DIVISION II, Section 3, Types of Company which may be incorporated.

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1. Introduction

Throughout our work I would like to use the phrase "kinds of companies" when referring to companies permitted to be incorporated under our present Alberta Act but having different requirements with respect to the Memorandum of Association. The phrase "types of companies" will be used to distinguish the different types of companies which may be incorporated with fundamentally the same memorandum of association.

2. Kinds of Companies

The present Alberta Act permits the incorporation of three distinct kinds of companies. They are: (a) a specially limited company; (b) a company limited by guarantee with or without shares; (c) a company limited by shares.

(a) Specially Limited Company

The provisions regarding such a company first appeared in the Alberta Companies Act of 1929 which followed the English Act of the same year. The whole concept was abandoned in England with the passage of the Companies Act of

1948. No modern English textwriter such as Gower or Pennington deals with the topic at all, nor does even the second edition of Halsbury discuss the matter. The concept still exists in the Australian Companies Act probably because the Australian Act does not allow no par value shares. It has been abandoned in the new South Africa Act (if it ever existed in the old one), the Ghana Companies Code, the Ontario Business Corporations Act, the Canadian Business Corporations Act, the proposed new Saskatchewan Companies Act and has never had any currency in the United States. The one recent Act which still provides for specially limited companies is the British Columbia Companies Act under the provisions of section 7 of that Act. It may well be that this was done because of the wording of the application section 3 of the B.C.C.A. and the fact that there were a fairly substantial number of such companies incorporated in British Columbia prior to the passage of the new Act. The application section, section 3, makes the Act applicable to existing companies, rather than requiring continuance under the new Act, and it was probably felt that this was the only manner in which a substantial number of specially limited companies could be brought under the provisions of the new Act.

In its original concept the use of such a company was restricted to development of a natural resource, such as mining and oil development, a very high risk game. Par value shares of $1.00 or $10.00 per share could be sold for as little as ten cents per share with the balance remaining on call, but the purchaser was not liable for the balance and could not be called upon to be a contributory in the event of winding up or bankruptcy of the company. Under our present Alberta Act a specially limited company is defined in section 2(1)(33). The special requirements for the Memorandum of Association are set out in section 19 and a special set of powers are given to the company under section 20(3).

The whole of Part 7, which consists of sections 163 and 164 set forth the special provisions with respect to such a company and deal primarily with the necessity of warning the public that this is a specially limited company. The words "non-personal liability" had to be shown in brackets after the company's name wherever the company was required to use its name such as its seal, on its share certificates, and on its invoices.

The present Registrar of Companies for Alberta can recall one instance only in the last 30 years in which the staff of a Registrar's Office failed to dissuade a proposed incorporator from adopting this form of a company. The proposed incorporator was not a lawyer and simply could not be dissuaded. To the best of his knowledge this has been the only specially limited company incorporated since the end of the last war. He could not give me, nor has he any way of determining, how many such companies had been incorporated since the passage of the 1929 Act. He occasionally sees one, but being a sensible and cautious man, he is not prepared to give any estimate as to numbers although he assures me that it cannot be very many.

RECOMMENDATION:

> All of the arguments which apply to par value shares as a possible trap for the untutored in being sold at less than the par value shown on the share certificate, apply with equal force to the specially limited company, which can only have par value shares. The vehicle is no longer used, and it embodies complexities for shareholders and creditors, and in the drafting of the Act, which seem totally out of proportion to any advantage to be gained by retaining this kind of company. I recommend therefore that it be abandoned and that a special section in the application sections of the

Act be inserted to compel such companies to continue under the new Act, or by the provisions of the section to simply convert them to companies limited by shares.

(b) A Company Limited By Guarantee

The pure guarantee company, one which has no shares, was first introduced in the English Companies Act of 1862 in order to allow the convenience of a corporate structure, as opposed to a trust, for charitable and educational purposes where no distribution of profits was contemplated. Since no distribution of profits was contemplated the injection of capital in the form of shares seemed unwarranted, but the English legislatures could not give up or alter their firm views regarding the capital yardstick even to accomplish good and charitable works. A pure guarantee company was therefore devised in which those interested could become members by guaranteeing a fixed amount to pay the corporation's debts upon dissolution. The following points should be noted:

(i) a creditor could not sue on the guarantee unless the company was forced to dissolve and had insufficient money to pay its creditors;

(ii) probably, but it is not absolutely clear, a member could not retire from the company and thus escape liability on the guarantee. This is not as serious as it sounds since the guarantee per member was usually quite small;

(iii) the right of a member to transfer his membership was and is doubtful since membership is not usually transferrable under the enabling statute unless specifically granted by the articles or the bylaws.

A company limited by guarantee with a share capital was introduced in England in the 1929 Act and arrived in Alberta the same year. This hybrid form was evidently adopted to facilitate non-profit companies which were designed more for the members than for charitable purposes such as golf clubs, business associations, etc., which needed a starting capitalization in order to acquire facilities. Membership would then carry with it participation in assets and this form removed any doubts concerning the transferrability of membership.

The main, and so far as I am aware the only, use for companies limited by guarantee is for a non-profit company that desires the convenience and benefits of the corporate structure in carrying on its endeavours and the corporate form in order to raise capital. The O.B.C.A. and the C.B.C.A. make no provision for companies limited by guarantee, nor does the B.C.C.A. The Ghana Code in section 9 makes provision for

Ghana Companies Act provisions:

9. (1) An incorporated company may be either—

(a) a company having the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them (in this Code termed "a company limited by shares"); or

(b) a company having the liability of its members limited to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up (in this Code termed "a company limited by guarantee"); or

(c) a company not having any limit on the liability of its members (in this Code termed "an unlimited company").

(2) A company of any of the foregoing types may either be a private company or a public company.

(3) A private company is one which by its Regulations—

(a) restricts the right to transfer its shares, if any;

(b) limits the total number of its members and debentureholders to fifty, not including persons who are *bona fide* in the employment of the company and persons who, having been formerly *bona fide* in the employment of the company, were while in that employment, and have continued after the determination of that employment to be, members or debentureholders of the company;

(c) prohibits the company from making any invitation to the public to acquire any shares or debentures of the company; and

(d) prohibits the company from making any invitation to the public to deposit money for fixed periods or payable at call, whether bearing or not bearing interest:

Provided that where two or more persons hold one or more shares or debentures jointly, they shall, for the purposes of this subsection, be treated as a single member or debentureholder.

(4) Any other company shall be a public company.

(5) A company limited by shares and an unlimited company must be registered with shares. A company limited by guarantee shall not be registered with shares and shall not create or issue shares.

10. (1) A company limited by guarantee may not lawfully be incorporated with the object of carrying on business for the purpose of making profits.

(2) If any company limited by guarantee shall carry on business for the purpose of making profits all officers and members thereof who shall be cognisant of the fact that it is so carrying on business shall be jointly and severally liable for the payment and discharge of all the debts and liabilities of the company incurred in carrying on such business, and the company and every such officer and member shall be liable to a fine not exceeding £G5 for every day during which it shall carry on such business.

(3) The total liability of the members of a company limited by guarantee to contribute to the assets of the company in the event of its being wound up shall not at any time be less than £G100.

(4) Subject to compliance with subsection (3) of this section, the Regulations of a company limited by guarantee may provide that members can retire or be excluded from membership thereof.

(5) If in breach of subsection (3) of this section the total liability of the members of any company limited by guarantee shall at any time be less than £G100, every director and member of the company who is cognisant of the breach shall be liable to a fine not exceeding £G100.

South Africa Company Act provisions:

Types of companies.

19. (1) Two types of companies may be formed and incorporated under this Act, namely:

(*a*) a company having a share capital; or

(*b*) a company not having a share capital and having the liability of its members limited by the memorandum of association (in this Act termed "a company limited by guarantee").

(2) A company having a share capital may be either a public company or a private company having shares of par value or shares of no par value.

(3) All companies limited by guarantee, including such existing companies, shall be deemed to be public companies for the purposes of this Act.

Incorporation of associations not for gain.

21. (1) Any association—

(*a*) formed or to be formed for any lawful purpose;

(*b*) having the main object of promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests;

(*c*) which intends to apply its profits (if any) or other income in promoting its said main object;

(*d*) which prohibits the payment of any dividend to its members; and

(*e*) which complies with the requirements of this section in respect to its formation and registration,

may be incorporated as a company limited by guarantee.

(2) The memorandum of such association shall comply with the requirements of this Act and shall, in addition, contain the following provisions:

(*a*) The income and property of the association whencesoever derived shall be applied solely towards the promotion of its main object, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever, to the members of the association or to its controlling or controlled company: Provided that nothing herein contained shall prevent the payment in good faith of reasonable remuneration to any officer or servant of the association or to any member thereof in return for any services actually rendered to the association.

(*b*) Upon its winding-up, deregistration or dissolution the assets of the association remaining after the satisfaction of all its liabilities shall be given or transferred to some other association or institution or associations or institutions having objects similar to its main object, to be determined by the members of the association at or before the time of its dissolution or, failing such determination, by the Court.

(3) The provisions of sections 49 (1) (*c*) and 174 of this Act shall not apply to any such association.

(4) Existing associations incorporated under section 21 of the repealed Act shall be deemed to have been formed and incorporated under this section.

companies limited by guarantee but only those without share capital and such companies under the provisions of section 10 cannot be used to carry on any business for gain. The South Africa Act under section 19 permits the incorporation of companies without share capital having the liability of its members limited by the memorandum of association (referred to as companies limited by guarantee) all such companies are classed as public companies. Under section 21 these companies may only be used for not for profit purposes and upon winding up any assets remaining must be given to some other association or institution having similar objects.

The U. S. Model Business Corporations Act does not include non-profit companies and does not include what are referred to in the United States generally as "membership companies", i.e., companies limited by guarantee without share capital. There is however a Model Non-Profit Corporations Act and all of the states have enacted either a membership corporations statute or a wide variety of statutes dealing with specific non-profit endeavours such as religious, educational and recreational institutions.

The Iacobucci Report does not recommend that companies limited by guarantee be continued if the Act is to deal with profit-orientated companies. The Report does mention that this form of company is commonly used by the Hutterite colonies. Since apparently these are now officially classed as a non-profit organization, the restricted use of companies limited by guarantee would not really affect them.

The New Brunswick Report on Company Law recommends that any new proposed companies act provide for companies limited by shares only, and that companies limited by guarantee be restricted not for profit companies.

3. Non-Profit Companies

As mentioned previously the C.B.C.A. makes no provision for companies limited by guarantee. The proposals for a not for profit corporation law were presented in 1974 in a two-volume format. The first contained a commentary and the second the proposed act. The proposed not for profit corporation law permits membership companies only and does not permit companies limited by guarantee to have a share capital.

Under the provisions contained in Part 9 of the present Alberta Act (sections 183-186) a company with objects other than the acquisition of gain can be incorporated as a company limited by shares or as a company limited by guarantee either with or without share capital providing that:

(1) In the case of a company formed to encourage art, science, religion or charitable objects or any other useful objects;

a. the profits, if any are applied to the objects of the company;

b. the payment of dividends is prohibited.

If it meets these qualifications it does not have to use the word "limited" and instead of filing an annual report need only file a list of directors and officers with the Registrar of Companies after each annual meeting.

In the case of a company formed to promote recreation amongst its members the provisions are similar except for a curious limitation of the registration fee of $27.50. These sections do-not deal adequately with the main problems of non-profit companies which may be briefly summarized as follows:

(1) The need for control which is partially covered by the Public Contributory's Act being Ch. 292, R.S.A. 1970. This Act is now administered by the Department of Social Services and Community Help, a copy of it is attached as Appendix A to this paper.

(2) The distinction between non-profit companies incorporated for the benefit of the members and those incorporated to promote good and charitable works.

(3) The problems of serving notice on the membership particularly in the case of non-profit companies incorporated to promote good works who may have a very large annual membership.

(4) By permitting incorporation to take the form of a company limited by shares or a company limited by guarantee and having a share capital, there is no effective manner in which inactive or undesireable members can be expelled.

(5) In the case of a company limited by guarantee without share capital, a problem of transferrability of interest.

The definition section of the Securities Act is broad enough to cover non-profit corporations who desire to distribute securities, but registration is not required for a private company, and under the Companies Act a non-profit corporation can be a private company so long as it complies with the usual private company provisions. Furthermore, under section 19(2)(6) registration is not required with respect to a trade in securities issued by a person or company organized exclusively for educational, benevolent, fraternal, charitable or religious or recreational purposes and not for profit, where no part of the net earnings of such person or company enure to the benefit of any security

holder. However this exemption is subject to the regulations and the Commission has an overriding right in section 19(5) to make an order that the exemption shall not apply. It is my understanding that the Commission seldom exercises this power with regard to non-profit organizations.

The Iacobucci Report does not discuss non-profit companies since apparently this topic was outside their frame of reference. The New Brunswick Report contains an excellent discussion of the problems in connection with non-profit companies in Part XI of the Report, pages 320-331 which is reproduced as Appendix B to this paper.

RECOMMENDATIONS:

1. Non-profit or not for profit companies are not part of this project except where necessary. There is no question in my mind that the whole area should be reviewed and a not for profit corporation act prepared which should certainly seriously consider the draft federal proposals and the ethicacy of the present provisions of the Securities Act and the Public Contributory's Act.

I agree with the recommendations contained in the New Brunswick Report at page 330 that the provisions dealing with non-profit companies, as nearly as possible, be comparable to those dealing with business corporations. In the meantime however the only direct problem posed by not for profit companies would seem to be in the application sections of the new Act. In this respect we have little choice but to adopt the general scheme used in Ontario, namely to keep the present Act in existence and applicable to non-profit companies until a not for profit

corporation act can be brought into existence. It is suggested however that the present provisions of Part IX of the Alberta Act should be amended to restrict the form used for non-profit companies to a company limited by guarantee either with or without shares and perhaps only without shares.

Unlimited Companies

There is a further kind of company for which there is no provision under our present Alberta Act although provision was made for it under the 1922 Act. This is a company not having any limitation on the liability of its members (an unlimited company). These companies could be incorporated either with or without share capital but were not required to have share capital since the removal of limited liability took the place of the capital yardstick. The form was abandoned in Alberta with the passage of the 1929 Act and has been abandoned everywhere else except in England, Australia and Ghana. The Ghana Code however only permits this incorporation with share capital, primarily for reasons of symmetry within the Act since every other type of company permitted under that Act is required to have a share capital. The form might have had a use with respect to professional incorporation but Bill 68 of the last Session (now Chapter 44 S.A. 1975) has shown that there are other and easier methods to use rather than introducing unnecessary complications into a companies act by having to provide for any class of company without share capital.

RECOMMENDATION:

Requiem in pacem.

4. Types of Companies

It is suggested that at least three types of companies, all having a share capital, be permitted to be incorporated under the proposed act, namely:

(a) Single shareholder companies
  (i) for ordinary use;
  (ii) for use by professional corporations.

(b) Private companies.

(c) Public companies.

(a)(i) Single shareholder companies:

The present Alberta Act makes no provision for a one-man or single shareholder company other than for a professional corporation. A minimum of two shareholders or members is required in the case of a private company and three for a public company (section 15(1)).

Division (1)—Memorandum of Association

15. (1) **Formation of companies.**—Any three or more persons (or in the case of a private company, any two or more persons) associated for any lawful purpose permitted by this Act may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with limited liability, that is to say,

(a) a company limited by shares, or
(b) a company limited by guarantee, or
(c) a specially limited company.

Section 135(1)(d) imposes similar quorum requirements for meetings of shareholders in a public and private company.

> **135. (1) Other meetings.**—The following provisions have effect in so far as the articles of the company do not make other provision in that behalf:
>
> **(a)** a meeting of a company, other than a meeting for the passing of a special resolution, may be called by seven days' notice in writing;
>
> **(b)** a notice of a meeting of a company shall be served on every member of the company in the manner in which notices are required to be served by Table A in the First Schedule, and for the purpose of this provision, the expression "Table A" means such table as for the time being in force;
>
> **(c)** two or more members holding not less than one-tenth of the issued share capital or, if the company has not a share capital, not less than five per cent in number of the members of the company, may call a meeting;
>
> **(d)** in the case of a private company, two members, and in the case of any other company, three members, personally present, constitute a quorum;

Curiously though, with the exception of sections 129(1), the penalty for failure to comply with which is contained in section 130,

> **129. Quorum of directors.**—Unless the articles or by-laws otherwise provide, a majority of the board of directors constitutes a quorum, but in no case shall a quorum be less than two-fifths of the board of directors or two directors, whichever is the greater. 1970, c. 25, s. 129.

There are few provisions in the present Act which require more than one director. At the present time therefore wholly owned subsidiaries of another company and de facto one-man companies are forced to find one other shareholder who will hold the share as a nominal trustee and execute a deed of trust with respect to the one share, and to find one other nominee as a director in order to comply with section 129(1). The nominal director is probably exposing himself to a liability for wages of clerks, labourers, servants and apprentices of the company under section 77 (see discussion in Kramer v. Humfrey [1971] 1 W.W.R. 607). As the duties and liabilities of directors increase it may be more and

more difficult to find nominee directors. There seems to be two possible solutions for this problem, the first is to not impose these liabilities on nominee directors, and the second is to make adequate provision for one-man companies. If the first choice is adopted there seems little point in having the second director. We are faced with the problem of making some provision for single shareholder companies by virtue of Chapter 44 1975 second session which provided for single shareholder professional corporations so our choice generally can only be whether we permit single shareholder companies for normal business purposes or only for professional incorporation.

The English courts have held that one person cannot constitute a meeting. The earliest case was Sharpe v. Dawes [1876] 2 Q.B. 26 where the secretary of the company, holding proxies from two other shareholders, held a meeting at which he was the only person in attendance. He passed a resolution initiating a call of six shillings per share and a further resolution thanking himself for his services. The Court of Appeal held both resolutions to be invalid on the basis that one person could not hold a meeting, not on the ground that a quorum was not present. The case was followed one year later, and for the same reasons, by Jessel, M. R. in Re Sanitary Carbon Company 1877 W.N. 223 and again in the case of Re London Flats Limited [1969] 2 A.E.R. 744. There is one Canadian case which quotes and follows this line of cases, the decision of the British Columbia Trial Division in Re Primary Distributors Ltd. [1954] 2 D.L.R. 438. The only case to the contrary is East v. Bennett Bros. Ltd. [1911] 1 Ch. 163 in which East held all of the issued preferred shares of a certain class and approved a resolution to alter the memorandum which would provide for a new and different class of preferred shares. Such approval required a resolution of the holders of the preferred shares passed at a

"meeting" of the class. The court held that under these circumstances where there was only one shareholder of the class, and such possibility must have been contemplated by the draftsman of the memorandum of association, the expression "meeting" would include approval by a single shareholder holding all of the issued shares of that class.

Canada Business Corporations Act

The Dickerson proposals put the problems succinctly as follows in Article 48

> **48.** Section 2.01 makes two important changes in the present law. The minimum requirement of three incorporators (s.5 of the present Act) is reduced to one. This is consistent with legislation in other jurisdictions (eg. Ontario Act, s. 4). The legality of the "one-man" corporation has been acknowledged since the landmark decision in *Salamon* v. *Salamon & Co.* [1897] AC 22, and the formal requirements of the present Act are invariably met by the use of "dummy" incorporators, usually stenographers in lawyers' offices. The minimum membership requirement affords no significant protection to creditors, nor does it present any serious obstacle to irresponsible incorporation. Its abandonment will therefore expose creditors to no greater risks than those to which they are at present subject and, in accordance with a policy followed consistently in the Draft Act of dispensing with meaningless formalities, the requirement in the present Act of three incorporators is abolished.

and a specific recommendation regarding the number of directors in Article 192

> **192.** It will be noticed that s. 9.01(1) by implication represents a change from the existing legislation. in that only one director is required, whereas the present Act (s. 84) requires a minimum of three directors. This change is a necessary consequence of the adoption, in s. 2.01 of the Draft Act, of the "one-man corporation".

These recommendations were carried into the new Act which provides for single shareholder companies in section 5(1)

INCORPORATION

5. (1) Incorporators.—One or more individuals no one of whom

(a) is less than eighteen years of age,

(b) is of unsound mind and has been so found by a court in Canada or elsewhere, or

(c) has the status of bankrupt,

may incorporate a corporation by signing articles of incorporation and complying with section 7.

(2) Bodies corporate.—One or more bodies corporate may incorporate a corporation by signing articles of incorporation and complying with section 7.

and makes a specific provision under section 133(4) that a single shareholder constitutes a meeting

133 **(4) One shareholder meeting.**—If a corporation has only one shareholder, or only one holder of any class or series of shares, the shareholder present in person or by proxy constitutes a meeting.

Section 109(8) makes the same provision with regard to a single director

109 **(8) One director meeting.**—Where a corporation has only one director, that director may constitute a meeting.

The wording of section 136(1) has obviously been carefully drawn so that it is broad enough to cover the single shareholder company

136. (1) **Resolution in lieu of meeting.**—Except where a written statement is submitted by a director under subsection 105(2) or by an auditor under subsection 162(5),

(a) a resolution in writing signed by all the shareholders entitled to vote on that resolution at a meeting of shareholders is as valid as if it had been passed at a meeting of the shareholders; and

(b) a resolution in writing dealing with all matters required by this Act to be dealt with at a meeting of shareholders, and signed by all the shareholders entitled to vote at that meeting, satisfies all the requirements of this Act relating to meetings of shareholders.

Section 97(2) permits a corporation to have one director only if the corporation is not issuing securities which are being distributed to the public, a distinction which is not made with respect to shareholders.

97 **(2) Number of directors.**—A corporation shall have one or more directors but a corporation, any of the issued securities of which are or were part of a distribution to the public, shall have not fewer than three directors, at least two of whom are not officers or employees of the corporation or its affiliates.

Section 112(1) parallels for directors the provisions of section 136(1) for shareholders

112. (1) Resolution in lieu of meeting.—A resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors, is as valid as if it had been passed at a meeting of directors or committee of directors.

Under the provisions of section 109(3) a majority of directors are to be resident Canadians. The effect of this section is to pretty well limit single shareholder companies to resident Canadians. While there is no such restriction with regard to shareholders that the majority must be resident Canadians it would be a brave investor indeed who incorporated a single shareholder company and had one resident Canadian director.

The Ontario Business Corporations Act

The Lawrence Report recommended the adoption of single shareholder companies and discussed in section 2 the pros and cons of such incorporation. The entire section is reproduced as Appendix C to this paper. These recommendations found their way into the new Act in the following sections:

Section 4(1) permits incorporation of a company by one person

> 4. (1) Articles of incorporation.—One or more persons, being a body corporate or a natural person who is of the age of eighteen years or more, may incorporate a corporation by signing and delivering to the Minister in duplicate articles of incorporation.

Section 23(4) sets out a method for a single shareholder to pass a bylaw or make a resolution

> 23 (4) **Idem.**—Any by-law, resolution or other action of a corporation that has only one shareholder consented to at any time during a corporation's existence by the signature of such shareholder is as valid and effective as if passed at a meeting of shareholders duly called, constituted and held for that purpose.

Section 107(2) makes special provisions with respect to the annual meeting in single shareholder company

> 107 **(2) Idem.**—Where a corporation has only one shareholder and, on or before the date the annual meeting is required to be held, the action required to be taken at the annual meeting is completed in accordance with subsection (4) of section 23, the action so completed shall be deemed to have been taken at an annual meeting of the corporation and such annual meeting shall be deemed to have been held on the date of the completion.
>
> **[Subsec. (2) added by 1971, c. 26, s. 18, in force January 1, 1971.]**

Section 113(1) provides complete statutory authority for the personal representative of the deceased shareholder to do everything that the deceased shareholder could have done.

> **113. (1) Personal representative.**—Where a person holds shares as a personal representative, that person or his proxy is the person entitled to vote at all meetings of shareholders in respect of the shares so held by him.

Section 122(2) provides for a single director but again it will be noted that companies distributing their securities to the public must have at least three directors with the further qualifications set out in that section.

Directors

122. (1) **Board of directors.**—Every corporation shall have a board of directors however designated.

(2) **Composition.**—The board of directors shall consist of a fixed number of directors,

(a) in the case of a corporation that is not offering its securities to the public, of at least one; and

(b) in the case of a corporation that is offering its securities to the public, of not fewer than three, of whom at least two shall not be officers or employees of the corporation or of any affiliate of the corporation. 1970, c. 25, s. 122.

All of these sections seem to be adequate to cover the problems of the single shareholder company, and provision has been made in section 183 for signing the annual statement of the company by one director, with the exception of the somewhat baffling section 129 which requires a minimum of two directors to be a quorum. This seems to be an apparent conflict within the Act and just one of those items that presumably will be cured by amendment.

183. Approval by directors.—The financial statement shall be approved by the board of directors and the approval shall be evidenced by the signature at the foot of the balance sheet by two of the directors duly authorized to sign, or by the director where there is only one and the auditor's report unless the corporation is exempt under section 167 shall be attached to or accompany the financial statement.

[S. 183 amended by 1972, c. 138, s. 53.]

The British Columbia Companies Act

The British Columbia Bar in its submission recommended that incorporation by a single shareholder, who was a natural person, be allowed but opposed incorporation by another corporation on the grounds that this would place an extra administrative burden on the Registrar of Companies

to ensure that the incorporator had the necessary capacity and was in good standing. Since this was the manner in which the draft act had been drafted no change was recommended. Under section 7(1) one or more natural persons may form a company

Division (2).—Formation of Companies

Formation of company by memorandum.

7. (1) Subject to this Act, one or more natural persons may form a company by subscribing his or their names to a memorandum and by complying with the requirements of this Part.

No distinction is made between reporting and non-reporting companies as to the minimum number of shareholders, nor is there apparently any prohibition in the Act preventing all of the shares of the company being held by another company, once it has been incorporated. Section 164 provides that one member of a company may constitute a meeting of the company, but it will be noted that the necessary quorum provisions must be contained in the company's articles.

One member at a meeting.

164. One member of a company may, if the company has a quorum of one, constitute a meeting of the company. 1973, c. 18, s. 164.

Section 167 contains the quorum requirements and seems somewhat redundant with respect to a single shareholder company in view of section 164

Quorum for general meeting.

167. The quorum for the transaction of business at a general meeting of a company is two persons, unless

(*a*) the articles otherwise provide, in which case the provisions of the articles shall govern; or

(*b*) the company has only one member, in which case the quorum shall be one person, and any provision of the articles inconsistent with that quorum has, to the extent of that inconsistency, no force or effect. 1973, c. 18, s. 167.

A company that is a non-reporting company shall have at least one director under the provisions of section 130

Number of directors.

130. Every company shall have at least one director, and a reporting company shall have at least three directors. 1973, c. 18, s. 130.

since under the provisions of section 131(2) one director of every company shall be ordinarily resident in the province, this limits the right to incorporate a single shareholder company with a single director, who is that shareholder, to residents of British Columbia. The Act does not have any minimum quorum for directors' meetings. Presumably this must be covered in the articles of association. The only section dealing with a quorum of directors is section 154 which simply permits the directors of the company to appoint additional directors if the number of directors is reduced below the quorum fixed by the articles.

Vacancy and quorum.

154. (1) Unless the articles otherwise provide, a casual vacancy that occurs among the directors may be filled for the unexpired term by the remaining directors.

(2) Where the number of directors of a company is reduced below the number fixed by, or pursuant to, the articles as the necessary quorum for directors, the continuing directors may act for the purpose of filling the vacancies up to that number, or of summoning a general meeting of the company, but for no other purpose.

(3) Where there are no directors, the members holding a majority of the shares entitled to elect directors may, by instrument in writing, designate one director to exercise the rights of continuing directors under subsection (2). 1973, c. 18, s. 154.

Subsection (3) in combination with section 58 would permit the personal representative of a deceased shareholder, following the grant of probate or administration, to appoint a single director. Section 58 reads as follows:

Powers of personal representative.

58. Notwithstanding the memorandum or articles of a company, upon the death or bankruptcy of a member, his personal representative or trustee in bankruptcy, although not entered as a member, has the rights, privileges, and obligations that attach to the shares formerly held by the deceased or bankrupt member, if the documents required by section 61 are produced and deposited with the company at its registered office. 1973, c. 18, s. 58.

GHANA

Section 8 of the Ghana Act permits incorporation of companies by one or more persons and persons is deemed to include a corporation. Section 161 and in particular subsection (2)(a) and subsection (4) cover the problem of a single shareholder meeting

orums.

161. (1) No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to discuss that business but provided that a quorum is then present the meeting may validly proceed with that business notwithstanding that a quorum is not present throughout:

Provided that where any members present are entitled to vote only on some resolutions and not on others such members shall be counted towards a quorum in respect of the former resolutions but not in respect of the latter.

(2) Unless otherwise provided in the company's Regulations the following shall constitute a quorum:

(a) if the company has only one member, that member present in person or, where proxies are allowed, by proxy;

(b) in any other case two members present in person or, where proxies are allowed, by proxy, or one member so present holding shares representing more than 50 per cent of the total voting rights of all the members having a right to vote at the meeting.

(3) Unless otherwise provided in the company's Regulations, if a quorum is not present within half an hour after the time appointed for the meeting, the meeting if convened upon the requisition of members in accordance with section 271 or 297 of this Code shall be dissolved, and in any other case shall stand adjourned to the same day in the next week at the same time and place or to such other day place and time as the directors may determine, and if at the adjourned meeting a quorum is not present within half an hour after the time appointed the member or members present shall constitute a quorum. Where the meeting is adjourned to the same day place and time in the following week no notice need be given; otherwise notice of the adjourned meeting shall be published in at least one daily newspaper circulating in the district in which is situated the registered office of the company.

(4) Provided that a quorum is present the meeting shall be deemed to be duly conducted notwithstanding that only one member or one proxy is present.

The Act does however require a minimum of two directors for any company. In his commentary Professor Gower acknowledges the fact that during the lifetime of the single shareholder, who is also a director, the remaining director will probably be almost totally inactive, but the requirement to have two directors does provide some form of orderly succession and particularly covers the hiatus between the date of death and the date of the grant of letters of administration or letters probate. He chose this route since apparently in Ghana immediately upon the death of the main shareholder, the family moved in, sold off all the assets and disappeared. He hoped that this would provide a more orderly dissolution, than had been the previous practical experience. Section 180(1) therefore is as follows:

Number of Directors.

180. (1) Every company incorporated after the commencement of this Code shall have at least two directors.

(2) Every company incorporated prior to the commencement of this Code shall, after the expiration of six months from the commencement of this Code, have at least two directors.

(3) If at any time the number of directors is less than two in breach of either of the foregoing subsections of this section and the company continues to carry on business for more than four weeks thereafter, the company and every director and member of the company who is in default shall be liable to a fine not exceeding £G5 for every day during which it so carries on business after the expiration of such 4 weeks without having at least two directors and every director and member of the company who is cognisant of the fact that it is carrying on business with fewer than two directors shall be jointly and severally liable for all the debts and liabilities of the company incurred during that time.

(4) Subject as aforesaid the number of directors shall be fixed by or in accordance with the company's Regulations.

Section 180(3) provides a fairly stiff penalty for any company that ends up with less than one director,

In addition to this method of securing some sort of orderly continuation of the company in the event of the death of the single shareholder, the Act provides two further protections, the first in section 99 gives a right to the personal representative to compel a transfer of the shares to himself

Transmission of shares or debentures by operation of law.

99. (1) In the case of the death of a shareholder or debentureholder the survivor or survivors where the deceased was a joint holder, and the legal personal representatives of the deceased where he was a sole holder or last survivor of joint holders, shall be the only persons recognised by the company as shareholders or debentureholders.

(2) A person upon whom the ownership of a share or debenture devolves by reason of his being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law may, upon such evidence being produced as the company may properly require, be registered himself as the holder of the share or debenture or transfer the same to some other person and such transfer shall be as valid as if he had been registered as a holder at the time of execution of the transfer:

Provided that the company shall have the same right (if any) to decline registration of a transfer by such person as it would have had in the case of a transfer by the registered holder but shall have no right to refuse registration of the person himself.

(3) A person upon whom the ownership of a share or debenture devolves by reason of his being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law shall, prior to registration of himself or a transferee, be entitled to the same dividends interest and other advantages as if he were the registered holder and, in the case of a share, to the same rights and remedies as if he were a member of the company, except that he shall not, before being registered as a member in respect of the share, be entitled to attend and vote at any meeting of the company:

Provided that the company may at any time give notice requiring any such person to elect either to be registered himself or to transfer the share or debenture and if the notice is not complied with within ninety days the company may thereafter suspend payment of all dividends, interest or other moneys payable in respect of the share or debenture until the requirements of the notice have been complied with.

In contrast section 64 of the Alberta Act does not grant a right to the personal representative to become registered as a member but simply grants him the right to execute a valid transfer under the same terms that the deceased shareholder could. In the event that there were restrictions on transfer of shares from the company it could put the personal representative in a position where he could not become registered as a member of the company. Professor Gower felt this should not be left as an item which would be covered in the company's articles of association.

An additional right is given to the beneficiaries under the provisions of section 100 which, so far as I know, is unique

Protection of beneficiaries.

100. (1) Any person claiming to be interested in any shares or debentures or the dividends or interest thereon may protect his interest by serving on the company concerned copies of a notice and affidavit in accordance with the provisions of Order 46 rules 4 to 12 of the Rules of the High Court.

(2) Notwithstanding the provisions of subsection (1) of section 98 of this Code the company shall enter on the register of members or debentureholders, as the case may be, the fact that such notice has been served and shall not register any transfer or make any payment or return in respect of the shares or debentures contrary to the terms of the notice until the expiration of due notice to the claimant in accordance with the provisions of that Order.

(3) In the event of any default by the company in complying with this section the company shall compensate any person injured thereby.

I can see possible abuses of such a section and of course it places great reliance on the share register. I would not unhesitatingly recommend such a section until we have covered thoroughly the section dealing in the proposed Act with security documents.

The South Africa Companies Act

Single shareholder companies are not permitted under the new South Africa Act.

U. S. Model Act

Section 53 permits the incorporation of a company by one or more persons and specifically permits incorporation by a foreign corporation

> **§ 53. Incorporators**
>
> One or more persons, or a domestic or foreign corporation, may act as incorporator or incorporators of a corporation by signing and delivering in duplicate to the Secretary of State articles of incorporation for such corporation.

There is no statement in the U. S. Model Act that one shareholder may constitute a meeting since when carefully analyzed the provisions of section 32 with respect to quorum would probably cover the necessary quorum for a single shareholder corporation

> **§ 32. Quorum of Shareholders**
>
> Unless otherwise provided in the articles of incorporation, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number or voting by classes is required by this Act or the articles of incorporation or by-laws.

Section 36 provides for one or more directors

§ 36. Number and Election of Directors

The board of directors of a corporation shall consist of one or more members. The number of directors shall be fixed by, or in the manner provided in, the articles of incorporation or the by-laws, except as to the number constituting the initial board of directors, which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the by-laws, but no decrease shall have the effect of shortening the term of any incumbent director. In the absence of a by-law providing for the number of directors, the number shall be the same as that provided for in the articles of incorporation. The names and addresses of the members of the first board of directors shall be stated in the articles of incorporation. Such persons shall hold office until the first annual meeting of shareholders, and until their successors shall have been elected and qualified. At the first annual meeting of shareholders and at each annual meeting thereafter the shareholders shall elect directors to hold office until the next succeeding annual meeting, except in case of the classification of directors as permitted by this Act. Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified.

There is no provision in the Model Act which deals with the transmission of shares or the rights of the personal representative, but it must be remembered that statutory provisions regarding security documents are contained in the U. S. Model Commercial Code and not in the U. S. Model Corporations Act. These were by and large the model for the provisions of the Canada Act and are similar in purpose and intent.

COMMENT:

1. There seems little purpose in maintaining the fiction that a corporation is necessarily an association of persons requiring more than one shareholder or more than one director.

2. There seems to me to be two substantive problems with single shareholder companies:

a. protection of the rights of creditors;
b. what happens to the corporation in the event of the death of the single shareholder who is also the sole director.

3. There are various mechanical problems which should certainly be covered by statute such as quorums for meetings and the fact that one shareholder or director may constitute a meeting.

4. The historic structure of shareholder and director seems totally inappropriate for a single shareholder company where the same man fills both functions.

RECOMMENDATIONS:

1. That any one individual be permitted to incorporate a company, and unless undue strain is placed upon the office of the Registrar of Companies in its administrative function, that a corporation be allowed to incorporate another company as a single shareholder. If we are going to permit single shareholder companies and the single shareholder to be another corporation it seems to me unnecessary to demand that the corporation be incorporated by an individual and then transferred to the real incorporator.

2. That companies be permitted to continue in existence with one shareholder who may be either an individual or a corporation. Some statutory provision will have to be provided that compels the dissolution of the wholly owned single shareholder company that is owned by a corporation,

upon dissolution of the parent corporation, which perhaps could be in the form of a statutory amalgamation so that both vanished at the same time, if a parent company being wound up did not choose to sell the shares of the wholly owned subsidiary.

3. That the Act contain a clear statutory statement that one person may hold a shareholder's meeting.

4. That the Act permit a company to have one director who must be an individual. Under the present provisions of Bill 61 of the last legislature this would restrict a right to single shareholder companies to one Alberta director. Because of the problems in protecting the creditor I am not opposed to this since at least there is one person within the jurisdiction. I cannot see how a corporation can fulfill the function of a director.

5. A clear statutory statement that one director may constitute a valid meeting, which could perhaps be coupled with the statement regarding shareholders.

6. As mentioned in the paper on corporate seals, corporate seals should be permitted if we permit single shareholder corporations, as a method of easy identification between the acts of the shareholder and the corporation.

7. I have some worries about the sequence of events following the death of a single shareholder who is also the sole director. Professor Gower's proposed cure would still impose all of the duties and liabilities of a director upon a person who is fundamentally inactive. Since the modern trend is to increase these duties and liabilities it places the single shareholder in the difficult position of having to find a willing dummy. I can see no reason why the statute could not provide for the appointment of an

alternate director to serve in the event of the death of the sole director until such time as the deceased's personal representative has obtained a grant of letters of administration or probate. I would suggest that the alternate director could be filed at the Office of the Registrar of Companies but must be accompanied by his consent to act in that capacity. It would at least give single shareholders who are also the sole directors of their companies a method of providing for orderly succession without involving another director during his lifetime.

8. I think a separate division of the Act should be devoted to single shareholder companies clearing up all of these problems, and it may well be that certain Acts which are normally permitted by a special resolution of the shareholders, would still require a further approval not otherwise required, in the interests of creditors.

9. If a single shareholder corporation is distributing securities to the public then I think it should be compelled to have the minimum number of directors that we impose upon a public company (a recording company).

Item for Discussion:

The single shareholder company, all of whose shares are owned by another corporation, is probably not in as bad a position to handle the mechanics of complying with the minimum of two directors as is the sole individual who is operating his incorporated business from his garage. I throw out for discussion at the meeting the possible proposition that while single shareholder companies may be owned by or incorporated by another corporation, they still be required to have a minimum of two directors and if distributing securities to the public, a minimum of three. I am concerned about the rights of creditors in a chain of single shareholder

companies all of whose shares are owned by yet another corporation.

Some Mechanical Problems Which Will Require Amendment

1. Section 129(1) requires that the financial statements shall be approved by the Board of Directors requiring the signature of two directors.

Approval of financial statement

129. (1) The financial statement shall be approved by the board of directors, such approval to be evidenced by the signature at the foot of the balance sheet by two of the directors duly authorized to sign.

(2) The auditor's report shall be attached to the financial statement or there shall be inserted at the foot of the balance sheet a reference to the report.

[R.S.A. 1970, c. 60, s. 129]

This will obviously have to be changed to permit the annual statement to be signed by a single director.

2. A single director company could not comply with the provisions of section 188(4) or a quick and easy method of dissolution by simply passing a special resolution and filing the necessary statutory declaration.

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(4) At the expiration of the time mentioned in a notice prescribed under subsection (2) or (3), and also in any case where a company has by resolution requested the Registrar to strike it off the register, and has filed with him a statutory declaration of two or more directors proving that the company has no debts or liabilities, the Registrar may, unless cause to the contrary is previously shown, strike the company off the register, and shall publish notice thereof in the *Alberta Gazette*, and on publication the company is dissolved, or, in the case of an extra-provincial company, shall be deemed to have ceased to carry on business in the Province.

I am not sure that this method of dissolution should be available to the single-shareholder, single-director corporation, without some further imposition of liability in order to protect the creditors.

3. Section 293 which reads as follows:

Division (6)—Violations of the Act

Number of members

293. A public company shall not carry on business with fewer than three members nor a private company with fewer than two members, and if at any time a company carries on business for more than six months with fewer than three members or two members, as the case may be, every person who is a member of the company during the time that it so carries on business after those six months, and is cognizant of the fact that it is so carrying on business, is severally liable for the payment of all the debts of the company contracted during that time, and may be sued for the same, without joinder in action of any other member. [R.S.A. 1970, c. 60, s. 293]

This is of no particular concern to the present professional one-man corporations since their liability is not limited in any event. It would however have to be altered if we were providing for the ordinary one-man corporation which was not a professional corporation.

d. Professional Incoporation

Since professional incorporations are now permitted under the provisions of Chapter 44 of the Statutes of Alberta of 1975, Second Session (hereinafter called Chapter 44), all that this paper will cover is a brief explanation of the mechanics, and a list of recommended reforms to the present Act in order to provide for single shareholder companies, albeit in a specialized form. Chapter 44 permitted incorporation by four professional groups, the chartered accountants, the dentists, the lawyers and the medical doctors. Prior to its passage the professional engineers and architects were the only other professional groups permitted by their own governing bodies to carry on business under the corporate form but no provision was made for a single shareholder company. The amendments to section 15 of the Companies Act contained in Chapter 44 (the whole of which is attached as Appendix D to this paper) still do not permit engineers or architects to carry on their profession as single shareholder companies.

Section 21 of the Engineering and Related Professions Act permits the practice of the profession of engineering by a firm partnership corporation or association under certain conditions the most important of which is that the practice may only be carried on in any of these forms providing that it is the holder of a permit which is valid for one year. The requirements for the issuance of a permit by the association are set out in section 22 of the Act. In practice the association insists on certain special clauses in the Memorandum of Association but these are not set out in the Engineering and Related Professions Act. A professional engineering company would still have to use the word "limited" or "Ltd.". Section 3(a) of section 21 reads as follows:

Firms, partnerships, etc.

21. (1) Notwithstanding section 9, a firm, partnership, corporation or association of persons may practise professional engineering, professional geology or professional geophysics in its own name

(*a*) if the firm, partnership, corporation or association is the holder of a permit granted to it by the Association pursuant to this Act, and

(*b*) if the practice is carried on under the direct personal supervision and responsibility of a full-time permanent employee or member who is also a member or licensee of the Association and who is qualified by training and experience in the fields of engineering, geology or geophysics in which the firm, partnership, corporation or association intends to engage or offers to engage.

(2) Notwithstanding subsection (1), no firm, partnership, corporation or association of persons shall be registered as a member or licensee.

(3) When the practice of professional engineering, professional geology or professional geophysics is carried on by a firm, partnership, corporation or association of persons as permitted in subsection (1),

(*a*) all plans, specifications, reports or documents shall be signed by, and sealed with the stamp of, the member or licensee of the Association who is responsible for the same and who supervised the preparation thereof, and

(*b*) in addition, the plans, specifications, reports or documents shall carry the stamp issued to the firm, partnership, corporation or association of persons pursuant to this Act.

(4) A firm, partnership, corporation or association of persons purporting to practise professional engineering, professional geology or professional geophysics in its own name as permitted in subsection (1), shall keep the Association advised of the name of the member or licensee of the Association who is a full-time permanent employee or member of the firm, partnership, corporation or association of persons and is directly and personally supervising the practice and assuming responsibility therefor.

[1968, c. 25, s. 21]

This would apparently bring home to the individual professional member a personal liability for the work defined in that subsection. There is apparently no restriction on the kind of company which may be incorporated by professional engineers.

In 1969 the architects were permitted to carry on their profession in the corporate form. Section 24 of the Architects Act contains a basic restriction as to who may practice as an architect within the Province of Alberta. Section 3 provides for carrying on the practice in the form of a corporation.

Practise by corporations

3. (1) Notwithstanding section 24, a corporation may practise as an architect in its own name

(*a*) if the corporation is the holder of a permit granted to it by the Association pursuant to this Act,

(*b*) if the practice is carried on under the direct personal supervision and responsibility of one or more permanent employees or shareholders who are also registered or licensed architects, and

(*c*) the beneficial ownership of all of the issued shares of the corporation is vested in one or more registered architects and all of the directors and officers of the corporation are registered architects.

(2) Notwithstanding subsection (1), no corporation shall be registered as a registered architect or a licensed architect.

(3) When the practice of architecture is carried on by a corporation as permitted in subsection (1),

(*a*) all plans, drawings, specifications, reports or documents shall be signed by and sealed with the stamp of a registered or licensed architect who is responsible for them and who supervised the preparation thereof, and

(*b*) in addition, the plans, drawings, specifications, reports or documents shall carry the stamp issued to the corporation pursuant to this Act.

(4) A corporation purporting to practise architecture in its own name as permitted in subsection (1) shall keep

(*a*) the Registrar of Companies, and

(*b*) the Association,

advised of the names of the registered or licensed architects who are full-time permanent employees or shareholders of the corporation and are directly and personally supervising the practice and assuming responsibility therefor.

(5) The Council shall issue a permit which shall be valid for the calendar year during which it is issued to any corporation which has

(*a*) filed an application on a form provided by the Council,

(*b*) paid all the fees prescribed by the Council,

(*c*) satisfied the Council that it has one or more full-time permanent employees or shareholders who are also registered or licensed architects and who will assume direct personal supervision of and responsibility for the practice of architecture in which the permit holder engages, and

(*d*) satisfied the Council that the beneficial ownership of all of its issued shares are vested and that all of its directors and officers are registered or licensed architects as required by subsection (1), clause (*c*).

(6) When the Council issues a permit pursuant to this Act, it shall provide the permit holder with a stamp bearing the permit number engraved in such manner as the Council decides which remains the property of the Association and shall be returned to it on demand.

(7) Any permit issued under this Act may be revoked or its renewal withheld by the Council for failure of the permit holder to observe any of the conditions set forth herein governing the issuance of a permit, or where the permit holder has been guilty of conduct that, in the judgment of the Council, is inimical to the best interest of the public or the profession of architecture.

(8) The provisions of this Act relating to maintenance of the dignity and honour of the profession of architecture apply *mutatis mutandis* to the revocation or withholding of a permit. [R.S.A. 1955, c. 16, s. 3; 1969, c. 10, s. 2]

Note that:

1. There is no provision for a single shareholder company.

2. All beneficial owners of the shares must be architects.

3. All of the directors and officers must be architects.

4. The professional corporation would still have to use the word "limited" or Ltd.".

5. Subsection 3(a) embodies the same mechanics with regard to liability as used in the Engineers and Related Professions Act, and is identical except for the addition of the word "drawings".

6. There is apparently no restriction on the kind of company which can be formed in order to carry on the practice of architecture.

Chapter 44 generally uses the same method for each of the four professions which it covers but it also amends the provisions of the Companies Act in relation to all of the professions to provide for a single shareholder company and makes one additional necessary amendment with respect to the legal profession. The Company Act amendments which apply to all four of the amendments, provide:

1. One or more persons may incorporate, providing they are active members of the profession.

2. The company must be a company limited by shares.

3. The company need not use the word "limited" or "Ltd.", providing it undertakes to add either word within 90 days after it ceases to hold a permit.

4. The Registrar of Companies may compel the addition of the word "limited" or "Ltd." 90 days after the company has ceased to hold a permit.

5. The Act refers specifically to the liability of the members in accordance with the provisions in each professional Act.

Comments:

1. The professional engineers have apparently had no problem in carrying on with two shareholder companies. In a conversation with the secretary of the Alberta Professional Engineers, Geologists and Geophysicists Association, I gathered that there were not many sole practitioners and that they had been able to handle the requirements of the Act by using an additional shareholder who held the shares in trust under a declaration of trust. I gathered further that they were not particularly concerned as to whether they should be allowed to carry on as single shareholder companies or not.

2. The Alberta Society of Architects were not unduly distressed about their present situation. Their restrictions are tougher but in a converstion with the secretary of the Association and the association solicitor, Ms. Sherry Harper, they had been able to get along within the framework of the present Act by having the additional shareholder execute a trust declaration and simply carrying on with one director. Shareholders apparently waive the requirement for an audit and this is the only real hurdle presented if the company has two shareholders but one director.

3. The problem of the death of the sole shareholder causes some conern to the architects but only in connection with an architect who was engaged, at the time of his death, in supervision of construction, and in any event there was one

remaining shareholder who could probably forthwith call a special meeting and appoint someone to take over or make some arrangement for the work to be done by somebody else. The engineers had not even considered the problem and did not think it was important.

4. The secretary of the Institute of Chartered Accountants informed me that while there was nothing in their Act comparable to sections 82 to 84 of the Legal Professions Act, the Institute had set up a members' emergency assistance plan on a voluntary basis. Upon the death or total disability of a member of the plan, the Society would send in people to handle his work, and in the event that a sale of his practice was necessary, to arrange a sale at a fair price to other members of the Society. I gathered that the Institute had done this on at least one occasion in the event of the death of a member where the member had not been a voluntary participant in the plan.

5. Neither the medical nor the dental profession could conceive of any problem whatsoever in the event of the death of the sole shareholder. They simply took the view that the patient would immediately acquire another dentist or doctor.

6. The situation is certainly adequately covered in sections 82 to 84 inclusive of the Legal Professions Act.

CONCLUSIONS:

1. The existing Companies Act should be amended to provide for the single shareholder corporation now allowed to charge accountants, dentists, lawyers and medical doctors, to remove some of the anomalies which now exist and which have been mentioned with respect to the ordinary single shareholder company. I can see no enormous rush to amend the existing

(*b*) instruct the Secretary to direct the member to pay the property into or deposit the property with the Supreme Court,

and may fix a time within which the member is to comply with the direction.

(2) Property paid or deposited under subsection (1) may, upon a summary order of a judge of the Supreme Court, be paid out or delivered to the person or persons named in the order as being entitled thereto.

(3) Failure of a member to comply with a direction given under subsection (1) subjects the member to attachment by a judge of the Supreme Court and may be the subject matter of a charge of conduct unbecoming a barrister and solicitor. [1966, c. 46, s. 80]

Seizure of Property

Seizure of property

81. (1) Upon a summary application made *ex parte* by the Society, a judge of the Supreme Court may order the sheriff of a judicial district to enter upon any premises where any property that relates to a transaction between the member and any of his clients, is or may be kept, and to seize and remove the property and place it in the custody of the Secretary or any other person named in the order.

(2) A sheriff executing an order under subsection (1) has all the powers of a person lawfully charged with the execution of a writ of execution or a distress warrant under section 24 of *The Seizures Act*.

(3) The Secretary shall cause any property placed in custody under subsection (1) to be examined by such persons as may be designated by the chairman or vice-chairman of the Discipline Committee or by the chairman of an investigating committee and thereafter shall return the property to the member or otherwise deal with it as a judge of the Supreme Court may direct on notice being given to the member.

(4) An order under this section may be varied or set aside on two days' notice. [1966, c. 46, s. 81]

Custodian

Custodian

82. (1) In any of the following cases, namely,

(*a*) when the name of a member has been struck off the roll, or

(*b*) when a member has been suspended, or

(*c*) when a member has died or become mentally incapacitated, or

(*d*) when by reason of illness or for any other reason a member is unable to practise as a barrister and solicitor, or

(*e*) when a member has absconded or is otherwise improperly absent from his place of business or has neglected his practice for an unduly extended period, or

(*f*) when there is reason to believe that the trust moneys held by a member are not sufficient to meet his trust liabilities, or

(*g*) when sufficient grounds otherwise exist,

a judge of the Supreme Court may, upon application by the Society either *ex parte* or on such notice as the judge may require, by order appoint a person as custodian to have custody of the property of the member and to manage or wind up the legal business of the member.

(2) An order under subsection (1) may direct the sheriff of any judicial district within the Province to seize and remove and place in the custody of the custodian all property of the member, and to that end the order may authorize the sheriff to enter upon any premises or open any safety deposit box or other receptacle when there are grounds for believing that property of the member may be found thereon or therein.

(3) Unless otherwise directed, the order shall be promptly served upon the member.

(4) Upon the receipt by any person of notice that an order has been made pursuant to this section, he shall retain and shall not dispose of any property of a member until directed by the custodian or by order of the Court as to the disposition thereof.

(5) A judge of the Supreme Court may in an order under subsection (1) or may at any time and from time to time by a subsequent order made *ex parte* or upon such notice as the judge may require,

(*a*) direct any bank or other depository of property of a member to deal with, hold, pay over or dispose of such property to the custodian, or in such other manner as the judge may deem proper,

(*b*) remove any custodian appointed by such order and appoint another custodian,

(*c*) give directions and advice to the custodian as to the dispositon of the property in his hands or any part or parts thereof, and

(*d*) give such directions or make such further orders as the nature of the situation requires.

[1966, c. 46, s. 82]

Examination and disposal of property in custody

83. (1) Where property of a member has been placed in the custody of a custodian under section 82 the Secretary or the Society's solicitor and such other solicitors or other

persons, if any, as the chairman or vice-chairman of the Discipline Committee may designate, shall examine the property and thereafter the custodian shall, by such notice as he thinks proper, including publication in a newspaper if he thinks fit, inform clients of the member or other persons as he may consider necessary,

(*a*) that the property of the member is in the custody of the custodian and that an examination thereof indicates that the client or other person appears to have an interest therein, and

(*b*) that the client or other person may apply to the custodian in person or by solicitor or agent for the delivery to him of the property in which he appears to have an interest or for leave to make copies of any documents and papers among the property that he may deem necessary to copy, in respect of any transactions or dealings he had with the member, subject to any solicitor's lien of the member upon or with respect to such property.

(2) Where the custodian is satisfied that a person is entitled to any property in his custody and that no solicitor's lien is claimed thereon or appears to exist, or if any such lien is satisfied, he may deliver the property to the person claiming it.

(3) Where a member whose property has been placed in the custody of a custodian under section 82 claims to be entitled to a solicitor's lien upon or in respect of any part or parts thereof,

(*a*) he shall, within thirty days from the service of the order upon him, file notice of his claim for lien with the custodian with particulars thereof, and

(*b*) the custodian shall forthwith give notice of the claim for lien to the apparent owner of the property against which the lien is claimed and thereafter the rights of the parties shall be determined according to law.

(4) Where a member fails to file a claim for lien pursuant to this section any lien that he might otherwise be entitled to is extinguished and the custodian is entitled to deliver any property to the claimant thereof if otherwise satisfied that it is proper to do so.

(5) Notwithstanding anything in this section, a judge of the Supreme Court may summarily determine the validity of any claim to a solicitor's lien [1966, c. 46, s. 83]

General

Extension of time, etc.

84. (1) Notwithstanding anything in this Division, a judge of the Supreme Court may at any time enlarge or shorten the time within which any thing is required to be done under this Division or dispense with any of such requirements.

(2) Neither the custodian, the Society, its officers, any Bencher, any one designated by the Benchers nor any one acting for any of them, incurs any liability or obligation as trustee or otherwise to the member or to any of the member's clients or former clients or to the member's estate or to any other person by reason of any proceeding taken under this Division.

(3) No liability attaches to the persons enumerated in subsection (2) or any of them for any thing done or omitted to be done in good faith under this Division.

(4) A judge may fix and award the costs and fees to be taxed, allowed and paid by the member or any other person in respect of proceedings under section 82 or 83, including the costs and fees payable to a custodian, but no costs shall be awarded against the Society, its officers, the Benchers or any one designated by the Benchers or any one acting for any of them by reason of or in respect of any proceedings under this section and taken in good faith.

[1966, c. 46, s. 84]

Companies Act to provide remedial sections for single shareholder professional corporations. The section dealing with signing the balance sheet has been mentioned to me but it must also be pointed out that the single shareholder could certainly waive his right to an audit statement if this really distressed him. My own suggestion is that the matter wait until the new Act comes into force.

As with all new legislation, however, some problems have arisen with regard to professional incorporations. I may say at the outset that all of these problems arise because of tax planning, or gimmickry, and are not related to the professional incorporation by itself, but have arisen with respect to converting an existing company which may have substantial loss carry forward, to a professional corporation, or amalgamation of an existing company with a professional incorporation. It also arises under a particularly esoteric piece of tax planning whereby the wife incorporates an ordinary company, gives all the shares to her husband, who converts it to a professional corporation, but presumably the attribution rules apply so that for tax purposes dividend income paid by the corporation is the wife's income. The income can then be split between the husband and wife by varying the salary and the dividends. I gather this scheme has been given the name "reverse attribution".

Attached to this paper is a copy of a letter from the Registrar of Companies to myself and others proposing a meeting at 3:00 pm on March 31st dealing with some of these problems and I will report to you the results of the meeting. My own feeling is that the professional corporation is a tax advantage which has been granted by the legislative assembly under considerable fire from the opposition, and any further tax advantages gained from it may well result in cancellation of the whole idea. If I had my druthers I would be opposed

to converting existing companies or to permitting amalgamation of a professional corporation. It is a new and strange beast and if we want to keep it I think we should tread very lightly at the start.

THE PUBLIC CONTRIBUTIONS ACT

CHAPTER 292

Short title

1. This Act may be cited as *The Public Contributions Act.* [1965, c. 72, s. 1]

Definitions

2. (1) In this Act,

(*a*) "charitable purpose" includes any benevolent, philanthropic, patriotic, artistic, athletic, recreational or civic purpose and any purpose that has as its object the promotion or provision of a public service;

(*b*) "Minister" means the member of the Executive Council charged with the administration of this Act;

(*c*) "organization" means a person, an association of persons or a corporation.

(2) For the purposes of this Act, an organization is conducting a campaign to obtain funds for a charitable purpose

(*a*) when it

(i) canvasses for, solicits or collects money, goods or financial assistance of any kind, or

(ii) sells or provides or offers to sell or provide any goods, services or other thing of value or purported value,

on the plea or representation, direct or implied, that the money, goods or financial assistance or the sale or provision of the whole or part of the proceeds thereof is for a charitable purpose, or

(*b*) when it instructs or causes any person to do any thing to which clause (*a*) refers.

[1965, c. 72, s. 2]

Authority to campaign

3. (1) No organization shall conduct a campaign to obtain funds for a charitable purpose unless it is authorized to do so

(*a*) by the Minister, or

(*b*) in the case of a campaign to be conducted within the corporate boundaries of a city that has a by-law passed pursuant to section 16, by the approving authority of that city.

(2) This Act does not apply to the soliciting of funds by an organization only from persons who are members of the organization at the time of the soliciting, and the spouses, parents and children of such members.

[1965, c. 72, s. 3]

Application for authorization

4. (1) An application for authorization shall be made to the Minister or to the approving authority of any city whose authorization is required, as the case may be.

(2) Where an application is made to the approving authority of a city, a copy thereof shall be delivered to the Minister.

(3) An application for authorization shall be made at least 30 days prior to the proposed starting date of the campaign, unless the Minister or the approving authority of the city, as the case may be, otherwise permits.

(4) Where the gross amount of funds that an organization intends to raise by a campaign does not exceed $250, the Minister or the approving authority of the city, as the case may be, may with respect to that campaign exempt the organization from complying with any specified provision or provisions of this Act, the regulations or the city by-law passed under this Act. [1965, c. 72, s. 4]

Contents of application

5. The application for authorization shall state

(*a*) the name and address of the organization seeking to obtain funds,

(*b*) the names, addresses and occupations of the officers of the organization,

(*c*) the names, addresses and occupations of persons in charge of the campaign,

(*d*) the place or area in which the organization will attempt to obtain funds,

(*e*) the objective of the campaign,

(*f*) the duration of the campaign,

(*g*) the budgetted expenses of the campaign, in detail,

(*h*) the budgetted salaries, wages, subsistence and travelling expenses that will be paid to organizers, employees and campaign workers,

(*i*) the purpose for which the money obtained will be used,

(*j*) the estimated percentage of the funds obtained that will be expended in Alberta for the services stated in the application to raise funds,

(*k*) the proportion of the funds obtained in any annual canvass or campaign that will be placed in a sink-

ing fund for long-term projects, to meet debentures and a reserve fund for programs of expansion, and

(*l*) such other information as may be required.

[1965, c. 72, s. 5]

Duration of authorization

6. (1) An authorization given under this Act may, at the discretion of the authority giving it, be made valid for a limited time only or until revoked and any such authority may be revoked at any time.

(2) An authorization may be refused or revoked by and in the discretion of the Minister or the approving authority of a city, as the case may be,

(*a*) where there is or will be a non-compliance with this Act, the regulations or any other applicable law, or

(*b*) where there is or is likely to be a misuse of the funds collected, or

(*c*) where the amount to be actually applied to a charitable purpose is too little considering the total amount of the funds to be obtained, or

(*d*) where a campaign of a similar nature and to be conducted in the same period has previously been authorized, or

(*e*) where the Minister or the approving authority of the city, as the case may be, is not satisfied of the honesty, integrity or *bona fides* of the persons conducting or to be conducting the campaign, or any of them, or

(*f*) for any other reason considered by the Minister to be sufficient and in the public interest.

(3) Where an authorization is refused or revoked by the approving authority of a city, the organization affected thereby may, within 30 days after receiving notice of the decision, appeal the decision to the Minister who, after considering the representations of the organization and of the approving authority, may either confirm the decision or direct the approving authority to grant or reinstate the authorization. [1965, c. 72, s. 6]

Financial statement of receipts

7. (1) Every organization that conducts a campaign to obtain funds for a charitable purpose shall, after the completion of the campaign, file with the Minister and with the approving authority of a city that gave an authorization for the campaign a financial statement audited by an independent and qualified auditor showing

(*a*) the total amount of the moneys received,

(*b*) the total amount of the expenses incurred in conducting the campaign,

(*c*) the disposition of the proceeds, and

(*d*) the assets and liabilities of the organization.

(2) Where the receipt of moneys is continuous, the organization shall file its financial statement with the Minister forthwith after the end of the fiscal year of the organization or at such other times as the Minister requires.

(3) Where moneys are received from or the campaign is conducted in the Province and elsewhere, the financial statement required to be filed pursuant to this section shall show only the moneys received in, the expenses incurred in and the disposition of the proceeds collected in the Province. [1965, c. 72, s. 7]

Accounting for distribution of contributions

8. (1) The Minister may require an organization that has obtained funds from the public for a charitable purpose to file at such times as the Minister may designate a financial statement accounting for the distribution of those contributions, until the contributions or the contributions of a particular campaign or drive have been expended or disposed of.

(2) The Minister may at any time require any organization that places any of the funds received by it into a sinking fund to file with him a financial statement respecting the sinking fund. [1965, c. 72, s. 8]

Inspection of books and accounts

9. If so directed by the Minister, an organization that has obtained funds from the public for a charitable purpose shall at any time permit the Provincial Auditor or his nominee to inspect the books, records and accounts of the organization relating to the collection, expenditure and distribution of the contributions. [1965, c. 72, s. 9]

Annual report

10. (1) The Minister shall submit to the Lieutenant Governor in Council an annual report containing a statement of the receipts and expenditures of each organization to which this Act applies.

(2) The report shall be laid before the Legislative Assembly within 15 days after the commencement of the next regular session. [1965, c. 72, s. 10]

Publication of information re campaigns

11. The Minister may publish or cause to be published such information as he considers to be in the public interest relating to

(*a*) any organization that obtains or attempts to obtain funds from the public for charitable purposes whether that organization has complied with this Act or not, and

(*b*) any campaign to obtain funds from the public for charitable purposes. [1965, c. 72, s. 11]

Appointment of trustee

12. (1) The Minister may apply to a judge of the Supreme Court, either *ex parte* or upon such notice as the judge may require, for an order appointing a trustee of all or any of the assets of an organization that has obtained funds from the public for a charitable purpose and if it appears to the judge that

(*a*) the organization is misapplying any of the funds received by it, or

(*b*) the organization has failed or is failing to apply all or any of the funds received by it to the charitable purpose for which the contributions were obtained, or

(*c*) it is otherwise in the public interest to do so,

the judge may appoint a trustee and vest in him the control of all or any of the assets of the organization on such terms as he considers proper.

(2) Subject to any directions or conditions contained in the order appointing him, the trustee may apply the assets placed under his control to the charitable purposes for which the funds were originally obtained

[1965, c. 72, s. 12]

Offence by organizations

13. (1) An organization that contravenes this Act, or any regulation or by-law hereunder, is guilty of an offence and liable on summary conviction to a fine of not more than $100 for each day that the offence continues.

(2) An officer of an organization who contravenes this Act, or any regulation or by-law hereunder, is guilty of an offence and liable on summary conviction to a fine of not more than $50 for each day that the offence continues.

[1965, c. 72, s. 13]

Offence by individuals

14. A person who on behalf of an organization canvasses or solicits or obtains a contribution from the public for a charitable or benevolent purpose when the organization is not authorized under this Act to conduct a campaign is guilty of an offence and liable on summary conviction to a fine of not more than $25 for each day the offence continues. [1965, c. 72, s. 14]

Regulations

15. The Lieutenant Governor in Council may make regulations

(*a*) governing the operation and activities of organizations to which this Act applies,

(*b*) governing the obtaining of funds from the public and the application thereof by an organization to which this Act applies,

(*c*) designating charitable purposes within the scope of this Act, either generally or in particular cases,

(*d*) designating organizations or campaigns to obtain funds as organizations or campaigns to which this Act applies,

(*e*) exempting a designated organization or any designated class or classes of organizations from compliance with this Act or with a named provision of this Act,

(*f*) respecting records to be kept by organizations and returns to be filed pursuant to this Act,

(*g*) prescribing forms to be used under this Act and the regulations, including the form of by-law that may be adopted by a city under section 16,

(*h*) prescribing when an organization is required to give receipts for contributions and requiring and governing the use of identification cards by persons who canvass or solicit for organizations, and

(*i*) prescribing any other matter or thing deemed necessary or advisable to facilitate the administration of this Act and the carrying out of its provisions according to their true intent. [1965, c. 72, s. 15]

Campaigning in cities

16. A city, by by-law, may designate any person or body as an approving authority for the purpose of this Act and may make such rules, not inconsistent with this Act or the regulations, as may be necessary to give proper effect to this Act within the city. [1965, c. 72, s. 16]

(3) Section 1 is amended by adding the following clause after clause (d):

(e) "patient", with reference to a home or unit operated under *The Homes for the Aged Act*, means a person who resides in that home or unit.

The Public Contributions Act

R.S.A. 1970, c. 292

3. (1) The Public Contributions Act is amended by this section.

Amends s. 6

(2) Section 6 is amended by striking out subsection (3).

Commencement

Coming into force

4. This Act comes into force on the date upon which it is assented to.

CHAPTER XI

NON-PROFIT COMPANIES

Within Part I of the present Companies Act there are a number of provisions permitting the incorporation of "non-profit companies". Sections 16, 17 and 18 are generally considered to come within the scope of non-profit companies. Section 16 provides for the incorporation of fishing, sporting and literary clubs, and for restrictions on the transfer of their shares. There is no specific requirement that such a company not carry on business for profit, but the implication is to that effect. Section 17 authorizes the passing of by-laws that would permit making assessments on the members of such clubs. Section 18 has two very distinctive provisions. Section 18(1) provides for the incorporation of companies with share capital with "charitable, philanthropic, temperance, religious, social, political, literary, educational, athletic or other like purposes." Such companies

may provide in their Letters Patent that all property of the corporation, including profits and income, shall be held in trust for the objects and purposes for which the company was incorporated and a prohibition against the payment of dividends. The provision, unlike section 16, requires in effect that the company not be for the pecuniary gain of the shareholders or members. Section 18(2), unlike section 18(1) provides that a corporation may be incorporated without share capital for the purposes for which a corporation may be incorporated under section 18(1). The section goes on to provide that such a corporation shall be subject to clauses (a) to (j) of section 18(2) "as well as all other provisions of the Act not inconsistent therewith, unless otherwise specified in the Letters Patent". It is not completely clear whether or not the last phrase is applicable to provisions (a) to (j) and therefore that provisions contrary to them may be included in the Letters Patent. If that is the case, then it is conceivable that the corporation could carry on business for the profit of its members as it is clause (h) that contains the prohibition. However, this seems clearly to be contrary to the general intent of the section, therefore, we have included section 18(2) corporations under the heading of non-profit companies.

These provisions are now generally used to incorporate two distinct types of non-profit companies. A section 16 corporation can be described as a "corporation formed for a private non-pecuniary purpose ... Activities for the benefit of the membership are the predominant aspect of the corporation, although the corporation may sometimes extend incidentally some services of a charitable nature for the benefit of the public at large."[1] Such companies may also, however, be incorporated under section 18. However, many companies incorporated under section 18 are more aptly described as corporations "formed for a public non-pecuniary purpose which is more commonly referred to as the charitable not-for-profit corporation ... The charitable corporation can be considered to be one which meets the common law test as to what constitutes a charity set forth by Lord MacNaughten in Pemsel v Special Commissioners, [1891] A.C.531, 533: 'Charity in its legal sense comprises four principle divisions: relief of poverty, the advancement of education, ... the advancement of religion and ... other purposes beneficial to the community not falling under any of the preceding heads.'[2] Not only does section 18 attempt to treat the two

1. Cumming, Proposals for a New Not-for-Profit Corporations Law for Canada, (1974), Vol. I, p.6.

2. Ibid., at p.5-6.

types of non-profit companies as one, but it also attempts to regulate them under provisions primarily intended for business corporations. To even further compound the difficulties, the degree to which general trust law applies to such corporations is open to question. One writer has described the non-profit company as a 'bastard legal form'."[3]

Many provinces and almost all the American States have separate statutes for non-profit corporations. In Nova Scotia and Saskatchewan, non-profit companies are regulated by separate statutes called Societies Acts. In Ontario, non-profit corporations are regulated by the Corporations Act, while the Business Corporations Act regulates commercial enterprises. This past summer, the Federal Department of Consumer and Corporate Affairs released a Report, Proposals for a New Not-for-Profit Corporations Law for Canada, which would, if enacted, provide a separate code for all federally incorporated non-profit companies. As a minimum, it is recommended that non-profit corporations be regulated by a part of the Companies Act separate from the business corporations provisions and preferably, a separate statute. It also appears to us that any such

3. Mockler, Charitable Corporations: A Bastard Legal Form, [1966]Can. Bar Papers, 229.

provisions should distinguish between private membership corporations and public charitable corporations. In addition, the application of general trust law should be clearly delineated.

We think, however, that it is inappropriate at this time to attempt to deal with non-profit companies in any detail. The major questions will basically be whether or not to follow the rules for business corporations. This, of course, depends upon the rules finally enacted for business corporations. We do, however, make the following initial recommendations for consideration.

A. INCORPORATION WITHOUT SHARE CAPITAL

The present federal Act, the federal Proposals for a New Not-for-Profit Corporations Law for Canada and the Ontario Act provide for incorporation of non-profit companies without share capital. The usually stated advantages of incorporation without share capital include provisions for the expulsion of members and control on the transfer of membership. In part, these advantages only reflect the

disadvantages of the present status of the law of share capital legislation which could easily be changed. However, it appears to us that the advantages of having no share capital outweigh the advantages of share capital for both private membership and public charitable corporations. There is no need to have share capital to evidence a member's equity interest in a company that is not formed for the profit of the members. Having no share capital tends to reinforce the non-pecuniary purpose of the incorporation. There will be no dividends and in most cases, there will be no surplus assets to be distributed on dissolution. Nor are there insurmountable problems in raising capital with corporations without share capital.

Though capital could not be raised by the issuance of shares, it could be raised through entrance fees, membership dues, donations, borrowing, or through the issuance of bonds or debentures. It would be a simple matter to have the by-laws make membership conditional on the purchase of a bond or debenture. The terms of the bond would not be at all onerous on the corporation and could, for example, be made redeemable only on dissolution, the happening of a remote contingency, or even made irredeemable. In order to remove

any question as to the validity of such bonds (as a result of the rule against perpetuities), it would be advisable to continue section 80(3) of the present Act. We believe that there is no reason to change the present scheme in the Ontario and Federal legislation and therefore that, as with section 18(2), the non-profit corporation provisions should provide for no-share capital only.

B. OBJECTS OF NON-PROFIT COMPANIES

The present Act lists a number of purposes for which incorporation may be sought. The federal Proposals for a New Not-for-Profit Corporations Law for Canada refer to this method as a functional approach. They suggest a general economic approach be taken. Incorporation must be for a non-pecuniary purpose and it must be stated whether the corporation is a membership type or a charitable type corporation. They need not state, however, the objects of incorporation. We favour the distinction between membership and charitable non-profit companies. We recommend that the incorporation of companies be permitted for any non-pecuniary purpose. We understand that this recommendation is not substantially different from the current practice under section 18.

C. MEMBERSHIP

The company, as under section 18(2), should have the power to decide on the qualifications for membership and on the removal of members. As under 18(2), it seems a reasonable safeguard that any by-law for the removal of members must have a two-thirds majority vote. There should be a provision allowing for different classes of membership in the same manner as companies with share capital. If there is more than one class, or only one class for that matter, at least one class must have voting rights.

D. THE LAW OF TRUSTS

One of the major theoretical questions involving non-profit corporations, and particularly charitable corporations, is the matter of the applicability of the law of trusts, including investment powers, mingling of assets, visitorial powers of the founder and the application of the cy-près doctrine.[4] There is authority to the effect that equity will treat a charitable corporation as a trustee of its property. The federal Proposals for a New Not-for-Profit Corporations Law for Canada recommend that it be expressly

4. See Mockler, Charitable Corporations: A Bastard Legal Form, [1966], Can. Bar Papers, 229.

provided that unrestricted property of a charitable corporation not be subject to trust law.[5] This appears to be the preferred view.

It is also recommended that the legislation specifically state the destination of surplus assets on dissolution. At present, there are three possibilities.[6] (1) It may be returned to the donor where the property was not given with a general charitable intention,[7] (2) It may be forfeited to the Crown on the principle of bona vacantia.[8] (3) It may be distributed as nearly as possible in accordance with the donor's intention.[9] The third possibility is often referred to as the cy-près doctrine, an analogy to the doctrine applicable to trusts and seems to be generally accepted as the most preferrable.[10] A charitable corporation under the federal Proposals for a New Not-for-Profit Corporations Law for Canada[11] would require charitable companies on dissolution to distribute their surplus assets to

5. Cumming, Proposals for a New Not-for-Profit Corporations Law for Canada (1974), Vol. I at p.33-34.

6. Ibid. at p.82-83.

7. Scott, The Law of Trusts (3rd ed.) Vol. IV at p.3054-5.

8. Re Enderton, [1954] 4 D.L.R. 710 (Man. Q.B.).

9. Wallis v Solicitor General for New Zealand [1903] A.C. 173 (P.C.).

10. See Mockler, op. cite at note 3; Cumming, op. cite at note 2.

11. Cumming, op. cite at note 5 at p.83.

one or more organizations having similar purposes. In the event that such distribution (in accordance with the articles) is impossible, the liquidator would be required to choose another organization having similar purposes subject to the approval of the court. We recommend that New Brunswick similarly, specifically enact, a cy-près rule for charitable corporations.

Non-charitable or membership corporations also should be permitted to provide for the distribution of their surplus assets on dissolution to one or more organizations with similar objects or purposes. However, a mandatory provision to that effect would seem unreasonable, for example, a golf club being required to turn over its surplus to another golf club. But because of the non-profit purpose or objective of such membership corporations, there is a question as to whether the surplus should be distributed to the members. The alternative would be a forfeiture to the Crown, perhaps to be used for charitable purposes or perhaps to charities directly, the decision being made by a government agency or by the liquidator with the approval of the court. However, the present Federal, Ontario and New Brunswick legislation appear to allow the distribution of a surplus

to members and so does the proposed Federal legislation. Despite the fact that it is against the non-profit purpose of the company, and the inequity when only the members at the time of dissolution share in the increasing value of the assets, we think that it is still the most generally acceptable and practical method of distribution.

E. RECOMMENDATIONS

We recommend that:

Non-Profit Companies

1. Provisions dealing with non-profit companies, as nearly as possible, be comparable to those dealing with business corporations.

2. In order to accomplish our first objective, the drafting of Non-Profit Companies provisions await the final determination of the business corporations law.

Incorporation Without Share Capital

3. As a preliminary matter, consideration be given to the repeal of sections 16, 17 and 18 of the present Act and a new part be enacted allowing all organizations whose purpose is not for the direct pecuniary profit of its members to incorporate without share capital.

Membership

4. The corporations have the right to determine the restrictions and conditions attaching to each class of membership.

The Law of Trusts

5. The cy-près doctrine apply on the distribution of surplus assets of charitable corporations, but that the assets of membership corporations be distributed according to the articles, and in the absence thereof, to the members.

APPENDIX C.

CHAPTER 1

Formation of Companies

SECTION 2.

Incorporation—The "One-Man" Company.

1.2.1. The original historical concept of the business corporation in England was that of a relatively large number of individuals associated together to carry on business in corporate form as a separate and distinct entity, initially as joint stock companies and later as commercial corporations formed under the United Kingdom Companies Act of 1862 and its successors.[3] Early corporation statutes reflected this concept in that in England, prior to 1908, seven incorporators and members (shareholders) were required at all times; by the 1908 amendments "private companies" were permitted to have only two incorporators or members.

1.2.2. The Ontario Act provides,[4] in effect, that three natural persons over the age of 21 years shall be the minimum number of incorporators permitted to apply for incorporation. The Ontario Act further provides[5], in effect, that in certain circumstances if a company exercises its corporate powers when the number of its shareholders is fewer than three, every person who was a shareholder during such time, and who is aware of the fact that the company so exercised its corporate powers, is severally liable for the debts contracted by the company during the period in which the company had less than the statutory minimum number of shareholders.

1.2.3. This Committee, as was the case with the 1952 Select Committee and with the Jenkins Committee, has considered whether the law should permit the so-called "one-man" company, that is, a company having but a single shareholder. For practical purposes, the one-man company has been recognized in law since Salomon's case.[6] Particularly is this true in Ontario and other jurisdictions which provide for private companies. The private or closely-held company is not infrequently beneficially owned by one person or company. The law should be brought in line with reality by giving statutory sanction to the judicial recognition of one-man companies. The limited company, being a separate legal entity distinct from its incorporators and shareholders, it should not matter, in law, whether a company has one beneficial owner or many or whether such one owner is a natural person or a company.

1.2.4. The Jenkins Committee arrived at the opposite conclusion. Commenting on the suggestion that the requisite minimum number of shareholders of a company should be one for all companies, public or private, the Jenkins Committee stated[7]:

"We recognize the force of these arguments [in favour of giving statutory sanction to the one-man company] but in our view the practical advantages of making the change are insufficiently great to justify the consequential alterations of existing law and practice. Especially is this so in the light of our later recommendation that every company should have at least two directors and that the first two subscribers to the memorandum should be deemed to be directors unless and until the Registrar is notified of others. This recommendation is designed to discourage irresponsible incorporations; and a change which would enable one man, by merely signing a piece of paper and complying with certain statutory requirements, to convert himself into a company and to repeat this performance as often as he wishes, might be thought to encourage them."

1.2.5. We have not considered this line of reasoning convincing in the light of modern business conditions. Incorporators of companies today are rarely, if ever, the promoters. Almost invariably the several incorporators are mere nominees designated by the solicitor preparing the incorporation documents. Very frequently the private or closely-held company has but a single beneficial owner, all other shareholders being, again, mere nominees of such owner.[8] As was said by the Joint Legislative Committee to Study the Revision of Corporation Laws of the State of New York:

"The law to engender respect should itself respect realities. This is especially true, and does not import any sense of weakness, when no substantive policy of law argues to the contrary, as with incorporators."

1.2.6. The majority of corporations in Ontario are no doubt in essence "one-man" companies. The Committee has concluded that the existing statutory minimum number of three incorporators (and, inferentially, of shareholders) is arbitrary and artificial causing unnecessary inconvenience. We do not consider that a reduction in the number of incorporators of companies would encourage "irresponsible incorporations" or facilitate fraud. The concept of "one-man" companies can be given recognition in the Ontario Act without detrimentally affecting rights of creditors or other persons dealing with corporations. This recommendation would bring Ontario law into line with the laws of 16 of the states of the United States including New York, Pennsylvania, Illinois and Michigan. To avoid technical difficulties in the case of the death of the shareholder of a one-man company, Section 77 of the Act should be amended so as to state clearly that the personal representatives of a deceased shareholder should be deemed to be shareholders of the com-

pany for all purposes with the same voting rights as had the deceased shareholder.

1.2.7. The Committee recommends that the Ontario Act be amended to adopt, in principle, the concept embodied in Section 47 of the Model Business Corporation Act prepared by the Committee on Corporate Laws of the American Bar Association, which section reads in part as follows:

> "One or more persons, or a domestic or foreign corporation, may act as incorporator or incorporators of a corporation . . ."

This recommendation reflects the view of the Committee that modern corporation law should impose minimum restrictions on and afford maximum convenience and simplicity to incorporation and organization of companies. As a corollary to this recommendation, the Committee suggests that the Act be further amended so as not to require the incorporator or incorporators to be subscribers for shares.

3. Witness the fact that only new joint stock companies with 25 or more members or with shares transferable without the express consent of all the members were required to register under Gladstone's Joint Stock Companies Act, 1844 (7 and 8 Vict. c. 110).
4. Section 3(1).
5. Section 322.
6. *Salomon v. Salomon & Co. Limited* [1897] A.C. 22. (H.L.).
7. Jenkins Report, para. 21 et seq.
8. This state of affairs is encouraged by the effect of section 299 of the Ontario Act which does not require directors to own beneficially the shares held for qualification purposes. In the Committee's opinion, Section 299(1), (2) & (3) serve no useful purpose and should be repealed.

CONSUMER AND
CORPORATE AFFAIRS

Companies Branch

403/427-2311
TWX 610-831-1942
2nd Floor, Century Place
9803 - 102 A Avenue
Edmonton, Alberta, Canada
T5J 3A3

March 24th, 1976

Mr. G. C. Field,
Institute of Law Research,
Law Centre,
University of Alberta,
EDMONTON, Alberta.

Dear Sir:

Re: The Companies Act
Professional Corporations
Bill 68 (Ch.44, S.A. 1975 Second Session)

For the reasons which follow, I consider it necessary that a meeting be arranged to review the amendments effected by Bill 68, in light of the existing provisions of The Companies Act.

I discussed this briefly with Mr. Witten, Mr. Hurlburt, Mr. Field, Joanne Veit and Marg Donnelly, who suggest that the meeting be held as soon as possible.

The above mentioned Chapter 44 of the Statutes of Alberta inter alia amended Sections 13, 15, 16 and 293 of The Companies Act.

The amendments to Sections 13, 15 and 293 do not cause us problems and regardless of the obvious deficiencies in The Companies Act respecting one-man corporations, this office has worked out a scheme whereby such professional corporations can be incorporated and as a matter of fact approximately 130 have received certificates to date.

The problems arise as the result of the amendments to section 16 which appear to contemplate the conversion of any share-capital company to a professional corporation and the reverse if a professional corporation were to lose or surrender its professional permit.

The main problem confronting us at the moment is the conversion of an existing share capital company to a professional corporation.

a) The company can change its name.
b) The company can change its objects.
c) The company can change its powers.
d) The company can change its authorized capital and/or rights, etc. attaching to its shares.

continued.....

These changes are all provided for in sections 32 - 38 inclusive, of The Companies Act.

It is my opinion, however, that the present provisions, inclusive of the amendment effected by Chapter 44, S.A. 1975, do not permit an alteration to the clause respecting the limitation of liability.

Too, the present arrangement this office has with the professional organizations would be defeated, at least to the extent that we would no longer have assurance that such a professional corporation (by name and upon conversion) was at least capable of being issued a permit.

Another method by which a professional person might offset income from his profession by losses incurred from the other business of running a farm, a ranch, an apartment block, clinic building, or some other business, would be to amalgamate a professional corporation formed in the usual way with his existing corporation.

In either case, however, we run into the same problem.

From recent discussions it appears that the adoption of a new Companies Act for Alberta is at least a year down the road and therefore the existing Act may need amendment :-

a) to permit the conversion of an existing share capital corporation to a professional corporation (See especially section 34.(1) re inclusion of new objects and section 30 re liability clause).
b) to make provision for meetings if there is only one member.
c) to make provision for signing resolutions, balance sheets, seal, quorum, etc. in the case of one-man companies.
d) in the case of a professional corporation, need a director be a shareholder - it is not a statutory requirement of our Companies Act at this time.
e) to give the Registrar authority to remove "Professional Corporation" from a name in the event that a company loses its permit - all he can do under existing circumstances is to add the "Limited" or "Ltd." to the name and yet by definition a "Professional Corporation" is a company possessing a permit.
f) perhaps devise a Schedule (C) to The Companies Act as Articles of Association peculiar to professional corporations (one-man companies).
g) clarify the point as to whether or not there is no limitation of liability only in respect of professional acts and that such does not extend to the other businesses one might carry on in the name of a professional corporation.

Because detailed instructions to Legislative Counsel regarding suggested Legislation must be in his hands by July 1st for the Fall Session and requires prior approval of the Minister who is responsible for the particular statute, I am requesting that you meet with me at a convenient time. As a suggestion, I propose the meeting be held at the Companies Branch at 3:00pm on Wednesday, March 31st.

Yours truly,

Harold J. Thomas
Registrar of Companies

P.S. Please contact my secretary, Miss Williams, 427-2311, regarding your ability to attend.

Letters have been mailed to -

Mr. N. L. Witten
Mrs. M. Donnelly,
Mr. W. H. Hurlburt, Q.C.,
Mr. G. C. Field
Mr. D. J. Boyer,
Mr. W. N. Richards
Mr. P. L. Herring
Mr. P. N. McDonald

Copies to -

Mr. J. L. Lyndon
Mr. S. A. Pepper

The Private and the Public Company

A brief look at the history of the United Kingdom legislation will help us to focus on some of the problems in this area. The distinction between private and public companies first entered the United Kingdom statutes in the 1907 Companies Act and reappeared in the Companies (Consolidation) Act of 1908. The basic definition of a private company was the same as in Alberta today, namely, not more than fifty shareholders (exclusive of employees or former employees), a restriction on the right to transfer shares, and a prohibition against the solicitation of the public to purchase the company's shares. These provisions are all basically an attempt to provide a corporate vehicle for the small trading venture in which the directors and the shareholders are the same people, and in some ways are an attempt to implement some of the partnership provisions in the Companies Act, such as the restriction on transfer since the partners would have to accept a new partner. It may be recalled that although the famous Mr. Solomon was carrying on a de facto one man company, he owned 2,001 out of 2,007 issued shares, he was still required to have seven shareholders, the remaining six shares being held by members of his family. The 1908 Act reduced this number to three. The other two main advantages of the private company lay in the area of disclosure, it was not required to file its annual financial statements, and in the fact that a private company could make a loan to its director which a public company could not do. By 1945, the year of the Cohen Report, the private company provisions had suffered considerable abuse through the incorporation of private subsidiaries by public companies who were permitted to file consolidated balance sheets remarkable mainly for the paucity of information given. The private subsidiary did not have to file a balance sheet and could make a loan to its directors who by an odd coincidence were frequently the same persons as the directors of the parent. The Cohen Report then attempted

a classification of private companies into exempt private companies and non-exempt private companies. The definition separating the two was complex and proved ineffective to cure the abuses. In 1962 the Jenkins Committee recommended that both the distinction between exempt and non-exempt private companies, and between private and public companies be abolished. The Companies Act of 1967 however abolished the first distinction only and sought to cure the abuses arising out of the second distinction by removing the two main areas of abuse. Thenceforth private companies in England were required to file their annual statements and could no longer make loans to their directors. The private company still exists in England but its advantages are not as great as before. Professor Gower has summarized these advantages as follows:

1. There need be only two members instead of a minimum of seven and one director instead of a minimum of two.

2. It can be formed more simply and more cheaply since no prospectus requirement is required.

3. It can commence business immediately upon registration.

4. Since no prospectus is required there is not a great deal of publicity regarding its affairs other than its filing of its annual statements.

5. All its directors can be appointed by a single resolution of a general meeting which is apparently not true with regard to public companies.

Professor Gower then lists as disadvantages the three original criteria, namely the limitation of fifty members, the restriction on the right to transfer shares and the prohibition for making any invitation to the public to subscribe for its shares, which in the 1967 Act added debentures as well. It might be interesting to comment on the fact that when I was in England in May of 1975 I was told by the Registrar of Companies and by Mr. [illegible], the Registrar of the Companies Court, that private companies were generally two to three years late in filing their annual statements and that nobody was paying much attention to this fact. This simply arose from the fact that all of the auditors in England were terribly overworked and so far behind in all of their work. No action was being taken by any of the administrative branches dealing with the Companies Act to compel private companies to file their financial statements since the administration were as understaffed and behind in their work as were the auditors. Apparently, these companies are paying tax on an estimated basis on unaudited statements and simply file amended returns when the audited statements come in.

It is suggested therefore that the main criteria which we must look to in attempting any distinction between a private and public company is whether the directors are substantially the same group as the shareholders. From the positive tone of the last statement you will note that I am presupposing that the distinction should be retained. The Registrar of Companies for the Province of Alberta estimates that 98% of the companies incorporated under the Alberta Companies Act are private companies, and that of these a total of 5% only would have more than 15 shareholders. To alter this distinction by wiping it out altogether would be a major change in our company law and is not recommended.

This leaves us therefore with three alternatives:

1. A separate act for each type.

2. An act broad enough to encompass the the public company with the necessary exceptions for a private company.

3. An act designed specifically for private companies expanded where necessary to handle public companies.

As it will be seen in the following paper different jurisdictions have adopted different techniques so far as I know no jurisdiction has adopted route number 3 above. In the interests of uniformity therefore it would seem to be wiser to stick with either number 1 or number 2, and in the interests of practicality this would seem to leave us with number 2.

Our problems therefore would seem to be:

1. What should the distinction be between a public and a private company?

2. What requirements that govern a public company should be eased or abandoned with regard to a private company?

3. What are the specific private company problems with which we should deal?

(1) Alberta

"Private company" is defined in section 2 26 and is as follows:

26. "private company"—"private company" means a company that by its memorandum or articles,
    (i) in the case of a company having a share capital,
        (A) restricts or prohibits the right to transfer any of its shares,
        (B) limits the number of its members to fifty or less (exclusive of persons who are in the employment of the company, and persons who, having been formerly in the employment of the company, were while in such employment and have continued after the determination of such employment to be members of the company), but where two or more persons hold one or more shares in the company jointly they shall, for the purposes of this definition, be treated as a single member, and
        (C) prohibits any invitation to the public to subscribe for any shares or debentures of the company,

    or

    (ii) in the case of a company not having a share capital,
        (A) limits the number of its members to fifty or less (exclusive of persons who are in the employment of the company, and of persons who, having been formerly in the employment of the company were, while in such employment and have continued after the determination of such employment to be members of the company),
        (B) prohibits any invitation to the public to become members or to subscribe for debentures of the company, and
        (C) restricts or prohibits any transfer of the interest of a member in the company;

There is a further subsection (ii) which deals with a company not having a share capital. These are the three classic distinguishing features first embodied in the English Act of 1907. A public company is simply defined as a company that is not a private company.

The two attributes of a private company which were subject to so much abuse in England, the exemption from filing its annual financial statements, and no restriction on the loans to its directors are contained in section 14 regarding loans, but it will be noted that the section covers loans to both shareholders and directors, and in section 146(3) which excepts a private company from filing with its annual report, a copy of the balance sheet and related documents.

14. (1) Loans.—A public company shall not make any loan to any of its shareholders or directors or give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company.

(2) Nothing in subsection (1) shall be taken to prohibit

(a) the lending of money by the company in the ordinary course of its business where the lending of money is part of the ordinary business of the company.

(b) the making by a company of loans to persons *bona fide* in the employment of the company, whether directors or otherwise, with a view to enabling or assisting those persons to erect or purchase dwelling houses for their own occupation, or

(c) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase by trustees of fully paid up shares in the capital stock of the company, to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company, or

(d) the making by a company of loans to persons in the employment of the company, including directors holding salaried employment, with a view to enabling those persons to purchase fully paid up shares in the capital stock of the company, to be held by themselves by way of beneficial ownership.

(3) If any loan is made by a public company in contravention of subsection (1), all directors and officers of the company making the same or assenting thereto are, until repayment of the said loan, jointly and severally liable to the company and any person injured, for any loss, damage or costs that the company or person sustained or incurred by reason of the contravention of subsection (1).

(4) Notwithstanding subsection (3),

(a) the liability of the directors and officers of a company under this section is limited to the amount of the loan made in contravention of subsection (1) with interest at the rate, if any, stipulated for in the loan, and

(b) a director shall not be held liable for a contravention of subsection (1) if he proves that the contravention was not due to any misconduct or negligence on his part.

(5) Proceedings to recover any loss, damage or costs sustained or incurred by reason of a contravention of subsection (1) may not be commenced after the expiration of two years from the date on which the loss, damage or costs were sustained or incurred. [R.S.A. 1955, c. 53, s. 14]

146.(3) Except where the company is a private company, the annual return shall include a written copy, certified by a director or the manager or secretary of the company to be a true copy, of the last balance sheet that has been audited by the company's auditors, including every document required by law to be annexed thereto, together with a copy of the report of the auditors thereon, certified as aforesaid, and if any such balance sheet is in a foreign language, there shall also be annexed to it a translation thereof in English, certified in the prescribed manner to be a correct translation.

In addition the following distinctions are made throughout the Act between a private and a public company:

(a) Under the provisions of section 15 three or more shareholders are required to incorporate a public company.

(b) Under the provisions of section 75(1) a person is not capable of being appointed a director of a public company by the articles of association and shall not be named as a director unless he has signed the articles by which he is appointed or filed a consent in writing with the Registrar, and, either signed the memorandum for the number of shares necessary for him to qualify or filed with the Registrar an undertaking in writing to take up and pay for his qualifying shares.

(c) Under the provisions of section 78(5)(b) a director of a private company may vote upon a contract in which he has an interest if there is no quorum of directors in office who are not so interested.

(d) The definition of insider contained in section 81(1)(e) refers only to a director or senior officer of a public company and therefore exempts private companies from

the whole of division 3, Part VI, which deals with insider trading.

(e) Since a private company is prohibited from soliciting the public with regard to purchase of its securities and could not do so unless it converted to a public company, division 6 of Part VI dealing with prospectuses.

(f) Under the provisions of section 117(2), and providing the shareholders have agreed by unanimous vote, the auditor of a private company may be a director, officer or employee of the company. There is a complete prohibition with regard to a public company.

(g) Under the provisions of section 118.1 certain types of companies are exempt from the necessity of appointing auditors or obtaining an annual report. The distinction is not the distinction between private and public company embodied in the Act but is a curious distinction which seems to follow more closely the distinction in Ontario between an offering and non-offering company. In order to be exempt the company (which apparently can be either public or private) must:

(i) not offer its securities to the public;

(ii) have five or fewer shareholders; and

(iii) must not have assets exceeding $500,000 and gross operating revenues not exceeding one million dollars shown on the financial statement for the preceding year. Just how a company can do this for two successive years in a row is not very clear.

This section was introduced into the Act by Bill 39 of the 1973 legislature. I have checked the Bill and Hansard for any possible explanation as to its wording. Mr. Koziak introduced the Bill and as might be expected there was a brief statement that the provision would be welcomed by all and there was no further discussion of it.

(h) Throughout Division 7 of Part VI of the present Act which deals with accounting records and financial statements there are many distinctions drawn between the requirements for a public company and a private company. Under the provisions of section 120 a private company must present a financial statement consisting of a balance sheet, profit and loss and surplus, while a public company must present a comparative financial statement showing all of these items and in addition a statement of source and application of funds (the current accounting term for which is changes in financial position). Under sections121, 122, 123 and 124 a private company must prepare its balance sheet and ancillary statements "to present fairly the results of the operations of the company" whereas a public company must comply with detailed provisions. For example section 121 deals with statements of profit and loss in a public company clearly distinguishes ten different items as well as presenting the situation clearly. The same detailed distinction is made in section 122 with regard to the statement of surplus. Section 123 deals with a statement of source of application of funds which a private company does not have to prepare in any event, and

section 124 deals with the balance sheet and lists 26 separate items which must be covered in the balance sheet of a public company. Section 125 deals with notes to the financial statements and subsection 3 of that section lists some 15 particular items which must be dealt in a note to the financial statement of a public company.

Section 131 states that financial statements must be mailed to the shareholders of a public company ten days or more before the date of the annual meeting but that in a private company the shareholder is simply entitled to demand them and there is apparently no requirement to mail them out before the annual meeting. Under the provisions of section 132 public companies are required to send to their shareholders a six-month comparative statement.

While no attempt will be made to deal in this paper with audit requirements for either public or private companies it is apparent that private companies are left pretty well to themselves with regard to specific requirements of their financial statements, because they do not have to file them and they are really for the shareholders' own information wholly. This of course does not give the creditors of a private company a great deal of information, they are left to fend for themselves and use other resources as best they may.

(i) Under section 135(1)(d) the quorum requirements which apply unless the articles of the company make other provisions are different for a public and a private company. In a public company it is three, in a private company it is two.

(k) Under section 197(d) the court has jurisdiction to wind up a company if the number of members in a private company falls below two in any other company below three. Section 293 imposes personal liability on the members under the same circumstances. There is one other further section in the Companies Act, the precise effect of which has always baffled me, this is section 48.

48. (1) **Failure to comply with conditions.**—If the company fails to comply with the provisions that are included in its memorandum or articles and that constitute it a private company, it ceases to be entitled to the privileges and exemptions conferred on private companies under the sections of this Act relating

(a) to the making of an annual return in the form of a balance sheet (section 146),

(b) to the grounds upon which a company may be wound up by the court (section 197), and

(c) to the minimum number of members with which a company may continue to carry on business (section 293),

and thereupon those sections apply to the company as if it were not a private company.

(2) Notwithstanding subsection (1), the court, on being satisfied that the failure to comply with the provisions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested, and on such terms and conditions as may seem to the court just and expedient, order that the company be relieved from such consequences as aforesaid. [R.S.A. 1955, c. 53, s. 58]

To give a concrete example let us presume that a private company has 48 shareholders. One of the shareholders wishes to divide his shares equally amongst his six children and to make a gift inter vivos to them. This will of course mean that the company will have 54 shareholders and will no longer comply with the provisions included in its articles of association that constitute it a private company. It would seem that the only effect of this would be to make the company into a public company, but the only effect, providing an order is obtained under subsection (2), is to bar a loan to shareholder or director, and to require the company to recast its financial statements in a somewhat different in order to comply with the public company requirements. It would also seem that the insider provisions would apply and the proxy and proxy solicitation provisions would apply since these are not matters with regard to which the judge has any jurisdiction to order an exemption under subsection (2). However it is the wording of section 48(1) that perplexes me since it specifically lists the three provisions of the Act which will be effective if the company goes over 50 shareholders. The only rational explanation is that the company does become a public company but if a judge so orders it is exempt from the provisions of the three sections dealing with company orders but no others. I am not sure that this really is what the section says but it seems to be the only rational meaning I can dig out of it.

PROBLEMS:

Of the three criteria contained in the 1929 Alberta Act which are carried forward to our present Act, only one has caused little trouble and that is the restriction on the right to transfer shares. This restriction can be as simple and limited as simply requiring the approval of the directors to any proposed transfer. The next variation is to require

unanimous approval and various articles have built into them what are in fact the provisions normally found in a buy-sell agreement amongst the shareholders, usually granting a right of first refusal to the remaining shareholders to purchase. It may well be that there are companies which provide for a "shotgun" clause in their articles but I have never seen one.

The limitation of fifty members (exclusive of employees or former employees) has certainly been abused in one wellknown case, namely Papp Holdings Ltd. At the time of its demise Papp Holdings Ltd., a private company, had over 250 shareholders. Various shareholders held large quantities of shares and issued trust declarations saying that the beneficial owner was another shareholder or shareholders, and there were instances where prospective shareholders became employees of the company for as little as one-half a day, purchased their shares during that period, and then left the employment of the company. While this abuse is possible, there seems no question whatsoever that Papp Holdings were soliciting the public to purchase their shares. Since "public" has not been defined in either the English Act or our present Act, the question of what precisely is soliciting the public has been left to the courts to determine. The leading case in England is Nash v. Lynde [1929] A.C. 158. The most succinct statement of the problem however occurs in the judgment of Scrutton, L.J. who dissented in the Court of Appeal and was vindicated in the House of Lords. His statement of the problem which occurs on page 102 of the Report of the case in [1928] 2 K.B. 93, is as follows:

> "It seems to me to be a question of degree whether there is a sufficiently general offering to make it a public offer, or such a limited selected distribution as to make it private negotiation. One may consider the whole circumstances, ...but it remains, in my view, a question of fact."

The House of Lords upheld this view and found that while the document probably resembled a prospectus it had never been "issued" to the public. In the light of this and other English cases it would appear that the relevant facts to be looked at are, the number of copies of the circular printed or written, the number of persons to whom the circular is sent, the circumstances in which persons receive it, and the character of the document itself. In looking at the line of English cases which preceded Nash v. Lynde it is apparent that the English courts have taken a much more hands off attitude than the one British Columbia and Alberta case which will be discussed shortly.

There are two leading cases in Canada on this matter. The first is a decision in British Columbia, Rex v. Empire Dock Ltd. (1940) 55 B.C.R. 34. One new factor was considered namely the general history of the company which had started as a public company, been converted to a private company and had then issued some 800 invitations coupled with an application to purchase shares and an additional 600 advertisements regarding the issuance of shares. It seems clear that even the English courts would have found this to be soliciting the public.

The leading Alberta case is The Queen Reg. v. Piepgrass (1959) 29 N.S. W.W.R. 218, a decision of the Court of Appeal. Piepgrass was the director of a company called Superior Accounting Systems Ltd., incorporated as a private company. All told there were three directors

and seventeen shareholders. At the time of the trial the shares were worthless. Within a period of three weeks Piepgrass called on four farmers in the Camrose area to whom he had sold shares in other private companies, and one station agent in Westlock with whom he had no previous business dealings whatsoever and who was totally unknown to him. The court acknowledged that it was impossible to define with any degree of decision what is meant by the term "offer for sale to the public", pointing out that it is one thing for an individual or group of individuals to disclose information to friends or associates seeking support for a private company but it is quite another for a private company to go out on the highways and byways seeking to sell its securities, and used a very restrictive phrase that in each case the court would be called upon to determine whether the sale of securities was something other than a sale to persons having a common bond of interest or association. They found in Piepgrass that the company had put on a vigorous selling campaign to certain members of the public who had no common bond of interest or association. While this has somewhat narrowed the interpretation of the word "public", and may have narrowed it to a degree that leaves very little room to organize and start a medium-sized company without using the route of a public company, the definition still lacks some clarity and it seems indisputable that this is one of those areas in which the facts will simply have to be determined in each case.

(2) Ontario

As we have seen the English Act of 1908 contained the three essential characteristics as a private as opposed to a public company. The former Ontario Act contained the same distinction but it must be noted that the consequences of the distinction were not the same. Under the former Ontario Act neither a public nor a private company was required to file

financial statements. The Lawrence Committee seems to have got somewhat confused between the distinguishing features of a private company and the consequences of that distinction. They felt that a provision in the company's charter restricting the right to transfer shares or solicitation of the public to purchase the company's securities could be better handled by securities legislation. They were obviously impressed with the danger of the attempt in the United Kingdom to effectively distinguish between exempt and non-exempt private companies. Since their recommendation was to abolish the distinction completely, no mention was made of the number of shareholders, be it 50 or some other number, as being a proper distinction.

These recommendations were not carried into the Ontario Business Corporations Act and a distinction was made between two types of companies, namely offering corporations and non-offering corporations the sole distinction being whether a company was offering its securities to the public, which as we have seen is a difficult matter of definition. The definition contained in the Ontario Act is contained in section 1(9) which reads as follows:

since it might be pointed out that at the present time the only stock exchange in Ontario that is recognized by the Commission is the Toronto Stock Exchange.

Providing the company can bring itself within the non-offering category, by and large the Act permits retention of a small shareholder group, freedom from public disclosure of its financial affairs and makes inapplicable measures contained in the Act for the protection of widespread shareholders or creditors. Bearing in mind these three themes the Act contains the following provisions:

(a) A company may restrict the right of transfer of its shares but if it does so it cannot offer its securities to the public.

(b) Non-offering corporations are free from the provisions of sections 57 to 62 which impose obligations on a trustee appointed on issuance or guarantee of debt obligations issued to the public under a trust indenture.

(c) Dissenting shareholders of a non-offering corporation may trigger their appraisal right in the event of a resolution authorizing the sale of all or substantially all of the assets of the company, amending the articles to delete a provision restricting the transfer of shares, approving an amalgamation agreement, or approving continuance in another jurisdiction under the provisions of section 100.

(d) A minimum time for a notice of meeting of shareholders is 21 days for an offering corporation and 10 days for a non-offering corporation.

(e) The proxy solicitation sections, section 115 to 121 do not apply to non-offering companies.

(f) The insider trading provisions contained in sections 148 to 152 do not apply to a non-offering corporation with one exception. If any company purchases its own shares it is deemed to be an insider and must file a report when it does so, and must file a further report when it resells those shares.

(g) The audit provisions contained sections 167(1) are the direct lineal parent of our section 118.1 which permits companies with five or less shareholders and the other qualifications to dispense with an audit entirely.

(h) A non-offering company need not have more than one director whereas an offering company must have at least three in order to comply with the audit committee provisions.

(i) The actual form of the financial statements and their requirements are different for the offering and non-offering company and are roughly comparable to the difference between private and public company in Alberta.

THE CANADA BUSINESS CORPORATIONS ACT

The Canada Business Corporation Act makes no distinction between private or public companies, offering or non-offering companies, or reporting Vs non-reporting companies, as a general classification throughout the Act. The Act uses different criteria in different sections. Thus in certain cases companies which are not distributing their securities to the public are entitled to certain exemptions. Other exemptions do not depend upon whether the company is distributing its securities to the public but vary and may depend on the number of shareholders of the company or upon its economic size. Since most of the exemptions are related to whether the company is distributing its securities to the public, there are four (4) sections of the Act which concern this definition. Section 2 (6) defines a deemed distribution to the public.

> (6) Deemed distribution to the public. - For the purposes of this Act, securities of a corporation
> (a) issued upon a conversion of other securities, or
> (b) issued in exchange for other securities
>
> are deemed to be securites that are part of a distribution to the public if those other securities were part of a distribution to the public.

Section 2 (7) defines distribution to the public as follows:

> (7) "Distribution to the public".- Subject to subsection (8), for the purposes of this Act a security of a body corporate
> (a) is part of a distribution to the public where, in respect of the security, there has been a filing of a prospectus, statement of material facts, registration statement, securities exchange take-over bid circular or similar document under the laws of Canada, a province or a jurisdiction outside Canada; or
>
> (b) is deemed to be part of a distribution to the public, where the security has been issued and a filing referred to in paragraph (a) would be required if the security were being issued currently.

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and Section 2 (8) provides for an application to the Director for determination that a security of a corporation is not part of the distribution to the public. In addition to these Section 121 (1) which is the definition section for the part of the Act dealing with insider trading, defines distributing corporation as follows

> 121. (1) Definitions - in this Part,
>
> "distributing corporation". - "distributing corporation" means a corporation, any of the issued secutities of which are or were part of a distribution to the public and remain outstanding and are held by more than one person;
>
> "insider" - "insider" means, except in section 125,
> (a) a director or officer of a distributing corporation,
>
> (b) a distributing corporation that purchases or otherwise acquired, except under section 34, shares issued by it or by any of its affiliates, or
>
> (c) a person who beneficially owns or exercises control or direction over more than ten per cent of the shares of a distributing corporation, excluding shares owned by an underwriter under an underwriting agreement while thoses shares are in the course of a distribution to the public;

The various distinctions or exemptions contained in the Act as as follows;

A. Access to Corporate Records - Under the provisions of Section 21 (1) shareholders and creditors of the corporation, their agents and legal representatives and the Director may examine the records referred to in Section 20 (1), which are primarily the Articles and By-laws, minutes of meetings, security register, notice of directors and notice of change of directors, during the normal business hours of the corporation. If the corporation is a distributing corporation (see 121 (1)) these records are available to any person, Chris Harder included.

B. Access to Shareholders List - The same distinction is drawn as with regard to access to corporate records, but under the provisions of Section 21 (3) the person wishing to examine the shareholders list must file an affidavit stating the name and address of the applicant, the name and address of service of the body corporate if the applicant is a body corporate, and that the list will not be used except for

.../60.

a purpose under subsection 9 of section 21, namely in an effort to influence the voting of shareholders, or an offer to acquire shares or any other matter relating to the affairs of the company.

C. Trust Indentures - Part VII dealing with trust indentures, under the provisions of Section 77 (2) applies only to the trust indenture if the debt obligations issued are part of a distribution to the public.

D. Number of Directors - Under the provisions of Section 97 (2) a corporation whose securities are or were part of a distribution to the public shall have not fewer than three (3) Directors at least two (2) of whom are not officers or employees of the Corporation. Any other corporation may have one (1) Director only.

E. Insider Trading - As we have seen Section 121 (1) which is the first section in Part X dealing with insider trading contains a definition of distributing corporations. Section 122 (1) requries filing of insider reports only if the corporation is distributing corporation. "Insider" is defined in Section 121 (1) as follows

> "insider". - "insider" means, except in section 125,
>
> (a) a director or officer of a distributing corporation,
>
> (b) a distributing corporation that purchases or otherwise acquires, except under section 34, shares issued by it or by any of its affiliates, or
>
> (c) a person who beneficially owns or exercises control or direction over more than ten per cent of the shares of a distributing corporation, excluding shares owned by an underwriter under an underwriting agreement while those shares are in the course of a distribution to the public;

and is further defined in Section 125 (1) (2) (3). The special definition in Section 125 applies to the rest of that section which imposes a civil liability on the insider who makes use of any confidential information. These sections do not make any distinction between different kinds of corporations and would apply to all corporations incorporated or continued under the Act.

.../61.

F. Proxy Solicitation - Under the provisions of Section 143 (2) a different standard is used rather than the distribution to the public yardstick. The exception exempting mandatory solicitation of proxies applies to companies that have fewer than fifteen (15) shareholders two (2) or more joint holders being counted as one (1).

G. Financial Disclosure - A third standard is used under Section 154 (1) as to which companies are required to send copies of their financial statements to the Director. All distributing corporations are required to send copies of their financial statements and any other corporation whose gross revenues exceed $10,000,000.00 or whose assets exceed $5,000,000.00 are also required to file their financial statements with the Director, See also Sec 157, Distributing [illegible]

H. Audit Committee - Under the provisions of Section 165 (1) a distributing company is required to have an audit committee of not less than three (3) Directors two (2) of whom are officers or employees of the corporation. This section ties in directly by reference to Section 97 (2) mentioned above in the number of directors.

I. Take-over Bids - Under the definition section for Part XVI, Section 187, an exempt offer is an offer to fewer than sixteen (16) shareholders or to purchase shares of a corporation that has fewer than sixteen (16) shareholders, two (2) or more joint holders being counted as one (1).

The Dickerson Report discusses the attitude taken in the new Act in Sections 36, 37 and 38 which reads as follows:

> 36. We have not preserved the traditional private-public corporation dichotomy. Instead, we have defined "corporation" in different wasy in different parts of the Draft Act where is seemed necessary or desirable to create a distinction. Corporations are therefore distinguished on functional rather than on doctrinal grounds. Thus, under Part 13.00, certain corporations will not have to make public their financial statements; in Part 12.00 some corporations will not have to solicit proxies from their shareholders, and so on.

.../62.

In each case, the corporations are differentiated according to criteria which are relevant in circumstances.

37. It will still be possible for incorporatiors of corporations to set out in the articles of incorporation those features which have traditionally distinguished "private' corporations, such as restrictions on the tranferability of shares. The realities are unchanged, only the label has been dropped.

38. At the same time, we have improved the position of those who may wish to have a truly "private" corporation. By expressly legitimating the device of a unanimous shareholder agreement in Part 11.00 we allow the closely-held corporation to avoid much of the formalism that is not appropriate to it, and to operate, in effect, as a partnership with limited liability. The provisions allowing signed resolutions in lieu of minutes of meetings, for example, have a similar effect.

I have no great difference of opinion with the comments excepting only the last sentence of Article 37. I believe that the realities have been changed. A company such as the T. Eaton Company that had never distributed its securities to the public, or Poole Construction Limited, would now be required to file its annual financial statements if it were incorporated under the C.B.C.A. There is also a distinct difference in having a minimum number of shareholders at fifty (50), whatever the problems with soliciting the public may be, as opposed to distribution to the public and the limitation of fifteen (15) where it occurs in the C.B.C.A. I do however agree with the comments in Article 38 that in many ways the position of the "private" company has been improved, and in particular by giving legitimacy and strength to the shareholders agreement.

BRITISH COLUMBIA'S COMPANIES ACT

The New British Columbia's Companies Act reveals an enormous concern with abuses which occured in public companies on the Vancouver Stock Exchange and certainly imposes onerous obligations upon the directors of companies and seems to be designed more with the object of security regulations than the problems of private companies as we know them in Alberta. The distinctions drawn in the

Act is that between "reporting company" and a company that is not a reporting company. Reporting company is defined in Section 1 (1) as follows:

> "reporting company" means a corporation incorporated by or under an Act of the Legislature
>
> (a) that has any of its securities listed for trading on any stock exchange whweresoever situate; or
>
> (b) that is ordered by the Commission to be a reporting company; or
>
> (c) that
>
> (i) was or was deemed to be a public company immediately before the coming into force of this Act; or
>
> (ii) had obtained an exemption order, under section 38A of the Act repealed by this Act, where the exemption order was in effect immediately before the coming into force of this Act; or
>
> (iii) with respect to any of its securities, files a prospectus with the Commission and obtains a receipt therefor; or
>
> (iv) became an amalgamated company after the coming into force of this Act if one of the amalgamating companies was, at the time of the amalgamation, a reporting company,
>
> unless the Commission orders that it is not a reporting company;

this section was strongly opposed in the submission of the B.C. Bar and they requested at least a right of appeal from the decision of the Commission that a company was a reporting company, but no change was made in the Act.

Under Section 40 (1) preemptive right is given to the existing shareholders of the allotment of further shares in a company but this right does not apply to a reporting company. Apparently the original Act applied to all companies and this is one of the few incidents that the recommendations of the B.C. Bar were adopted to restrict it to reporting companies.

Under Section 68 (3) a reporting company may if authorized by its Articles keep a branch register of members outside of the province.

.../64.

Under Section 70 a different standard than the reporting vs non-reporting company is used. Under the provisions of this section a company having more than one hundred (100) members must keep a index of the names of the members of the company as part of its register of its members. The B.C. Bar had no particular comment with regard to this particular section other than subsection (2) with superfluous. This puts them a long way ahead of me since I really don't understand exactly what is meant by an index I presume it means an alphabetical list.

Division (d) of Division (2) deals with trustees and trust indentures. The sections run from 94 to section 105 and section 95 exempts these provisions if the debenture secured by the trust indenture is exempt from registration under clauses b or c of subsection 1 of 21 of the Securities Act, 1967, which reads as follows:

> (1) Subject to the regulations, registration is not required in respect of
>
> (b) an isolated trade in a specific security by or on behalf of the owner, for the owner's account, where the trade is not made in the course of continued and successive transactions of a like nature, and is not made by a person or company whose ususl business is trading in securities;
>
> (c) a trade where one of the parties is a bank or the Industrial Development Bank incorporated under the Industrial Development Bank Act of Canada, or a trust company registered under the Trust Companies Act, or a loan company approved under the Trust Companies Act, or an insurer licensed under the Insurance Act, or is an officer or employee, in the performance of his duties as such, of Her Majesty in right of Canada, or of any Province or Territory of Canada, or of any municipal corporation or public board or commission in Canada, or any other trade where the purchaser or proposed purchaser is a person, other than an individual, or a company recongnized by the Superintendent as an exempt purchaser;

this would exempt bank borrowings or any isolated transactions. The B.C. Bar felt that the distinction should have been between reporting and non-reporting to be consistent with the rest of the Act.

.../65.

Under section 125 a reporting company can not but a reporting company may lend money to or guarantee the loan of a member or a director or an officer of the company or an employee of the company. However under subsection (2) no company shall give any assistance to any person with respect to the acquisition of shares or debt obligations of the company or an affiliate or give by means of loan guarantee or any other method financial assistance upon the security of a pledge upon any shares or debt obligations of the company. However under subsection (3) there are some exemptions namely the purchase of a house, pension plans that involve purchase of the company's stock if the stock is held by a trustee. The B.C. Bar had no comment on this section.

Under the provisions of Section 130 every company shall have at least one (1) director and a reporting company is required to have three (3). The B.C. Bar had no comment with regard to this section.

Under the provisions of Section 133 a reporting company is required to publish, not less then fifty-six (56) days before it holds any general meeting at which directors are to be elected, a notice giving the date time and place of the meeting, an invitation for written nominations for directors and some other details. While the B.C. Bar were unhappy with the various time constraints imposed as result of this section and other sections they did not object to the general tenor of the section particularly when coupled with Section 134 which states that at a general meeting of a reporting company no motion for the election of two (2) or more persons as directors of the company can be made by a single resolution in other words each director would have to be voted upon separately. There is a saving provision that if a seventy-five (75%) per cent majority is cast at the meeting waiving this provision it can be waived.

Under the provisions of Section 168 there are enlarged requirements for the financial statements to be presented to the annual meeting of a reporting company as opposed to the annual meeting of a non-reporting company. These are similar in substance to the differences presently existing in our Alberta Act.

.../66.

The proxy solicitation rules apply only to reporting companies under the provisions of Section 173. The B.C. Bar had no comment on this section.

Under the provisions of Section 186 every company is required to keep at its record's office a list of items running down to (w) which is a pretty exhaustive list. Under the provisions of Section 187 (3) if the company is a reporting company any person may examine and take extracts from these records except the minutes of the meetings of the directors, copies of any documents or instruments approved within the preceding ten (10) years by the directors, copies of every mortgage created or assumed by the company whereas if the company is not a reporting company a person may examine and take extracts from the records excepting thoses for a reporting company and extracts from the minutes of every general and class meeting and copies of the audited financial statements. In effect what these two (2) sections have done is to requrie the company to keep on file and available a great number of documents that would normally be filed with the Registrar of Companies. The reporting company is not required to file its annual financial statements but it must make them available to anyone that wanders in off the street and wants to look at them.

Section 195 and 196 deals specifically with financial statements and again they are not that different in substance from the present Alberta provisions.

Part VI divisions 1 deals with audits and auditors. Section 202 permit a non-reporting company, if all the members consent in writing, to waive the appointment of an auditor for one (1) year only. Section 203 requires that an auditor of a reporting company be a member in good standing of either CICA or the Certified General Accountants Association of British Columbia. Section 207 forbids the management of a reporting company to propose the appointment of any auditor other than the encumbant auditor unless the proposal is put in the information circular, and gives the auditors some rights to appear. Section 208 follows the Ontario Act and requires an audit committee of three (3) directors of whom a majority can not be officers

.../67.

or employees of the company.

Section 252 (1) (c) permits a reporting company to cancel shares that have been held in escrow pursuant to an escrow agreement, and that are surrendered for cancellation pursuant to that agreement.

GHANA COMPANY CODE

The distinction between a public and a private company, in the English tradition, is maintained in the Ghana Code. Section 9 (2) permits incorporation of either a private or a public company and subsections 3 and 4 define each. These sections read as follows:

> 9. (2) A company of any of the foregoing types may either be a private company or a public company.
>
> (3) A private company is one which by its Regulations-
>
> (a) restricts the right to transfer its shares, if any;
>
> (b) limits the total number of its members and debentureholders to fifty, not including persons who are boan fide in the employment of the company and persons who, having been formerly bona fide in the employment of the company, were while in that employment, and having continued after the determination of that employment to be, members or debenture-holders of the company;
>
> (c) prohibits the company from making any invitation to the public to acquire any shares or debentures of the company; and
>
> (d) prohibits the company from making any invitation to the public to deposit money for fixed periods or payable at call, whether bearing or not bearing interest:
>
> Provided that where two or more persons hold one or more shares or debentures jointly, they shall, for the purposes of this subsection, be treated as a single member or debentureholder.
>
> (4) Any other company shall be a public company.

.../68.

the following points will be noted about this definition of private companies:

1. The words "if any" at the end of (3) (a) are designed to cover a private company limited by guarantee.

2. The fifty (50) person limit includes debentureholders as well as members.

3. In subparagraph c the words used are "any invitation to the public to acquire", rather than the words used in the Alberta statute "to subscribe for" this was designed to cover issues of shares or debentures for a non-cash consideration.

4. Subparagraph (d) was inserted to prevent an abuse that had arisen in England in which private companies advertised inviting the public to deposit money at high rates of interest in the hope that they could earn still higher rates of interest and augmented cash flow in equipment leasing. Section 13 (1) of the present Alberta Act would not prohibit a private company from doing this in Alberta today. The only provisions of the Securities Act that might be broad enough to cover this is contained in the definition of security in section 2 27 (v) which reads as follows

> Any bond, debenture, share, stock, note, unit, unit certificate, participation certificate, certificate of share or interest, pre-organization certificate or subscription.

While the Securities Act by itself does not apparently cover the situation, the provisions of the Deposit Regulations Act, passed in 1964, would provide adequate protection in this regard so that subparagraph (v) would not be necessary in a definition of private company in Alberta.

Professor Gower did not ignore the thorny problem of what constitues an invitation to the public, and attempted to expand and define, and also to reform, the case law as to what constitutes an invitation to the public.

.../69.

266. (1) For the purposes of this Code an invitation shall be deeemd to be made to the public if an offer or invitation to make an offer is: -

(a) published advertised or disseminted in Ghana by newspaper, broadcasting, cinematograph, or any other means whatsoever;

(b) made to or circulated among persons whether selected as members of debenture holders of the company concerned or as clients of the persons making or circulation the invitation or in any other manner;

(c) made to any one or more persons upon the terms that the persons to whom it is made may renounce or assign the benefit thereof or of any shares or debentures to be obtained thereunder in favour of any other person;

(d) made to any one or more persons to acquire any shares or debentures dealt in upon any stock exchange or in respect of which the invitiation states that application has been or will be made for permission to deal in those shares or debentures upon any stock exchange:

Provided that:

(i) nothing therein contained shall be taken as requiring any invitation to be treated as made to the public if it can properly be regarded in all circumstances as being a domestic concern of the persons making and receiving it;

(ii) an invitation made by or on behalf of a private company exclusively to its existing shareholders and debentureholders (not being greater in number than is prescribed by subsection (3) of section 9 of this Code) and its existing employees shall not be deemed to be an invitation to the public unless the invitation is of the type referred to in paragraph (c) or (d) of this subsection.

(2) For the purposes of the foregoing subsection the issue of any form of application for shares or debentures or of any form to be completed on the deposit of money with a company shall be deemed to be an invitation to acquire those shares or debentures or to deposit money.

267. Where any company allots or agrees to allot any of its shares or debentures to any person with a view to the public being invited to acquire any of those shares or debentures, then, for all the purposes of this Code, any invitation so made shall be deemed to be an invitation to the public made by the company as well as by the person actually making the same, and any person who acquires any such shares or debentures in response to the invitation shall be deemed to be an

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allottee from the company of those shares or debentures:

Provided that where,

(a) an invitation to the public is made in respect of any such shares or debentures within 6 months after the allotment or agreement to allot; or

(b) at the date when the invitation to the public was made, the whole consideration to be received by the company in respect of the shares or debentures had not been so received;

it shall be assumed, unless the contrary is shown, that the allotment or agreement to allot was made by the company with a view to an invitation to the public being made in respect of those shares or debentures.

Professor Gower in his commentary mentions that he considered the American rule of thumb that any invitation to more than twenty (20) people should be regard as an invitation to the public. This apparently is a rough and ready test adopted by the American Courts in construing S.E.C. legislation. One jump ahead as always, Professor Gower could see that it might be difficult to distinguish between one invitation to twenty (20) people and a series of invitations to separate people which could exceed twenty (20). Subsection 2 clears up a decidedly gray area in the case law, namely that if an application or subscription form accompanies the invitation it is deemed to be an invitation to the public. Section 267 was simply designed to cover the situtation where the shares were issued to one person who was a broker or an underwriter.

Chapter 3 of the Code consisting of Section 268 to 273 contains additional specific provisions which are applicable to private companies only. Section 268 is the counter part of the Alberta Section 48 and does give a right to a Court to relieve the company from the consequences of failing to comply with the provisions relating to private companies.

Section 269 lists the documents which must be filed by a private company annually. These consist of the following:

1. An annual report.

2. A certificate that the company has not issued any invitation to the public to acquire any shares or debentures of the company.

3. A certificate that the number of members and debentureholders does not exceed fifty (50).

4. Either a

(a) Financial statements or

(b) A written statement by the auditors of the company that the financial statement and the auditor's report have been sent to the members and the debentureholders together with a copy of the auditor's report but not the financial statements together with a certificate that no public company owns shares in the company.

Section 270 deals with qualifications of auditors of private companies and are not as onerous as the provisions dealing with public companies.

Section 271 contains special provisions regarding the requisiting of an extraordinary meeting of the shareholders of a private company, which may be called by any two (2) or more members of the company or a single member holding over one-tenth of the share of the company.

Section 272 deals with the appointmemt and removal of directors of private companies which can be regulated by the company's regulations subject to the provisions of Section 180 to 185 of the Code which set out the competence of directors the qualifications of directors etc.

Section 273 permits conversion of a private company to a public company.

While not included in any of the sections dealing with private companies, Section 301 prohibits a public company from making a loan to any of tis directors or shareholders and thus follows the English model.

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THE UNITED STATES OF AMERICA

The private company is referred to in American Statute Law and legal writings as the Close Corporation. It came as a considerable surprise to me to find how recently the concept has had any statutory authority whatsoever in any of the states, but then it came as an equal surprise to me to find that there were no private company provisions in Manitoba until 1964. Before statutory provisions was made for the Close Corporation the American Courts in a series of decisions had held invalid a by-law adopted by a corporation requiring unanimity for all shareholders resolutions, a by-law requiring unanimity for election of directors and for all directors' actions, and

(1) A provision in a charter appointing a particular person as secretary-treasurer of the company.

(2) An unanimous agreement amongst four (4) equal shareholders that one (1), who had advanced additional funds to the company when it was in trouble, was to cast fifty (50%) percent of the votes.

(3) The Courts took the attitude that "Corporations were invented to circumvent the unity required in partnerships" and that "any agreement amongst the shareholders which would tend to sterilize the directors was invalid". All of these decisions follow the spirit of the decision in Jackson vs Hooper (1910) 76 N.J. Eq. 592 and its apparently widely quoted statement that business associates in an incorporated partnership forego all the rights duties and obligations of partners when they form a corporation and become its shareholders. They can not be partners inter se and a corporation to the rest of the world. By adding a new section to the New York Stock Corporation Law in 1948, New York took a cautious step towards the Close Corporation. The new section, Section 9, only authorized and permitted charter provisions fixing high quorums for shareholders and directors meetings and requiring higher votes for shareholders and directors' actions. Minority shareholders could thus be given a veto power.

The first extensive statutory innovation on Close Corporation Law was the North Carolina Business Corporations Act, enacted in 1955 which became effective July 1st, 1957. In order to overcome the

.../73.

Jackson vs Hooper philosophy Section ~~in~~ 73 (b) of the Act read as follows:

> "Except in cases where the shares of the corporation are at the time or subsequently become generally traded in the markets maintained by securities dealers or brokers, no written agreement to which all of the shareholders have actually assented, whether embodied in the charter of bylaws or in any side agreement in writing and signed by all the parties thereto, and which relates to any phase of the affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners ... A transferee of shares covered by such agreement who acquires them with knowledge thereof is bound by its provisions."

There was no attempt to define a Close Corporation other than the absences of trading in its shares in the securities market since it was felt that the shareholders had it within their power to forestall general trading in their shares by imposing restrictions upon transfers. The following were the main changes in the Law:

1. The Act provided that " subject to the provisions of the Charter, the by-laws or agreement between the shareholders otherwise lawful, the business and affairs of a corporation shall be managed by a board of directors". Prior to this all United States Statutes simply provided that business of every corporation shall be managed by its directors and this was a statutory rejection of the concept for Close Corporations so that the shareholders could by agreement control the business of the company.

2. Provision was made for one (1) man companies.

3. High or unanimous quorum requirements were permitted for shareholders and director meetings and actions.

4. The Act provided for liquidation in an action by a shareholder when a deadlock amongst the directors could not be broken by the shareholders and permitted the shareholders to expand upon this

.../74.

in a written agreement setting out other incidents in which the company could be wound-up.

5. No specific statutory provision was made with resepct to restrictions on transfer of shares since apparently the case law in North Carolina clearly permitted this. The Act did permit the Company to buy its own shares (out of surplus) from any shareholder upon the vote of the majority of the other shares.

6. The Act had attempted to deal with an unfortunate fact of life in the Close Corporation, namely the complete informality in the manner in which a great number of them are run. They rejected the concept that a formality good for General Motors was necessarily good for the incorporated hot dog stand by providing a section relating to informal or irregular actions by directors or committees. Section 34 Subsection a made an informal action taken by the majority of the directors even without a formal meeting as binding as if it had been done with all the formalities. Subsection b provided that if a meeting of the directors otherwise valid was held without proper call or notice, action taken as such meeting was deemed to be ratified by non-attending directors unless they filed an objection promptly after learning about the action and subsection c provided for written consent signed by all of the shareholders or directors to be equivalent to action taken at a meeting.

7. A simple procedure for dissolution was provided and a much simplified procedure for amalgamation.

The commission which drafted the Act considered carefully the question of having one Act for Close Corporations and another Act for "Public" Corporations. The two act principle was rejected primarily because of the problems of definition as to which was which but almost equally they were attempting to generate a general awareness throughout corporation law of the peculiarities of the Close Corporation. The commission also pointed out that the concept

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of private company used in England, and the two separate kinds of Acts used in various European countries were primarily distinctions arising from distributions to the public. Since they felt that this was adequately covered by the S.E.C. and its regulations and by the Blue Sky Laws this distinctions was not necessary in their statute.

In 1962 South Carolina followed with the South Carolina Business Corporation Acts which again was an Act that could apply to either type of company but considerably expanded a shareholders right to dissolve the company and incorporated the English section 210 giving the Courts very braod powers as to remedies other than dissolution.

In 1963 the New York Business Corporation Law became effective although it had been enacted in 1961 and went one step further with respect to the unanimous shareholder agreement. It permitted the shareholders to in effect run the company but provided that if they did the directors were relieved from liability for managerial acts or ommissions ordinarily imposed upon them and transferred that liability to the shareholders for so long as the discretion or powers of the board were controlled by the shareholders. The Act also imposed a liability for wages upon the shareholders of a Close Corporation as well as upon the directors.

The same year, 1963, saw the first of the states to enact a separate integrated Close Corporation Statute, namely Florida. The statute permitted a Close Corporation, and "a corporation for profits who shares of stock are not generally traded in the markets maintained by securitie dealers or brokers", to elect to be governed either by its provisions or to remain subject to the law aplicable to corporations. The Act contained most of the provisions which we have already discussed. There has been considerable criticism of the Act in that it is not as clearly drawn as the North Carolina Statutes and in many sections is ambiguous. In 1967 Delaware and Maryland enacted Close Corporations Statutes the model for which was adopted by Pennsylvania in 1969. These take the form of a separate

.../76.

subchapter to general corporation law but it is interesting to note that some attempt has been made to further define a Close Corporation, and in these three (3) Acts a Close Corporation is defined as one that:

(a) It outstanding stock shall be held by not more than thirty (30) persons.

(b) All of its stock shall be subject to one or more restrictions on transfer.

(c) It shall make no "public offering" of its stock.

Any corporation that meets these requirements can elect to become a Close Corporation or it can remain subject to the other provisions of the general corporation law. Provision was also made that any existing corporation that met these requirements could become a Close Corporation. While most of the section are similar to what we have already dealt with and permit prinicipals usually associated with partnerships to be embodied in the corporate structure, one very interesting provisions was added. To make absolutely certain that a Close Corporation's stock was subject to effective restrictions on transferability the Act provided that if a restriction on transfer of stock of a Close Corporation was held to be unauthorized by the Court, the corporation could none the less have an option for thirty (30) days to acquire the restricted stock at a price agreed upon by the parties or to be determined by the Court failing agreement. In the event of the company doing some act which would take it out of the Close Corporation status, the shareholders had thirty (30) days in which to rectify the breach or the company lost its status as a Close Corporation. Once again if the shareholders entered into an agreement (and not necessarily all of them providing that a majority did so) which constrained the powers of the directors and transfered some management functions to the shareholders, then the directors were relieved of their liability and the liability was transferred to the shareholders. The Act also gave the Delaware Chancery Court the power to appoint a custodian or a provisional director for any Close Corporation whose directors (or shareholders if the corporation was managed by shareholders through an agreement) in the event of deadlock.

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The Maryland Act was similar except that it required unanimity in all shareholders agreements and unanimity for alterations of the corporate structure including the holders of non-voting shares.

In 1969 Pennsylvania, as mentioned above, followed the Delaware model.

In 1972 Michigan enacted a new business corporation Act which took the route of providing all the necessary provisions for Close Corporations in their general Act. The Act included a section directing that it be liberally contrued to promote it purposes and policies in giving recognition to legitimate needs of Close Corporations.

Kansas took the same route in the same year with a very similar Statute.

In the following year Maine enacted a new Buisness Corporation Act defining a Close Corporation and containing a number of provisions aplicable solely to a Close Corporation which were similar to the North Carolina and New York Acts. In the same year Virginia enacted a stutute similar to North Carolina's and Texas added five (5) new articles dealing with Close Corporations to its business corporation Act.

F. Hodge O'Neal in his massive two volume work on Close Corporation Law in the United States list the following criticisms of the existing law with regard to Close Corporations.

1. The variations in the Statutes and the still difficult problem in American law in interpretation as to just how much freedom the participants in a Close Corporation have to set up control patterns allocating management the way they desire. Some of the statutes are characterized by the principal that an important control arrangement can not be given effect, even amongst shareholders who agree to it, unless it is embodied in the Corporations charter. If it appears in a shareholders agreement a loan or in the by-laws of the corporation the old rules would probably apply.

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SUMMARY

American jurisprudence has been faced with the Rule contained in Jackson vs. Hooper, that if one incorporates, one losses the ability to mold ones business affairs more closely to that of a parntership. As the American cases reveal on many occassions, the price for limited liability has been high and particularly when dealing with a minority shareholder who felt his rights had been protected by a shareholders agreement only to discover to his sorrow that the agreement was void. Canadian law is not faced with the same historical perspective. While shareholders agreements do have their problems and particularly when shareholders proport to bind the actions of some or all of them as directors of the company, the Courts have usually held them to be severable and have not declared the entire agreement void but simply unenforceable when it proports to control the directors in any case where there is a conflict between the provisions of the shareholders agreement and the directors fiduciary relationship to the company.

O'Neal has pointed out that in actual practice the Close Corporation does not achieve all of the limited liability that it sets out to obtain since large creditors and lending institutions will inevitability require personal guarantees of the shareholders and/or directors. The American Courts have been more prone to pierce the corporate veil with respect to the contractual obligations then our courts. They have used as instruments to do this a finding of a failure to comply with the formalities required in a company, a representation to the creditors that the corporate shareholder was acting on his own behalf and have even gone so far in some jurisdiction to use the grounds of under capitalization as a basis for finding that the shareholder had used the corporation as a "mere instrumentality" or "alter ego". This however appears to me to be one of those areas which will simply have to be decided on the facts in each case and I would doubt that Canadian Courts would be quite as quick to pierce the corporate veil as American Courts in some jurisdictions have been.

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Considerable discussion has taken place in the United States concerning the liabilities of the shareholders of a Close Corporation for torts of the corporation. Apparently enormous abuses have arisen in New York city with the taxi cabs companies. An operator owning fifty (50) taxi cabs will incorporate twenty-five (25) companies each holding two (2) cabs apiece, which in the event of a serious tort claim it is prepared to abandon. No doubt the injustice have been grave but it must be remembered that there is apparently no unsatisfied judgment fund, and equally apparent no proper legislative requirement for liability insurance before the vehicle licence is issued for the taxi cab. The theory is that a creditor dealing with a Close Corporation is doing so by choice and should take whatever precautions he deems necessary, the victims of torts however had no choice in the matter whatsoever and the suggestion has been made that Close Corporations be required to carry liability insurance. One of the first problems presented by such a statutory provision would be the definition of a Close Corporation, and it is interesting to note that in 1967 in the Yale Law Journal the suggested definition was as follows:

> "An incorporated enterprise whose common stock is owned by or for not more than twenty-five (25) persons, not counting those who own stock representing neither one (1%) percent or more of the outstanding common stock nor more than the total book value of $10,000.00."

While the twenty-five (25) persons is an interesting figure, in the ten years since 1967 the $10,000.00 figure seems to be totally inadequate, and this would always present a problem in an inflationary economy in the definition section would have to be changed every four (4) years or perhaps less.

THE EUROPEAN PRIVATE COMPANIES - A very brief summary

A. WEST GERMANY

German company law is federal law. Business can be carried on in West Germany under a partnership a public company (AktG) and a private company (GmbH) and a limited (referred to a "Commerical") Partnership. The common form of business endeavor in West Germany

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is a combination of the limited partnership and the private company in which the private company is the general partner subject to unli personal liability for the debts for the firm. This form is usuall adopted because of the West German tax laws which apparently have n quite been able to reconcile the "flow thorugh" of profits from the corporation to its shareholders. The form is referred to as th "Gmb H & Co. it is taxed like a normal partnership and only the pro channeled through to the shareholders of the general partner are sul to double taxation. Naturally these are kept very low. The shareholders of the private company are usually identical with the limited partners.

The private company itself owes its existence to an Act of 1870, which has not been changed to date to any major degree although West Germany has been working on a up-dated draft since 19 but apparently has not been able to obtain legislative approval for this draft. The private company has the following characteristics

1. Two founders are need for formation but once formed all of the shares may be held by one individual or corporate body. There is no restriction as to residence or citizenship.

2. After agreeing to and filing the articles, the founders must appoint at least one managing director and a registered office.

3. Registration will take place after the capital duty tax has been paid, the articles have been approved, and the minimum capital of D.M. 20,000 has been paid up. In practice this sum is often not paid but the founders file a certificate saying that it has been, and are liable for the amount.

4. The company comes into existence once it has been entered into the Commerical Register and after registration one of the two original founders may transfer his share to the other.

5. Preincorporation contracts are generally not binding upon the company and must be ratified approved and accepted by the company.

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6. The principle of ultra vires does not exist under German Law and while objects are stated in the articles the list is of relative minor importance. One sentence is usually used to satisfy the requirement. Shareholders loans have been treated as part of capital and 1959 the Federal Supreme Court decided that a loan which a sole shareholder gave to a private company in order to avoid its bankruptcy could not be paid back before the company was restored to a healthy financial condition, and in the event of bankruptcy, must be treated by share capital and rank after the creditors.

7. The company must have one or more managing directors and the power of the managing director to act vis-a-vis third parties can not be limited except by providing for the necessity of the signature two (2) managing directors. His power with respect to the company's internal affairs however is usually limited in the articles which will list various business transactions for which he needs the approval of the shareholders meeting or, if provided for, the approval of a supervisory board. It will be noted that the supervisory board is not a necessity for a private company. The managing director may be personally liable for acts exceeding his authority, but the company will bound with respect to third parties.

8. The shareholders meeting is paramount and a resolution instructing the management is binding upon the management. The shareholders decide the appointment and removal of the managing director approval of financial statements and distribution of dividends and in effect supervision of the managment. In addition they make dicisions on items such as the annual budget investment plan and the future operations of the company. A resolution is effective if signed by all of the shareholders. Resolutions are passed on the basis of simple majority but there is a provision for "special resolutio of three quarters (3/4) votes which is necessary in order to amend the articles. Proxies are permissable.

9. Shareholders holding ten (10%) percent of the share capital

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are entitled to requistion a shareholders meeting.

10. The Supervisory Board

a. The supervisory board is mandatory only if the company has more than five hundred (500) employees or is engaged in coal mining or steel manufacturing.

b. Until February of this year one-third (1/3) of the members of the supervisory board must consist of employee's representatives in February of this year the law was changed so that one-half (1/2) of the supervisory board must consist of employee's representatives and the other half of the shareholders' representatives. The shareholders' representatives have a casting vote in the event of a tie. No managing director can act as a member of the supervisory board.

c. In the case of a voluntary supervisory board complete freedom is left to the articles. In the case of mandatory supervisory board the supervisary functions are listed in the Act. In some larger private companies the voluntary supervisory board has been used rather than leave some of the functions normally performed at the shareholders meetings to the larger group. From the articles I have been able to read I have not found any limitation on the number of shareholders.

d. The share capital IN A PRIVATE Co. does not consist of negotiable shares and share certificates are seldom issued since they would not have the significance of share certificates but would merely serve as evidence. Normally the share capital is divided into such number of shares and of such amount as happens to be subscribed by the individual shareholders. These can be split at any time into parts of a share with the approval of the company. Transfer can only be done by contract executed before a notary and is only effective upon a company upon receipt of notice that the transfer has been completed. Restrictio may or may not be contained in the articles. Since a share is not a negotiable share certificate the transferee has no absolute guarantee that the transferor actually owns the share and the

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share register is of no great help in proving ownership. Transfer of shares in a private company in Germany are therefore aught with danger and the vendors chain of title would have to be checked in much the manner of a search of an old system piece of land.

e. By and large the accounting principles are not set forth in the private company law but are set out in the tax laws. The Act simply provides that proper accounts must be kept and places this responsibility upon the managing director. The financial statements need neither be audited nor filed or even published unless the total balance sheet volume exceeds D.M. 125,000,000, or the annual turnover exceeds D.M. 250,000,000 or the average number of employees exceeds 5,000. All affiliate companies are locked together as one for the above requirements.

THE PUBLIC COMPANY

By and large the provisions of the law regarding public companies are much more detailed and to a far greater extent they are mandatory since the purpose is to protect the general public. In general it resembles the English public company and very briefly has the following characteristics:

1. There must be five (5) founders and at least five (5) shareholders.

2. Minimum subscription is D.M. 100,000.

3. There must be a supervisory board and a board of managment.

4. Financial statements must be audited and filed.

5. There are three (3) distinct bodies each with strictly distinct functions. They are:

(a) The Board of management which is solely responsible for the management of the company and makes all decisions on day to day management. It has the exclusive and unrestricted authority to represent the company. Its members are appointed by the supervisory board for a period of not more than five (5) years. It decisions are made by majority resolutions and its members are bound with the

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duties normally associated with the Directors of an English public company.

(b) The supervisory board it main functions are to appoint, and remove, the members of the board of management and to supervise the management in its general directions. It approves the annual financial statements and has the power to call a general meeting of the shareholders in any case which it deems to be an emergency or of grave necessity. The general meeting elects its representatives and the union or workers counsel elect theirs. The term of office of members can not exceed four (4) years. Any representative of the shareholders, but not the employees representatives, may be removed at anytime by a three-fourths (3/4) majority of a general meeting of the shareholders.

(c) The general meeting of the shareholders is responsible for the election and removal of its representatives to the supervisory board, the appointment of the auditors decisions on the appropriation of profits as determined by the financial statements. The meetings are normally presided over by the chairman of the supervisory board but are called by the board of management or as mentioned above in case of emergency by the supervisory board.

6. Shares may be either bearer or registered and shareholder representating at least five (5%) percent of the share capital may requistion a shareholders meeting. Shareholders representing at least ten (10%) percent of the capital or D.M. 10,000,000 may demand that the Court decide whether the auditors should be replaced or that special auditors be appointed in order to investigate fraud or other irregulatites.

7. German law has worked out an interesting solution to the problem of conflict of interest between parent and subsidiary in the mechanism of a "control agreement." Providing the control agreement has been executed the controlling company is not prohibited from issuing instructions to the subordinate company to either enter into or refrain from transactions which would be to its own disadavantag but would be in the overall interest of the parent or the group. The primary requirement for the legality of such an agreement is that it provide reasonable compensation to outside shareholders ~~and assumption~~ of the subordinate company who may suffer. Both in the Act and in the tax laws detailed and specific provision is made with regard

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to reporting on relationship of affiliated companies and the preparation of consolidated financial statements.

AUSTRIA

Similar to the German private company Act except that it was passed in 1892. No share certificates are issued in a private company. The differences between Austrian and German law are not many and main ones are as follows:

1. Preincorporation contracts are binding upon the company and the promoters are not personally liable in any case where the nonregistration of the company was known to the third party.

2. A shareholder may be held liable beyond his full capital contribution, in proportion to his share, if the articles so provide. However the shareholder has a right to surrender his share in lieu of making any further payment over and above the paidup amount of the share.

3. German law does permit a company to acquire its own shares if they are fully paid up, out of the net assets of the company exceeding the stated share capital. Austrian law prohibits a company from acquiring its own shares.

4. The managing director is subject to a statutory prohibition against competition.

5. A supervisory board is required where the number of shareholders exceeds fifty (50) and is also mandatory where there are more than three hundred (300) employees.

6. Directive actions are more easily brought under the Austrian law against the managing director or against members of the supervisory board.

7. Probably the greatest difference lies in the existence

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of a public control institution similar to the jurisdiction exercised by the company courts in Great Britain.

8. The minimum share capital is approximately the same and the procedure is also identical to the German system in most other respects the law is very similar to the German law.

9. The public company law is almost identical with the German law.

DENMARK

Denmark passed a new private companies act and a new separate public companies act in 1973. The private company is referred to as an ApS and the public company is referred to as an A/S. One of the most distinctive features contained in both acts deals with a definition of a group of companies. The parent company must prepare a consolidated balance sheet in addition to its own annual accounts and special provisions apply to groups with respect to the acquistion by a company of its own shares, trading in a company shares by members of the company's board of directors or board of managment, and regarding auditing and profits of the companies within the group. There is a special rule regarding the parent company'sright to redeem minority shareholders in subsidiary companies. While the Acts thus go part way towards treating a group of companies as a legal unit the principal rule in Dannish law remains that any company, including a wholly owned subsidiary, is treated in all respects as an independent legal person and each company is only liable for the commitments it has itself entered into.

A private company can be converted to a public company and most enterprises start as private companies and are converted since incorporation of a public company is a very long and technical business. Apparently the lawyers in Denmark incorporate companies with the minimum subscription and minimum paid in capital and have them

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available on ready use basis.

Companies are formed by filing the articles of association which must contain the following main provisions.

1. The company name.

2. The municipality in Denmark where the company has its registered office.

3. The objects to the company.

4. The share capital.

5. The denomination of the shares and the voting rights of the shareholders.

6. The minimum and maximum number of members of the board of directors, the number of auditors and the term of office of each.

7. Provisions regarding notice conveying general meetings.

8. The matters to be dealt with at ordinary general meetings.

9. The company's fiscal year.

10. Whether the shares are to be registered or bearer.

11. Whether the company shares are to be non-negotiable instruments.

12. Whether the shareholders are to be bound to allow the company to redeem their shares and if so the rule governing redemption.

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13. Any restrictions on the transferrability of shares.

14. Any restriction on the authority of the board of directors and the general manager to bind the company.

The main characteristics of Dannish companies, with indications as to whether they apply to both private and public, are as follows:

1. Denmark has adopted the first directive of E.E.C. and has thus pretty well abolished the doctrine of ultra vires.

2. A public company must issue share certificates a private company may or may not and may issue share certificates in bearer or registered form, with special rights and conditions, with rights or redemption, and may limit their transferability. Share certificates are negotiable unless the contrary is stated in the articles and each individual share certificate carries a conspicuous notice to the effect that the certificate is not negotiable. A bearer share can be converted to a registered share but a registered share in the name of the holder does not, by delivery and endorsement, become a bearer share. The share register is only accessable to the company's board of directors, the tax authorities, and where there is a two-tier structure to a representative of the employees.

3. There is a registrar of companies whose office in Copenhagen deals with the whole country. His decisions may be appealed and his records are open for inspection to the public.

4. He also receives annual reports from all companies public or private which include financial statements, the contents of which resemble closely the modern requirements of the C.I.C.A.

5. Only par value shares are permitted and must be subscribed for in cash or in kind, but if in kind the details must be filed with the registrar of companies. Share may be sold at a discount or a premium. The excess must be appropriated to the statutory reserve fund. A special resolution is required for the issuance of convertable debentures. In a private company a pre-emptive right is given to

the shareholders. All shares must carry voting rights. The voting power of some shares may be increased beyond one vote per share but not beyond ten times the voting power of any other share of the same amount.

6. Dannish companies use the two-tier system. Members of the board of management may sit on the supervisory board but may only constitute a minority of the board of directors and the chairman of the board of directors can not be a member of the board of management. The board of management is obliged in all matters to follow the instructions of the board of directors. The board of directors may if it wishes, take up each separate item for discussion and decision. The system may be described as about half-way between Germany and the United Kingdom. All public companies are required to have the two-tier system whereas private companies are only required to have the two-tier system if their share capital is Kr. 4,000 or more. If less the board of directors may consist of only one. If the share capital is more then the board of management can be one or more members but the board of directors must consist of at least three members. Employees of either a public or private company have a right to elect two members to the board of directors. They may waive this right but if they choose to exercise it then the board of directors in any case must consist of at least three members elected by the general meeting and two by the employees. This is true however only in companies with fifty or more employees. Curiously enough the managers are entitled to vote for the election of the employee's representatives.

7. There is one exception to filing the annual statements namely if a private company has assets totalling less than Kr. 2,000,000 an annual report need not be prepared and only a balance sheet showing the main items and not specified in detail, including only the principle notes, need be submitted to be published.

8. One of the most distinct features of Dannish company law are the sections dealing with appropriation of surplus. At least ten (10%) percent of that part of the years earned surplus which is not used to cover any loss from the previous years must be transferred

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to a legal reserve fund until such time as the fund amounts to ten (10%) percent of the share capital. The amount transferred thereafter msut be at least five (5%) percent until the fund amounts to a quarter of the share capital. Contributed surplus arising from the sale of shares at a premium must also be transferred to the legal reserve fund.

Apart from reductions of capital, the legal reserve fund may be used to cover a loss which is not covered by the free equity capital or to issue bonus shares if the company has no uncovered loss. The balance of the earned surplus is described as "free equity capital" and may only be distributed by way of dividend. A dividend must be approved by the board of directors and presented to the general meeting for approval. Since directors are personally liable if they dip into the legal reserve fund they may overrule the decision of the shareholders meeting. Dividends may be declared only once a year following receipt of the annual statements.

In addition the free equity capital may be tied to a definite object by provision in the articles. Any fund so provided such as an exchange regulation fund or a building fund can not be paid out in dividends unless the company alters its articles which it can only do by special resolution (75%). Both acts provide that Dannish companies may make charitable donations either as regular contributions or on a once and for all basis but they must be approved at the general meeting. The directors are however entitlted to make donations which are insignificant in relation to the company's financial position.

9. A loan to a shareholder may be granted but only against good and valid security and only to the extent which the company's free equity capital exceeds the appropriated equity capital. All loans to shareholders must be specifically shown on the balance sheet of the company. Loans to the company's auditors are specifically prohibited.

10. Auditors are elected for one year by the shareholders however shareholders holding at least one-tenth of the share capital may demand at a general meeting that a special minority auditor be

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appointed by the Registrar of companies to share the auditing of the accounts for the current year. In general the act has emphasised the auditors position as an essential but independent organ of the company and gives the auditor powers to convene extraordinary general meetings of the shareholders. Some attempt has been made to define the scope of the auditor's duty. He is not required to submit the company's activities to commercial evaluation but he is required to express his opinion on matters of accountantcy and must give a certificate in a statutory form.

11. Minority shareholders have been given a new remedy under the Acts of 1973. A shareholder may submit a proposal at any general meeting for an extraordinary scrutiny of the company's affairs. If the proposal is passed by a simple majority the general meeting elects one or more scrutineers. If the proposal is defeated but still obtains the support of shareholder representating twnety-five (25%) percent of the share capital, a shareholder may request the bankruptcy court in the district where the company has it registered office to appoint scrutineers. The bankruptcy court must give the company's management and its present auditors the opportunity of speaking before it makes any decision and the request will be upheld only if the bankruptcy court finds sufficient grounds to proceed with the scrutiny. If scrutineers are appointed they present a written report to the general meeting which is available to all shareholders. If can be seen that this could provide the necessary means for a shareholder to obtain the information he requires in order to commence a dirivative action.

All in all this is a modern and comprehensive treatment of company law embodied into distinct acts. I propose to write to the Dannish counsel to see if I can obtain an english translation of both. It is interesting to note that while the law is as recent as 1973 proposed reform are now being considered in the area particularly dealing with transferability and negotiability of shares and debentures.

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THE NETHERLANDS

Until 1971 there was only one type of limited liability company available under Dutch Law (throughout this paper I will use the common initials rather than the extremely lengthy, and to me unpronounceable, Dutch names in full), the N.V. The law was however flexible enough to encompass companies ranging from Royal Dutch Shell and Phillips to the local gargage or grocery store. 1971 saw the introduction of the B.V. which is very similar in the nature and structure to the N.V. in most of its provisions but it must impose restrictions on the transfer of its shares and there are some other differences. The B.V. shares some other characteristics of the private company in other European judisdictions however it must be pointed out that the main distinction in Dutch company law is not between the N.V. and the B.V. but in various classifications imposed on companies in other statutes. Thus either a N.V. or a B.V. may be divided between "normal" and "large" companies which are subject to different regulations. The large companies are further divided into "exempt companies", "structure companies", and "mitigated structure companies".

A. DISTINCTIONS BETWEEN N.V. AND B.V. COMPANIES

1. The N.V. company may or may not impose restrictions upon the transfer of its shares. If it does impose restrictions on the transfer of its shares it can not issue its shares in bearer form and nor can its shares be traded on the Amsterdam Exchange. The B.V. must impose some restriction on the transfer of its shares.

2. The N.V. whether it has restrictions on the transfer of its shares or not must issue share certificates. The B.V. can not issue share certificates and shares are only transferrable by a written contract.

3. The N.V. no matter what its size must publish its annual accounts and it must have an auditor. The B.V. need not publish

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its anuual accounts and does not require an auditor providing that there are fewer than one hundred (100) employees and its assets do not exceed Df1.8,000,000.

4. The N.V. may issue shares at a discount up to five (5%) percent but may only issue discounted shares to brokers or to an underwriter. The B.V. may not issue shares at a discount.

5. The N.V. must keep a share register or registered shares but is not obliged to keep a share register for bearer shares. The B.V. must keep a share register sine this is essential for transferr-ability of interest.

6. While not an actual article of law, the Ministry of Justice must approve the articles for either type of company before they are registered and they have made a general ruling that the N.V. must have a minimum issued and fully paid capital of Df1. 100,000, and B.V.'s must have issued and fully paid capital of Df1.15,000. In both cases the authorized capital may not exceed the issued capital by more than five times. In both cases all shares must be par value but different classes of shares with different par values are permitted.

7. A B.V. may be converted into a N.V. and a N.V. may be converted into a B.V. Since the introduction of the law in 1971, and up to the beginning of 1975, approximately 35,000 N.V. had converted to B.V.

8. There is no distinction in the provisions regarding dissolutic of winding up .

9. In both cases a minimum of one-fifth of the authorized capital must be issued and paid up upon incorporation. The Supreme Court of the Netherlands have held that existing shareholders do not, per se, have a pre-emptive right on the allotment of authorized but unissued shares, if the articles do not give them such a right, but rules similar to the common law rules in England have been

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worked out, and such an issue must be made in good faith.

10. Neither company may purchase its own shares unless the articles authorize the company to do so. The Ministry of Justice does not accept articles authorizing the company to purchase more than fifty (50%) percent of its issued capital, and a company can not acquire its own partly paid shares. Shares purchased by a company can either be kept in a portfolio and sold, or cancelled and the capital reduced in which case the consent of creditors is necessary.

11. There is no prohibition against loans to directors but the Amsterdam Stock Exchange rules prohibit a loan to a director if the company's stock is traded on the exchange.

B. STRUCTURE COMPANIES

As noted above the main distinctions in Dutch Company Law are not so much between the public and the private companies but arise from the size or other criteria. Any company which:

(a) Has an issued capital and free reserve totalling at least Dfl. 10,000,000, and

(b) It or legal entities which it participates beneficially to the extent of at least fifty (50%) percent, has formed a work's council, (there are various legal requirements which compel a company to do so), and

(c) It and any legal entities in which it participates beneficiall to the extent of at least fifty (50%) percent, together, employ at least one hundred (100) persons in the Netherlands, and

(d) Has meet these conditions for a period of three (3) years,

must comply with the special rules regarding structure companies. Basically these are as follows:

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(a) It must have a two-tier management system and the supervisory board must consist of at least three (3) persons, whose powers are statutory and very broad, and who must be consulted and approve the following decisions of management:

(a) To issue acquire or cancel shares or debentures.

(b) To apply for a listing or delisting of the shares or debentures.

(c) Any merger amalgamation or "cooperation" with another company.

(d) Purchase of shares of another company for a price equal to at least one-fourth of the company's own issued capital and reserves.

(e) Any amendment of the articles.

(f) Any proposal to liquidate the company.

(g) Any proposal to lay off a considerable number of employees at once or within a relatively short period of time.

(h) Any proposal which will change considerably the labor conditions of the company's employees.

The supervisory board also appoints and removes the managers and adopts the annual accounts of the company.

C. MITIGATED STRUCTURE COMPANIES

While the criteria are the same as for the structured companies, this classification in effect provides a partial exemption from some of the rules affecting structure companies. A company is a mitigated structured company if it meets the requirements for a structure company but is owned to the extent of at least fifty (50%) percent by a legal entity the majority of whose employees are employed outside the Netherlands. In the case of a mitigated structure company the power to appoint and remove directors and the power to adopt the annual accounts rests with the general meeting of the shareholders

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and not the supervisory board. The remaining powers are the same.

D. THE EXEMPT COMPANY

As the name applies these are large companies which are exempt from the structure provisions and the following are the main exemptions granted:

(a) A company beneficially owned to the extent of at least fifty (50%) percent by one or more other structure or mitigated structure companies.

(b) A "pure" holding and financing company providing the majority of the employees of the companies in its group are employed outside the Netherlands.

(c) A company rendering administrative and financial services to companies referred to under (b) above and to affiliated Dutch companies.

COMMENT ON THE RIGHTS OF EMPLOYEES IN DUTCH COMPANY LAW

The position of the employee has been very much strengthened since the reforms of 1971 which not only included the provision for the private company but set up the whole concept of the works council, and has elevated the works council to the status of one of the organs of the company. This is a reflection of the basic philosophy that a company should be a co-operation between the two factors of capital and labor in which the factor of labor is at least as important as the factor of capital. Co-determination has been one of the objectives of the Economic Council of the EEC. The Netherlands have gone further in this regard than any other European country. The works council has important powers in structure companies, but even in smaller companies it has the following powers:

(I) It must meet at least six (6) times a year and at two (2) of these meetings at least the management must report on the general trend of the affairs of the company and at least one (1) supervisory director must be present.

(II) The management must put the annual accounts at the disposal of the works council.

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(III) The advice of the works council must be sought on matters relating to:

(a) The transfer of any power within the company to another person or company.

(b) Closing down the company or any part of it.

(c) Any important restrictions extention or other change in the functioning of the company.

(d) Any important change in the company's organization.

(e) Any change in location of the company's works.

(f) Any merger.

(IV) Management must also request the advice of the works council on the following matters:

(a) General rules relating to pay.

(b) Measures relating to training.

(c) Evaluation systems.

(d) General principles of employment.

(e) Dismissal or promotion policy.

(f) Any proposed social work scheme within the company.

(v) In the following cases approval of the works council must be obtained:

(a) Labor rules.

(b) Pension rules.

(c) Pension schemes.

(d) Profit sharing.

(e) Saving schemes.

(f) General rules on working time and holidays.

(g) Safety regulations.

The members of the works council are elected directly by the employees and its meetings are presided over by one of the managers of the company. The elected members may however, if they so choose, meet without the manager.

I have two friends and acquaintances of Dutch origin both of whom have returned to Holland for a visit within the last two years. Each is running his own business here in Edmonton, and both were appalled by what they found in Holland in the attitude of their brothers or cousins who had remained in that country. While labor strife is perhaps at a minimum compared with Italy or Great Britan, productivity is sinking fast and the "goof-off" factor is enormous. Their families all felt that since they were part of the enterprise, they could take a day off if the weather was nice, and did so. In fact both my friends cut short their proposed time in Holland and went elsewhere for the remainder of their planned trip. Industrial peace does not necessarily mean increased productivity.

SWITZERLAND

The rules applying to business organizations are contained in the Swiss Code of Obligations of 1881. They were revised in 1911 and in 1936. The general law relating to legal persons is laid down in the Swiss Commerical Code of 1907 which has been amended from time to time since that date. The Swiss Cmmmerical Code deals with associations and foundations, whereas the Code of Obligations provides for the following types of business organizations:

1. A general partnership.

2. A limited partnership.

3. A public company (AG).

4. A company with unlimited partners.

5. A private company (GmbH).

Generally these provisions follow the German pattern rather than the French of Italian but the GmbH which was introduced in the 1936 amendments has not proved very popular mainly because of a lack of flexibility in the administration of the provisions dealing with it. Most business in Switzerland whether large or small carry on in the AG form. A company with unlimited partners was also a result of the 1936 amendments. It provides for shareholders plus one or more members with unlimited liability. Since 1936 only two (2) have been formed.

The cornerstone of the commerical system with respect to business organizations is the commerical register which is kept by each canton under federal supervision. It provides the public with reliable information regarding any commerical enterprise and is open to the public for inspection. The doctrine of constructive notice

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applies and everyone is deemed to have knowledge of the contents of the commercial register. A company becomes a legal person only by registration. A board member is validily appointed upon his designation being recorded and a limited partner for example is liable up to the amount of his contribution as set out in the documents in the commercial register and may not invoke a partnership agreement which states that his liability is less. A registered tradename grants the exclusive rights to that name to the exclusion of any other tradename that may lead to confusion. With regard to an AG the following facts and any modifications are filed in the register and published in the official commercial gazette:

1. Name.

2. Objects.

3. Capitalization including the number par value and kinds of shares.

4. The number of shares paid up or the amount paid up on each share.

5. The board of directors and other signatories with their respective signature rights on behalf of the company.

6. The registered office.

A business organization does not exist until it is registered once it is registered there is an obligation on it to keep proper books and records, to submit to bankruptcy proceedings, and it is bound under the rules providing special procedures for rapid collection of bills of exchange.

Incorporation of an AG under the Swiss law is somewhat a time consuming affair. A name clearance must be obtained the objects of the company must be set out and approved. There must be three (3)

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incorporators although subsequently all shares can be held by only one shareholder. The minimum share capital is SF $50,000.00 and must be divided into shares of par value of at least SF 100. The incorporators must subscribe for the whole of the share capital before incorporating the company and must pay the money into a bank to be held in escrow by the bank pending the issuance of the certificate of incorporation. The signatories are jointly and severally liable with regard to transactions entered into on behalf of the company prior to incorporation. If the transaction is entered into in the name of the company and if it is adopted by the company within three (3) months of its registration by a decision of the board, the signatories are released and the company alone is liable. If the shares are to be offered to the public a prospectus must be prepared giving detailed information about the proposed company.

The provisions regarding types of capital are similar for an AG or a GmbH.

Generally speaking the provisions of the AG with regard to shareholders meetings capitalization management and auditors reports are more flexible than the GmbH, and the GmbH provides few advantages since the balance sheets must be filed by both. Both grant a preemptive right to an existing shareholder and provide for the same information to be distributed to him. The law also embodies the concept of "vested rights" with respect to the owner of the shares of either. This is a sort of bill of rights for shareholders and holds as inalienable the right of a shareholder to attend a general meeting, the right to vote, the right to challenge a decision and the right to dividends and to liquidation proceeds. No resolution can take these rights away.

Apparently new reforms are on the way in Switzerland a first report was published in 1972 but these have not yet reached the stage of parliamentary discussions with one exception. The proposals planned to introduce detail legislation on the management

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reports to be submitted to the general meeting of the board, minimum professional qualifications and independence of auditors, revised and modernized rules on the presentation of the financial statements, the introduction of authorized capital, and the introduction of shares with a very small par value.

The Swiss Law does not use a two-tier board system. The shareholders meeting is paramount and it elects the board of directors in much the same fashion as in England. A proposal to require two (2) workers on the board of directors was submitted to a national referendum in February of this year, according to a clipping I have from the Paris Herald. This would have provided worker participation on the board of directors, however the referendum got less than one-third of the popular vote and was defeated.

FRANCE

French Law provides for a bewildering array of corporate and partnership modes of carrying on a business. What we conceive of as the private company, the societe responsabilite limitee is a relative newcomer to French law. The distinction between it and the societe anonyme is roughly the same as our distinction between a private and a public company. This distinction is however blurred by the fact that there are a variety of different divisions with respect to the societe anonyme depending upon whether it is offering shares to the public or not. Thus French law provides a general corporate structure divided into two (2) classes as to whether the company is offering shares to the public or not, and amongst others and, a private company structure which seeks to embody some partnership concepts into company law.

In the societe responsabilite limitee (SARL) the shareholders are liable only to the extent of their contributions to the capital of the company and they are deemed to be shareholders and not merchants, a special definition under French commercial law. However as in a partnership the shares are not transferrable without the consent of seventy-five (75%) percent of the remaining shareholders and only by a written instrument of assignment. Hoping that the distinctions

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will not get too muddled I will attempt to draw the major distinctions between an offering SA , a non-offering SA, and a SARL which are as follows:

1. Any SA must have seven (7) incorporators and must have at least seven (7) shareholders. If a SA has fewer than seven (7) shareholders over a one year period and does not rectify the position it may be dissolved. There is no maximum limit to the number of shareholders which it may have. A SARL must have a minimum of two (2) shareholders and not more than fifty (50). If it exceeds fifty shareholders for over a year without agreement by the members toeither transform it into a SA or by some arrangement amongst themselves to buy out sufficient shareholders to reduce the number to fifty or below then it may be dissolved.

2. Seven (7) incorporators are required for a SA and only two (2) for a SARL.

3. The minimum capitalization required for an offering SA is FF 500,000. The minimum capital required for a non-offering SA is FF 100,000. In both cases twenty-five (25) percent must be paid in cash with the balance to be paid up in not more than five (5) years. The minimum capitalization for a SARL is FF 20,000 but the entire amount must be subscribed for in cash, and similar to the Swiss system must be paid into a Bank to be held in escrow pending issuance of the certificate of incorporation.

4. Articles of Association are necessary and must be filed in an offering SA. They are not necessary but usually filed with respect to a non-offering SA, and they must be filed to incorporate a SARL.

5. The criteria for determining whether a SA is raising its capital from the public are:

(a) Listing of its shares or debentures on the Stock Exchange, or

(b) Using the services of a bank, financial institution or stock broker, or

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(c) Issuing public advertisements to subscribe for shares or debentures other than those filings or publications that are required by law.

The distinction between SARL and a SA are as follows:

(a) There must be no more than fifty (50) shareholders.

(b) Shareholders are jointly liable to third parties for five years for the value attributed to the contributions in kind made at the time of formation of the company.

(c) An offering SA may issue debentures after it has been in business for two (2) years and providing that the capital is fully paid in. A non-offering SA may issue a debenture with the same qualifications, a SARL may not issue a debenture.

(d) Generally a SA cannot buy its own shares there are certain exceptions to this principle. An offering SA may purchase shares listed on the stock exchange and allot them to the company's employees in a profit sharing scheme providing that it does not acquire more than ten(10%) percent of its own shares for such purpose, and it may under certain conditions purchase its own shares listed on the stock exchange to uphold the market value. Once again the upper limit is ten (10%) percent of the shares which includes those purchased for the employees. A non-offering SA may purchase its shares as a method of reducing capital for any reason other than loss. A SARL may not purchase its own shares.

(e) The notice provisions for shareholders meetings are slightly different for an offering SA as opposed to a non-offering SA. A resolution signed by all of the shareholders of a SARL is as effective as if passed at a meeting but this provision does not apply to a SA even if there is only the seven (7) members.

(f) The form of proxy with which we are familiar is permitted in both the offering and the non-offering SA. If the proxy is in blank it is deemed to be in favor of management. In a SARL a proxy can only be granted to a spouse or to another member.

(f) The SA may elect to use a board of directors or the

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two-tier system. If they elect to use a board of directors the directors must hold qualifying shares in the company which must be deposited with a bank upon the individual's appointment as a director as security for any bad deeds. One-third (1/3) only of the board of directors of a company may be employees of the company and no person may serve as a director of more than eight (8) SA. A SARL need not have a board of directors at all and may simply appoint a manager or managers who are directly responsible to the shareholders. They may, however, if they so elect to do so, provide in their articles for a supervisory board who must be shareholders. The manager may or may not be a shareholder.

(g) An offering SA is required to have two (2) auditors. A non-offering SA must have one (1) auditor. A SARL need have no auditor at all unless its capital exceeds FF 300,000.

Apparently no immediate change of substance in the existing company laws are expected however France like the other members of the EEC is working on harmonization of company law in accordance with the EEC directives. They are not particularly worried about the first directives since the concept of ultra vires has never been known to French corporation law.

BELGIUM

BRIEF HISTORY

Belgium company law is basically the law of 1873 although there had been amendments in 1953, 1958, 1962, 1967 and as recently as 1973 which embodied the first EEC directive. These amendments have been slight and small with the result that the law ignore many essential problems encountered in modern company law such as mergers,actions by minority shareholders and the legal requirements for financial reporting. It is encouraging to me to note that in 1952 the government of Belgium appointed a commission to reform Belgium company law their work was finally completed in 1973 and has been submitted to the government however it did not include

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any discussion of labor representation in the management of a company and to date the government has not even submitted the first bill to parliament. While this would seem to be an archiac and almost unworkable situtation it has been saved by the part taken by the commission bancaire (banking commission). This administrative agency established in 1935 in order to supervise the banks and protect capital markets in the fields of public offers has evolved into an organ somewhat similar to the British Board of Trade. While its legal capacity is only to advise, its activites have imposed upon the company law provisions regarding shareholders preemptive rights, duties of the majority to the minority in the case of a sale of a controlling interest and some modern accounting techinques with regard to financial reporting.

Two (2) forms of company are commonly used. They follow the French pattern except that there is no distinction between a public company which is offering its shares to the public and one that is not. As in France the public company is called a societe anonyme (SA). The private company is fairly recent and is called a societe du personnes responsabilite limitee (SPRL). The main differences between the two are as follows:

1. The SA requires a minimum of seven (7) shareholders to incorporate and throughout its lifetime. The SPRL requires two (2) only but both must be natural persons.

2. There is no maximum limit to the number of shareholders in a SA, whereas in the SPRL the number of shareholders can not exceed fifty (50).

3. There is practically no minimum capital requirement for a SA although the present corporate law reform envisage a minimum capitalization of 1,000,000 fr this is not yet the law. In effect therefore there is practically no minimum capital requirement because the capital need be paid up only to the extent of twenty (20%) percent

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and there is no time limit for the balance. It follows the English pattern and is simply on call. In the SPRL a minimum capitalization is 250,000 fr and must be subscribed for with a twenty (20%) percent down payment before incorporation.

4. Share capital of a SA may be shares of par value or shares without nominal or par value but in a SPRL the capitalization must be divided into shares of 1,000 fr each.

5. The shares in a SA are freely transferrable whereas those in a SPRL are only transferrable with the consent of seventy-five (75%) percent of the members. This restriction does not apply to transfer to a spouse or to a direct lineal antecedent or decedent. There is also provision to apply to a Court in the event consent is unreasonably withheld.

6. The SA may issue debentures but the SPRL may not.

7. The SA must have a minimum of three (3) directors whereas the SPRL may have directors or the shareholders may simply appoint a manager who may be a shareholder.

8. The SA must have an auditor the SPRL need not have an auditor if there are five (5) or fewer members but must have one if there are more members.

9. The balance sheet of a SA must be published in the Belgium Gazette but the present legal requirements for a balance sheet are minimal indeed. The SPRL does not have to publish or circulate its balance sheet but it must be available to its members.

10. A SA may purchase its own shares providing such purchase does not reduce its net assets below the amount of the share capital. The banking commission considered that such a transaction must be sanctioned by the company's articles, must respect the principle of equality between shareholders and that the repurchased shares

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must be immediately and finally cancelled, however the Supreme Court has admitted in several judgments that the repurchase by a company of its own shares is merely a purchase and the company could resale the repurchased shares. A SPRL can not purchase its own shares.

Generally speaking the SPRL is fairly modern and very closely resembles the French SARL. The Belgium SA however is a very old fashioned vehicle indeed and does not have the refinements of the Franch SA.

LUXEMBURG

Luxemburg follows the Belgium pattern and uses the Belgium capital and stock markets. This therefore will simply be a brief description of the differences between Belgium and Luxemburg with regard to a SA and a SPRL. The Luxemburg SA differs from the Belgium SA mainly as follows:

1. If it is issuing shares to the public they have provisions in their commercial code similar to our securities provisions and all such issues come under the authority of the commisaire au controle des banques.

2. By a law passed in May of 1974 which applies to companies employing at least one thousand workers during the last three years or to those in which there is state participation of at least twenty-five (25%) percent, or which exploit a state concession, the number of directors must be nine (9) and one-third of these directors must represent the employees of the company.

3. The articles may provide for a general council at which the auditors and the directors sit together.

4. A general meeting may be called by the directors or by the auditors or convened at the request of the shareholders representing one-fifth of the company's share capital.

The Luxemburg private company (SRL) differs from its

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Belgium counterpart as follows:

1. It may have corporations as members.

2. The minimum capital is 100,000 fr divided into units of 500 or multiples thereof.

3. The minimum number of shareholders is two (2) and the maximum can not exceed forty (40).

4. As in the Belgium SPRL shares are not transferrable without the consent of seventy-five (75%) percent of the remaining members but there is no right of appeal to the Court.

5. A Luxemburg SRL may issue bonds but may not offer any of its shares or bonds for public subscription.

6. The company need not appoint an auditor or hold annual meetings if it has less than twenty-five (25) shareholders as opposed to the Belgium five (5) shareholders.

ITALY

Italian law provides for sole proprietorships a civil partnership a general partnership and a limited partnership, together with three distinct types of companies:

A. The private company, societa au responsabilita limitata (SpA).

B. The public company societa per azioni (SA).

C. The limited partnership with share capital, societa in accomandita per azioni. These are not very common. They are similar to the private company except for the fact that the general partners

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are jointly and severally liable for the debts of the partnership but are different from a partnership in that the members contributions are represented by shares. There will be no further discussion of this type of company since it is very unusual.

GENERAL COMMENTS

By and large the differences between public companies and private companies in Italy are fewer than in most of the other European jurisdictions. As may be expected from the country that originated double entry bookkeeping, the requirements for the company's accounts and the audit are more detailed and more modern than any of the other European countries with the possible exception of the new Dannish Act. While various other European countries have gone to the two-tier system in an attempt to control the management of the company and to give shareholders and creditors some outside protection, the Italian system lays great emphases on a "board of auditors". In Italian companies therefore there are three main organs, the shareholders meetings, the directors meetings, and the board of auditors.

The differences between a public and a private company.

1. Shares in a public company must be negotiable, shares in a private company must have some restriction on their transfer.

2. A public company may issue debentures whereas a private company may not.

3. A public company may under special circumstances purchase its own shares if its capital is not thus impaired. A private company may not purchase its own shares.

4. The minimum capitalization for a public company is L1,000,000. The capitalization must be subscribed upon incorporation and three-tenths must be in cash. The balance must be for tangible benefits and none can be issued for services. The minimum capitalization

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for a private company is L50,000 with one vote for every L1,000.

5. All shares in both must have a par value but it must be remembered that the private company does not actually issue share certificates since shares are only transferrable by a written agreement.

6. A public company must have a board of auditors as must a private company if its capitalization is L1,000,000 or more. A private company may have a board of auditors if its capital is less than L1,000,000 but this is optional. Shareholders holding one-third of the capital in a private company can demand an audit at anytime.

ODD COMMENTS

The report on Company Law prepared by Richard W. Bird for the Department of Justice of the Province of New Brunswick dispenses with the entire matter in two pages and simply recommends abolishing any distinction whatsoever between public and private companies but permit the companies to impose restrictions on the transfer of shares should they so desire. This would leave the situation much the same as it was in the Netherlands before the 1971 amendments, namely that one Companies Act by flexible enough to handle any size of company.

The Province of Manitoba has tabled a new Companies Act in this session of the Legislature. I have spoken to the Clerk of the Legislature Assembly and he has promised to send me a copy of the Act and the commentary. It will be interesting to see what Manitoba has done in regard to the public and private company since no private company provisions were available in Manitoba until 1964. There will be a further addendum to this report as soon as I get the Act.

GENERAL DISCUSSION

It is suggested that there are two fundamental distinctions between the public and the private company, whether they be called that or called offering or non-offering, or reporting or non-reporting companies. The first is whether the majority of the shareholders are actively engaged in the management of the company, and the second is the source of the company's capital, i.e. Does the capital of the company come from those who are involved in the management or does it come from shareholders who never expected to become part of, or to have much say in, the management of the company. It is a simple matter to distinquish between a small private company having three shareholders all of whom work actively in the business, and the large public corporation whose stock is listed on the exchange and whose directors andmanagement together may own ten (10%) percent or less of the outstanding shares. Just where the dividing line between these two extremes should fall is bound to be an emperical decision if a distinction between the two is to be made in the Act. It is interesting to note the other factors which have been taken into consideration by various jurisdictions such as :

1. A statutory number of shareholders.

It is suggested that this is merely a practical and easy method to determine whether the shareholders are active participants or not. Just where the number of fifty (50) came from in the English Acts of 1907 and 1908 I have been unable to determine, but it must be remembered that this was a period when the English Gentlemen's Club was at one of its zeniths and it would be perfectly possible to put together a fairly substantial venture involving forty to fifty people providing the capital for it without going out of the doors of the club and on to the street. In present times I suggest that this figure is subject to abuse, that those companies presently incorporated in Alberta having fifty (50) members, exclusive of employees, do have a real distinction between those providing the capital and those managing the business, and should therefore be classed as public companies and thus come under the scrutiny of our present regulatory bodies.

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2. A restriction on the transferrability of shares.

Once again this is a reflection of whether the management are the actual owners of the business. Such a provision serves two functions:

Firstly, if the shares are not readily negotiable, the public is unlikely to buy them, and secondly, it enables a small group to control the membership of the business unit in a manner similar to that of a partnership.

3. Economic size, irrespective of the number of shareholders.

The two classic examples in the United States before they went public were the Ford Motor Company and Campbell Soup. In Canada the classic example is the T. Eaton Company. These are acknowleged economic giants but whether such a factor should be taken into consideration so that the exemptions or privileges granted by the stututes to a private company, should not apply simply because of their economic size, seems to me to be a matter of political or emotional outlook. I do not know what purpose or good is served in requiring private companies who have been very successful and have achieveda certain economic size to file their annual financial statements or to comply with the other regulatory statutes designed to protect the small investor shareholder.

4. Number of employees.

While this will often be a parallel test to factor number 3 it may not always be so. The employees however do have a interest in the financial condition and management of the company and the community will undoubtedly suffer when a company employing a large number of people ceases to function. Anything that can be done to prevent the business failure of a large employer will be of benefit to the community and in the long run to the remainder of the business sector as a whole.

The large North American public company represents a pooling of capital in the form of shares or certificates of indebtedness necessary to implement and carry on projects requiring more capital than can be raised by any small group of businessmen. In theory the shareholders of such a company in North America can control the

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company's policy, and its efficiency, by means of the election of its directors; in practice this has proved more illusion than fact. The tendency has been as pointed out by Berle and Means for the executive management of a large public company to escape from any effective control at all. If they were hopelessly incompetent as were the management of Cowles Communications Inc. (as described in "Divorce Corporate Style") or the Penn Central Railway (as described in "The Wreck of the PennCentral") there was little that the shareholders could do until it was too late. It is a truism that the more widely dispersed the stock the more powerful the internal management will be and the smaller amount of voting stock it will require to maintain its control. The concept therefore of a balance of power between three (3) organs of the company, namely, the shareholders, the directors, and management, has simply not been very effective in North America because management and the directors became one.

Different jurisdictions have attempted to reinstate some form of balance of power by different methods. In North America the commonly accepted method has been outside regulations by the state in the form of security regulations, Acts and commissions. It has only been in the 1970's that any other statutory attempt has been made to divorce the union between management and the directors. This first occured in the O.B.C.A. with statutory provisions regarding an audit committee, two of whom must be directors of the company and must not be part of management. These provisions have now been followed in B.C.C.A. the C.B.C.A., the proposed Saskatchewan Act, and the proposed Manitoba Act. Generally European jurisdictions have taken a different tack and have divorced management from the directors by means of the two-tier board and prohibiting management from sitting on the supervisory board. Those countries which have adopted this technique have gone one step further and acknowledged that the employees of the company do have a interest in its welfare by demanding worker representation on the supervisory board. The two mavericks, who incidentally do have the worst record in Europe for days lost through strike action, are England, with whose provisions we are familar, and Italy which has adopted a unique method in its use of the board of auditors.

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The Icaobucci Report makes fifteen (15) recommendations with regard to the private (closely-held) company. They occur on pages 76 to 80 which are reproduced as the following pages in this paper. Dealing with these recommendations one by one will highlight most of the problems in this area.

7. Recommendations:

Where special provisions are adopted to regulate closely-held corporations, it is necessary to define what constitutes a closely-held corporation. An alternative approach, that of Federal Bill C-29 is to avoid any general definition, but distinguish among different sorts of corporations for different purposes throughout the Act. This pragmatic flexibility has advantages, but we feel a case can be made for a general distinction between the closely-held and widely-held corporation. The most important advantage of this approach is that it ensures that special provision can be made to meet the distinct needs of these very different forms of business organization.

(a) We recommend that a definition of the closely-held corporation include the following elements:[43]

(i) limitation on the number of shareholders to not more than fifteen;
(ii) restriction on the transfer of shares;
(iii) prohibition against the public-offering of securities;
(iv) prohibition against direct or indirect ownership by a public corporation of securities which materially affect the control of the closely-held corporation.

These provisions are designed to ensure the private or closely-held nature of the corporation and the unity of management and ownership which are basic to it.

(b) We further recommend that where for some technical reason a corporation does not meet each of the above conditions, it be able to apply to the Registrar for designation as a closely-held corporation on such terms as the Registrar thinks appropriate.

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43. See Iacobucci and Johnston, supra, n. 1, at 130.

(c) We further recommend that where a corporation involuntarily ceases to meet the criteria for closely-held corporation status, procedures be provided to prevent its loss of status where appropriate.[44]

(d) We further recommend that provision be made for corporations to convert voluntarily from closely-held to widely-held status and vice versa. Since this is a fundamental change, a high majority shareholder vote should be required to authorize it, and dissenting shareholders should be given appraisal rights.[45]

(e) We further recommend that where a corporation acts as a closely-held corporation unlawfully, it cease to be entitled to the special privileges or powers conferred upon such corporations. We also recommend that it be an offence to act unlawfully as a closely-held corporation and that any director, officer or shareholder who has knowingly caused a corporation to act unlawfully as a closely-held corporation also be liable to an offence.[46]

(f) We further recommend that the statutory framework provide as much assistance to the incorporators of the closely-held corporation as possible. Specifically, we recommend that as appendices to the corporations statute, sample incorporating documents and articles, designed specifically for closely-held corporations, be provided. These would serve as a checklist for incorporators of the kinds of planning devices open to them and would help diminish the expense and time required for incorporation.[47]

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44. See s. 348 of the Delaware General Corporations Law in Folk, supra, n. 31.

45. See Iacobucci and Johnston, supra, n.1, at 131. For a discussion of appraisal rights generally, see chapter 7, Shareholders, infra.

46. Ibid., p. 130.

47. Ibid., p. 132.

(g) We further recommend that, as in the British Columbia and Ontario Acts and the Federal Bill, the one-person corporation be recognized, and written resolutions signed by all the shareholders be acceptable as a means of complying with shareholder meeting requirements.

(h) We further recommend that, as in the Ontario Business Corporations Act, a closely-held corporation be enabled to redeem special shares within a year of the time when a holder of such shares dies or leaves the corporation's employ.

(i) We further recommend that, as in Federal Bill C-29 a corporation be expressly authorized to establish in its incorporating documents a pre-emptive right on the issue of shares so that whenever new shares are issued by the corporation, existing shareholders have a right of first refusal in proportion to their current shareholdings. Alternatively, as in the British Columbia Act, pre-emptive rights could be made mandatory for closely-held corporations, or, as in section 5.05 of the Draft Act which preceded Bill C-29, made applicable to all corporations unless their incoporating documents provide otherwise. The relative merits of these approaches are discussed below in chapter 7, Shareholders.

(j) We further recommend that, as in Federal Bill C-29, unanimous shareholder agreements which restrict the discretion of directors be validated with respect to closely-held corporations. Consideration should also be given to the Delaware approach which provides that such agreements are effective if entered into by shareholders holding a majority of the outstanding voting shares. We prefer the Federal Bill requirement of unanimity on the grounds that the established corporate decision-making process should not be abrogated unless all the shareholders agree. We feel that shareholders should be able to rely on the fact that the directors will manage the affairs and business of the corporation unless their discretion is fettered by unanimous shareholder agreement. In other words, if the corporation is to operate in any sense like a partnership, there should be unanimous agreement among "the partners". We further recommend

that the effect of a unanimous shareholder agreement be to relieve the directors of, and impose upon the shareholders who are parties to the agreement, the duties and liabilities of directors to the extent that the discretion or powers of the directors are controlled by the agreement.[48]

(k) We further recommend that, as in section 351 of the Delaware statute, direct shareholder management of the closely-held corporation be authorized, if provided for in the corporation's incorporating documents. Where the directors and shareholders are essentially the same people, it makes sense to eliminate the formalities of holding both directors' and shareholders' meetings. Where direct shareholder management is adopted, the statute should provide that the shareholders assume the same duties and liabilities as are imposed upon directors.

(l) We further recommend that, as in section 354 of the Delaware legislation, it be provided that no shareholder agreement or provision in corporate documents is invalid on the ground that it is an attempt to treat the corporation as a partnership.

(m) We further recommend that provision be made for the settlement of disputes and resolution of deadlocks in the closely-held corporation. Consideration should be given to the provisions in the Delaware statute, outlined above, with respect to appointment of a custodian or provisional director. Alternatively, consideration should be given to providing that if the directors are deadlocked, they must submit the matter to the shareholders, and if the shareholders cannot agree on a course of action, an arbitrator be appointed, provided that either the incorporating documents authorize arbitration or a specified majority of the shareholders agree by resolution to the use of arbitration. In this case, the statute would specify the procedures for selecting the arbitrator (or board of arbitration) and for governing its deliberations.[49]

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48. For a further discussion of shareholder agreements, see chapter 7, Shareholders, section C.3.b., "Unanimous Shareholder Agreements". See also chapter 8, Directors, section A.2., "The Directors' Power to Manage".

49. Ibid., at 134.

(n) We further recommend that legislative authorization be given to include in the incorporating documents a provision enabling a shareholder to require the closely-held corporation to purchase his shares. Such a purchase would be subject to the general requirements that the corporation has surplus funds available and the purchase is bona fide and in the best interests of the corporation. As Professors Iacobucci and Johnston point out,

> "Such a provision would allow the orderly termination of a shareholder's interest in the corporation. It would also serve as a method of dispute settlement in a case where, for example, a minority shareholder disagrees with the majority shareholders but has no practical way of selling his shares because of the limited market for them."[50]

(o) We further recommend that consideration be given to providing, as in section 355 of the Delaware statute, that where the incorporating documents so provide, any shareholder have the right to obtain an order for the dissolution of the closely-held corporation. Though this provision emphasizes the affinity between the closely-held corporation and a partnership, it is not without disadvantages. It is a drastic remedy which affects not only shareholders but employees, creditors, and perhaps the wider community. It may be that a unilateral right to dissolve the corporation should not be conferred in the absence of some mechanism for considering the interests of all who are affected.[51]

It should be noted that recommendations with respect to specific distinctions made between closely-held and widely-held corporations will be found throughout this Report.

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50. Ibid., at 135. For a further discussion of shareholder appraisal rights, see chapter 7, section C.3.d.iii, "Appraisal Right".

51. Ibid., at 135-6.

RECOMMENDATION A

One of the thorniest problems, should we elect to maintain a distinction between private and public companies, is the problem of definition. This recommendation is the definition which currently exists in the present Alberta Act with two changes. The first sets the maximum limit of shareholders at fifteen (15) rather than fifty (50) and item (iv) is an attempt to get over the abuses that occured in the United Kingdom where public companies skirted the law through the incorporation of wholly owned private subsidiaries.

COMMENT

Providing recommendations B and C are followed I would agree with this definition.

RECOMMENDATION B

It is suggested that this recommendation really applies to the number of shareholders and I would agree with this recommendation providing that it was limited to the number of shareholders only.

RECOMMENDATION C.

This recommendation could apply to any of the four (4) criteria of a private company but the company should be given a specific period of time, such as six (6) months, in which to correct the abuse.

RECOMMENDATION D.

This really is three (3) recommendations each of which I will deal with separately.

1. Conversion. It seems to me self evident that a private company should be given the ability to convert to public and vice versa.

2. It is a fundamental change to the shareholder's right when a public company coverts to a private company since negotiability

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of his interest is suddenly removed, and in such case this should be classed as a fundamental change and dissenting shareholders given appraisal rights, but,

3. It is not necessarily ture that the shareholder's rights are going to be that badly effected upon convertion from a private company to a public company since upon conversion his share becomes negotiable. It is however true that the company may convert to a public company without becoming listed on the stock exchange and negotiability may become illusory. Where, therefore, it is proposed that not only will the company be converted but that an attempt will be made to list shares on a recognized stock exchange I do not think an appraisal right should be given. If however it is not proposed to list the shares on an exchange, or the shares are not listed on an exchange within a certain period of time, then the dissenting shareholders should be given appraisal rights.

NOTE 1

The application of the Act to the existing private company is not dealt with in Professor Iacobucci's recommendations and this seems as good a place as amy to deal with it since Items numbered (i) and (iv) of recommendation A may effect a good number of existing private companies. Item (iv) has already been dealt with in that this would not be a permissable application to the tribunal for designation as a closely-held corporation but unquestionably item number (i) is one that should be left to the discretion of the tribunal. In the event that the tribunal demanded conversion to a public company I would not grant an appraisal right to a dissenting shareholder.

RECOMMENDATION E.

Generally I have no objection to this recommendation although I am surprised that a liability would fall on a shareholder as well as a director and officer unless there was a unamious shareholder agreement dispensing with the functions of the directors.

RECOMMENDATION F.

As has been pointed out elsewhere in this paper different

jurisdictions do provide a Table A dealing with the Articles for a public company, and a Table B dealing with the Articles for a private company. This is not a monumental job and I therefore agree with this recommendation.

RECOMMENDATION G.

This recommendation has already been made.

RECOMMENDATION H.

Primarily this would depend on whether we use the technique in the O.B.C.A. defining the common share and special share. It could equally be handled in provisions regarding the purchase by a company of its own shares.

RECOMMENDATION I.

Committee discussed the preemptive rights over one year ago and were of the opinion that the preemptive right should not apply to a public company. There was however considerable support in the committee for a preemptive right to apply in the case of a private company and three possibilities were discussed:

1. A mandatory preemptive right.
2. A preemptive right unless the articles of the company stated otherwise.
3. A statutory permission to enable a preemptive right to be inserted in the articles.

Traditionally, in Alberta companies, the right to allot authorized but unissued shares, lies with the directors of a company, under the provisions of Table A and under the provisions of most of the articles of association that any of the members of the committee had seen at that time. Particularly in view of cutting down the number of members in the definition of a private company, the private company would approach much more closely "incorporated partnership" and it would seem that one of the above three provisions should be made statutor It was the feeling of the committee at that the time that if this were a mandatory requirement, which could only be waived by unanimous

consent of the existing shareholders, this would give an individual dissenting shareholder an unreasonable veto power. I am inclined to agree with this and my recommendation would be the second of the three alternatives.

RECOMMENDATION J.

I do not imagine there will be much dispute concerning this recommendation providing that the shareholders agreement is an unanimous shareholders agreement. I can see no reason why the shareholders of a small private company, if unanimous, should not take over the management of the company and dispense with directors entirely, providing that if they do so they are bound by the same obligations and liabilites as the directors would have been.

RECOMMENDATION K.

This has been discussed in recommendation J.

RECOMMENDATION L.

I can not see the point in this recommendation since it is not a concept that has ever been given any weight in our law. The philosophy enunciated in Jackson vs Hooper has never, to the best of my knowledge, been enunciated by any English or Canadian Court.

RECOMMENDATION M, N AND O.

All of these recommendations deal fundamentally with trying to give the shareholder in a private company the same rights as a partner in a partnership, the most basic of which is the right to terminate the relationship. In a public company the shareholder has no difficulty in this respect since he can always sell his shares if the stock is listed or is traded on a over the counter market. There maybe some problems with companies that do not comply with the definition of a private company and are not so traded. This is one

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insistence where perhaps a different criteria should be used so that the remedy of the shareholder depended on whether there was a market for the stock or not, but I suggest that this matter be left until we deal with shareholder's remedies.

CONCLUSIONS:

I. The distinct types of companies.

II. The problems of each and criteria for reform.

III. The problems of definition.

IV. The various sections in the Act which will be affected by the distinction.

I. THE DISTINCT TYPES OF COMPANIES.

It is submitted that there are really three distinct types of company:

1. The small corporate endeavour in which all of the shareholders are active participants, what is known in the U.S.A. as the "incorporated partnership".

2. The corporate entity in which all of the shareholders do not participate in the management but where the shares or securities of the company are not traded on an exchange or through an over-the-counter market.

3. The public company whose shares are traded on an exchange or through an over-the-counter market.

II. THE PROBLEMS OF EACH AND THE CRITERIA FOR REFORM.

1. The incorporated partnership does confir limited liabilities on the shareholders and does provide for perpetual succession, but

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it presents the participants with another set of problems, namely:

(a) The shareholder, unlike a partner in a partnership, has a very limited right to dissolve the business entity.

(b) Because his right to dissolve is the only right he has at present in Alberta, and because the Courts have refused to exercise this right except in the case of dead-lock situation, he can become the victim of a freeze-out.

(c) If he is unhappy with the situation there is no market or usually only a very limited market amongst the remaining shareholders in which he can sell his shares.

(d) Since a great number of Alberta private companies are incorporated and operated by people unsophisticated in the law, they are unaware of the formal complexities of company law and may in many incidents suffer because of this.

The basic criteria for reform in the area of the incorporated partnership or private company would therefore seem to be as follows:

(a) An expanded remedy granted to a minority shareholder who is being oppressed.

(b) Provision for a shareholders agreement under the terms of which the company may be run on a very informal basis without the necessity of directors meetings, providing that the liabilities normally associated with directors become the liabilities of the shareholders.

(c) Some statutory provision regarding the pre-emptive right, so that such a right exists unless the memorandum of association specifically provides otherwise.

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(d) This is a somewhat revolutionary thought but if the minority shareholder is going to be given expanded rights perhaps some similar rights should be given to the majority in order to enable them to deal with a recalcitrant minority shareholder.

2. The shareholder in the public company whose shares are not traded on a stock exchange or through an over-the-counter market seems to have the worst of both worlds in that he:

(a) Probably has little control over management.

(b) He too can be frozen-out and receive little return on his investment in shares because of salaries paid to management.

(c) He has not much, if any, greater market for his shares than the shareholder in the private company.

(d) There are usually too many shareholders for a unanimous shareholders agreement.

(e) The company is subject to little or no regulatory control.

The basic criteria for reform would therefore seem to be:

(a) Subject such companies to the regulatory control of the securities commission.

(b) Provide the shareholder with expanded rights such as an appraisal right in the event of oppression, a right to demand an investigation, an a more liberal means of maintaining a derivative action.

(c) To see if there can be some additional control on management such as an audit committee.

3. The shareholder of a public company, whose stock is traded on an exchange or through an over-the-counter market, under present Alberta law, has one main remedy, namely he may sell his shares. His

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right to influence management by the election of directors, unless he controls a large block of stock, is more illusion than fact. The absence of a board of directors that is independent of management removes one of the counter-weights in any balance of power. Three factors have improved his position in fairly recent years. Firstly, the securities legislation, secondly, the rules and regulations of the various stock exchanges in Canada, and thirdly, the search light of full disclosure. Over-the-counter stocks are usually traded through one market-maker brokerage house that hopes to be able to get the stock listed on an exchange in the future, so with few exceptions such brokerage houses do comply with the exchange rules as though the stock were already listed.

The criteria for reform therefore really is nothing more than what will reduce fraud in market manipulation or in some other manner, and anything that will increase ~~confidence of~~ CONFIDENCE IN management. If, as I believe, an independent and different outlook will increase the ~~confidence in~~ CONFIDENCE OF management, then provisions regarding an audit committee would be desirable.

III. THE PROBLEM OF DEFINITION.

I had prepared a definition of each of these three kinds of companies, but when I started to work through the Act as to the different applications of various provisions for each I found that there were very few distinctions between numbers 2 and number 3. My recommendation therefore is that the distinction between public and private company be retained, but as will be seen some additional qualifications are used when an attempt is made to distinguish between the public company whose stock is traded and the one whose is not.

My proposed definition for a private company and a public company are as follows:

"Private Company" means a company that by its memorandum:

1. (a) restricts in some manner the right to transfer any of its shares.

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(b) Limits the number of its shareholders, whether registered or beneficial, to no more than fifteen (15) (exclusive of persons who are in employment of the company and person who, having been formerly in the employment of the company, became shareholders while in such employment.)

(c) Prohibits any invitation to the public to subscribe for or acquire any of the securities of the company

2. Is not a subsidiary of a public company.

"Public Company" means a company that is not a private company.

IV. THE VARIOUS SECTIONS IN THE ACT WHICH WILL BE AFFECTED BY THE DISTINCTION.

(A) Matters arising from definiton.

1. The number of shareholders. Fifteen (15) shareholders is the number recommended by Professor Iacobucci. Frankly I am not sure where this limit should be and perhaps it should be twenty (20) to match the present practice of the Alberta Securities Commission with regard to commerical syndicates under the Securities Act. In any event whether it is 15 or 20 the Act should also provide:

(i) A method of conversion to a public company or a method of conversion from a public company to a private company.

(ii) A reasonable time granted to the company to recitify an inadvertent breach of the provision.

(iii) A discretion vested in the tribunal so that the company may still be classed as a private company even though the number of shareholders does exceed the statutory limit.

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While we have spoken of the maximum number in the definition it is clear that the minimum number would be one (1) and that special provision will have to be made for the single shareholder meeting as discussed earlier in this paper.

2. Restriction on transfer of shares. The definition does not prohibit a public company from having such a restriction but the various stock exchange rules do. Provision therefore should be made for "constrained share" which may be necessary to comply with government regulations such as the Air Transport Committee, the Canadian Radio and Television Committee or provincial legislation which may demand restriction regarding citizenship or residence.

3. Prohibition against public offering of securities. This will occur through-out the remainder of this part of the paper.

4. Prohibition regarding subsidiary of a public company. In this regard I think the European law which we have mentioned throughout this paper may be of some assistance particularly the provisions regarding groups of companies and the provisions of "control agreements".

(B) Other aspects of the Act.

1. The number of Directors. If we wish to impose an audit committee on public companies then I suggest the minimum number of directors for a public company be three (3), and the minimum number for a private company be one (1).

2. Conflict of interest situations amongst the directors. In the incorporated partnership which constitutes approximately 90% of the Alberta companies incorporated under Alberta Law, some saving provision must be made for the conflict of interest situation since it will constantly arise, and providing full disclosure is made, and the only time that a director gets a vote is if his vote is necessary to constitute a quorum.

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3. Election of directors. The Act should make provision for cumulative voting for either public or private companies should the memorandum so provide.

4. Removal of directors. I would prefer not to make any recommendations in this regard at the present time but wait until we have our paper on directors.

5. Alternate directors. Once again I would prefer to wait until we have done our paper on directors.

6. Trust indentures. These provisions should not apply to a private company.

7. Insider trading. This really is a two-pronged matter involving firstly disclosure, and secondly liability. While my view may change after we have done a paper on insider trading, my present opinion is that neither aspect should apply to the private company.

8. Proxy solicitation. This would only apply to the public company.

9. Take-over bid. This would only apply to the public company.

10. Access to records. In part this will depend on whether we adopt the British Columbia attitude and have most of the records of the company at the company's registered office rather than filed at a Companies Branch. A part from this I am tentatively in favour of permitting shareholders in a private company to examine everything they can examine now plus minutes of directors meetings.

11. Definition of special resolution. It might be considered that there be a different standard for public company and private company. In a public company the two-thirds majority as is required

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in most of the other Canadian Acts, but in a private company, more in line with a partnership requirement, this could be raised to seventy-five (75%) percent.

12. Pre-emptive right. Generally I think this should prevail in the private company unless the memorandum provides otherwise, and I suggest that it might ~~qualify~~ apply to the public company whose shares are not listed on an exchange or traded through an over-the-counter market.

13. Audit and Auditors.

(a) Qualifications of Auditors. The qualifications for Auditors could be relaxed with regard to private companies.

(b) The necessity for an audit. I think this could be waived by the private company providing that all of the shareholders agreed to do so, but any shareholder should have the right to demand an audit.

(c) The Audit Committee. It is my recommendation that this be necessary in a public company.

(d) Filing of financial statements. If not filed the financial statements should certainly be available to the public for a public Co. But not for a private Co.

(e) The contents. My first impression is that if you are going to have financial statements they might as well be thorough whether the company is public or private but I would like to reserve my final decision on this until we have had discussions with the Alberta Institute of Chartered Accountants since we may be imposing a considerable additional cost on private companies.

14. Fundamental change. Once again my views are not fixed on this until we have done a paper in this regard, but, it would seem to me that in this case the shareholder in a private company and the shareholder in a company whose stock is not traded on a market are very much in the same position, whereas the shareholder in a

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public company can always sell his shares.

15. Shareholders remedies. There seem to me to be four aspects to this topic.

(a) The right to dissolve. A shareholders right to dissolve should be subject to approval of the tribunal, or unanimous approval of the shareholders in a private company.

(b) Apprasial rights, here again I would class the public company whose stock is not traded with the private company and grant the apprasial right to the shareholder in a private company and to a shareholder in a company whose stock is not traded.

(c) Derivative action at the present time I can see no difference in the shareholders remedy in either case.

(d) Deadlock in the small private company. This should be the subject of a paper.

16. Purchase By A Co of its own Shares - No Difference

SOME NEGATIVE COMMENTS.

1. I do not think that economic size by itself is of any importance in distinguishing between the kinds of companies.

2. I am not wedded to the idea that a shareholder of a private company should have all the rights of a partner in a partnership. Providing his treatment as a minority shareholder is neither unjust nor inequitable then I can see no reason to give him a right to either terminate the relationship by dissolving the company or compelling his fellow shareholders, or the company, to purchase his shares.

3. I am of two minds as to whether the number of employees should constitute a part of the definition of a private company.

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If it should I really don't know what figure we should use as the maximum number of employees that a private company may have

THE DEPOSITS REGULATION ACT

CHAPTER 108

Short title

1. This Act may be cited as *The Deposits Regulation Act.* [1964, c. 21, s. 1]

Definitions

2. In this Act,

(*a*) "advertisement" includes any form of advertising in any media or any act, conduct, communication or negotiation or any display, writing or statement made, done, issued or published to members of the public or in a public place;

(*b*) "Commission" means the Alberta Securities Commission;

(*c*) "deposit" means a loan of money at interest or at a discount or repayable at a premium in money or otherwise but does not include a loan of money to any corporation in connection with the issue and sale of its bonds, debentures, notes or other written evidences of indebtedness;

(*d*) "members of the public" means any section or segment of the public without regard to the numbers thereof;

(*e*) "short term securities" means bonds, debentures or other evidences of indebtedness maturing within 180 days from the date of acquisition thereof and authorized for trustee investment under section 5 of *The Trustee Act;*

(*f*) "solicitation of deposits" means any advertisement calculated directly or indirectly to lead to or induce the deposit of money or the investment of money on deposit by members of the public, and any reference to soliciting deposits shall be construed accordingly. [1964, c. 21, s. 2]

Exemption from Act

3. This Act does not apply to

(*a*) a chartered bank, or

(*b*) a trust company to which *The Trust Companies Act* applies, or

(*c*) a credit union to which *The Credit Union Act* applies, or

(*d*) an issuer within the meaning of *The Investment Contracts Act,* or

(*c*) an association within the meaning of *The Co-operative Associations Act*, or

(*f*) a post office savings bank established under the *Post Office Act* (Canada), or

(*g*) a treasury branch, or

(*h*) an insurer to which *The Alberta Insurance Act* applies, or

(*i*) any person or class of persons exempted by the regulations. [1964, c. 21, s. 3]

Solicitations

4. No person shall solicit deposits in any manner that is false, misleading, deceptive or likely to create an erroneous impression. [1964, c. 21, s. 4]

Advertisements

5. (1) No advertisement soliciting deposits shall be made, done, issued or published in any manner without such advertisement first having been submitted to the Commission for its review and certification as complying with the provisions of this Act and the regulations, and no advertisement shall be made, done, issued or published without such certification.

(2) Any person who, in the ordinary course of business, makes, issues or publishes an advertisement soliciting deposits on the order or direction of another person, the making, issue or publication of which by such other person constitutes an offence under this Act, is not guilty of such offence if the matter or material contained in such advertisement was not devised or selected by such person or under his direction or control. [1964, c. 21, s. 5]

Security for deposits

6. (1) Every person accepting or receiving deposits from members of the public shall set aside and segregate and hold separate from the other assets of any such person as security for such deposits

(*a*) cash on hand, or

(*b*) cash deposited in a chartered bank or treasury branch, or

(*c*) short term securities,

in an amount or principal amount aggregating not less than 60 per cent of the aggregate amount of the deposits accepted or received.

(2) Every person accepting or receiving deposits from members of the public shall keep records of such deposits and the particulars of the security therefor in the form and content prescribed by the Commission.

(3) Every person accepting or receiving deposits from members of the public shall furnish to the Commission a return in the prescribed form on or before the first day of January, April, July and October in each year containing information as to the particulars of the security for such deposits certified by the auditor or accountant of such person.

(4) Any person appointed by the Commission to do so may at any reasonable time inspect the books, accounts, documents and other records kept by any person receiving or accepting deposits from members of the public and may require any officer, director or employee of any such person to furnish such information as the Commission considers necessary for the purpose of acertaining whether this Act and the regulations have been or are being complied with.

(5) For the purposes of subsection (4) the representative of the Commission has the same power

(*a*) to summon and enforce the attendance of witnesses,

(*b*) to compel witnesses to give evidence on oath or otherwise and to produce documents, records and things, and

(*c*) to seize and take possession of any documents, records, securities or other property

as those given by section 21, subsections (4) and (6) of *The Securities Act* to a person making an investigation under that section. [1964, c. 21, s. 6; 1967, c. 76, s. 150]

Fees

7. Any advertisement submitted to the Commission for review and certification and every return, record or other information required to be filed with the Commission shall be accompanied by the fee prescribed by the regulations. [1964, c. 21, s. 7]

Offences and penalties

8. (1) Every person who contravenes this Act is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or to both.

(2) Every corporation that contravenes this Act is guilty of an offence and liable on summary conviction to a fine of not more than $25,000.

(3) Any officer, director or agent of a corporation who directed, authorized, assented to, acquiesced in, or participated in a contravention of this Act by that corporation is a party to and guilty of the offence and is liable on summary conviction to the fine or imprisonment or to both provided in subsection (1), whether or not the corporation has been prosecuted or convicted. [1964, c. 21, s. 8]

Regulations

9. The Lieutenant Governor in Council may make regulations

(*a*) exempting any person or class of persons from the application of this Act,

(*b*) prescribing the requirements with respect to the submission to the Commission, for its review and certification, of advertisements that solicit deposits,

(*c*) prescribing the form and content of records of deposits and particulars of the security therefor,

(*d*) prescribing the return to be furnished to the Commission by persons or corporations receiving or accepting deposits containing information as to the particulars of security therefor,

(*e*) prescribing and providing for fees under this Act, and

(*f*) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act. [1964, c. 21, s. 9]