The topic of corporate conveyancing is of some passing interest to practitioners and particularly so since the passage of The Canada Business Corporations Act in 1975.

This paper is divided into sections as follows:

1. The Nova Scotia Companies Act;
2. The Canada Business Corporations Act;
3. Special Act and other companies:
4. Miscellaneous;

1. The Nova Scotia Companies Act

The Nova Scotia Companies Act has been with us for some time and although amendments have been made periodically, it has remained basically unaltered. A committee of the Bar Society has studied the Act and debated as to whether the Act should be repealed entirely or whether only specific sections should be amended. Whether the legislature has paid any attention to the recommendations of this committee is uncertain. It is obvious that legislative amendments of this type generally receive a low priority in the political process.

For practitioners it is important to properly review the Act and to be basically familiar with the 142 sections contained therein.

(a) The Power of the Company to Borrow.

Before drafting any resolutions, you must consider the power of the company to borrow and how it is exercised.

The power to borrow is set out in Section 88 of **the Act**:

88(1) Every company shall have power, subject to the conditions of and in addition to all other powers conferred by this Act, to borrow money for the purpose of carrying out the objects of its incorporation and to execute mortgages of its real and personal property, to issue debentures secured by mortgage or otherwise, to sign bills, notes, contracts and other evidences of or securities for money borrowed or to be borrowed by it for the purpose aforesaid, and to pledge debentures as security for loans.

(2) The power to execute mortgages of its real and personal property, and the power to issue debentures secured by mortgage or otherwise, shall not be exercised except with the sanction of a special resolution of the company previously given in general meeting.

The power to borrow is a statutory power, but you must check and make sure that there is nothing in the Memorandum which would limit the power to borrow.

The conditions concerning the execution of a Special Resolution are found in Section 75 and Section 76 of the Companies Act. For most private companies you will obtain a waiver as to notice of the meeting and the shareholders will unanimously pass a Special Borrowing Resolution.

The Special Resolution must be filed at the Office of the Registrar of Joint Stock Companies within 15 days of the confirmation thereof, or if confirmation is not necessary, within 15 days of the passing thereof [S.'76(1)]. Failure to comply with the filing requirements renders the company, or a director or management, liable to a fine; [S. 76(4)(5)(6)] but does not invalidate the resolution.

Any Chartered Bank will insist upon receiving its own Special Borrowing Resolution from the company on their printed form. This form purports to exercise a general power to borrow and then is followed by specific powers to borrow from that particular banking institution, and delegates those powers to the directors.

In the appendix of precedents following these notes, you will find a copy of The Royal Bank of Canada form of Special Borrowing Resolution. The other banks generally use a

similar form.

It is often common for law firms to pass a Special Borrowing Resolution at the time of incorporation of the company; not only in favour of the Chartered Bank which has been selected by the incorporators, but also in a general form. A copy of this form is included in the appendix. If you can pass a general form **of Borrowing** Resolution at the time of incorporation this will simplify matters in the future.

As a solicitor I am firmly of the opinion that it is best to obtain a Special Borrowing Resolution at the time of the particular borrowing transaction. If this is done you do not have to depend on a general form of resolution nor the banking form of resolution. If this has not been done you can always have the shareholders ratify the action taken by the directors and subsequently pass the Borrowing Resolution. See Thompson & Sutherland Ltd. v. The Nova Scotia Trust Co. (1971), 4. N.S.R. (2d) 161 N.S. Sup_ Court (TD).

(b) The Powers of a Company to Guarantee.

The power to guarantee should be set out in the Memorandum of Association.

A broad form of guarantee as set out in a standard memorandum is as follows:

"To guarantee the performance of obligations or contracts by any company, corporation or person whatsoever and as security for such guarantee, to mortgage, pledge, hypothecate or otherwise charge the whole or any part of the property of the company:"

You should also note SECTION 24(3) of the Act which reads as follows:

Section 24 (3) Every company, limited by shares, formed and registered under this Act, shall have, in like manner as if the same were included among the objects set out in its memorandum, all corporate powers, and all corporate capacity, necessary to enable it to do, in addition to the acts and things included in the objects set out in its memorandum, all or any of the following acts or things, to:

(d)enter into any arrangements for sharing of profits, union of interests, co-operation, joint adventure, reciprocal concession or otherwise, with any person or company carrying on or engaged in. or about to carry on or engage in any business or transaction capable of being conducted so as directly or indirectly to benefit the company; and to lend money to, guarantee the contracts of, or otherwise assist any such person or company:

(4)All or any of the rights and powers set out in subsection (3) may be excluded or modified by express provision in the memorandum of the company, either as originally framed or as altered in accordance with this Act.

Some companies do not have a power to guarantee in their memorandum, and so you must bring the guarantee within the ambit of Section 24 (3)(d).

Other companies have a power to guarantee but this power is strictly limited in wording. Normally this power is restricted to guaranteeing the debts of parties with which the company has "business dealings".

The exercise of the power to guarantee will only require a shareholders' resolution where the memorandum requires one. Nevertheless you should obtain a directors resolution. There is a form of resolution by the directors to issue a guarantee also attached to the appendix to this paper.

In all cases where there is a restricted power of guarantee,' a Statutory Declaration should be obtained from **an officer of** the company to the effect that the guarantee **sought is within** the restricted power contemplated in the memorandum. For example if the company is guaranteeing the debts of a subsidiary company then the Statutory Declaration **might very well** set out the "business dealings" between the companies.

(c) The Power to Convey Assets.

The power to convey assets is set out in the standard memorandum as follows:

"To sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit and in particular for shares, bonds, debentures, debenture/stock or other securities of any other company."

Unfortunately, the word "undertaking" has not been satisfactorily defined. See Wickham v. N.B. s Can. Ry. **(1865)**, L.R. 1 P.C. 64.

If you do not have this power as set out above in your standard Memorandum, then you must rely on SECTION 24 (3)(f) of the Companies Act which reads as follows:

24 (3)(f)with the sanction of a special resolution, sell or dispose of the undertaking of the company or any part thereof for such consideration a the company may think fit, and in particular for shares, debentures or securities of any other compan having objects altogether or in part similar to those of the company;"

Basically speaking, you must satisfy yourself as to whether the undertaking of the company is being disposed of in whole or in part.

If the undertaking or part thereof is being sold and there is not a provision to cover this in the Memorandum then you must obtain a Special Resolution. In any case you should obtain a Directors' Resolution.

As a further practical consideration you should consider whether the company is merely disposing of inventory which it holds for sale, (i.e. a lot of land in a subdivision). If inventory is being disposed of, a deed signed by the officers of the company in accordance with the Memorandum and Articles of Association will suffice. If YOE believe that the company is not disposing of inventory but is actually disposing of assets which would make up the undertaking of the company in whole or in part then you must consider whether you should obtain a Special Resolution and certainly you should obtain a Directors Resolution.

Remember, if inventory is involved consider the provisions of the Bulk Sales Act and the Health Services Tax Act.

(d) Deregistration of the Company.

Pursuant to the Corporations Registration Act, if fees due to the Registrar are not paid on a date set by the Registrar (usually in May), the Certificate of Registration is revoked. *(SECTION* 31)

Upon revocation the company may still operate pursuant to the penalty provisions in the Corporations Registration Act. *SECTION* 43 of that Act provides for interest on the fees owing.

If the revocation of registration is not corrected, the Registrar may follow up under *SECTION* 122 of the Companies Act. You may correct revocation by payment of double fees and filing of the appointment of a new agent or reappointment of the old agent. *(SECTION 36(5))*

SECTION 122 of the Act reads in part as follows:

122 (1) Where the Registrar believes that a company is not carrying on business or in operation, he may send to the company by post, a registered letter inquiring whether the company is carrying on business or in operation, and stating that if an answer to the letter is not received within one month from the date thereof, a notice will be published in the Royal Gazette with a view of striking the name of the company off the register.

(2) If the Registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not *within one* month after sending the letter receive an answer thereto, the Registrar may within four weeks after the expiration of the month publish in the Royal Gazette and send to the company by post, a notice

referring to the letter, and stating either *than an* answer thereto has been received from the company to the effect that it is not carrying on business or in operation, or that no answer thereto has been received by the Registrar (as the case may be), and that at the expiration of one month from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(3)At the expiration of the time mentioned in the notice the Registrar may, unless cause to the contrary is previously shown to his satisfaction by such company, strike the name of such company off the register, and shall publish notice thereof in the Royal Gazette and on the publication in the Royal Gazette of such last mentioned notice the company whose name is so struck off shall be dissolved, provided that the liability, if any, of every director, *managing officer* and member of the company shall *continue and* may be enforced as if the company had not been dissolved.

(4)If any company or member or creditor thereof feels aggrieved by the name of the company having been struck off the register in pursuance of this Section, the company or member or creditor may apply to the court, and the court if satisfied that the company was, at the time of the striking off, carrying on business or in operation, and that it is just so to do, may order the name of the company to be restored on the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off, and the court may by the order give such directions and make such provisions as seem just for placing the company and all persons in the same position, as nearly as may be, as if the name of the company had never been struck off.

(5)A letter or notice authorized or required for the purposes of this Section to be sent to a company may be sent by post, addressed to the company at its registered office, or if no office has been registered, addressed to the company to the care of some director or officer of the company, or if there is no director or officer of the company whose name and address are *known to* the Registrar, a letter **or notice in** identical form may be addressed to ,the company, to the care of each of the persons who subscribed the memorandum of association, addressed to him at the address mentioned in the memorandum.

Once revocation is complete the company is dissolved. The provision of theDissolved Corporations Property Act apply and the former company's real and personal property escheats to or is vested in the Crown in the right of the Province of Nova Scotia.

In summary, you may obtain security from a revoked company but not a dissolved one. If you are obtaining assets purchased from a revoked company this will make little difference. If you are entering into a guarantee arrangement or lending money to a revoked company, you should ensure that that company is reinstated by payment the double fees and reappointment of the agent as your clients association with that company will likely be a continuing one.

2.The Canada Business Corporations Act

This Act is little understood by practitioners in i Province of Nova Scotia. In most instances incorporation by way of the Nova Scotia Companies Act for the following reasons:

(a)Practitioners feel more comfortable with the Provincial Companies Act;

(b)It is more convenient to deal with the Registrar of Joint Stock Companies rather than the Department of Consumer and Corporate Affairs in Ottawa;

(c)The Federal Act requires a majority of directors to be residents of Canada and Canadian citizens.

(d)There are more onerous reporting requirements under the Federal Act.

Apart from the above disadvantages incorporation is easy and the company has broad powers and is less restricts that a Nova Scotia company. I SECTION 15 (1) of the Act provides as

follows:

CAPACITY OF A CORPORATION - A corporation has the capacity and, s ject to this Act, the rights, power and privileges of a natural person.

Thus a corporation is given the power of a natural person and of course the ability to borrow.

SECTION 16 (1) of the Act does not require a by-law to be passed.

SECTION 16 (1)

POWERS OF A CORPORATION - It is not necessary for a by-law to be passed in order to confer any particular power on the corporation or its directors.

You should note however SECTION 16 (2) which reads as follows:

RESTRICTED BUSINESS OR POWERS - A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles.

(3)RIGHTS PRESERVED - No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act.

Please note the following restricted loans and guarantees set out under SECTION 42.

SECTION 42 (1)

PROHIBITED LOANS AND GUARANTEES - Except as permitted under subsection (2), a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise,

(a) to any shareholder, director, officer or employee of the corporation or of an affiliated corporation or to an associate of any such person for any purpose, or
(b)to any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or affiliated corporation, where there are reasonable grounds for believing that

(c) the corporation is or, after giving the financial assistance, would be unable to pay its liabilities as they become due, or

(d) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

SECTION 42 (2)

PERMITTED LOANS AND GUARANTEES - A corporation may give financial assistance by means of a loan, guarantee or otherwise

(a) to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation;

(b) to any person on account of expenditures incurred or to be incurred on behalf of the corporation;

(c) to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate;

(d) to a subsidiary body corporate of the corporation; and

(e) to employees of the corporation or any of its affiliates;

(i) to enable or assist them to purchase or erect living accomodation for their own occupation, or

(ii) in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.SECTION 42 (3)

ENFORCEABILITY - A contract made by a corporation i contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

A Solicitor should be aware that SECTION 183 provide as follows:

SECTION 183

BORROWING POWERS - Unless the articles or by-laws o1 or a unanimous shareholder agreement relating to a corporation otherwise provide, the articles of a corporation are deemed to state that the directors c 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;

(c)subject to section 42, give a guarantee on behalf of the corporation to secure performance of an obligation of any person, and

(d)mortgage, hypothecate, pledge or otherwise create a security interest in all or any property of the corporation, owned or subsequently acquired, to secure any obligation of the corporation.

Another saving provision of the Act is SECTION 183

SECTION 183 (1.1)

DELEGATION OF BORROWING POWERS - Notwithstanding subsection 110 (3) and paragraph 116 (a), unless the articles or by-laws of or a unanimous shareholder agreement relating to a corporation otherwise provide,the directors may, by resolution, delegate the powers referred to in subsection (1) to a director, a committee of directors or an officer.

Would you please note SECTION 17 of the Act which is the saving section.

SECTION 17

NO CONSTRUCTIVE NOTICE - No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed by the Director or is available for inspection at an office of the corporation.

SECTION 18

AUTHORITY OF DIRECTORS, OFFICERS AND AGENTS - A corporation or a guarantor of an obligation of the corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that

(a)the articles, by-laws and any unanimous shareholder agreement have not been complied with,

(b)the persons named in the most recent notice sent to the Director under section 101 or 108 are not the directors of the corporation,

(c)the place named in the most recent notice cent to the Director under section 19 is not the registered office of the corporation,

(d)a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or leas no authority to exercise powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent,

(e)a document issued by any director, officer or agent of a corporation with actual or usual authority to issue the document is not valid or not genuine, or,

(f)financial assistance referred to in section 42 or a sale, lease or exchange of property referred to in subsection 183 (2) was not authorized, except where the person has or ought to have by virtue of his position with or relationship to the corporation knowledge to the contrary.

The above SECTIONS 17 and 18 together with SECTIONS 42 (3) and 16 (3) are an attempt to give statutory authority parallel to the case of the Royal British Bank vs. Turquand (1856) 6 E & B 327.

In summary a Canada Business Corporation will have a power to borrow which will be unfettered. The Act contemplates that there may be restrictions on borrowing or a shareholder agreement restricting borrowing but this will not affect a third party. In other words one of the shareholders may bring action against the other shareholders or the management of the company for an illegal exercise of the company's powers. This right to bring an action may not be asserted against third parties unless the third parties had actual notice of the restriction.

It may very well be that the financial corporation for which you will act will not feel comfortable without a borrowing by-law. If so, you can draft a by-law for execution by the shareholders. This borrowing by-law has **little or** no effect but may be of comfort to your client. A draft form of such by-law is attached to the appendix. Also attached you will find a form of Directors Resolution authorizing the borrowing.

Please note that an extraordinary sale, lease or **exchange of** the companies assets will require the approval of shareholders.

This is set out in SECTION 183 as follows:

SECTION 183 (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 business of the corporation requires the approval c the shareholders in accordance with subsections (3) to (7).

SECTION 183 (3)

I NOTICE OF MEETING - A notice of a meeting of shareholders complying with section 129 shall be se in accordance with that section to each shareholder and shall

(a)include or be accompanied by a copy or summa 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 referrec to in subsection (2).

SECTION 183 (4)

SHAREHOLDER APPROVAL - At the meeting referred to it 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.

SECTION 183 (5)

RIGHT TO VOTE - Each share of the corporation carrie the right to vote in respect of a sale, lease or exchange referred to in subsection (2) whether or no it otherwise carries the right to vote.

SECTION 183 (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.

SECTION 183 (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.

SECTION 183 (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.

You will need a by-law for the extraordinary sale, lease or exchange.

For issue of a Trust Debenture I refer you to Part 7 of the Act, SECTIONS 77 to 88 inclusive.

For the purchase of assets of a Canada Business Corporation from a Receiver or Receiver-Manager I refer you to Part 8 of the Act, SECTION 89 to 96.

An excellent book and manual, the Canada Corporations Manual, 1978 Edition, by Robert Kingston,-Q.C., of the Ontario Bar, is issued by the Richard De Boo Company Limited of Toronto.

3. Miscellaneous

(a) The Corporations Securities Registration Act:

This simple statute is of great assistance to the practitioner. Always remember that a Debenture must have one affidavit as defined in SECTION 3 (2) of the Act. A mortgage charge contained in a Trust Deed or other instruments to secure bonds, debenture or debenture stock set out in SECTION 2 (1) of the Act must have an affidavit of the mortgagee as defined in SECTION 2 (2). A form of this affidavit is attached in the appendix.

SECTION 15 of the Act states that neither the Bills of Sale Act nor the Assignment of Book Debts Act will apply to the Corporations Securities Registration Act. Consequently, it is unnecessary to file a Debenture in the Registry of Deeds chattel section or to attempt to renew a debenture every three or five years as the case may be.

Remember that a fixed charge on land contained in a debenture necessitates the debenture being recorded in the applicable Registry of Deeds office.

It was the consensus among practitioners for years that where a corporation appeared in a chain of title, a search of the records at the Registry of Deeds Office should be conducted for the period of time before the company acquired that piece of land and at the office of the Registrar of Joint Stock Companies to see if there was either a Debenture or a Deed of Trust and Mortgage containing an after-acquired fixed charge.

This consensus may now change. Our Supreme Court Appeal Division in the case of The Royal

Bank of Canada v. Madill (1981), 43 N.S.R. (2d) 574 has stated that an afterward fixed charge is no better than a floating charge. Such a fixed charge cannot affect a bona fide purchaser for value without notice because it could not be found upon a search of title at the Registry.

You should always obtain a Certificate of Status from the Registrar of Joint Stock Companies. Remember to insist that the Certificate show any charges pursuant to the Corporations Securities Registration Act. If a fixed charge shows up you will have to dispose of this charge or have it postponed before completing your borrowing. If it is a floating charge and your lender is still in agreement to proceed with the transaction then you should obtain a letter from the previous lender to state that the floating charge is not crystallized and that a Receiver has not been appointed.

It is proper receivership practise to file, upon the appointment of a receiver, a Statutory Declaratio of the appointment at the office of the Registrar of Joint Stock Companies and at the Registry of Deeds office. It i: equally proper to evidence this appointment by way of letter rather than Statutory Declaration. Nevertheless there may be a time lag between the appointment of the receiver and the filing of the Statutory Declaration or letter. In addition a great many practitioners do not file a Statutory Declaration nor letter and this is a good reason for obtaining a letter from the lender.

(b)The Corporations Contracts Act:

This statute is a small statute which runs or page and is often overlooked. Essentially it states that every contract made by a corporation within the scope of it charter or act of incorporation which would be valid and binding if the corporate seal was affixed shall be so valid and binding notwithstanding the failure or omission to affi the seal. This applies to all sorts of companies and not just provincial companies. It is an attempt to regulate the law of contract in the Province of Nova Scotia.

Remember this Act will not make valid any contract of a corporation if the corporation forgets to affix its seal and if it is the type of contract which will be invalid against a person for want of a seal.

4.Special Act and Other Companies

A list of incorporations incorporated other than pursuant to the Canada Business Corporations Act or the Nov. Scotia Companies Act seems almost endless. There is nothing. to stop a foreign corporation from doing business in Nova Scotia upon registration and payment of the proper fees nor indeed for any company incorporated by any statute of any o the ten provinces or of the federal government.

When you deal with companies incorporated outside the Province of Nova Scotia pursuant to provincial legislation or foreign government legislation you will require an opinion from a firm of solicitors in that jurisdiction as t< the legal affect of the borrowing, guarantee or conveyance and as to what documents should be required.

A company incorporated by a special statute is also becoming quite commonplace. A number of companies which are usually of a nonprofit variety are incorporated by Special Act. You must read the Act and judge matters accordingly.

In addition there are other statutes which incorporate public companies but which the average . practitioner does not run across on a day to day basis. For example you may very well deal with a company which is incorporated under the **Credit Union Act or under the Cooperative** Societies Act. You can also deal with a federal company incorporated under the Trust Companies Act or under the Loan Companies Act.

You will have to read these statutes and do the necessary research. Fortunately, these problems occur infrequently and everybody starts off on the same footing. It is merely a matter of familiarizing yourself with the particular statute involved.

Summary

1. Always obtain a Certificate of Status from the Registrar of Joint Stock Companies. Remember to order the Certificate to show charges under the Corporations Securities Registration act.

2. Remember to get your clearance as required under other provicincial legislation, i.e., Workers' Compensation Act, Labour Standards Act and the Health Services Tax Act.

3. Search at the Companies Office for the powers and restrictions on those powers when dealing with a Nova Scotia Company. Check to see under the Memorandum and/or Articles as to how the company is to execute the documents and as to how the corporate seal is to be affixed.

4. Obtain a Certificate of Encumbrancy or Statutory Declaration in some form for corporate borrowing.

5. For a Nova Scotia company always get a Directors and Shareholders Resolution for borrowing. Don't be forced into depending on some variation of the rule in Thompson & Sutherland v. Nova Scotia Trust Company.

6. On sale of the companies assets, make sure that it is not a disposition of the undertaking in whole or in part. If there is any doubt obtain the necessary Directors and Shareholders Resolutions.

7. For a Nova Scotia company check on the power to guarantee and always obtain a Directors Resolution.