

Opinion No. 43

CORPORATIONS; Foreign Corporations; admission to state—Sections 15-101, 15-103, 15-108, 15-110, 15-111, 15-204, 15-401, 15-1701, 15-1704 and 15-1709, Revised Codes of Montana, 1947.

Held: A foreign corporation having less than three (3) directors on its managing board cannot be admitted to do business in Montana.

May 16, 1962

Honorable Frank Murray
Secretary of State
Capitol Building
Helena, Montana

Dear Mr. Murray:

You have presented this office with the question of whether or not a foreign corporation organized and existing under the laws of a sister state which permits such corporation to be governed by less than three directors may qualify to do business in the State of Montana. Your question is premised on the requirements of Sections 15-1701 and 15-1709, Revised Codes of Montana, 1947, which require:

(a) under Section 15-1701, *supra*, as a condition to doing business in this State the filing of certain statements "attested by not less than three of its board of directors."

(b) under Section 15-1704, *supra*, that the annual report of a foreign corporation doing business in this state under Section 15-1701, *supra*, "shall be in the same form and contain the same information as required in the statements mentioned in said section."

The rationale of an answer to such question must necessarily begin with consideration of the overall intent of the legislature in permitting and regulating corporations as to the number of directors.

Section 15-101, Revised Codes of Montana, 1947, states:

"A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes."

As the corporations in question are necessarily private corporations, the manner of formation thereof is pertinent to this discussion.

Section 15-103, Revised Codes of Montana, 1947, states:

"Private corporations may be formed by the voluntary association of any three or more persons in the manner prescribed in this chapter."

In Section 15-103, *supra*, we have the initial indication of the legislative intent that a corporation should be initiated by at least three persons.

Section 15-108, Revised Codes of Montana, 1947, specifying the contents of the Articles of Incorporation, states in part:

"5. The number of its directors or trustees, which shall not be less than three. . ."

Section 15-110, Revised Codes of Montana, 1947, states with regard to the execution of articles of incorporation:

"The articles of incorporation must be subscribed by three or more persons. . ."

Section 15-111, Revised Codes of Montana, 1947, repeats as to the manner of forming corporations the requirement that three or more persons must subscribe the articles and that upon compliance with statute shall be a body politic and corporate.

Section 15-204, Revised Codes of Montana, 1947, in specifying contents of notice for corporate organization changes, again evidences the intent that the number of directors be at least three.

Section 15-401, Revised Codes of Montana, 1947, states unequivocally:

"The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted and controlled by a board of not less than three nor more than thirteen directors, to be elected from among the holder of stock. . ."

Section 15-1709, Revised Codes of Montana, 1947, outlines the liabilities, restrictions and powers of foreign corporations thusly:

"All foreign corporations licensed to do business in the State of Montana shall be subject to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers."

To this same effect see *Lewis v. N. P. Ry. Co.*, 36 Mont. 207, 92 Pac. 469 and *Great Western Sugar Co. v. Mitchell*, 19 Mont. 328, 174 Pac. 2d 817.

The legislative intent that corporations doing business in Montana shall be governed by at least three directors is thus manifest and applicable to both domestic and foreign corporations.

Our Supreme Court in *Chicago, Milwaukee, St. Paul and Pacific Railroad Co., v. Harmon*, 89 Mont. 1, 295 Pac. 762, expressed the policy regarding a foreign corporation's doing business in Montana thusly:

"A corporation, being but a creature of statute, can have no actual existence outside the state of its creation (Citing case), and

can do business in a sister state only by reason of comity between the states (Citing case). It is not a 'person' within the meaning of Section 2, Article IV, of the Constitution of the United States, the privilege and immunity clause (Citing case); and, while it is considered a person or citizen within the meaning of the equal protection clause (Sec. 1, Fourteenth Amendment), it cannot invoke the equal protection clause until after it has been duly admitted to do business in the state (Citing case). Therefore, generally speaking, with reference to the portion of the corporation only, **a state may exercise its discretion in either excluding foreign corporations of a given class, or imposing conditions upon its admission which the corporation must meet or forego its intent to enter the state for the purpose of conducting business therein.** (Citing cases.)" (Emphasis supplied.)

The comity enjoyed between Montana and her sister states does not, in my opinion, require the extension to a foreign corporation of the privilege of operating herein under a managerial structure clearly and repeatedly denied to domestic corporations.

Very truly yours,
FORREST H. ANDERSON
Attorney General