by arbitration in accordance with the law relating to arbitration for the time being in force in [the Dominion.]" This was the formula suggested by the Working Party but it occurred to me that my suggested wording might make for greater certainty and simplicity. Another alternative would be to provide that the determination should be by the Court—as in section 152 of the present Ordinance. However, it seems to me that this is essentially a technical problem far more suitable for an accountant than a lawyer.

8. The English Act, and the enactments which follow it, give no guidance on the basis of valuation. This is one reason why the section has worked unsatisfactorily from the viewpoint of the dissenting shareholder. There seems to have been a tendency to give weight to the market value of the shares in the old company and to the value of the corresponding shares in the new company. Neither is really appropriate, and the latter clearly incorrect since, *ex hypothesi*, the dissenting shareholder has refused to accept the shares, as he is allowed to do. Specific guidance on the basis of valuation seems to be desirable and the formula suggested appears to be appropriate. But the valuation cannot be an easy one to make since it is necessarily based on hypothetical assumptions.

9. Subsection (5) is designed to codify the effect of the decision in *Bisgood v. Henderson's Transvaal Estates* [1908] 1 Ch.743, C.A. which prevents evasion of the members' appraisal rights by resort to a sale under a power in the company's constitution followed by a distribution in specie. Under the subsection such a sale of the undertaking is not forbidden, although under section 202 it may be beyond the powers of the directors unless members' approval is obtained. But if a sale is followed by a distribution in specie a member is given rights of dissent and appraisal similar to those which he would have had if the scheme had been carried out under this section.

Subsection (5) applies whether the distribution is to be in liquidation or by way of dividend as a going concern. But in the latter event the purchase must comply with the rules laid down in sections 59 to 64 regarding the purchase by a company of its own shares and the dividend rules must be obeyed.

It does not seem to be desirable to ban completely a sale and distribution except under subsections (1) to (4) of this section; a sale of part of the undertaking for shares followed by a distribution in specie may be an advantageous transaction.

Arrangeme[nt] Amalgama[tion] with Court Approval.

231. (1) Where any arrangement or amalgamation is proposed, whether or not involving a compromise between a company and its creditors or members or any class or classes of them, the Court, on the summary application of the company or any member or creditor of the company or, in the case of a company being wound up, of the liquidator, may either order that meetings of the various classes of members and creditors concerned be summoned in such manner as the Court directs or that a postal ballot be taken of the various classes in manner provided by subsection (b) of section 170 of this Code.

(2) If a three-fourths majority of each class of members concerned and a majority in number representing three-fourths in value of each class of creditors concerned shall approve the said arrangement or amalgamation the same shall be referred to the Registrar who shall appoint one or more competent reporters to investigate the fairness of the said arrangement or amalgamation and to report thereon to the Court. The remuneration of the reporters shall be fixed by the Registrar and it and the proper expenses of the investigation shall be borne by the company or such other party to the application as the Court shall order.

(3) If the Court, after considering the said report, shall make an order confirming the arrangement or amalgamation (with or without modifications) the same as confirmed shall be binding on the company and on all members and creditors thereof and its validity shall not subsequently be impeachable in any proceedings.

(4) Upon the hearing by the Court of the application to confirm the arrangement or amalgamation any member or creditor of the company claiming to be affected thereby shall be entitled to be represented and to object.

(5) The Court may prescribe such terms as it shall think fit as a condition of its confirmation including a condition that any members shall be given rights to require the company to purchase their shares at a price fixed by the Court or to be determined in manner provided in the order.

(6) An arrangement or amalgamation may be carried out in accordance with the provisions of this section notwithstanding that it could have been accomplished under the previous section or any other provisions of this Code but the provisions of section 75 to 79 of this Code shall also be complied with if the arrangement or amalgamation is one which, by virtue of section 75 requires the confirmation of the Court in accordance with such sections.

(7) An order made under subsection (3) of this section shall have no effect until an office copy of the order has been delivered to the Registrar. The Registrar shall register the order and cause the same to be published in the *Gazette*. A copy of the order shall be annexed to every copy of the company's Regulations issued by the company after the order has been made and if a company makes default the company and every officer of the company who is in default shall be liable to a fine not exceeding £G5 in respect of every copy in respect of which default is made.

COMMENT

1. This section provides an alternative and more far-reaching method of effecting an arrangement or amalgamation. It is based on section 206 of the English Act, but again with substantial amendments. In contrast with the previous section the rights of creditors or the class rights of members may be affected but they have the protection that the scheme is not effective unless confirmed by the Court.

2. The wording of subsection (1) makes it clear (and this is confirmed by subsection (6)) that a company may proceed under this section notwithstanding that the arrangement might have been carried out under section 230. This is to avoid doubts that have arisen under section 206 of the English Act: *see Re Anglo-Continental Supply Co.* [1922] 2 Ch. 723.

3. Under subsection (1), the first step is to apply to the Court to order meetings of the various classes or to direct a postal ballot. The latter possibility is novel and links up with the suggestions made in section 170 (6): *see* comments to that section. Employment of a postal ballot seems singularly appropriate in these circumstances—it is the method widely employed in the U.S.A. Care must, however, be taken that the order prescribes that membership of the class shall be determined as at a fixed day, otherwise fluctuations of membership may cause grave difficulty: *cf.* Masson: *A Case Study of Balloting Regulation* (Harvard, 1956). If section 170 (6) is followed this should be provided for.

The Court will have to decide what the appropriate classes are for this purpose. It will be observed that it is only those who are " concerned " that constitute classes whose approval is needed. Hence if, for example, ordinary trade creditors are not to be affected, they will not need to be considered. But if the scheme involves a reduction they may have to be brought in under section 76: *see* subsection (6).

4. The scheme must then be approved by a three-fourths majority of members of each class and a majority in number representing three-fourths in value of each class of creditors. This follows section 206 of the English Act except for the different formulation as between members and creditors which is a consequence of the abolition of par values. If it is so approved, the Registrar appoints one or more reporters to investigate the fairness and to report to the Court. This is a novel provision, but follows the practice normally adopted in Scotland. It will be remembered that a similar proposal has been made in connection with reductions: *see* section 76 (3).

I regard this safeguard as a valuable one. There is no doubt that both under reductions and schemes of arrangement grave injustice has, under the English procedure, been done to certain classes—especially perhaps, preference shareholders. The need for the Court's sanction is intended to ensure that no unfair schemes are passed, but it has certainly not proved effective. This is largely because Courts who operate under an " adversary " system are necessarily ill-equipped to carry out the economic and accounting inquisition needed in order to assess fairness. In the U.S.A., under Federal Legislation, the Securities and Exchange Commission act as advisers to the Courts in matters of this sort. I do not suggest that anything as elaborate as an S.E.C. is needed in Ghana but I do think it would be useful if the Court could have the advantage of an expert and impartial report before deciding whether to confirm.

My suggestion is that this should be accomplished by requiring the Registrar to appoint a reporter—normally an accountant—or occasionally perhaps more than one, on the lines of the Scottish procedure.

5. Application is then made to the Court for its approval. Not only must the Court consider the report (subsection (3)) but any persons claiming to be affected may be heard (subsection (4))—this is in accordance with existing English practice though the Act is silent on the point.

6. Subsections (3) and (5) make it clear that the Court may insist on modifications and prescribe terms. It is expressly mentioned in subsection (5) that it may order that members be given appraisal rights: this is in accordance with English practice under its section 206 and may be appropriate when this section is being resorted to in an attempt to evade appraisal rights under section 230: *see Re Anglo-Continental Supply Co., supra*, and *Re Sandwell Park Colliery Co.* [1914] 1 Ch. 589. Under section 232 (1) (*e*) special provision may also be made for dissenting creditors.

7. If the Court confirms, the scheme is binding on all concerned (subsection (3)) once a copy has been delivered to the Registrar: subsection (7).

Powers of the Court for Facilitating Arrangements or Amalgamations.

232. (1) Where an application is made to the Court under the last foregoing section and it is shown to the Court that under the arrangement or amalgamation the whole or any part of the undertaking or assets of any company (in this section referred to as a " transferor company ") is to be transferred to another company (in this section referred to as " the transferee company ") the Court may, either by the order sanctioning the arrangement or amalgamation or by any subsequent order, make provision for all or any or the following matters:—

(a) the transfer to the transferee company of the whole or any part of the undertaking assets and liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares debentures or other like interests in that company which, under the arrangement or amalgamation, are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the arrangement or amalgamation;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the arrangement or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the arrangement or amalgamation, to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause an office copy thereof to be delivered to the Registrar for registration within 28 days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a fine not exceeding £G5 for each day during which the default continues.

(4) In this section the expression " property " includes property rights and powers of every description and the expression " liabilities " includes duties of every description notwithstanding that such rights powers and duties are of a personal character which could not under the general law be assigned or performed vicariously.

COMMENT

This is virtually identical with section 208 of the English Act which provides most useful powers to implement a scheme without excessive legal formalities or expense.

The only substantial alteration of the wording of the English section 208 is the additional words at the end of subsection (4). These words are designed to over-rule the decision in *Nokes v. Doncaster Amalgamated Collieries* [1940] A.C. 1014, H.L., which decided, rather unexpectedly, that the section did not authorise the Court to transfer the benefit or burden of contracts of a personal character, such as service agreements. This inconvenient restriction on the ambit of the Courts' powers is removed by subsection (4).

Informat[ion] to Arrang[e]ments an[d] Amalgam[a]tion.

233. (1) Where any notice of any resolution to approve an arrangement or amalgamation under section 230 or 231 of this Code is sent to members or creditors of any company there shall be sent also a statement explaining the effect of the arrangement or amalgamation and in particular stating any material interests of the directors of the company, whether as directors or members or creditors of the company or otherwise, and the effect thereon of the arrangement or amalgamation in so far as it is different from the effect on the like interests of other persons.

(2) In any notice of any such resolution which is given by advertisement there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which members or creditors to whom the notice is addressed may obtain copies of such a statement, and every such member or creditor shall, on making application in the manner indicated in the notice, be furnished by the company, free of charge, with a copy of the statement.

(3) Where the arrangement or amalgamation affects the rights of debentureholders of the company, the said statement shall give the like explanation as respects the trustees of any deed for securing the debentures as it is required to give as respects the company's directors.

(4) Where a company makes default in complying with any requirements of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding £G500 and for the purpose of this subsection any liquidator of the company and any trustee of a deed securing debentures of the company shall be deemed to be an officer of the company:

Provided that:

(a) a person shall not be liable under this subsection if he shows that the default was due to the refusal of any other person to supply the necessary particulars as to his interests;

(b) nothing herein contained shall derogate from the power of the Court under section 217 or 218 of this Code to declare ineffective any special resolution passed pursuant to section 230 of this Code.

(5) It shall be the duty of any director of the company and of any trustee for debenture-holders of the company to give notice to the company of such matters relating to himself as may be necessary for the purposes of this section, and any such person who makes default in complying with this subsection shall be liable to a fine not exceeding £G50.

COMMENT

1. This section is based on section 207 of the English Act. The major changes are referred to in the following paragraphs.

2. The English section applies only to schemes under the equivalent of section 231. It seems to me that it should be equally applicable to a scheme under section 230; subsection (1) so provides.

3. Proviso (*b*) of subsection (4) has been inserted to make it clear that a failure to make proper disclosure is a ground for setting aside the resulting resolutions. If the scheme is accomplished under section 231 the Court's confirmation is needed and if this is given the validity of the arrangement cannot be subsequently impeached: *see* section 231 (3). But the Court should satisfy itself that there has been proper disclosure under this section and not confirm unless it is satisfied: *Rankin v. Blackmore Ltd.* 1950 S.C. 218; *Peter Scott & Co., Ltd., ibid*, 507; *Coltness Iron Co. Ltd.*, 1951 S.L.T. 344; *City Property Investment Trust* 1951 S.L.T. 371. If, however, the scheme is affected under section 230 its validity can be subsequently attacked on the ground of failure to comply with the present section : *cf. Kaye v. Croydon Tramways Co.* [1898] 1 Ch. 358, C.A.; *Tiessen v. Henderson* [1899] 1 Ch. 861; *Baillie v. Oriental Telephone Co.* [1915] 1 Ch. 503, C.A.

Power to Acquire Shares of Minority on Acquisition of Subsidiary Company.

234. (1) Where a body corporate, whether a company within the meaning of this Code or not (in this section referred to as " the transferee company "), has made an offer to the holders of shares in a company (in this section referred to as " the transferor company ") then, provided that the conditions specified in subsection (2) of this section are duly fulfilled, the transferee company may compulsorily acquire the shares in the transferor company in the manner specified in this section.

(2) This section shall apply if:—

(a) the offer by the transferee company is made to the holders of the whole of the shares in the transferor company, other than those already held by the transferee company or any of its associated companies or by nominees for the transferee company or any of its associated companies;

(b) the consideration for the acquisition is either

(i) the allotment of shares in the transferee company, or

(ii) the allotment of shares in the transferee company or, at the option of the holders, a payment of cash;

(c) the same terms are offered to all the holders of the shares to whom the offer is made or, where there are different classes of shares, to all the holders of shares of the same class;

(d) within 4 months after the making of the offer it has been accepted in respect of not less than nine-tenths of the whole of the shares and of not less than nine-tenths of the shares of each class (other than shares already held as aforesaid) and the holders of such shares are not less than three-fourths in number of the holders of those shares and of each class thereof.

(3) Where the conditions specified in subsection (2) of tbis section are fulfilled, the transferee company may, within 2 months thereafter, give notice in the prescribed form to any shareholder who has not accepted the offer in respect of all his shares that it desires to acquire his shares and when such notice is given the transferee company shall, unless on an application made by the shareholder in accordance with subsection (4) of this section the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms of the offer.

(4) At any time within the period of two months referred to in subsection (3) of this section, any shareholder to whom notice has been given in accordance with such subsection may apply to the Court, and the Court may order that the transferee company shall not be entitled to acquire the share of such holder or that the transferee company shall be bound to acquire those shares upon such other terms as the Court may order.

(5) On any application to the Court under subsection (4) of this section the Court, before making any order may, if it thinks fit, refer the matter to the Registrar who shall appoint one or more competent reporters to investigate the fairness of the offer and to report thereon to the Court. The remuneration of the reporters shall be fixed by the Registrar and it and the proper expenses of the investigation shall be borne by the transferee company or by the applicant or both as the Court shall order.

(6) Where the Court makes an order under subsection (4) of this section that the transferee company shall be bound to acquire the shares concerned upon terms different from those of the original offer then, unless the Court shall otherwise order, the transferee company shall give notice in the prescribed form, of such amended terms, to all other holders of shares of the same class and to all former holders of shares of the same class who accepted the original offer, and at any time within 2 months of the giving of such notice any shareholder shall be entitled to require the transferee company to acquire his shares upon the same terms as those ordered by the Court and any such former holder shall be entitled to require the transferee company to pay or transfer to him any additional consideration to which he would have been entitled had his shares been acquired on the terms ordered by the Court.

(7) Where a notice has been given by the transferee company under subsection (3) of this section and the Court has not, on an application by the shareholder under subsection (4) of this section, ordered to the contrary, the transferee company shall, on the expiration of 2 months from the date on which notice has been given, or, if an application by the shareholder under subsection (4) of this section is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferee company, and transfer to the transferor company the shares (or if the shareholder has exercised the cash option, if any, pay to the transferor company the cash) representing the consideration payable by the transferee company for the shares which by virtue of this section the transferee company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(8) Any sums received by the transferor company under subsection (7) of this section shall be paid into a separate bank account and any such sums and all shares so received shall be held by the transferor company on trust for the several persons entitled to the shares in respect of which the said sums and shares were received.

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235. (1) Where, as a result of an offer to the shareholders of a company or any of them, shares in that company are transferred to another body corporate, whether a company within the meaning of this Code or not (in this section called " the transferee company ") or its nominee and those shares, together with any other shares in the first mentioned company held by, or by a nominee for, the transferee company, or by, or by a nominee for, any of its associated companies at the date of the transfer, comprise or include three-fourths of the shares in the first named company or any class of those shares, then—

(a) the transferee company shall within one month from the date of the transfer (unless on a previous transfer it has already complied with this requirement) give notice of that fact in the prescribed form to the holders of the remaining shares or of the remaining shares of that class, as the case may be; and

(b) any such holder may within 3 months from the giving of the notice to him require the transferee company to acquire all or any of his shares.

(2) Where a shareholder under subsection (1) of this section requires the transferee company to acquire any shares, the transferee company shall be entitled and bound to acquire those shares on the terms of the offer or on such other terms as may be agreed or as the Court, on the application of either the transferee company or the shareholder, thinks fit to order.

(3) On any application to the Court under subsection (2) of this section the Court may, if it thinks fit, refer the matter to the Registrar who shall appoint one or more competent reporters to investigate the fairness of the offer and in that event subsection (5) of section 234 of this Code shall apply.

COMMENT

1. These two sections unlike the previous ones deal with amalgamations by acquisition of shares instead of the undertaking. They are based on section 209 of the English Act.

2. The English section accomplishes two purposes:

(*a*) By subsection (1) it gives a company which has made a take-over bid that has been accepted by at least 9/10ths of the shareholders a right compulsorily to acquire the shares of the dissenting minority; and

(*b*) By subsection (2) it gives any of that dissenting minority a right to insist on being bought out after all.

In both cases there is a right to resort to the Courts.

3. The Working Committee thought that both parts of the English section should be adopted in Ghana, pointing out that it is convenient to be able to coerce a minority of shareholders who refuse to sell. No doubt it is convenient; but, on the face of it, powers of expropriation of this sort are difficult to justify. The justification put forward by the Greene Committee, on whose recommendation subsection (1) was originally enacted, was that the absence of such a power enabled a small minority to hold the majority up to ransom by refusing to accept a conditional offer thus causing the whole scheme of amalgamation to fall through: Cmd. 2657, para. 84. By virtue of this power the transferee company knows that if it makes a successful offer conditional on 90 per cent acceptance it can then acquire the remaining 10 per cent and thus cause the other company to become its wholly owned subsidiary. Furthermore, the existence of the power has the result of encouraging the take-over to be by way of general offer (under which all the shareholders receive the same terms), rather than by way of stock-exchange purchases and private deals with individual blocks which may result in some doing better than others.

4. These are powerful arguments. But there are powerful arguments to the contrary. When one looks at some of the cases in which minorities have been compulsorily acquired under the English section one is forced to the conclusion that they have had a rather raw deal and have had little help from the Courts, which have tended to take refuge in the rather facile argument that since the terms have been accepted by more than 9/10ths they must be fair: *see*, for example, *Re Hoare & Co.* (1933) 150 L.T. 374; *Re Evertite Locknuts Ltd.* [1945] Ch. 220; *Re Press Caps* [1949] Ch. 434; *Re Sussex Brick Co.* [1960] 2 W.L.R. 665n (but *cf Re Bugle Press* [1960] 3 W.L.R. 956, C.A. Furthermore, it is clear that this power is unpopular with investors—especially American ones—and, since I have been asked to make recommendations for a law which would encourage foreign investment, their objections are weighty.

5. My original idea was not to incorporate anything on the lines of section 209 (1), but merely to adopt provisions comparable to section 209 (2)—i.e., section 235. On further reflection, however, in the light of representations made to me I have decided not to delete section 209 (1) completely but instead to adopt the much more limited and restricted version of it, represented by section 234. It seems to me to be better to deal with the two facets of the problem in separate sections rather than to keep then together as the English section 209 does.

6. The main difference between section 234 and the English section 209 (1) is that the latter applies to offers to acquire shares for cash as well as to offers of shares for shares. Where the transferee company offers shares for shares there seems to me to be a strong case for enabling it to take over a dissenting minority. The arrangement is a genuine merger in which the former shareholders are given an opportunity of retaining an interest in the merged concern. Where, however, the offer is simply to purchase for cash the case for rights of compulsory acquisition is very much weaker. It amounts to straightforward expropriation for which I can see little justification. It is this power to buy shareholders out which makes American investors so critical of the English section; it is clear that they would not object to it if it were limited to genuine mergers through the offer of shares for shares.

With this, and the other safeguards referred to below, I think that the various objections are met and that powers of compulsory acquisition can and should be inserted.

7. Both sections 234 and 235 apply only when the offer for shares is made by another body corporate but that body need not be a Ghanaian company: sections 234 (1) and 235 (1). On the other hand they apply only when the company whose shares are being acquired is a Ghanaian company.

8. Section 234, conferring powers of compulsory acquisition on the transferee company applies only when the conditions of subsection (2) are fulfilled. First, the offer must be made for *all* the outstanding shares, i.e., for all except those already held by the transferee company and its associated companies. This is not so under the English Act; there the offer may be limited to a particular class or classes. Since the basic object is to enable the transferee company to make the transferor company its wholly owned subsidiary—thus avoiding possible conflicts of interest and duty—I can see no justification for applying the section unless a bid is made for the whole of the shares.

Secondly, the consideration for the acquisition must be shares in the transferee company; the shareholder may be given a cash option but must also be given the option to take shares. As pointed out above, this too differs from the English position.

Thirdly, the same terms must be offered to all or, where there are different classes of shares, to all holders of shares of the same class. Under the English Act this is only so if the transferee company already holds some of the shares.

Finally, the offer must have been accepted within four months by the holders of nine-tenths of the shares for which offer was made *and* by the holders of nine-tenths of each class. And, furthermore, the accepting shareholders must be 3/4ths in number of such holders. Here again the conditions are stricter than in the English Act.

It should perhaps be pointed out that it is not necessary for the offer to have been open for acceptance for four months: *Re Western Manufacturing Ltd.* [1956] Ch. 436. Subsection (2) merely states that the section does not operate unless the requisite acceptance are obtained within four months.

9. If these conditions are fulfilled the transferee company may then serve a notice of compulsory acquisition under subsection (3). It is not compelled to do so but if it does not section 235 will operate.

10. If the shareholder in question takes no action his shares will then be transferred to the transferee company in accordance with the procedure set out in subsections (7) and (8). But within two months he may apply to the Court under subsection (4). If the Court thinks that the circumstances do not justify compulsory acquisition of the applicants' shares it may so order. If it thinks that compulsory acquisition is justified but that the terms are unfair it may prescribe different terms. Before making a decision the Court may obtain a report on the offer from an impartial expert: subsection (5) which should be compared with section 231 (2).

11. If the Court alters the terms the other shareholders are given the right to adopt the amended terms: subsection (6). This too is a novel provision of which there is no counterpart in the English Act. It seems to me that shareholders of the same class should be offered the terms which the Court has decided to be fair.

12. Subsections (7) and (8), which are virtually identical with subsections (3) and (4) of section 209 of the English Act, provide a simple machinery for accomplishing the take-over.

13. So much for section 234. I turn now to section 235 which is equivalent to section 209 (2) of the English Act. This applies to a much wider range of cases than section 234 and comes into operation whenever as a result of an offer (whether for cash or shares) the transferee company has become entitled to 3/4ths of the shares of the transferor company or 3/4ths of the shares of any class. It enables the remaining shareholders, if they do not wish to be left as a small minority to insist on being bought out. The English section applies only when 9/10ths have been acquired, but this has been strongly criticised as unduly large.

14. The wording of the section is not identical with that in the English Act. The latter talks about transfers under " a scheme or contract "—a vague expression. My wording in subsection (1) may be somewhat wider in ambit, for the section applies where " as a result of an offer to the shareholders or any of them . . . " the transferee company and its associated companies end up with more than 3/4 of the shares or any class. Hence the section would apply where 5/8ths are already held by the transferee company which then makes an offer to a single shareholder holding sufficient to bring the total to more than 3/4ths. It should be pointed out that in such a case the offer made to that shareholder may be far from a fair basis on which the remainder should be valued.

15. Subsection (1) of section 235 has been worded in such a way as to stop a loophole in the English Act. Under that Act it is only shares owned by the transferee or its *subsidiary* that have to be taken into account. Hence if the bid is made *by* a subsidiary, shares already held by the holding company do not count. The use of the term " associated company " (as defined in the First Schedule) prevents this evasion.

16. Under subsection (2) the transferee company can be forced to acquire the remaining shares " on the terms of the offer or on such other terms as may be agreed or as the Court " orders. The Court should not necessarily assume that the terms of the offer are appropriate; one case when they might not be has been referred to in para. 14.

It is because of this that I have suggested (*see* subsection (3)) that the Court should be able to obtain expert advice from a reporter similar to that provided for in sections 231 and 234.

17. In the wording of both sections I have taken account of this fact that a nominee shareholder may accept in respect of some of his shares and not others; the English section ignores this possibility.

18. Both sections refer to " prescribed forms ". The forms prescribed for use under section 209 of the English Act can be adapted for use in Ghana, but a new form will be needed for section 234 (6).

SCHEDULE "D"

The Canada Business Corporations Act. Sections 167-185.

FUNDAMENTAL CHANGES

167. (1) Amendment of articles.—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) Termination.—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 approval of the shareholders.

168. (1) Constraints on shares transfers.—Subject to sections 170 and 171, a corporation any of the issued shares of which are or were part of a distribution to the public may by special resolution amend its articles to constrain the issue or transfer of its shares in accordance with the regulations for any purpose and, in particular, for the purpose of enabling the corporation or any of its affiliates to qualify under any law of Canada referred to in the regulations

(a) to obtain a licence to carry on any business;
(b) to become a publisher of a Canadian newspaper or periodical; or
(c) to acquire shares of a financial intermediary as defined in the regulations.

(2) **Five-year limit.**—Where a corporation has passed a resolution under subsection (1) amending its articles to constrain the issue or transfer of its shares for any purpose other than the purposes set out in paragraphs (1)(a) to (c), the amendment ceases to have effect five years after the date the resolution is passed unless the corporation before the termination of that five-year period

(a) decides by special resolution to extend the constraint provision for a further period not exceeding five years; and
(b) sends a copy of the resolution to the Director certified in accordance with subsection 250(1).

(3) **Removal of constraint.**—A corporation referred to in subsection (1) may by special resolution amend its articles to remove any constraint on the issue or transfer of its shares.

(4) **Termination.**—The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment under subsection (1), revoke the resolution before it is acted upon without further approval of the shareholders.

(5) **Regulations.**—Subject to subsections 254(2) and (3), the Governor in Council may make regulations with respect to a corporation that constrains the issue or transfer of its shares prescribing

(a) the disclosure required of the constraints in documents issued or published by the corporation;
(b) the duties and powers of the directors to refuse to issue or register transfers of shares in accordance with the articles of the corporation;
(c) the limitations on voting rights of any shares held contrary to the articles of the corporation;
(d) the powers of the directors to require disclosure of beneficial ownership of shares of the corporation and the right of the directors to rely on such disclosure; and
(e) the rights of any person owning shares of the corporation at the time of an amendment to its articles constraining share issues or transfers.

(6) **Validity of acts.**—An issue or a transfer of a share or an act of a corporation is valid notwithstanding any failure to comply with this section or the regulations.

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

(2) Notice of amendment.—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.

170. (1) Class vote.—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 equal or superior to the shares of such class;

(f) 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;

(g) 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

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

(2) Limitation.—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.

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

(4) Separate resolutions.—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.

171. (1) Delivery of articles.—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.

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

(3) **Deemed reduction of capital.**—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.

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

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

(2) **Rights preserved.**—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 or officers, or any civil, criminal or administrative action or proceeding to which a corporation or its directors or officers is a party.

174. (1) Restated articles.—The directors may at any time, and shall when reasonably so directed by the Director, restate the articles of incorporation as amended.

(2) **Delivery of articles.**—Restated articles of incorporation in prescribed form shall be sent to the Director.

(3) **Restated certificate.**—Upon receipt of restated articles of incorporation, the Director shall issue a restated certificate of incorporation in accordance with section 255.

(4) **Effect of certificate**—Restated articles of incorporation are effective on the date shown in the restated certificate of incorporation and supersede the original articles of incorporation and all amendments thereto.

175. Amalgamation.—Two or more corporations, including holding and subsidiary corporations, may amalgamate and continue as one corporation.

176. (1) Amalgamation agreement.—Each corporation proposing to amalgamate shall enter into an agreement setting out the terms and means of effecting the amalgamation and, in particular, setting out

(a) the provisions that are required to be included in articles of incorporation under section 6;

(b) the name and address of each proposed director of the amalgamated corporation;

(c) the manner in which the shares of each amalgamating corporation are to be converted into shares or other securities of the amalgamated corporation;

(d) if any shares of an amalgamating corporation are not to be converted into securities of the amalgamated corporation, the amount of money or securities of any body corporate that the holders of such shares are to receive in addition to or instead of securities of the amalgamated corporation;

(e) the manner of payment of money instead of the issue of fractional shares of the amalgamated corporation or of any other body corporate the securities of which are to be received in the amalgamation;

(f) whether the by-laws of the amalgamated corporation are to be those of one of the amalgamating corporations and, if not, a copy of the proposed by-laws; and

(g) details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated corporation.

(2) Cancellation.—If shares of one of the amalgamating corporations are held by or on behalf of another of the amalgamating corporations, the amalgamation agreement shall provide for the cancellation of such shares when the amalgamation becomes effective without any repayment of capital in respect thereof, and no provision shall be made in the agreement for the conversion of such shares into shares of the amalgamated corporation.

177. (1) Shareholder approval.—The directors of each amalgamating corporation shall submit the amalgamation agreement for approval to a meeting of the holders of shares of the amalgamating corporation of which they are directors and, subject to subsection (4), to the holders of each class or series of such shares.

(2) Notice of meeting.—A notice of a meeting of shareholders complying with section 129 shall be sent in accordance with that section to each shareholder of each amalgamating corporation, and shall

(a) include or be accompanied by a copy or summary of the amalgamation agreement; and

(b) 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 amalgamation.

(3) Right to vote.—Each share of an amalgamating corporation carries the right to vote in respect of an amalgamation whether or not it otherwise carries the right to vote.

(4) Class vote.—The holders of shares of a class or series of shares of an amalgamating corporation are entitled to vote separately as a class or series in respect of an amalgamation if the amalgamation agreement contains a provision that, if contained in a proposed amendment to the articles, would entitle such holders to vote as a class or series under section 170.

(5) Shareholder approval.—An amalgamation agreement is adopted when the shareholders of each amalgamating corporation have approved of the amalgamation by special resolutions of each class or series of such shareholders entitled to vote thereon.

(6) Termination.—An amalgamation agreement may provide that at any time before the issue of a certificate of amalgamation the agreement may be terminated by the directors of an amalgamating corporation, notwithstanding approval of the agreement by the shareholders of all or any of the amalgamating corporations.

178. (1) Vertical short-form amalgamation.—A holding corporation and one or more of its wholly-owned subsidiary corporations may amalgamate and continue as one corporation without complying with sections 176 and 177 if

- (a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation; and
- (b) the resolutions provide that
  - (i) the shares of each amalgamating subsidiary corporation shall be cancelled without any repayment of capital in respect thereof,
  - (ii) the articles of amalgamation shall be the same as the articles of incorporation of the amalgamating holding corporation, and
  - (iii) no securities shall be issued by the amalgamated corporation in connection with the amalgamation.

(2) Horizontal short-form amalgamation.—Two or more wholly-owned subsidiary corporations of the same holding body corporate may amalgamate and continue as one corporation without complying with sections 176 and 177 if

- (a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation; and
- (b) the resolutions provide that
  - (i) the shares of all but one of the amalgamating subsidiary corporations shall be cancelled without any repayment of capital in respect thereof,
  - (ii) the articles of amalgamation shall be the same as the articles of incorporation of the amalgamating subsidiary corporation whose shares are not cancelled, and
  - (iii) the stated capital of the amalgamating subsidiary corporations whose shares are cancelled shall be added to the stated capital of the amalgamating subsidiary corporation whose shares are not cancelled.

179. (1) Sending of articles.—Subject to subsection 177(6), after an amalgamation has been adopted under section 177 or approved under section 178, articles of amalgamation in prescribed form shall be sent to the Director together with the documents required by sections 19 and 101.

(2) Attached declarations.—The articles of amalgamation shall have attached thereto a statutory declaration of a director or an officer of each amalgamating corporation that establishes to the satisfaction of the Director that

(a) there are reasonable grounds for believing that

(i) each amalgamating corporation is and the amalgamated corporation will be able to pay its liabilities as they become due, and

(ii) the realizable value of the amalgamated corporation's assets will not be less than the aggregate of its liabilities and stated capital of all classes; and

(b) there are reasonable grounds for believing that

(i) no creditor will be prejudiced by the amalgamation, or

(ii) adequate notice has been given to all known creditors of the amalgamating corporations and no creditor objects to the amalgamation otherwise than on grounds that are frivolous or vexatious.

(3) Adequate notice.—For the purposes of subsection (2), adequate notice is given if

(a) a notice in writing is sent to each known creditor having a claim against the corporation that exceeds one thousand dollars;

(b) a notice is published once in a newspaper published or distributed in the place where the corporation has its registered office and reasonable notice thereof is given in each province in Canada where the corporation carries on business; and

(c) each notice states that the corporation intends to amalgamate with one or more specified corporations in accordance with this Act unless a creditor of the corporation objects to the amalgamation within thirty days from the date of the notice.

(4) Certificate of amalgamation.—Upon receipt of articles of amalgamation, the Director shall issue a certificate of amalgamation in accordance with section 255.

180. Effect of certificate.—On the date shown in a certificate of amalgamation

(a) the amalgamation of the amalgamating corporations and their continuance as one corporation become effective;

(b) the property of each amalgamating corporation continues to be the property of the amalgamated corporation;

(c) the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation;

(d) an existing cause of action, claim or liability to prosecution is unaffected;

(e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation;

(f) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation;

(g) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation.

181. (1) **Continuance (import).**—A body corporate incorporated otherwise than by or under an Act of Parliament may, if so authorized by the laws of the jurisdiction where it is incorporated, apply to the Director for a certificate of continuance.

(2) **Articles of continuance.**—Articles of continuance in prescribed form shall be sent to the Director together with the documents required by sections 19 and 101.

(3) **Certificate of continuance.**—Upon receipt of articles of continuance, the Director shall issue a certificate of continuance in accordance with section 255.

(4) **Effect of certificate.**—On the date shown in the certificate of continuance

(a) the body corporate becomes a corporation to which this Act applies as if it had been incorporated under this Act;

(b) the articles of continuance are deemed to be the articles of incorporation of the continued corporation; and

(c) the certificate of continuance is deemed to be the certificate of incorporation of the continued corporation.

(5) **Copy of certificate.**—The Director shall forthwith send a copy of the certificate of continuance to the appropriate official or public body in the jurisdiction in which continuance under this Act was authorized.

(6) **Rights preserved.**—When a body corporate is continued as a corporation under this Act,

(a) the property of the body corporate continues to be the property of the corporation;

(b) the corporation continues to be liable for the obligations of the body corporate;

(c) an existing cause of action, claim or liability to prosecution is unaffected;

(d) a civil, criminal or administrative action or proceeding pending by or against the body corporate may be continued to be prosecuted by or against the corporation;

(e) a conviction against, or ruling, order or judgment in favour of or against, the body corporate may be enforced by or against the corporation;

(7) **Issued shares.**—Subject to subsection 45(8), a share of a body corporate issued before the body corporate was continued under this Act is deemed to have been issued in compliance with

this Act and with the provisions of the articles of continuance irrespective of whether the share is fully paid or irrespective of any designation, rights, privileges, restrictions or conditions set out on or referred to in the certificate representing the share; and continuance under this section does not deprive a holder of any right or privilege that he claims under, or relieve him of any liability in respect of, an issued share.

(8) **Exception in case of convertible shares.**—Where a corporation continued under this Act had, before it was so continued, issued a share certificate in registered form that is convertible to bearer form, the corporation may, if a holder of such a share certificate exercises the conversion privilege attached thereto, issue a share certificate in bearer form for the same number of shares to the holder.

(9) **"Share" defined.**—For the purposes of subsections (7), and (8), "share" includes an instrument referred to in subsection 29(1), a share warrant as defined in the *Canada Corporations Act* or a like instrument.

182. (1) **Continuance (export).**—Subject to subsections (2) and (9, a corporation may, if it is authorized by the shareholders in accordance with this section, and if it establishes to the satisfaction of the Director that its proposed continuance in another jurisdiction will not adversely affect creditors or shareholders of the corporation, apply to the appropriate official or public body of another jurisdiction requesting that the corporation be continued as if it had been incorporated under the laws of that other jurisdiction.

(2) **Continuance (export) of investment company.**—A corporation to which the *Investment Companies Act* applies shall not apply for continuance in another jurisdiction without the prior consent of the Minister of Finance.

(3) **Notice of meeting.**—A notice of a meeting of shareholders complying with section 129 shall be sent in accordance with that section to each shareholder and 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 a discontinuance under this Act.

(4) **Right to vote.**—Each share of the corporation carries the right to vote in respect of a continuance whether or not it otherwise carries the right to vote.

(5) **Shareholder approval.**—An application for continuance becomes authorized when the shareholders voting thereon have approved of the continuance by a special resolution.

(6) **Termination.**—The directors of a corporation may, if authorized by the shareholders at the time of approving an application for continuance under this section, abandon the application without further approval of the shareholders.

(7) **Discontinuance.**—Upon receipt of notice satisfactory to him that the corporation has been continued under the laws of another jurisdiction, the Director shall file the notice and issue a certificate of discontinuance in accordance with section 255.

(8) **Rights preserved.**—This Act ceases to apply to the corporation on the date shown in the certificate of discontinuance.

(9) **Prohibition.**—A corporation shall not be continued as a body corporate under the laws of another jurisdiction unless those laws provide in effect that

(a) the property of the corporation continues to be the property of the body corporate;

(b) the body corporate continues to be liable for the obligations of the corporation;

(c) an existing cause of action, claim or liability to prosecution is unaffected;

(d) a civil, criminal or administrative action or proceeding pending by or against the corporation may be continued to be prosecuted by or against the body corporate; and

(e) a conviction against, or ruling, order or judgment in favour of or against the corporation may be enforced by or against the body corporate.

183. (1) Borrowing powers.—Subject to the articles, the by-laws or any unanimous shareholder agreement, directors of a corporation may without authorization of the shareholders

(a) borrow money upon the credit of the corporation;

(b) issue, reissue, sell or pledge debt obligations of the corporation; and

(c) mortgage, hypothecate, pledge or otherwise create a security interest in all or any property of the corporation, owned or subsequently acquired, to secure any debt obligation of the corporation.

(2) **Extraordinary sale, lease or exchange.**—A sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (3) to (7).

(3) **Notice of meeting.**—A notice of a meeting of shareholders complying with section 129 shall be sent in accordance with that section to each shareholder and shall

(a) include or be accompanied by a copy or summary of the agreement of sale, lease or exchange; and

(b) 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 a sale, lease or exchange referred to in subsection (2).

(4) **Shareholder approval.**—At the meeting referred to in subsection (3) the shareholders may authorize the sale, lease or exchange and may fix or authorize the directors to fix any of the terms and conditions thereof.

(5) **Right to vote.**—Each share of the corporation carries the right to vote in respect of a sale, lease or exchange referred to in subsection (2) whether or not it otherwise carries the right to vote.

(6) Class vote.—The holders of shares of a class or series of shares of the corporation are entitled to vote separately as a class or series in respect of a sale, lease or exchange referred to in subsection (2) only if such class or series is affected by the sale, lease or exchange in a manner different from the shares of another class or series.

(7) Shareholder approval.—A sale, lease or exchange referred to in subsection (2) is adopted when the holders of each class or series entitled to vote thereon have approved of the sale, lease or exchange by a special resolution.

(8) Termination.—The directors of a corporation may, if authorized by the shareholders approving a proposed sale, lease or exchange, and subject to the rights of third parties, abandon the sale, lease or exchange without further approval of the shareholders.

184. (1) Right to dissent.—Subject to sections 185 and 234 a holder of shares of any class of a corporation may dissent if the corporation resolves to

(a) amend its articles under section 167 or 168 to add, change or remove any provisions restricting or constraining the issue or transfer of shares of that class;

(b) amend its articles under section 167 to add, change or remove any restriction upon the business or businesses that the corporation may carry on;

(c) amalgamate with another corporation, otherwise than under section 178;

(d) be continued under the laws of another jurisdiction under section 182; or

(e) sell, lease or exchange all or substantially all its property under subsection 183 (2).

(2) Further right.—A holder of shares of any class or series of shares entitled to vote under section 170 may dissent if the corporation resolves to amend its articles in a manner described in that section.

(3) Payment for shares.—In addition to any other right he may have, but subject to subsection (26), a shareholder who complies with this section is entitled, when the action approved by the resolution from which he dissents becomes effective, to be paid by the corporation the fair value of the shares held by him in respect of which he dissents, determined as of the close of business on the day before the resolution was adopted but in determining the fair value of the shares any change in value reasonably attributable to the anticipated adoption of the resolution shall be excluded.

(4) No partial dissent.—A dissenting shareholder may only claim under this section with respect to all the shares of a class held by him on behalf of any one beneficial owner and registered in the name of the dissenting shareholder.

(5) **Objection.**—A dissenting shareholder shall send to the corporation, at or before any meeting of shareholders at which a resolution referred to in subsection (1) (or (2) is to be voted on, a written objection to the resolution, unless the corporation did not give notice to the shareholder of the purpose of the meeting or of his right to dissent.

(6) **Notice of resolution.**—The corporation shall, within ten days after the shareholders adopt the resolution, send to each shareholder who has filed the objection referred to in subsection (5) notice that the resolution has been adopted, but such notice is not required to be sent to any shareholder who voted for the resolution or who has withdrawn his objection.

(7) **Demand for payment**—A dissenting shareholder shall, within twenty days after he receives a notice under subsection (6) or, if he does not receive such notice, within twenty days after he learns that the resolution has been adopted, send to the corporation a written notice containing

(a) his name and address;

(b) the number and class of shares in respect of which he dissents; and

(c) a demand for payment of the fair value of such shares.

(8) **Share certificate.**—A dissenting shareholder shall, within thirty days after sending a notice under subsection (7), send the certificates representing the shares in respect of which he dissents to the corporation or its transfer agent.

(9) **Forfeiture.**—A dissenting shareholder who fails to comply with subsection (8) has no right to make a claim under this section.

(10) **Endorsing certificate.**—A corporation or its transfer agent shall endorse on any share certificate received under subsection (8) a notice that the holder is a dissenting shareholder under this section and shall forthwith return the share certificates to the dissenting shareholder.

(11) **Suspension of rights.**—After sending or delivering a notice under subsection (7), a dissenting shareholder ceases to have any rights as a shareholder except the right to be paid the fair value of his shares as determined under this section, unless the dissenting shareholder withdraws his notice before the corporation makes an offer under subsection (12), in which case his rights as a shareholder are reinstated.

(12) **Offer to pay.**—A corporation shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the corporation received the notice referred to in subsection (7), send to each dissenting shareholder who has sent such notice

(a) a written offer to pay for his shares in an amount considered by the directors of the corporation to be the fair value thereof, accompanied by a statement showing how the fair value was determined; or

(b) if subsection (26) applies, a notification that it is unable lawfully to pay dissenting shareholders for their shares.

(13) **Same terms.**—Every offer made under subsection (12) for shares of the same class or series shall be on the same terms.

(14) **Payment.**—Subject to subsection (26), a corporation shall pay for the shares of a dissenting shareholder within ten days after an offer made under subsection (12) has been accepted, but any such offer lapses if the corporation does not receive an acceptance thereof within thirty days after the offer has been made.

(15) **Corporation application to court.**—Where a corporation fails to make an offer under subsection (12), or if a dissenting shareholder fails to accept an offer, the corporation may, within fifty days after the action approved by the resolution is effective, apply to a court to fix a fair value for the shares of any dissenting shareholder.

(16) **Shareholder application to court.**—If a corporation fails to apply to a court under subsection (15), a dissenting shareholder may apply to a court for the same purpose within a further period of twenty days.

(17) **Venue.**—An application under subsection (15) or (16) shall be made to a court having jurisdiction in the place where the corporation has its registered office or in the province where the dissenting shareholder resides if the corporation carries on business in that province.

(18) **No security for costs.**—A dissenting shareholder is not required to give security for costs in an application made under subsection (15) or (16).

(19) **Parties.**—Upon an application under subsection (15) or (16),

(a) all dissenting shareholders whose shares have not been purchased by the corporation shall be joined as parties and are bound by the decision of the court; and

(b) the corporation shall notify each affected dissenting shareholder of the date, place and consequences of the application and of his right to appear and be heard in person or by counsel.

(20) **Powers of court.**—Upon an application to a court under subsection (15) or (16), the court may determine whether any other person is a dissenting shareholder who should be joined as a party, and the court shall then fix a fair value for the shares of all dissenting shareholders.

(21) **Appraisers.**—A court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the shares of the dissenting shareholders.

(22) **Final order.**—The final order of a court shall be rendered against the corporation in favour of each dissenting shareholder and for the amount of his shares as fixed by the court.

(23) **Interest.**—A court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting

shareholder from the date the action approved by the resolution is effective until the date of payment.

(24) **Notice that subsection (26) applies.**—If subsection (26) applies, the corporation shall, within ten days after the pronouncement of an order under subsection (22), notify each dissenting shareholder that it is unable lawfully to pay dissenting shareholders for their shares.

(25) **Effect where subsection (26) applies.**—If subsection (26) applies, a dissenting shareholder, by written notice delivered to the corporation within thirty days after receiving a notice under subsection (24), may

(a) withdraw his notice of dissent, in which case the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to his full rights as a shareholder; or

(b) retain a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.

(26) **Limitation.**—A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that

(a) the corporation is or would after the payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

185. (1) **"Reorganization" defined.**—In this section, "reorganization" means a court order made under

(a) section 234;

(b) the *Bankruptcy Act* approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

(2) **Powers of court.**—If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 167.

(3) **Further powers.**—If a court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) **Articles of reorganization.**—After an order referred to in subsection (1) has been made, articles of reorganization in prescribed form shall be sent to the Director together with the documents required by sections 19 and 108 if applicable.

(5) Certificate of reorganization.—Upon receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 255.

(6) Effect of certificate.—A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) No dissent.—A shareholder is not entitled to dissent under section 184 if an amendment to the articles of incorporation is effected under this section.