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Introduction to Symposium on New York Business Corporation Law (Laws 1961, Ch. 855 as Amended 1962)

Robert S. Leshner

New York Joint Legislative Committee to Study Revision of Corporation Laws

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INTRODUCTION TO SYMPOSIUM ON NEW YORK BUSINESS CORPORATION LAW

(Laws 1961, Ch. 855 as amended 1962)

ROBERT S. LESHER*

THE collection of articles which follows is the result of long-range planning bordering on the courageous. Over two years ago, the groundwork was laid for this symposium by Professor Robert B. Fleming of the University of Buffalo Law School who, because of his own work as both research consultant and drafting consultant to the Joint Legislative Committee to Study Revision of Corporation Laws, conceived the idea of printing in the Buffalo Law Review a collection of articles on New York's new Business Corporation Law. Considering that the 1960 Study Bill¹ had not then been distributed and the effective date of a business corporation law, if passed, was three years away by the most optimistic prediction, this conception involved timing which no one could predict and a degree of uncertainty which no one could then resolve. Whether there ever would be a Business Corporation Law, as such, and, certainly, when it would come into being, were then unknowns. New York now has a new law with substantial amendments.² Professor Fleming and the Buffalo Law Review have their symposium, for which both may be congratulated.

For those readers who during the past six years have been too busy making a living in the practice of law to become much concerned with the period of gestation³ and birth of new corporate legislation,⁴ perhaps a brief preliminary statement is in order. New York adopted a new Business Corporation Law in 1961 with a delayed effective date of April 1, 1963. In

* Syracuse University, A.B. 1938; Cornell University, LL.B. 1941; Member of the New York Bar; Counsel to New York Joint Legislative Committee to Study Revision of Corporation Laws.

1. 1960 Senate Int. 3124, Pr. 3316.

2. N.Y. Sess. Laws 1961, Ch. 855, amended by N.Y. Sess. Laws 1962, Chs. 317, 417, 552, 819, 834 and 837. Ch. 317 relates to the new Civil Practice Law and Rules (N.Y. Sess. Laws 1962, Ch. 308). Ch. 552 relates to the new Uniform Commercial Code (N.Y. Sess. Laws 1962, Ch. 553). The other amending chapters were originated by the Joint Legislative Committee to Study Revision of Corporation Laws. The 1962 bill numbers of these amending chapters are as follows: Chapter 317, Assembly Int. 32, Pr. 32, Senate Pr. 4517; Chapter 417, Assembly Int. 2643, Pr. 2674, 5732; Chapter 552, Senate Int. 1929, Pr. 1994; Chapter 819, Assembly Int. 4918, Pr. 5212; Chapter 834, Senate Int. 3774, Pr. 4287; Chapter 837, Senate Int. 3773, Pr. 4286.

3. Joint Legislative Committee to Study Revision of Corporation Laws, Third Interim Report, Legis. Doc. No. 39, 182d Sess. 35-41 (1959).

4. In addition to the 1960 Study Bill, the law was considered in bill form as pre-filed January 4, 1961, Senate Int. 522, Pr. 522, Assembly Int. 885, Pr. 885, and as a revised bill filed March 6, 1961, Senate Int. 522, Pr. 4061, Assembly Int. 885, Pr. 5310. The latter bill became law as Chapter 855 of the Laws of 1961 after unanimous passage by both Senate and Assembly and signature of Governor Rockefeller on April 24, 1961. The new law became Chapter 4 of the Consolidated Laws due to a vacancy in that chapter number resulting from the elimination in 1952 of the last vestiges of the former Business Corporation Law which had previously occupied that position.

1962 this date was extended to September 1, 1963.⁵ Although such date could be extended again by the 1963 legislature, such extension is, in this writer's opinion, unlikely in view of the extensive restudy and amendment of the law which took place prior to and during the 1962 session. The new law will apply to all corporations heretofore or hereafter formed in New York for profit for a business purpose, and to all business corporations organized elsewhere for profit and authorized to do or doing business in this state.⁶ As to such corporations, the General Corporation Law and Stock Corporation Law are made inapplicable as of the effective date of the new law.⁷ The General Corporation Law and the Stock Corporation Law continue to be effective in their residual application which will be referred to later in relation to the future work of the Joint Legislative Committee.

As passed in 1961 and amended in 1962,⁸ the new law is the result of six years of work by the Joint Legislative Committee to Study Revision of Corporation Laws,⁹ its staff and numerous advisory subcommittees. During this period the composition of the group working on the project has been unusually stable. The only change in the chairmanship of the Joint Committee occurred in July, 1959 after the research phase of the Committee's work on a business corporation law had been completed and the drafting had been planned but not developed to the point where the Committee had passed on questions of policy.¹⁰ Other changes took place in committee personnel but some were fortuitous in that members on two occasions were elected to the position of Majority Leader of the Assembly and thus continued as *ex officio* members. Three members of the original Joint Committee of 1956 are still members.¹¹ The Committee has been equally fortunate with its staff in that the Committee Counsel, Assistant Counsel and Chief Consultant have served since the establishment of the Committee in 1956 and all four of the principal drafting consultants who worked on twelve of the fourteen articles of the new statute since the initial research, have been with the Committee since 1958 or earlier. This continuity over a six-year period is somewhat unusual in legislative work of this type and the project benefited accordingly.

Two basic principles have guided the approaches of the Joint Committee

5. N.Y. Sess. Laws 1962, Ch. 837.

6. N.Y. Bus. Corp. Law §§ 102(a)(4), 102(a)(7), 103(a), 201(a).

7. N.Y. Bus. Corp. Law § 103(e).

8. *Supra* note 2.

9. The committee was established in 1956 by Joint Resolution No. 27, with its scope couched in the broadest possible language, and has been extended each year since then. During the 1962 session, it was extended to March 31, 1963. The Joint Committee consists of four senators and three assemblymen, all members of the bar, and seven *ex officio* members constituting the majority and minority leadership in both the Senate and Assembly.

10. Senator Warren M. Anderson of Binghamton, New York, Chairman of the Senate Committee on Corporations, succeeded Senator Frank S. McCullough of Rye, New York, upon the latter's elevation to the bench.

11. Senator Edward J. Speno, Assemblyman George L. Ingalls, now Majority Leader of the Assembly, and Assemblyman John Robert Brook.

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in its revision of the corporation laws of New York. These are (1) maximum dissemination of the materials being used in the development of legislation and (2) maximum participation by interested individuals and groups in the actual preparation of proposed legislation. It was felt that in a state like New York with such widely diversified and divergent interests it would be possible to obtain passage of legislation, however sound, only by stressing these principles.¹² In carrying out its program, the Joint Committee went to great lengths to integrate into its research and drafting activities all groups with a legitimate interest in a business corporation law. As this was being done, the need for recording the legislative history was recognized.

The Joint Committee views with some pride the public record which it has made available to the bench, bar and scholar who may be interested in the background of the new Business Corporation Law. Six annual Interim Reports have been filed with the legislature from 1957 to date.¹³ These set out plans of action and explain action previously taken. In most cases the proposed action was spelled out for the guidance of interested people before it was taken. The First and Second Interim Reports contain a record of the consideration of fundamental decisions which underlie the law. For example, the decision to undertake an overall revision rather than a series of piecemeal amendments, the elimination of the "trunk" system between the General Corporation Law and the Stock Corporation Law and its replacement by a unified Business Corporation Law,¹⁴ the drafting of a single rather than separate statutes governing public-issue and closely held business corporations,¹⁵ and the adoption of the American Bar Association Model Business Corporation Act as the point of reference for a research program are examples of such decisions. These appear elemental when viewed in the clear light of hindsight. They served, however, to chart a course which avoided many a shoal. Many revision efforts have floundered on the rocks of initial opposition and come to rest in the deceptively placid pool of piecemeal amendment. This the Joint Committee sought to avoid.

The step by step development of the new law involving five major progressions is also set forth in the Interim Reports. These constituted what was hoped to be a logical approach to a very complex subject. They served to break down the whole project into manageable segments wherein missteps at one point could be corrected at a successive stage without imperiling the whole project. These were: (1) exploratory phase; (2) organizational phase;

12. For a more complete explanation of the approach of the Joint Committee, see Leshner, *Revision of the New York Corporation Statutes*, 14 *Bus. Law.* 807-823 (1959).

13. First Interim Report, Legis. Doc. No. 17, 180th Sess. (1957); Second Interim Report, Legis. Doc. No. 23, 181st Sess. (1958); Third Interim Report, Legis. Doc. No. 39, 182d Sess. (1959); Fourth Interim Report, Legis. Doc. No. 15, 183d Sess. (1960); Fifth Interim Report, Legis. Doc. No. 12, 184th Sess. (1961); Sixth Interim Report, Legis. Doc. No. 30, 185th Sess. (1962).

14. First Interim Report, Legis. Doc. No. 17, 180th Sess. 131-138 (1957).

15. *Id.* at 115-129.

(3) research program; (4) drafting program; and (5) legislative phase. Each step afforded an opportunity to learn something which could be used in the successive steps and gave time for interested parties to learn what was happening and to contribute on an intermittent basis. At all costs, the Joint Committee desired to avoid placing segments of our financial community in a position where they would have to accept or reject on its face a completed product without having an opportunity to familiarize themselves with its background. Experience has proved that such considerations often affect major legislation more than does its quality. This was especially true in a project of this type which would affect one fifth of all new corporations organized throughout the country and approximately one fifth of all corporate wealth in the entire United States.¹⁶

The decision to separate the research program from the drafting was basic.¹⁷ This permitted the Joint Committee and others to take part in formulating decisions as to substance of the new law before long hours were spent on style. It also made it possible for many people to determine what the questions of substance were and to consider them from a common base of knowledge. We found that everyone had the answers but few had a clear understanding of the questions. This also permitted the power of decision to be independent, at least in part, from the function of preparing the technical text.

The primary responsibility of the Joint Committee was to prepare legislative recommendations which its members could embrace and support on the floor of the legislature, if necessary. This meant that the Joint Committee could not become committed with regard to controversial items involved in the new law until it had before it all alternatives, their strength and weaknesses, and the recommendations of its staff. Thus the power of decision had to be reserved and tentative guidelines laid down. This imposed upon the staff members a requirement of objectivity. They had to be willing to analyze technically many viewpoints, at least some of which they might not themselves espouse. The staff consultants who remained with the Committee through the 1962 session identified themselves with the project in this manner and perhaps in some cases implemented a viewpoint which was not their personal choice. Had this not been so, it is unlikely that the Committee could have resolved the many highly technical questions that it was called upon to decide during the 1961 and 1962 legislative sessions.

These staff members, some of whom are among the participants in this symposium, became aware of the need for balancing viewpoints on close questions. There are few questions of policy in the field of corporation law which are either black or white, at least from the point of view of the maker of public policy. They may be black or white to the outside analyst who can indulge in crystal clear philosophical exercises, but the sharpness of the color-

16. *Id.* at 17-19.

17. See Foreword to Second Interim Report, Legis. Doc. No. 23, 181st Sess. (1958).

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tion on many questions becomes diffused in the broader vista of practical application.

Originally, the plan for preparation of the Business Corporation Law was scheduled for four years. The law was passed at the end of the fifth year.

During the research program a standard system of research reports was developed which permitted extraction of portions as summaries for wider distribution. One hundred forty-two of such reports totalling over 1750 mimeographed pages were distributed for comment. Over 1350 written comments were received by the Committee Counsel, distributed for analysis within the staff and then used as a basis for staff recommendations for future drafting.

The objective of the research program was to develop concrete recommendations as to the content of the new statute while its organization was being simultaneously developed. All this was to antedate the drafting of text. Accordingly, the organization of eleven principal corporation statutes, including the ABA Model Business Corporation Act, was analyzed and compared with the existing New York law. Successive Statute Outline Analyses were developed until there emerged a satisfactory frame upon which to mold the content being developed in the Research Reports. These processes were carried on simultaneously through the original Research Reports keyed to the initial Research Outline Analysis which in turn was based on the sectionalization of the Model Act, through the Final Research Recommendations, Working Drafts, Tentative Staff Drafts, and Staff Drafts to the Committee Draft which became the 1960 Study Bill.¹⁸

The structure of the new law evolved as the text was drafted and each was adjusted to the requirements of the other as the needs of substance and form crystallized. Examples of these various documents used in creating the final product are set out in the Interim Reports.¹⁹ Thus the countless changes throughout the text were charted and controlled until the basic form of the complete statute took shape. Thereafter the redrafting, clarification, and polishing took place. In this process, in which our advisory groups participated, every suggestion for improvement was objectively analyzed. Very substantial assistance was received on the final draft of the 1961 prefiled bill from a drafting specialist made available through the courtesy of the Joint Bar Association Committee.²⁰

Any attempt to select and draw conclusions from certain steps in this process can be misleading. The program was a whole with each step as a planned progression toward the objective. Differences of opinion were encountered. This was expected and welcomed. To stress, however, some items, such as memoranda distributed by our cooperating bar committees in opposition to certain drafts of the bill, can lead to false conclusions and is a mis-

18. *Supra* note 1.

19. Third Interim Report, Legis. Doc. No. 39, 182d Sess. Apps. A, B, D-I (1959).

20. Jule E. Stocker, Associate Counsel, Equitable Life Assurance Society of the United States.

representation of the overall contribution of those committees to the success of the whole program. Without their assistance, what measure of success this work has attained, would not have been possible. Throughout, the advisory subcommittees, which were representative of every interested segment in our state with special emphasis on the organized bar, cooperated closely. An example of this is the special printing by the New York State Bar Association Committee on Corporation Law and The Association of the Bar of the City of New York Committee on Corporate Law for their own use of the so-called revised prefiled bill,²¹ the text of which was made available to the bar by the Joint Committee at the same time it was filed with the legislature. This was done to eliminate a delay in the bar committees' study of the bill which would have been occasioned had they awaited the legislative print.

When the Business Corporation Law was passed in 1961 both the Joint Committee and Governor Rockefeller recognized the need for continued study during the ensuing year so that further improvements in the law could be made. This restudy was carried out during the past year by the staff of the Joint Committee with the continuing cooperation of the advisory subcommittees especially those representing the New York State Bar Association, The Association of the Bar of the City of New York and the New York County Lawyers Association. As a result four amending bills were passed during the 1962 legislative session on the recommendation of the Joint Committee and signed by the Governor.²²

Of these, Chapter 417 of the Laws of 1962 is insignificant as it only corrects three minor printer's errors in the Business Corporation Law as passed in 1961.

Chapter 834 is an omnibus bill containing many technical amendments to the 1961 statute. It contains over 95 changes to the text of the law, the vast majority of which are textual in character to avoid possible ambiguities or to clarify specific applications of the law. The principal policy change made in this amending chapter involves Article 13 relating to foreign corporations. The concept of a "domiciled foreign corporation"²³ is eliminated. As amended, the Business Corporation Law imposes liability, upon the directors and officers of any foreign corporation doing business in this state, for the declaration of illegal dividends, illegal purchase by the corporation of its own shares, illegal loans to directors and illegal transfers of corporate assets, and, upon such foreign corporation, the duty to disclose to its New York shareholders certain information regarding dividends, share distributions and other transactions affecting its capital structure, subject however to a possible exemption if the foreign corporation is authorized to do business in New York State and either (1) its shares are listed on a national securities

21. 1961 Senate Int. 522, Pr. 4061, Assembly Int. 885, Pr. 5310.

22. N.Y. Sess. Laws 1962, Chs. 417, 819, 834, and 837.

23. N.Y. Sess. Laws 1961, Ch. 855, § 1317.

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exchange or (2) less than half of its total business income under the Tax Law during the preceding three fiscal years is allocable to New York State. These amendments will provide a simple and workable test for the exemption of a foreign corporation, its directors, officers and shareholders from the enumerated provisions of the law in place of the concept of a "domiciled foreign corporation" which involved questions of residence of shareholders, business income and investment income. In this way the "runaway" or "psuedo" foreign corporation will be subjected to certain important shareholder and creditor protections without unduly burdening the true foreign corporation having multi-state operations.

Chapter 819 of the Laws of 1962 amends Sections 722 through 725 of the 1961 statute applicable to indemnification of officers and directors. These changes are intended to recast these sections into more understandable form without in any way changing the scope or coverage of the provisions of the new law.

Chapter 837 extends the effective date of the new statute from April 1, 1963 to September 1, 1963. This extension will automatically carry with it the 1962 amendments to the Business Corporation Law by Chapters 417, 819, and 834. By their terms these chapters become effective April 1, 1963 which was the effective date of the law on the day these amending chapters were signed by the Governor and became law. Thus when Chapter 837 became law later, it extended the effective date of the Business Corporation Law as then amended to September 1, 1963. The other two chapters of the Laws of 1962 which amend the Business Corporation Law carry independent effective dates. Chapter 317 is tied to the effective date of the Civil Practice Law and Rules, which by Chapter 308 of the Laws of 1962 is now September 1, 1963. Chapter 552 relating to the Uniform Commercial Code²⁴ becomes effective September 27, 1964, the date on which the Code becomes effective.

During the past year the revision of the Civil Practice Act and the new Business Corporation Law were coordinated. Although the Joint Committee was urged not to agree to the inclusion of any additional procedural provisions in the new corporation law, the draftsmen of the new Civil Practice Law and Rules had earlier prepared the latter statute on the assumption that Sections 377, 977(b) and 1217 to 1221 inclusive of the Civil Practice Act would be eliminated from the new practice law. The proposal was to transfer the substance of these provisions to the corporation statutes. As to business corporations, this meant a transfer to the Business Corporation Law and as to most other corporations a transfer to the General Corporation Law. Although the Joint Committee took no official action in this regard, the issue, as it developed during the 1962 legislative session, was simply whether these provisions would be transferred to the corporation statutes or be dropped from the consolidated laws. Adopting the first alternative, the legislature by

24. N.Y. Sess. Laws 1962, Ch. 553.

Chapter 317 of the Laws of 1962 transferred the substance of these sections to the Business Corporation Law and the General Corporation Law and thereby eliminated a hiatus which would otherwise have developed. This chapter, however, does not take effect until the day on which the new Civil Practice Law and Rules become effective. This date is now set as September 1, 1963. If, however, this date is extended by the 1963 legislature, the effective date of Chapter 317 will likewise be extended automatically.

During the evolution of the Business Corporation Law, several successive revisions of official Revisers' Notes and Comments were published to explain briefly each section of the successive versions of the statute.²⁵ The Sixth Interim Report of the Joint Committee,²⁶ filed with the legislature on March 27, 1962, will, when published, contain amended Revisers' Notes and Comments reflecting the text of the new law as amended by Chapters 417, 819, 834, and 837. These notes will not reflect the amendments to the law made by Chapter 317 relating to the Civil Practice Law and Rules or by Chapter 552 relating to the Uniform Commercial Code.²⁷ It is expected that in a subsequent interim report a supplement to these notes and comments will be issued to reflect the changes made by these and any subsequent amendments to the law.

The work of the Joint Committee is far from completed. The life of the Committee has been extended to March 31, 1963 with an appropriation which brings the total devoted to this work over the seven years of the Committee's existence to \$470,000. During the past year, part of the staff effort has been devoted to limited revisions of the special stock corporation laws, *i.e.*, Banking, Insurance, Railroad, Transportation Corporations and Co-operative Corporations Laws. These were not affected by the new Business Corporation Law. It is planned to re-key these laws to the Business Corporation Law so as to end their present dependency on the General Corporation Law and Stock Corporation Law and thereby permit repeal of the Stock Corporation Law.

The projects with respect to each of the five special stock corporation laws, as explained in the Sixth Interim Report of the Joint Committee,²⁸ will be based on a five point program. These points are:

(1) Determine the defects, if any, of the present "trunk" relationship between each special stock corporation law on one hand and the supporting

25. Notes on the 1960 Study Bill were published under separate cover and as a part of the Fourth Interim Report, as Supplement to Fourth Interim Report, Legis. Doc. No. 15, 183d Sess. (1960). Notes on the 1961 prefiled bill were published in a separate document as Supplement to Fifth Interim Report, Legis. Doc. No. 12, 184th Sess. (1961). Notes on the Business Corporation Law as passed in 1961 (N.Y. Sess. Laws 1961, Ch. 855) were published both under separate cover and as a part of the Fifth Interim Report, as Revised Supplement to Fifth Interim Report, Legis. Doc. No. 12, 184th Sess. (1961).

26. Legis. Doc. No. 30, 185th Sess. (1962).

27. N.Y. Sess. Laws 1962, Ch. 553.

28. Legis. Doc. No. 30, 185th Sess. Apps. 4-7 (1962).

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statutes, *i.e.*, General Corporation Law and Stock Corporation Law, on the other.

(2) Prepare analyses of the specific interrelationships between each special law and its supporting statutes.

(3) Isolate the changes which the Business Corporation Law would make in the supporting law if it were substituted for the General Corporation Law and the Stock Corporation Law.

(4) Evaluate these changes and determine which, if any, are inappropriate for the particular type of stock corporation being studied.

(5) Prepare legislation to make each special stock corporation law either (1) self-sufficient in whole or (2) dependent on the Business Corporation Law in part and independent as to any items now in the supporting statutes which the Business Corporation Law has changed in a way inappropriate for the particular special stock corporation.

This approach to the limited revision of the five special corporation laws will not result in further amendments to the Business Corporation Law. It is hoped that any adjustments in these laws necessitated by the substitution of the Business Corporation Law for the existing supporting statutes can be accommodated within each special stock corporation law. To this extent the trunk relationship as it exists between the special law and its supporting statute or statutes will be continued. The extent of the dependency, however, will be determined only after the study as outlined above has been completed.

In addition to the adjustment of the special stock corporation laws, the Joint Committee is planning to undertake a study of the Membership Corporations Law in order to determine the need for a basic non-profit corporation statute. This may take the place of the present Membership Corporations Law and those provisions of the General Corporation Law which apply to non-profit corporations. Further study on this point is necessary.

The new Business Corporation Law is not the work of any one man or any small group of men. It is the product of many minds filtered through critical analysis by some of the finest corporate practitioners in the country. This is not to say that the result of this process is perfection. This does mean, however, that the purist will have a difficult time categorizing the law because it does not contain consistent evidences of a single philosophy of corporate legislation. It was not planned to reflect such single viewpoint. On the contrary, the whole program leading to enactment of the law was designed to develop the best answers to the many questions presented without limitation of preconception or predisposition. If, therefore, the law has many provisions to accommodate the requirements of public-issue corporations and seems to be in many respects oriented in that direction, balance can be found in some basic accommodations to the needs of closely held corporations. It

is hoped that the competent practitioner will thus be able to meet in some reasonable manner the needs of his corporate client whatever its size or scope.

The Joint Committee's major objective was to attain the proper balance among various viewpoints on each provision and to reach a conclusion supported by competent research and thorough screening performed by technicians both practical and academic. The only overall philosophy of the new law is one of reasonably balanced fairness to all interests.

It is predicted that theoreticians will speculate at length as to philosophically inconsistent provisions of the law. When one understands the background of the statute, however, these points will become less significant and the practical application of the law to business within the state of New York will become the real test of its soundness. The exposition and analysis in the articles of this symposium should contribute materially to an understanding of the new law and thereby aid the eventual decision on this test.