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The Indiana General Corporation Act

George O. Dix
Dix & Dix

THE INDIANA GENERAL CORPORATION ACT*

GEORGE O. DIX[1]

The 1927 session of the Indiana General Assembly adopted a concurrent resolution providing for the appointment of the Indiana Corporations Survey Commission. The resolution directed the Commission to investigate the existing laws of Indiana and the laws of other states and countries relative to private corporations, and to prepare and submit to the 1929 General Assembly a statement showing the results of such investigation and survey, together with such bills to accomplish the revision and codification of existing corporation laws and the establishment of such new laws as the Commission might find to be proper or necessary.

The Commission, at the outset, carefully considered the comparative results to be obtained from a revision and codification of the approximately one hundred and fifty laws, or parts of laws, relating to corporations for profit then on the Indiana Statute books, and the complete discarding of all of these laws and the drafting of an entirely new and complete Corporation Act. It was unanimously decided to adopt the latter course. It was further decided that the laws relating to domestic and foreign corporations for profit, being the more important, should receive cvonsideration ahead of the laws relating to corporations not for profit. The Commission was able to complete only the Act relating to domestic and foreign corporations for profit.

It was next decided that the new law should follow the modern idea of liberality rather than the old idea of restriction.

The Commission, and particularly the subcommittee thereof, which prepared the original draft of the bill, made an exhaustive study of the existing corporation laws of other states and of the leading commercial countries. It also drew extensively from the Uniform Business Corporations Act which had been finally approved in 1927 by the National Conference of Commissioners on Uniform State Laws after ten years of research work.

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*Read by Mr. Dix at the 1929 meeting of the Indiana State Bar Association.

1. See biographical note p. 119.

The final draft of the proposed Indiana Act, which was completed after many sessions of the Commission, was printed and submitted to the lawyers of this and other states for criticisms and suggestions. The suggestions made were carefully considered by the Commission and resulted in a further revision of the printed draft before submission to the legislature. The 1929 Session of the General Assembly passed the measure exactly as finally submitted and recommended by the Commission, and it may be found at pages 725 to 798, inclusive, of the Acts of 1929.

The same legislature, by concurrent resolution, continued the Commission for another two years to enable it to complete the work of preparing an act concerning corporations not for profit, and to enable it to further study and observe the Corporations for Profit Act and submit such amendments thereto as may seem advisable.

It is naturally to be expected that the practical application of the law will develop some defects and weaknesses, and it is hoped that the lawyers will cooperate in the work of perfecting the law by freely suggesting to the Commission such defects as they discover and such changes as they consider advisable. It is expected that all proposed amendments to the law will be first submitted to the Commission, and that the Commission, in turn, will prepare and submit the amendments to the General Assembly. It is believed that this will promote greater uniformity and will prevent the ambiguity and uncertainty which has heretofore characterized our corporation laws, a condition which has been due, in a large measure, to the fact that every legislature, since the adoption of the Constitution, has added something to the corporation laws of the state, in many instances wholly without regard to existing laws.

The new Act repeals individually by title the one hundred and forty odd separate laws relating to corporations for profit now on the statute books. This was considered a bold stroke by many lawyers, who feared that some law might thus be repealed which would be needed for future use. However, this can hardly be possible since the act contains a savings clause providing that the repealed laws shall continue in full force and effect as to all corporations formed before July 1, 1929.

The policy of the new law is a radical departure from that which has heretofore existed in Indiana. All former laws have been drafted upon the theory that the people must be protected

against what has generally been considered as possible corporate abuses, and that corporations must, therefore, be restricted. The new law follows the modern trend and was drafted on the theory that corporations are a desirable form of business organization and should be encouraged. The laws of such states as Delaware, New Jersey, New York, Illinois and Ohio, and the Uniform Business Corporations Act are drafted upon this theory.

It must not be assumed that encouragement to corporations means looseness or a letting down of the bars against fraud upon creditors or stockholders. On the contrary, it means precision, simplicity, uniformity and above all a law which is not ambiguous. The new law attempts to set out the various steps in the organization of a corporation and the various acts which it may thereafter do or not do, with such precision, and in such detail, and in such an analytical way, and with such completeness, that there is left little room for differences of opinion as to its construction upon any given point, thus making it possible for corporation officials and attorneys to act and advise with greater security and confidence. This certainty of construction is aided by the fact that many of the more important sections are patterned after the laws of other states and have heretofore received the construction of the Appellate Courts of those states.

The new law grants to corporations, and correspondingly to their stockholders and directors, a wide and almost unlimited range of powers. Under it, a corporation may be organized for any lawful purpose, or purposes, except rural loan and savings associations, credit unions, or for the conduct of a banking, railroad, insurance, surety, trust, safe deposit, mortgage guarantee or building and loan business.

The term "railroad" as defined by the Act does not include street or interurban railroad, so that these, as well as all other public service corporations, except steam railroads, come within the provisions of the law.

A corporation, under the new law, is given all of the capacity to act possessed by natural persons. Its charter may be perpetual. It may conduct its business in this State or elsewhere. It may acquire, own and dispose of both real and personal property, without limit, and anywhere. It may acquire, own and sell the shares of its own capital stock. It may issue one or more classes of capital stock, and each class may be issued in

one or more series, and any of its stock may be issued either with or without par value, and with full, limited or no voting powers. It may sell its shares at less than par, and may accept as payment, money or property, tangible or intangible, or labor or services actually performed or rendered. It may capitalize for any amount, not less than $1,000.00, and may incur indebtedness without limit. Its incorporators need not be residents of Indiana, and only a majority of them need be citizens of the United States. It may, at any time, amend its Articles of Incorporation without limitation. It may merge or consolidate with any other corporation. It may, at any time, lease or otherwise dispose of all of its property and assets upon the affirmtive votes of the holders of two-thirds of the outstanding shares, and if the corporation is insolvent, then upon a majority vote. It may hold its meetings of shareholders and directors either within or without the State. It may acquire, hold and dispose of securities in other corporations. It may keep its books of account and all of the books of the corporation, except the original or a duplicate stock register or transfer book, outside of the State of Indiana. When it maintains a transfer agent and a registrar, the signatures of its officers on its stock certificates may be by fac similes. Its directors may make and amend its by-laws. Its directors need not be shareholders. It may create an executive committee from its Board of Directors, and give to it the same powers which its Board of Directors have.

In order to create a positive distinction in names between corporations and partnerships, a domestic corporation is required to include in its name the word "Corporation" or "Incorporated," or one of the abbreviations thereof. While this restriction may, on first impression, sem too drastic, yet it is believed that, in time, it will be considered a wise provision as has the similar provision in the British and Canadian acts, which require the word "Limited" to be a part of every corporate name. The old method of changing the corporate name by a court proceeding is abolished, and the name can now be changed by an amendment to the Articles of Incorporation.

Every corporation is required to maintain an office in this state, and to have, at all times, a resident agent, whose name and address must be kept on file with the Secretary of State.

Every certificate of stock is required to show on its face what proportion of the consideration, for which it was authorized to

be issued, has been actually paid, and as further payments are made thereon, the certificate must be stamped on its face to show such payments. Assignees of shares are liable to the corporation for the unpaid portion thereof.

Every corporation is required to keep correct and complete books of account, minutes of its stockholders' and directors' meetings, and a stock register or transfer book, all of which shall be open to inspection and examination during the usual business hours, for all proper purposes, by any shareholder. It is believed that the inclusion of the phrase "for all proper purposes" will enable the corporation to lawfully decline to permit a stockholder to examine the books where it can be shown that his object is so doing is for some improper purpose, such as obtaining trade secrets or information to be used in competition with the corporation.

Cash or property dividends may be paid only out of surplus earnings, or net profits, or surplus paid in in cash, but stock dividends may be paid out of surplus due to or arising from unrealized appreciation in value or from a re-valuation of assets.

Corporations are not permitted to make any advancement on account of services to be performed in the future, or to make any loan to any officer or director. This provision has been the subject of some criticism, but it is believed that it is a wise and proper safeguard to which stockholders and creditors are entitled.

The steps now required in the formation of a corporation differ widely from the requirements under former laws. They are, briefly, and in their order, as follows:

First—The person or persons intending to organize the corporation may preempt any name not already in use for a period of thirty days by filing a notice in the office of the Secretary of State.

Second—The person or persons intending to organize a corporation shall open subscription lists and secure subscriptions to shares in an amount not less than one thousand dollars.

Third—The person or persons causing such subscription lists to be opened, or a majority of them, shall call a meeting of the subscribers, at which the incorporators, not less than three in number, and the directors for the first fiscal year, not less than three in number, shall be selected.

Fourth—The persons selected to be the incorporators shall then execute, and filed in the office of the Secretary of State, triplicate copies of the Articles of Incorporation, one of which copies shall be retained by the Secretary of State, and the other two copies, after being endorsed by the Secretary of State, shall be returned to the incorporators.

Fifth—One of the copies of the Articles returned to the incorporators shall the n be filed for record with the County Recorder of the County in which the principal office is located.

Sixth—The amount of paid in capital, with which the corporation will begin business, as stated in the Articles of Incorporation, which shall be not less than five hundred dollars, must be paid in, and the affidavit of not less than a majority of the Board of Directors, to that effect, shall be filed for record with the County Recorder of the county in which the principal office is located.

Seventh—If the Articles of Incorporation so provide, there shall then be held a meeting of the shareholders to be called by the incorporators, or a majority of them, to adopt the by-laws.

Eighth—The directors shall then meet at the call of a majority thereof and elect officers, and if the Articles of Incorporation do not require the stockholders to adopt the by-laws, the directors shall proceed to adopt the by-laws.

The provisions *required* to be set out in the Articles of Incorporation do not differ substantially from the provisions required in most of the former laws, but the new law affords a wide range *possible* provisions. One of the outstanding features of the new law is that it gives to persons who wish to conduct their business by the corporate method, the right to decide largely for themselves the character of their organization and what its rights, duties and liabilities shall be. The decisions on the various optional points must be made, however, at the time the corporation is formed. This is considered the fairest and most logical method of dealing with corporations, and is the one being adopted by the more progressive states. There appears no good reason why the subscribers should not be allowed to decide for themselves many of the matters involving the corporation's internal government, which the state has heretofore considered itself duty bound to prescribe. This is the democratic view. The basic law of the corporation should be its Articles of Incorporation. The persons, who are to com-

pose it, should be allowed to decide what their own basic law shall be so long as such law does not come in conflict with the common welfare.

Some of the most important optional provisions, which the Act recognizes, and which lawyers should be careful to provide for in the Articles of Incorporation are:

1. The Articles may provide for a limited period of duration for the corporation; otherwise it is perpetual.

2. The Articles may provide that the directors may, from time to time, fix the relative rights, preferences, limitations or restrictions of the various classes and the various series of stock; otherwise such rights, preferences, limitations or restrictions must be fixed in the Articles of Incorporation.

3. The Articles may provide that shares of stock may be sold at less than par, and that the Board of Directors shall have the power to fix the price at which they may be sold; otherwise shares having a par value must be sold at not less than par, and shares without par value must be sold for such consideration as shall be fixed, from time to time, by the holders of the shares of each class entitled by the Articles to vote with respect thereto.

4. The Articles may provide that the shareholders shall have preemptive rights to subscribe to any additional shares of stock which may be offered; otherwise the shareholders have no such pre-emptive rights.

5. The Articles may provide that the power to make, alter, amend or repeal the by-laws shall be vested exclusively in the shareholders; otherwise such power is vested in the directors.

6. The Articles may provide for the holding of shareholders' meetings anywhere; otherwise they must be held within this state and at the principal office of the corporation.

7. The Articles may restrict the voting rights of shareholders of any class or series of stock; otherwise every shareholder shall have the right at every shareholders' meeting to one vote for each share of stock standing in his name.

8. The Articles may provide for cumulative voting for directors; otherwise straight voting is required.

9. The Articles may provide that a quorum at a shareholders' meeting may be any designated proportion of the shares; otherwise a majority of the shares outstanding shall constitute a quorum.

10. The Articles may provide that the directors shall be shareholders; otherwise none of the directors need be shareholders.

11. The Articles may provide that where there are nine or more directors, they may be divided into two or more classes, whose terms of office shall expire at different times, and that the terms may be for not to exceed three years; otherwise directors are all elected annually at the annual meeting of shareholders.

12. The Articles may require action of the Board of Directors to be by the affirmative vote of more than a majority of the directors present; otherwise the affirmative vote of a majority of the directors present is sufficient.

13. The Articles may restrict the declaration and payment of dividends; otherwise the directors shall have power, in their discretion, to declare and pay dividends out of the surplus earnings or net profits or surplus paid in in cash.

14. The Articles may provide for dividends without deduction for depletion in cases of corporations owning wasting assets or limited life assets; otherwise deduction must be made for depletion.

15. The Articles may provide that stock dividends of one class may be payable to shareholders of another class; otherwise no dividend payable in the shares of any class may be paid to the holders of the shares of any other class, except upon the majority vote of the shares of the class out of which payment is to be made.

16. The Articles may provide that more than a majority vote shall be required to amend the Articles of Incorporation; otherwise the Articles may be amended by a majority vote.

17. If the Articles provide for different classes or series of shares, the Articles may set out the voting rights of each class or series, with respect to amendments, mergers, consolidations, dissolutions and the sale of all, or substantially all, of the corporation's assets, and such voting right may be different in each case; otherwise the vote of a majority of each class or series shall be required.

In addition to the foregoing options, which are specifically referred to in the new law, it is also provided that the Articles of Incorporation may contain "any other provisions, consistent with the laws of this State, for the regulation of the business and conduct of the affairs of the corporation, and creating, de-

fining, limiting, or regulating the powers of the corporation, of the directors, or of the stockholders, or any class or classes of shareholders." This, it is believed, will permit the organizers to include in the basic law governing the corporation any provision, which is not forbidden by the Act itself, or is not contrary to some decision of an Appellate Court upon some common law point.

The new law undertakes to set out, in considerable detail, the steps required in the more important corporate proceedings which may arise after organization, such as the amendment of the Articles, merger and consolidations, the sale of all, or substantially all, of the corporation's assets, voluntary and involuntary dissolution, reports and penalties. Much of the procedure thus provided for is entirely new to the statutory law of Indiana, and much of it deviates materially from the procedure under former laws.

The Act relating to domestic corporations applies only to corporations organized under this Act and corporations, formed before this Act became effective, that elect to accept the provisions of this Act. An exception to this is found in Section 43, Paragraphs c and d, which provide that "upon the final liquidation of any corporation in any court proceeding, whether such corporation be organized under this or any other act" the court shall decree such corporation dissolved, and the Clerk of the Court shall cause certified copies of the decree to be filed in the office of the Secretary of State and in the office of the Recorder of the county where the principal office was located.

A simple and inexpensive method is provided, however, by which any corporation heretofore organized under the laws of Indiana may reorganize under the new law, and thereafter avail itself of all the rights, privileges, immunities and franchises of the new law.

The fees payable to the State for the filing of the Articles of Incorporation, under the new law, are much less than the fees required under former laws. For the first one thousand shares, either with or without par value, the fee is ten dollars, and for corporations with more than one thousand shares, the fee is one cent per share. No annual franchise tax or fee is provided. There was considerable argument before the Commission in favor of such a tax. Many of the states, which are looked upon with favor by corporations, the most notable of which is Dela-

ware, assess an annual franchise tax, which has resulted in producing a worthwhile revenue to the states requiring it.

I have made no attempt to discuss Part III of the new law, which applies solely to foreign corporations. It does not differ radically from the former law on the same subject.

The new law went into effect July 1st, and it is confidently believed that as soon as its terms become familiar to the lawyers of this state, and especially to the lawyers of other states having less favorable laws, that it will result in a great increase in corporate organization in Indiana.

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