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Corporation Control of Non-US Corporations
Foreign Corporations
13-A M.R.S.A. 1401

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AUGUSTA, MAINE 04333

April 1, 1977

Honorable Donald Hall
House of Representatives
State House
Augusta, Maine 04330

Dear Representative Hall:

We are responding to your request for an opinion of this office on the legality and constitutionality of proposed legislation entitled, "An Act to Increase the Application and Annual Report Fees of Corporations Organized Outside the United States and Doing Business in Maine." Before commenting on constitutional issues which may be raised by the legislation, we will comment briefly on what the effect of the legislation would be.

Generally speaking, a domestic corporation is required to pay fees to the Secretary of State upon filing of its articles of incorporation, as determined by the sliding scale set forth in 13-A M.R.S.A. § 1403, based upon its authorized capital stock. In addition, a "foreign corporation" - that is, a corporation organized outside of the State of Maine - is required to pay a fee of \$100 upon application for authority to do business in Maine. 13-A M.R.S.A. § 1401, sub-§ 24. Both domestic corporations and foreign corporations authorized to do business in Maine are required to pay a fee of \$30 when filing their annual reports. 13-A M.R.S.A. § 1401, sub-§ 30.

The proposed legislation would create a third class of corporations; those corporations which are applying for or have received authorization to do business in the State of Maine and which are organized outside of the United States. Domestic corporations and foreign corporations organized in the United States would continue to pay initial fees and annual fees as previously designated by statute. Foreign corporations organized outside of the United States would pay an initial fee when filing for authorization to do business in the State based upon a sliding scale with regard to authorized capital stock similar to the fee

presently charged for organization of a domestic corporation. The minimum application fee for these corporations would be \$500. In addition, corporations in this latter category would be required to pay an annual report filing fee of \$100 as opposed to the \$30 required for the other two classifications of corporations.

The first of the fees which would be increased for "alien" corporations, i.e., those organized outside of the United States, would be the fee for application to do business in the State. It has long been decided law ". . . that foreign corporations cannot do business in a state except by consent of the state [and] that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction." Hanover Fire Insurance Company v. Carr, 272 U.S. 494 (1926). As a general rule, a State may discriminate in favor of domestic and against foreign corporations or make separate classifications of these corporations for purposes of assessing fees for admission of foreign corporations to do business within the state. See citations in annotations at 49 A.L.R. 726, 727 and 77 A.L.R. 1490, 1491; Cf. State v. Western Union Telegraph Company, 73 Me. 518, 525, (1882). See also 18 Fletcher Encyclopedia of Corporations (1969), § 8817, p. 616, et seq. and 1976 Supplement. Since the State, as a general rule, is allowed to impose such fees and is allowed to discriminate in imposing such fees, it is our opinion that increasing the fees paid on application by "alien" corporations would not cause general constitutional problems.

One warning to the foregoing paragraphs should be noted. While it is our opinion that increasing the entry fee for "alien" corporations would be sustainable per se, its application to specific corporations may cause constitutional problems depending upon the nature of the corporation's business. Article I, Section 8, Clause 3 of the United States Constitution gives Congress the power "To regulate commerce with foreign nations, and among the several states" Interpretation of this so-called "Commerce Clause" by the United States Supreme Court indicates that it would preclude any state from imposing a fee or tax upon the privilege of a foreign corporation to carry on a business within the state which is exclusively in the nature of "interstate commerce." Spector Motor Service v. O'Connor, 340 U.S. 602 (1951). Presumably this same restriction would apply to "alien" corporations whose business in the State of Maine would be in the nature of foreign commerce. Therefore, the applicability of the fee provision to any specific "alien" corporation would have to be decided upon the individual facts concerning the nature of its business within the State of Maine in order to avoid a finding of unconstitutionality as to the application of the statutory fee.

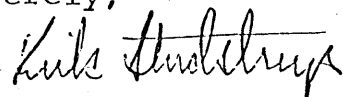
The proposal to increase the annual filing fees for "alien" corporations would create a constitutional problem. The specific problem would arise under the "Equal Protection Clause" of the Fourteenth Amendment to the United States Constitution. That provision states

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

A corporation is a "person" within the meaning of the Fourteenth Amendment (Hammond Beef and Provision Company v. Best, 91 Me. 431 (1898)) and this would apply equally to "alien" corporations which have been authorized to do business within the State of Maine. While "equal protection" does not apply to corporations when the question is application for authorization to do business in a State for they have not yet been admitted to the State's jurisdiction, once that authority has been extended, the provision applies. Southern R. Co. v. Greene, 216 U.S. 400 (1910); Hanover Fire Insurance Company v. Carr, supra; and Annotations at 49 A.L.R. 726, 747 and 77 A.L.R. 1490, 1494. An annual fee must not be arbitrary; there must be some relation between the fee and the value of the privilege for which it is imposed. If a schedule of such annual fees creates any inequalities among the corporations to which it applies, such schedule of fees would violate the "Equal Protection" provision. Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71 (1924).

The proposed legislation would impose an annual fee upon "alien" corporations which is more than three times the fee imposed upon domestic and other "foreign" corporations. There is no designation in the proposed statute of a special use for this greater fee, and it must be considered a general revenue raising provision. Under these circumstances, the increased annual fee for "alien" corporations would face the possible constitutional challenge that it violates the "Equal Protection" provision of the Fourteenth Amendment in that it discriminates against one class of corporations with no rational relationship between the basis of the classification and the discriminatory provision itself.

Sincerely,



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