

**Held:** Any corporation save those excepted by Section 5928, Revised Codes of Montana, 1935, may amend its articles of incorporation so as to accomplish any change of powers or activities which it could accomplish by incorporating an entirely new corporation. The filing fee in this instance should be in the recording of an amendment to the articles the same as if new articles were presented.

April 27, 1946

Mr. Sam W. Mitchell  
Secretary of State  
State Capitol  
Helena, Montana

Dear Mr. Mitchell:

You have presented for consideration to this office the question of whether or not a corporation organized under Sections 6375 to 6393, Revised Codes of Montana, 1935, may by amendment under the provisions of Sections 5918, Revised Codes of Montana, 1935, change from a cooperative corporation to a profit corporation under Sections 5900, et seq., Revised Codes of Montana, 1935, and if so, what fee should be charged for filing the amendment.

Your request and the documents presented therewith set forth that the corporation in question was formed on March 23, 1933, having complied with the provisions of Sections 6375 to 6395, Revised Codes of Montana, 1921, as a cooperative corporation. Said Sections 6375 to 6395 provide a specific procedure for the formation of a special type of corporation which is generally classified as a non-profit corporation. Although such corporations may carry on the same type of business as a regular profit corporation, there is a decided difference in theory as to the beneficiaries of the corporate success. A person who might invest in a profit corporation possibly would not be interested in a cooperative and vice versa. The profit corporation is operated primarily for the pecuniary benefit of those investing in it through ownership of its stock. Such stockholders, or at least some classes, are limited in their profits from the enterprise only by the success of the business. In a cooperative corporation the stockhold-

Opinion No. 149.

Cooperative Marketing Associations—  
Corporations—Profit Corporations—  
Non-Profit Corporations—Fees,  
Corporation.

ers in all instances are limited by law as to their return. The producer or consumer is the prime beneficiary of the success of a cooperative.

Further, the regular profit corporation is the owner in law of all profits made, and for the stockholder to derive a benefit there must be a dividend declared by the directors. In a cooperative the consumer or producer buys or sells for the prevailing price; but the cooperative by law is obligated at the end of the fiscal year to pay all profits on the business conducted, exclusive of operative expenses, which include interest on stock, to its patrons in patronage dividends. Under such circumstances the corporation does not in reality have an exclusive right in the profits or savings but only holds the same in a trust relationship similar, to some extent, to the relation of administrator and heirs.

In view of the above distinctions between profit corporations and cooperative corporations, the courts have unanimously taken cognizance of fundamental differences between the two types. I, therefore, believe the amendment in this instance makes a fundamental change in the corporation and in reality an entirely new and different corporation would be formed by the amendment.

Volume 7, Fletcher's CYC Corporations, Permanent Edition, pages 886, 887, Section 3718, states a general rule as follows:

"This granted power of amendment cannot be exercised to change the corporation in such a manner as to make an entirely different kind of a corporation or to change substantially the objects and purposes of the corporation."

See also *People v. Public Service Commission*, Second District, 124 N. E. 105, and *Perkins v. Coffin*, 79 Atl. 1070.

Under Sections 5900 to 5917.4, Revised Codes of Montana, 1935, being Chapter 12 of the Civil Code of Montana, the law specifically sets forth the procedure for incorporating profit corporations.

Section 5902, Revised Codes of Montana, 1935, states specifically as follows:

"Private corporations may be formed by the voluntary association

of three or more persons in the manner prescribed in this chapter."

As to the necessity of formal and strict compliance with the statutory methods of incorporation, it is stated in 14 Corpus Juris at page 118 as follows:

"Corporations are creatures of the law and can only come into existence in the manner prescribed by law. As has already been stated general laws authorizing the formation of corporations are general offers to any persons who may bring themselves within their provisions; and if conditions precedent are prescribed in the statute or certain acts are required to be done, they are terms of the offer and must be complied with substantially before legal corporate existence can be acquired."

The change to be brought about by the amendment in this instance is a change from one type of corporation to an entirely different type. In reality a new corporation is formed. It would seem, in view of the requirements of Section 5902 and the general rule above cited, the procedure set out in Sections 5900 to 5917.4, Revised Codes of Montana, 1935, should be followed in order to have a legitimate corporation. However, even if the above is more logical and possibly preferable, the statutes pertaining to amendments must be considered; and whether they are logically compatible with the provisions of Sections 5900 to 5917.4 is a matter within the control of our legislators and not a concern of yours or this office.

Chapter 38, Civil Code of Montana, being Sections 6375 to 6396, Revised Codes of Montana, 1921, under which the amending corporation herein was organized has no section or amendments. Thus, as to amendments and the extent thereof, the general corporate statutes must be consulted. Chapter 13, Civil Code of Montana, being Sections 5918 to 5928, Revised Codes of Montana, 1935, pertains to amendments of articles of incorporation of corporations organized under Montana law, save as to those specific types of corporations enumerated in Section 5928.

Section 5918, Revised Codes of Montana, 1935, is very broad in its scope. It was first enacted as Section 1,

Chapter 56, Laws of 1921. It states in part as follows:

"Any corporation organized under any of the laws of the state of Montana heretofore or hereafter, whether formed and existing before or after the taking effect of the Codes on July 1, 1895, may, in the manner herein provided, amend its articles of incorporation by . . ."

Thus any corporation save those expressly excepted in the law would come within its provisions. The section as originally enacted continued from the above quoted portion to the end in the following words:

". . . changing the name, place of business or number of directors, by changing the number, par value, character, class or preference of its shares of capital stock, by increasing or decreasing the capital stock, by changing or extending its powers or business to embrace any power or purpose for which corporations may be organized under the laws of Montana, by extending its term of existence within the limits provided by law, or by an amendment in respect to any other matter which might lawfully have been originally provided in such articles of incorporation."

A corporation might have under the original act changed its name, place of business, number of directors, the number and par value, character, class or preference of its shares of stock, increase or decrease the stock; or extend its powers or business to embrace any power or purpose for which corporations may be organized under the laws of Montana, extend its term of existence or make such other amendments which might have been originally provided in such articles of incorporation. These provisions were broad; however, I believe it was intended that all such changes should stay within the contemplation of its original articles of incorporation. That is, a corporation could not have, under the original act, changed its corporate structure entirely. The changes contemplated were those which could have been included under its original articles of incorporation and under the original act under which it was organized. The last portion of the original act under which it was or-

ganized specifically pointed out "which might lawfully have been originally provided in such articles of incorporation." The word **such** referred directly to its original articles.

By Chapter 28, Laws of 1931, the legislators of this state added to the above quoted portions of this statute the following:

". . . or is now or may be, by law, provided in original articles of incorporation or in amendments thereto."

It is to be noted no limitation is placed either directly or by implication on the word **original**. In fact, the amendment itself points to the fact it was not to be limited as had there been any intention of limited the meaning of the word the amendment would have been surplusage, as the subject matter would have been covered by the act in its original wording.

Under the last quoted portion of said section, namely the 1931 amendment, it seems the legislature intended a corporation could by amendment make any change in its articles which could be effected by the formation of a new corporation.

Therefore, it is my opinion—insofar as your office is concerned—any corporation save those excepted by Section 5928, Revised Codes of Montana, 1935, may amend its articles of incorporation so as to accomplish any change of powers or activity which it could accomplish by incorporating an entirely new corporation.

Further, it is my opinion that in this instance a new corporation is in reality formed and that a filing fee in the recording of this amendment should be the same as if new articles were presented.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General