Institute of Law Research and Reform

Company Law Project

PROXIES

Summer of 1978

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PART XII

PROXIES

141. Definitions. -

"form of proxy" - "form of proxy" means a written or printed form that, upon completion and execution by or on behalf of a shareholder, becomes a proxy;

Note: This is identical with CBCA, s. 141 and Ontario BCA, s. 115(2).

"information circular" - "information circular" means the circular referred to in subsection 144(1);

Note: This is based upon Ont. BCA, s. 155(b). Does such a definition serve any useful purpose? If in s. 144(1) the words "in prescribed form" are included, no definition may be necessary. Alternatively, it could be defined thus: - "information circular" means a circular, in a form to be prescribed by regulations, required to be sent by subsection 144(1).

"proxy" - "proxy" means a completed and executed form of proxy by means of which a shareholder appoints a proxyholder to attend and act on his behalf at a meeting of shareholders;

Note: This is taken from CBCA, s. 144. The wording in Ontario BCA, s. 115(c) is slightly different. "Proxyholder" seems preferable to "nominee". As the expression "proxy" (and "proxyholder") is used elsewhere in the Act, e.g., ss. 133-135, it may be that the term ought to be defined in the original definitions section.

"proxyholder" - "proxyholder means a person appointed by means of a proxy;

Note: As the term "proxyholder" is used in this Part, and elsewhere in the Act, should it be defined, and, if so, here or in s. 2?

["registrant" - "registrant" means a securities broker or dealer required to be registered to trade or deal in securities under [the laws of any jurisdiction] [the Securities Act, ...];]

Note: It is suggested that the provision dealing with the duty of a registrant be omitted entirely, in which case no definition is required.

"solicit" and "solicitation" - "solicit [and] "solicitation" include[s]

(a) any request for a proxy whether or not accompanied by or included in a form of proxy,

(b) any request to execute or not to execute a form of proxy or to revoke a proxy,

(c) the sending of a form of proxy or other communicatio to a shareholder under circumstances reasonably calculate to result in the procurement, withholding or revocation of a proxy, and

(d) the sending of a form of proxy to a shareholder under section 143,

but do[es] not include

(e) the sending of a form of proxy in response to an unsolicited request made by or on behalf of a shareholder, [or]

(f) the performance [by any person] of ministerial acts or professional services on behalf of a person soliciting a proxy,

[(g) the sending by a registrant of the documents regerred to in section 147, or

(h) a solicitation by a person in respect of shares of which he is the beneficial owner.]

Notes:

(1) The basic question is which precedent to follow - the CBCA, or the Ontario Securities Act? As the Alberta Securities Act will probably follow the latter it would seem that the major need for consistency is between the two Alberta statutes.

(2) The OSA defines "solicit and solicitation", the CBCA uses or

(3) The OSA refers to "any" request, the CBCA to "a" request.

(4) In (c), (d) and (e), the OSA speaks of "the sending or delivery". The words "or delivery" seem unnecessary.

(5) In (f), the OSA inserts the words "by any person", and uses the word "ministerial" where the CBCA says "administrati

(6) The only major point of difference is that the OSA omits (g) and (h). These are, however, included in the category of "exempt solicitations" under OSA, s. 87(2). This has only one practical consequence. If, as will be suggested, a deliberate falsehood in any solicitation (whether or not it is exempt from the circular formalities) constitutes an offence, then it does matter whether these two categories are classified as "exempt solicitations", as in the OSA, OBCA and the current Alberta Acts, or as "non-solicitations", as in the CBCA. There will be little difference in practice - a beneficial owner is unlikely to need to lie in order to be given a proxy by the registered owner - but in principle there is no reason why it should not be regarded as a solicitation offence. It is suggested that (g) and (h) be omitted.

(7) The final version should only be drafted when it is known what form the new Alberta Securities Act will take.

["solicitation by or on behalf of the management of a corporation" - Text as in CBCA.]

Note: This is not defined in the Ontario BCA or SA, though the expression is used. It was presumably considered to be unnecessary.

142.(1) Appointing proxyholder.

A shareholder entitled to vote at a meeting of shareholders may by means of a proxy appoint a proxyholder, or one or more alternate proxyholders, who shall not be required to be a shareholder, to attend and act [on his behalf] at the meeting in the manner and to the extent authorized by the proxy and with the authority conferred by the proxy.

Note: The CBCA could be interpreted to mean that it is only the alternate proxyholders who are not required to be shareholders. As "proxy" is defined to mean an executed form of proxy it would seem that any limitation on authority should be contained in the form of proxy itself. A limitation could, however, be imposed in some other manner, e.g., by a separate letter. The expressions "to the extent authorized" and "with the authority conferred" seem to mean the same thing. Might it be better to say - "in the manner and to the extent authorized by the shareholder."?

[(1a) Rights of proxyholder.

A proxyholder [who has been duly appointed] may exercise at a meeting of shareholders all the rights which could be exercised by the shareholder he represents if that shareholder

attended the meeting in person unless the by-laws or the proxy provide otherwise, but no by-law may exclude the right of a proxyholder to demand a ballot and to vote by ballot.]

Note: This suggested provision is a new one. It might be useful to clarify the position. If included, the subsections should be renumbered.

142.(2) Execution of proxy.

A proxy shall be executed by the shareholder or by his attorney authorized in writing.

Note: The reference to corporate seal, in the Alberta and Ontario Acts, has been omitted.

142.(3) Validity of proxy.

A proxy is valid only at the meeting in respect of which it is given or any adjournment thereof.

Note: This is CBCA, s. 142(3). The Alberta and Ontario Acts provide for a 12-month period from the date of the proxy. The CBCA solution is thought preferable.

[(3a) Form of proxy.]

Note: The CBCA does not specify any form of proxy, except where the Regulations apply, i.e., where a proxy is solicited The Alberta and Ontario Acts require all proxy forms to state certain matters, e.g., date, shares to which it relates, restrictions on authority. It is felt that no such requirement is necessary.

142.(4) Revocation of proxy.

A shareholder may revoke a proxy

(a) by depositing an instrument in writing executed by him or by his attorney authorized in writing

(i) at the registered office of the corporation at any time up to and including the last business day preceding the day of the meeting, or an adjournment thereof, [in respect of which the proxy is given], or

(ii) with the chairman of the meeting on the day of the meeting or an adjournment thereof; or

(b) in any other matter permitted by law.

Note: The words "in respect of which the proxy is given" seem more appropriate than "at which the proxy is to be used", and are also consistent with s. 142(3).

[(4a) Effect of revocation.

A vote given in accordance with a [duly executed] proxy shall be valid notwithstanding the revocation of the proxy unless notice of the revocation has been given in accordance with paragraph (a) of subsection (4).]

Note: This is a suggested addition and would place the onus on the shareholder to give proper notice of revocation. A problem may still arise where revocation is by the death of the shareholder, since subsection (4) deals only with revocation by the shareholder. The intention of (4a) is that the vote would be valid unless notice of the revocation was properly given, i.e., by deposit at the registered office or with the chairman, but in the case of death that notice would obviously not be an instrument in writing executed by the shareholder. Subsection (4a)

simply requires that the notice be given in accordance with (4)(a), not that the revocation be in conformity. Is further clarification needed?

142.(5) Deposit of proxies.

The directors may specify in a notice calling a meeting of shareholders a time not exceeding forty-eight hours, excluding Saturdays and holidays, preceding the meeting or an adjournment thereof before which time proxies [given in respect of the meeting] must be deposited with the corporation or its agent.

Note: Again, "given in respect of.." seems preferable to "to be used at...". Such a provision could be inserted in the by-laws, but it seems better to require the actual time to be stated in the notice of the meeting.

143.(1) Mandatory solicitation.

The [management] [directors] of a corporation which [distributes] [issues] [offers] its securities to the public shall, concurrently with giving notice of a meeting of shareholders, send a form of proxy [in prescribed form] to each shareholder who is entitled to receive notice of the meeting.

[(2) Form of proxy.

The form of proxy required to be sent by subsection (1) shall be in the form prescribed [by regulations made under this Act] [by Part... of the Regulations made under the Securities Act,...].

Notes:

(1) The major policy issue is which corporations should be required to solicit proxies. Under Ontario law, only an offering company is required to do so. This has the great advantage that the BCA and the SA apply to the same

companies. The alternative is to make s. 143(1) apply to all corporations, as in the CBCA,and then to provide exemptions in s. 143(2), thus:

(2) Exception. - Where a corporation...

[A. does not offer its securities to the public]

[B. has fewer than fifteen shareholders, two or more joint holders being counted as one shareholder]

[C. is a private company for the purposes of this Act]

...the management of the corporation is not required to send a form of proxy under subsection (1).

Alternative A is based upon the Ontario Law.

Alternative B is that in the CBCA.

Alternative C is based in part upon the current Alberta law.

(2) Form of proxy. It may be sufficient simply to state "in prescribed form". Alternatively, reference could be made to the regulations under the (proposed) new Securities Act. The safest course may be to adopt regulations under the BCA which are identical, as to form and content of proxy forms, with those adopted under the Securities Act.

(3) As it is the directors who must send notice of meeting, the duty to send proxy forms should rest with them, rather than with the "management". Alternatively, it is sufficient simply to provide that "A corporation shall...".

(4) The precise terminology - "issues", "distributes", "offers", - will depend upon what term is employed elsewhere in the Act and in the Securities Act.

143.(3) Offence.

If [the management of] [the directors of] a corporation fail[s] to comply without reasonable cause with subsection (1), the corporation is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars.

143.(4) Idem.

Where a corporation is guilty of an offence under subsection (3), then, whether or not the corporation has been prosecuted or convicted, any director or officer of the corporation who knowingly authorizes, permits or acquiesces in such failure is also guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both.

Note: The whole question of prescribed offences, as opposed to general offences, under the Act needs to be reviewed. There is an additional complication here. It has been proposed that s. 143(1) should apply only to an issuing company, which will also be required to comply with a similar provision under the Securities Act. In any event, virtually every company to which s. 143(1) applies will also be affected by the Securities Act. There is consequently the problem that the same omission, to send proxy forms, will constitute an offence under both acts (except where the omission is only in respect of shareholders not resident in Alberta). However, the Ontario Securities Act prescribes different penalties - $25,000 for a corporation, and $2,000 or one year imprisonment or both for a director, etc. The Ontario BCA does not prescribe any specific penalty for failure to comply with the mandatory solicitation provisions, but the "general" offence provision (s. 259) would still apply.

144.(1) Solicitation of proxies.

Subject to subsection (2), a person shall not solicit a proxy unless

(a) in the case of a solicitation by or on behalf of the management of a corporation, an information circular [in prescribed form] is sent, either as an appendix to

or as a separate document accompanying the notice of the meeting, to each shareholder whose proxy is solicited; or

(b) in the case of any other solicitation, an information circular [in prescribed form] is sent by the person making the solicitation, concurrently with or prior to such solicitation, to each shareholder whose proxy is solicited and to the corporation.

Notes:

(1) Proposed exemptions are set out in s. 144(2).

(2) The word "solicitation", being a defined term, is preferred to "soliciting".

(3) "Information circular" is preferred to "management proxy circular" and "dissident's proxy circular". The latter term may be inaccurate, and the Ontario BCA and SA employ "information circular". See also s. 141.

(4) "in prescribed form" may be unnecessary. This may either be stated in s. 141, or a separate subsection, based on s. 143(2), above, may be inserted - see s. 144(3), below.

(5) It is suggested that the requirement in the CBCA, that a non-management circular be sent to the corporation, be retained. However, the requirement that circulars also be sent to the auditor is omitted.

144.(2) Exemption.

Subsection (1) does not apply to

(a) any solicitation, otherwise than by or on behalf of the management of a corporation, where the total number of shareholders whose proxies are solicited is not more than fifteen, two or more joint holders being counted as one shareholder;

(b) Any solicitation by a person made pursuant to section [49] of the Securities Act; and

(c) any solicitation by a person in respect of shares of which he is the beneficial owner.

Note: This is taken from Ont. BCA s. 118(2) and S.A., s. 87(2). The reference in (b) is to the section in the Ont. S.A.

[144.(3) Form of information circular.

An information circular required to be sent by subsection (1) shall be in the form, and contain the information, prescribed by [regulations made under this Act] [Part ... of the Regulations made under the Securities Act...].

Note: This may not be necessary at all, depending upon how "information circular" is defined in s. 141. See also the note to s. 143(2), above.

[144.(4) Copy to Registrar.

A person required to send an information circular shall send concurrently a copy thereof to the Registrar together with a copy of the notice of meeting, form of proxy [and any other documents for use in connection with the meeting.]]

Note: Under the Ontario S.A. there appears to be no requirement to send copies of information circulars to the Commission. If this is to be so, it might be strange to require copies to be sent to the Registrar? The "any other documents" requirement seems rather too broad, and not very precise.

[144.(5) Offence.

A person who...]

Note: If included, this would be the same as CBCA, s. 144 (3), except that it would refer to subsections (1) and (4). The remarks on s. 143(3),(4), apply.

[144.(6) Idem.

If the person...]

Note: If included, this would be the same as CBCA, s. 144(4), but would refer to subsection (5). See again s. 143(3),(4).

[144.(7) Offence.

Any person who knowingly or recklessly makes an untrue statement in any form of proxy, information circular or otherwise in connection with the solicitation of a proxy commits an offence under subsection 243(1) of this Act.]

Note: The intention of this provision is to ensure that a person who solicits a proxy, whether or not required to under s. 143, and whether or not required to issue an information circular under s. 144(1), is guilty of an offence in the circumstances stated. It would apply, in particular, to a non-management solicitation to 15 or fewer shareholders.

145.(1) Exemption order.

Upon the application of an interested person, the Registrar may make an order on such terms as he thinks fit exempting such person from any of the requirements of subsection 143(1) or subsection 144(1), which order may have retrospective effect.

145.(2) Publication.

The Registrar shall set out in the periodical referred to in section 123 the particulars of exemptions granted under this section together with the reasons therefor.

Note: This follows the CBCA. The main question is to whom should the power to exempt be given. Under the Ontario BCA (s. 119(2)) it is given to the Commission and in Alberta at present to a designated judge (C.A., s. 138(2)). Under the Ontario S.A. (s. 89(2)) the Commission is given power to exempt, but an exemption sought under the BCA could be from a requirement which is not contained in the SA at all, e.g. a proxy solicitation in a non-issuing company.

146.(1) Duty of proxyholder.

A person who solicits a proxy and is appointed proxyholder shall attend in person or cause an alternate proxyholder to attend the meeting in respect of which the proxy is given and [shall] comply with the directions of the shareholder who appointed him.

146.(2) Offence.

A proxyholder or alternate proxyholder who without reasonable cause fails to comply with the directions of a shareholder [under this section] is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both.

Note: This reproduces CBCA, s. 146. The wording of subsection (2) is not entirely clear. The "directions" are not given "under this section". What seems to be intended is: - "A proxyholder [or alternate proxyholder] to whom subsection (1) applies who, without reasonable cause, fails to attend a meeting or to comply with the directions of a shareholder is guilty of an offence...", i.e., a proxyholder who has solicited the proxy. The position

of an alternate proxyholder is unclear. Presumably, the alternate has not himself solicited the proxy, but, in order to be entitled to attend he must be named in it. Consequently -

(a) a solicitor can only cause an alternate to attend if the shareholder has named one;

(b) an alternate should not be liable unless he can also be regarded as having solicited the proxy.

[146.(3) Demanding ballot.

Notwithstanding subsection (1), where proxies have been solicited by or on behalf of the management of a corporation a proxyholder appointed pursuant thereto shall not be obliged to demand a ballot in respect of any matter if the proxies requiring that the shares represented thereby be voted against what would otherwise be the decision of the meeting in respect of that matter do not total more than five per cent of all the voting rights attached to all the shares entitled to be voted and [be] represented at the meeting and it is apparent that the decision of the meeting would not be otherwise were a vote to be taken by ballot.]

Note: This provision attempts to deal with the situation to which Alberta C.A., s. 143, S.A., s. 105 and Ontario BCA, s. 121, S.A. s. 88, apply. It is considered that it is the duty of the proxyholder to demand a ballot, rather than that of the chairman. However, on balance it is felt that such a provision is undesirable and should be omitted entirely. No such provision appears in the CBCA.

[147.(1) Duty of registrant.

Shares of a corporation....]

Note: It is suggested that the entire CBCA, s. 147, be omitted altogether and be contained only in the Securities Act. The provisions are not contained in the Ontario BCA or the current Alberta C.A., and do not appear in the "Proxies" part of the corresponding Securities Acts. Regulation of brokers and dealers is essentially a matter for securities, rather than companies, legislation.

148.(1) Restraining order.

If a form of proxy [or information circular] contains an untrue statement of a material fact or omits to state a material fact required therein or necessary to make a statement contained therein not misleading in the light of the circumstances in which it was made, an interested person or the Registrar may apply to a court and the court may make any order it thinks fit including, without restricting the generality of the foregoing,

(a) an order restraining the solicitation [of a proxy], the holding of the meeting, or [restraining] any person for implementing or acting upon any resolution passed at the meeting to which the form of proxy or [information circular] relates;

(b) an order requiring a correction of any form of proxy or [information] circular and [requiring] a further solicitation;

(c) an order adjourning the meeting.

148.(2) Notice to Registrar.

An applicant under this section shall give to the Registrar

notice of the application and the Registrar is entitled to appear and to be heard in person or by counsel.

Note: This duplicates CBCA, s. 148, with some minor amendments. It may be that subsection (2) should go further and require notice of application to be given to the corporation and to the person who issued the form of proxy or information circular in question. In almost every case the form and circular will also be subject to the Securities Act. Should not notice also be given to the Commission?

PROXIES

A. INTRODUCTION

Certain essential principles are common to most recent Canadian companies legislation and are applicable under existing Alberta law. These are:

(i) Any shareholder entitled to vote at a meeting of shareholders is entitled to appoint by proxy a proxyholder to represent him and to vote his shares at the meeting.

(ii) With certain exceptions, applicable to small or private companies, every corporation which gives notice of a shareholders' meeting must send to every shareholder a form of proxy in prescribed form.

(iii) With some exceptions, no corporation or person may solicit a proxy from a shareholder without sending an information circular in prescribed form.

However, there are a number of points of detail, particularly regarding the exceptions under (ii) and (iii), which require examination. The two major issues seem to be:

(a) In what circumstances should solicitation of proxies be mandatory?

(b) In what circumstances should a corporation or other person who solicits proxies be required to comply with the detailed regulations governing the form and content of information circulars?

B. RELATIONSHIP TO SECURITIES LEGISLATION

The various Securities Acts in Canada contain detailed provisions governing the solicitation of proxies, the sending of an information circular and the form and contents of the various documents required to be sent. On the assumption that Alberta will, in the near future, amend its existing Securities Act and will

adopt legislation closely modelled on the Ontario Securities Act, the latter will be taken as the model for the purposes of these discussions. Two aspects of securities legislation are of particular relevance in determining the extent to which company law must deal with the question of proxy solicitation:

(i) Corporations which are affected.

As a broad generalization, a provincial Securities Act will apply to all corporations, wherever incorporated, which issue or trade in securities within the province, or whose securities are listed on a stock exchange within the province. In addition, by s. 1(1) (36.iv.), the Ontario Act applies to any corporation to which the (Ontario) Business Corporations Act applies which offers its securities to the public.

(ii) Proxy solicitations which are affected.

Under s. 86 of the Ontario Act, mandatory solicitation is required of all security holders whose latest address is in Ontario.

In the context of companies' legislation, it would seem that the following questions need to be resolved:

(a) Should any corporation which is incorporated under the (proposed) Alberta Business Corporations Act, and which is not subject to the provisions of the Alberta Securities Act, be subject:

(i) to provisions which make proxy solicitation mandatory, or

(ii) in the event that it (or any other person) does choose to submit proxies, to the provisions as to the form and content of information circulars, etc.?

(b) Should an Alberta corporation, i.e., one incorporated under the (proposed) Alberta Business Corporations Act, be required to comply with the relevant proxy solicitation rules with respect to all its security holders, wherever resident, as opposed to only those resident in Alberta?

C. APPOINTMENT OF PROXYHOLDER.

(i) The Right to Appoint.

This may be regarded as a fundamental right which belongs to every shareholder entitled to vote at a meeting of shareholders: see Alberta C.A., s. 139(1); CBCA, s. 142(1); Ontario BCA, s. 116 (1). This right is one which should not be capable of being restricted by the by-laws.

(a) Alternate proxyholders. The CBCA, s. 142(1), allows a shareholder to appoint one or more alternate proxyholders: the corresponding Alberta and Ontario provisions refer only to "a person". The point seems of importance only if a closing date is specified for deposit of proxies, as is permitted under CBCA, s. 142(5); Alberta C.A. s. 139(5). Should the directors be permitted to know at that time the precise identity of the proxyholder? It seems that the use of an alternate could cause problems, e.g., where two or more alternates arrive at the meeting. On the other hand, the sudden illness of a proxyholder shortly before a meeting could result in a shareholder being disenfranchized. It would seem that the purpose for requiring deposits of proxies is to enable the management to know the number of votes to be cast in a particular way, thus expediting the declaration of a vote by ballot. No share may be voted more than once, so the appointment of an alternative seems unobjectionable. Section 146(1) also anticipates that an alternative may be appointed.

(b) Who may be appointed? It seems essential, especially in small companies, that the proxyholder need not himself be a shareholder. This is specified in CBCA, s. 142(1); Alberta C.A., s. 139(1); Ontario CBA, s. 116(1); cf. Alberta Table A, art. 49, which requires that the proxyholder be entitled on his own behalf to be present and to vote. It should not be possible for the by-laws to vary this right.

(c) Power and authority of proxyholder. Under CBCA, s. 142(1), a proxyholder may be appointed "to attend and act at the meeting in the manner and to the extent authorized by the proxy and with the authority conferred by the proxy." The Alberta and Ontario Acts are essentially similar.

The rights, or powers, of a proxyholder may be restricted in two ways:

(i) by the proxy appointing him, i.e., the appointer may limit his authority, e.g. to support or oppose an amendment. This is as it should be, and is essentially a matter between shareholder and proxyholder, though the CBCA, s. 146(2), makes it an offence for a soliciting proxyholder to act contrary to directions;

(ii) by the Act or by laws. It is clear that the proxyholder is entitled to attend the meeting, but less clear just what "acts" he is permitted to perform, e.g. can a proxyholder speak, vote on a show of hands, call for a poll, vote on a poll or be included in a quorum? Under Table A of the Alberta Act, a proxyholder may vote on a poll (art. 48), but apparently cannot call for a poll (art. 40 - though as, under art. 39, he must himself be a shareholder, he can do so in his own right) and is not counted in a quorum (art. 35). By contrast, under the CBCA, a proxyholder can call for a poll (s. 135(2)) as well as vote on it, and is

included in a quorum (s. 133(1)). It remains unclear whether he can speak - other than to call for a poll - or can vote on a show of hands. It seems essential that a proxyholder should be able to call for a poll, as well as vote on it, and, probably, that he should be included in a quorum. Whether he should be able to speak, generally, may be questioned. Objection could perhaps be taken to the appointment of a proxy-holder in order to have an argument presented with greater eloquence and expertise. One solution would be to stipulate that a proxyholder has all the powers which could be exercised at the meeting as if the proxyholder were an individual shareholder (cf. CBCA, s. 134(3) which so provides in the case of a representative of a body corporate), subject only to any limitations upon his authority contained in the proxy. Such a provision would permit a proxyholder to raise questions and discuss matters at an annual meeting (cf. CBCA, s. 131(2)).

(ii) Method of Appointment.

Certain rules are necessary to determine what constitutes a valid proxy. Thus:

(a) Execution. A proxy must be executed by the shareholder or by his attorney authorized in writing: CBCA, s. 142(2); Alberta C.A., s. 139(2); Ontario BCA, s. 116(2). The current Alberta and Ontario acts require a proxy executed by a body corporate to be done under the corporate seal. Presumably this will no longer be required. Normally it is preferable for a corporate shareholder to appoint a representative, rather than a proxy (see. CBCA, s. 134) but it may simply wish to give a proxy to the management of the corporation of which it is a shareholder.

(b) Duration. The CBCA, s. 142(3), provides that a proxy is valid only at the meeting in respect of which it is given or at any adjournment thereof. The Alberta and Ontario acts provide that a proxy ceases to be valid one year from its date. The former rule seems preferable. In either case, only one annual meeting would normally be covered (though an annual meeting may be held less than twelve months after its predecessor), but it would seem that a proxy ought to be given in respect of each special meeting.

(c) Form and content. In the case of mandatory solicitation, detailed requirements are prescribed as to form and contents. Where these do not apply, then it may be that no formal requirements are necessary. This appears to be the case under the CBCA, since Part IV of the Regulations apply only to forms which are required to be sent to the Director under s. 144(2). By contrast, the Alberta and Ontario Acts required certain information to be stated in addition to any statutory requirements governing mandatory solicitation: Alberta C.A., s. 139(3); Ontario BCA, s. 116(3). These requirements are:

(i) date;

(ii) appointment of and name of nominee (proxyholder);

(iii) restrictions, limitations or instructions as to the manner in which the shares are to be voted, or as to the number of shares in respect of which the proxy is given;

(iv) restrictions, etc., that may be necessary to comply with the laws of any jurisdiction in which the shares are listed.

As a practical matter, one would expect all the above information to be stated as well as, if the CBCA duration rule is to apply, the meeting in respect of which the proxy is given. Whether it is necessary for the Act to specify these matters is, however, open to question. Disputes might arise:

(i) between the shareholder and the corporation. The corporation, or the chairman of the meeting, would presumably be entitled to refuse to recognize a proxy which was not duly executed, did not state the date or otherwise clearly indicate the meeting in respect of which it was given, did not name the proxyholder, or did not indicate clearly the shares in respect of which it was given.

(ii) between the shareholder and the proxyholder. A proxyholder who contravenes his instructions is in breach of trust. It would not seem to matter how those instructions were given, e.g., they could well be in a separate letter. It is suggested that the corporation ought not to be affected by notice (except in the case of fraud or oppression) or by constructive notice of any limitation upon a proxyholder's authority. There consequently appears to be no good reason for requiring the form of proxy to set out any such limitation. The position is, of course, entirely diferent where a proxy has been solicited.

(iii) between the shareholder or corporation and the authorities in some other jurisdiction. Normally there will be problems only where a proxy is solicited. In any event, it seems unnecessary and inappropriate to require that the form should comply with the laws of another jurisdiction.

It is suggested, consequently that requirements as to form and content of the appointment are unnecessary.

(iii) Revocation.

The giving of, and the revocation of, a proxy gives rise to the following legal consequences:

(a) between the shareholder and proxyholder. The giving of a proxy creates a relationship which may be contractual or merely fiduciary. A shareholder can revoke the authority

of the proxyholder simply by giving him notice thereof. If the proxyholder disregards this revocation he will be in breach of his duty to his appointor;

(b) between the shareholder and the corporation. The corporation is entitled, and obliged, to recognize a valid proxy unless it has notice that it has been revoked. It therefore seems desirable that a shareholder who wishes to revoke a proxy should be able to notify the corporation of this fact in order to ensure that it is effectively cancelled. This is provided for in CBCA, s. 142(4); Alberta C.A., s. 139(4); Ontario BCA, s. 116(4). Apart from the requirement of a corporate seal, these provisions are essentially the same and do not create any problems.

A proxy may also be revoked other than by the express act of the appointor, e.g., by his death. According to Gower (Modern Company Law, 3rd edn., p. 486) it is not uncommon for articles of association to provide that a vote given by proxy shall be effective notwithstanding the revocation, by death or otherwise, of the authority, provided the corporation has not received notice of the revocation (U.K. C.A., Table A, art. 73). Would such a provision be desirable?

(iv) Deposit of proxies.

From the point of view of the corporation, especially as regards ascertaining the validity of a proxy in respect of the particular shares which it represents and for the purpose of recording voting on a poll, it is desirable that it should be notified before a meeting of the appointment of proxies. This may, however, deprive a shareholder of his vote if he is suddenly rendered unable to attend the meeting. The CBCA, s. 142(5), and the Alberta (s. 139(5)) and Ontario (s. 116(5)) acts, all permit a closing date for deposit of proxies, not more than 48 hours before the meeting, to be specified in the notice of meeting. This seems not unreasonable.

D. MANDATORY SOLICITATION

Just as it is accepted that every shareholder has the right to appoint, by proxy, a person to attend a meeting and vote on his instructions, so it now seems widely accepted that, at least in the case of the larger companies, two-way proxy solicitation by the management should be compulsory, i.e., the corporation ought to provide the mechanism for what is, essentially, a postal ballot. This requirement, commonly found in securities liquidation, appears to have evolved from what, originally, was essentially a requirement of a very difficult nature, namely that the managements of large corporations should not be permitted to entrench themselves by means of their control over the proxy mechanism and that, therefore, if they chose to solicit proxies they should only be permitted to do so in a closely regulated manner which permitted proxy votes to be cast against, as well as in favour of, their proposals. With this in mind, it is apparent that proxy rules ought to be separated into three categories:

(a) where a shareholder simply appoints a proxyholder to represent him;

(b) where a shareholder, the management, or some other person chooses to solicit proxies in order to increase his (or its) voting power; and

(c) where a corporation is required to solicit proxies from all its shareholders.

It is with this third category which we are here concerned.

(i) Corporations required to solicit proxies under Securities Act.

Taking as the model the new Ontario Securities Act, those corporations required to solicit proxies are:

(a) all corporations, wherever incorporated, which come under the jurisdiction of the Act, by virtue of issuing securities or having filed a prospectus in Ontario, or by virtue of having securities listed on an Ontario stock exchange, and

(b) corporations incorporated in Ontario under the Business Corporations Act which offer securities to the public.

For the purposes of the proposed Alberta Business Corporations Act, only the second category is of concern. The Business Corporations Act can properly only make solicitation of proxies mandatory for corporations incorporated under that Act, i.e., "corporations" as defined in the Act. If it is intended to make solicitation mandatory only for such of those corporations as are also required to solicit under the Alberta Securities Act, then the matter is essentially one of definition only. The following courses appear possible:

(a) to omit, in the BCA, all reference to mandatory solicitation, treating this as an entirely separate matter governed by the Securities Act. There are a number of objections to this course:

(i) constitutional questions concerning the validity of securities legislation;

(ii) it will only be possible if it is decided that no other corporations, e.g., public non-issuing, or larger private companies, be required to comply;

(iii) the Securities Act is concerned (or will be) with the solicitation of shareholders who are resident in Alberta, but not elsewhere. It may well be that the BCA should be concerned with the solicitation of all shareholders wherever resident.

(b) to provide that proxies must be solicited by all corporations (i.e. incorporated under the BCA) which are required to do so under the Securities Act. Again, objections (i) and (ii), above, apply but objection (iii) can be dealt with expressly.

(c) to provide that proxies must be solicited by a corporation which, as defined in the Securities Act, is "offering its securities to the public". (The actual phrase employed would, of course, depend upon that used in the Securities Act). There might, again, be problems of a constitutional nature, though this seems unlikely.

(d) to provide that proxies must be solicited by a corporation which is "offering its securities...", as defined in the BCA. The definition should be identical with that in the Securities Act. This seems to solve all the problems, but it might be objected:

(i) it would be necessary, or at least highly desirable, to ensure that, if either Act were to be amended in the future, the corresponding provision in the other Act should similarly be amended.

(ii) the solution results in excessive duplication and length. Whether it is excessive, of course, depends upon how well-founded the objections in (b) or (c) above, might be.

(ii) Should any other corporation be required to solicit proxies?

Under the Ontario BCA, mandatory solicitation applies only to a corporation that is offering its securities to the public (s. 119(1)). The same is the case in British Columbia (C.A. s. 173). By contrast, under present Alberta law (C.A., s. 138) mandatory solicitation does not apply to a "private company" or to a "public company that has fewer than 15 shareholders".

By definition, a private company cannot be an issuing company (though technically it would seem that, if it issued share to the public without converting to a public company, it would lose the privileges of being a private company without actually ceasing to be one) but it is possible for a company to be a public company with more than 15 shareholders without being an issuing company (e.g., it did not, by its articles restrict membership to 50, but did restrict the right to transfer shares and prohibit invitations to the public). The CBCA, s. 143, goes further and makes solicitation mandatory except where a corporation has fewer than fifteen shareholders. This may include a number of larger private companies as well as non-issuing public ones.

If one assumes that classifications in an Act should serve some useful purpose, and that an excessive number of classifications is to be avoided, it is suggested that mandatory solicitation should be required either from

(a) only those corporations which offer securities to the public, or

(b) any corporation which is not a "private company" as it will be defined in the Act.

This would avoid "head-counts" (except infosar as necessary to determine private status) and problems regarding joint-holders. In either case, it should still be possible (e.g. for a small public company) to apply to the Registrar for an exemption order: see CBCA, s. 145(1); Alberta C.A., s. 138(2) - where the application must be made to a judge.

As between these two alternatives, a preference may be expressed for the former. An offering company will in any event be bound to comply by virtue of the Securities Act. Otherwise, it is difficult to see the merit in the mandatory requirement.

Any shareholder will retain the right to proxy in respect of his own shares and it is therefore suggested that it is only where proxies are solicited, by management or by some other person, that the regulations, which are designed to ensure fairness and fulness of information, are necessary.

E. REGULATION WHEN PROXIES ARE SOLICITED.

As should be apparent from the preceding section, it is suggested that regulations governing the form of proxy, the sending of information circulars and their content, are necessary, when proxies are solicited, to ensure that a shareholder from whom a proxy is solicited, should be given a free choice as to how his votes should be cast and should be provided with adequate information to enable him to make that choice. These regulations should, in principle, apply equally whether solicitation is mandatory or not, as in CBCA, s. 144 which provides that "a person shall not solicit proxies unless" [the various requirements are met]. By contrast, the Ontario and British Columbia provisions (Ontario BCA, ss. 118(1), 119; B.C.C.A., ss. 173, 177) apply only to solicitations by an offering, or reporting, company. Similarly, the current Alberta law only requires information circulars, etc., from those companies for whom solicitation is mandatory.

It remains to examine whether solicitation should be permitted in certain caseswithout requiring compliance with the regulations. Under the CBCA, s. 145(1), the Director, upon application being made to him, may exempt a person from the requirements of s. 144(1). The British Columbia Act gives the court similar powers (C.A., s. 178), and in Ontario these powers are given to the Securities Commission (BCA, s. 119(2)). The Alberta Companies Act (s. 141 (2)), in addition to giving exemption powers to a designated judge (s. 138(2)), provides that the solicitation rules do not apply to: -

(a) any solicitation, otherwise than by or on behalf of the management of a company, where the total number of shareholders whose proxies are solicited is not more than 15 (joint registered owners being counted as one),

(b) any solicitation by a person made pursuant to s. 79 of the Securities Act (shares held in name of registrant), and

(c) any solicitation by a person in respect of shares of which he is the beneficial owner.

The Ontario Act contains essentially identical provisions (BCA, s. 118(2). There would seem to be considerable merit in these exemptions. Neither (b) nor (c) would seem to be "solicitations" as normally understood (and are excluded from the definition in CBCA, s. 141), being rather voting instructions, or requests for such instructions, from the true owner. Exemption (a) does not apply to management solicitations, where it might be abused, and may be a necessary addition to the right of a dissenting minority to requisition a meeting. Protection against fraudulent solicitation may be retained by providing that it is an offence to make untrue statements in connection with a proxy solicitation: it appears that the "untrue solicitation" provisions in the Alberta (s. 141(4)) and Ontario (s. 118(3)) Acts do not apply to exempt solicitations, but clearly they should do.

It is suggested that exemption should be given automatically in the three cases presently provided for, without the need to apply for an exemption order. The exemption order should, of course, also be available, the only question being whether it should be granted by the court, the Registrar or the Commission. This raises a difficult issue, since under the Securities Act, where it applies, the Commission is given the power to exempt. It would consequently seen desirable, in the case of mandatory solicitation, for the Commission <u>alone</u> to have the

power, otherwise two applications would have to be made by an Alberta corporation. On the other hand it may be questioned whether the Commission can, for example, properly give an exemption from a requirement in the Business Corporations Act that a proxy form and information circular be sent to a shareholder who is resident elsewhere than in Alberta. And in the case, say of a voluntary management solicitation in a private company (where it is suggested the rules should apply), the matter seems to fall outside the jurisdiction of the Commission. However, if the Commission has the power, under the Securities Act, to grant complete exemption to offering companies, it would seem odd to require what might be regarded as a stricter step, an application to court, to dispense with the requirements in the case of a private company, and the Registrar would seem to be the more appropriate person. One would hope that the Commission and the Registrar would, in any event, work closely together in such a matter.

F. INFORMATION CIRCULARS.

Subject to stated exemptions, e.g., for small non-management solicitations, it is forbidden to solicit proxies unless a proxy circular, management, or other person's, is sent to each shareholder whose proxy is solicited: CBCA, s. 144(1); Alberta C.A., s. 141(1); Ontario BCA, s. 118(1). In the case of a mandatory solicitation this, of course, means to every shareholder entitled to vote at the meeting. The CBCA additionally requires a circular to be sent to the auditor, and a copy sent to the Director.

The Alberta and Ontario provisions are generaly, and clearly ought to be, identical with the provisions in the corresponding Securities Act, with one important exception. The Securities Acts require the circular to be sent only to those shareholders whose last given address is <u>within the province</u>. The Companies, or

Business Corporations, Act requires it to be sent to every shareholder whose proxy is solicited, wherever resident. Jurisdictional questions aside, this difference simply reflects the fundamental objectives of the respective statutes: the main purpose of a provincial securities law is to afford protection to investors, actual and potential, within the province, whereas a major aim of company legislation is to protect the interests of all the shareholders of the provincially incorporated corporation. It is therefore essential that all shareholders, wherever resident, should receive adequate and similar protection.

It is consequently necessary to include the provision in the proposed Business Corporations Act, i.e., it cannot be left entirely to the Securities Act. The wording of the provision should be identical with that adopted in the Securities Act, with the exception that it will refer to all shareholders, and not merely those resident in Alberta. If the Alberta Securities Act is to follow the Ontario Securities Act then the wording in the Business Corporations Act should follow the Ontario BCA, s. 118. This differs in some respects from CBCA, s. 144:

(a) reference is made simply to "an information circular", rather than separately to "a management proxy circular" and "a dissident's proxy circular". The latter term, in any event, is not a very accurate one.

(b) the CBCA speaks of a circular "in prescribed form" the form being prescribed in separate regulations. The Ontario BCA, s. 120, contains lengthy provisions as to the form and content of information circulars and proxy forms. By contrast, the Ontario Securities Act, s. 85, defines "information circular" as one prepared in accordance with the regulations and the Act itself does not consequently prescribe form and content.

(c) the CBCA requires that any circular be sent to the auditor and that a non-management circular be sent to the corporation. In addition, a copy of any circular must be sent to the Director. These are not requirements of either of the Ontario Acts.

Until the regulations under the Ontario Securities Act are published it is difficult to determine the precise course to be taken. It is tentatively suggested that:

(a) the form of proxy solicitation and the form and contents of any information circular should be set out in separate regulations rather than in the Business Corporations Act itself. These regulations should be identical to those adopted under the Securities Act. This can be done either

(i) by stipulating in the BCA that the form of these documents shall comply with the Regulations adopted under the Securities Act, or

(ii) by enacting separate, but identical, regulations under the BCA. In view of the constitutional question this might be the safer course.

(b) A copy of a non-management solicitation and circular should be sent to the corporation. Whether a copy should also be required to be sent to the auditor is open to question. It may be that a circular will have to include financial statements, but from CBCA, Reg. 43(2) it does not seem that the auditor must necessarily report on these. With regard to the requirement that a copy be sent to the Director (Registrar) under CBCA s. 144(2) it is suggested that this should depend upon whether the Securities Act contains a similar requirement to notify the Commission.

G. RESTRAINING ORDERS AND OFFENCES.

The CBCA, s. 148(1), gives the Court, on application by any interested person or by the Director, wide powers (including restraining solicitation, acting on proxy or holding a meeting, correcting any form of proxy or circular, or adjourning the meeting) where a form of proxy or information circular contains untrue statements of fact or material, and misleading, omissions. These powers constitute a valuable protection against abuse of the proxy system. By contrast, the powers given to the Commission, to order trading to cease, in the Alberta and Ontario Securities Acts, have a more limited scope and will not apply at all to a non-issuing corporation which solicits proxies.

In addition, the CBCA (s. 144(3)) and the Alberta Companies Act (s. 141(3)) specifically make it an offence to solicit proxies without complying with the circulars provisions, and the Ontario BCA (s. 118(3)) provides that untrue solicitations constitute an offence.

The following suggestions are advanced:

(a) the power given to the Court, under CBCA, s. 148(1), is a valuable one and should be retained. It provides for remedies which are far more flexible than the closure of trading (which is in any event inappropriate where the offence is committed in a shareholder's solicitation) and which can be applied to solicitations which are not subject to the Securities Act.

(b) It should be an offence to solicit proxies without complying with the provisions relating to form of proxy and the sending of information circulars, except in those cases where it is expressly permitted to do so (e.g., non-management solicitation of 15 or fewer persons).

This should be the case whether or not mandatory solicitation is required. The Alberta Act (C.A., ss. 138, 141) is less than clear on this point.

(c) It should be an offence knowingly to utter an untrue or misleading statement in any form of proxy, information circular, or any other document in which a proxy is solicited, even where compliance with prescribed forms is not required. Thus, an individual shareholder who solicits proxies from not more than 15 of his fellow shareholders, should nevertheless be liable for knowingly making a false statement.

H. DUTIES OF PROXYHOLDER.

Generally, a person who is appointed proxyholder, is, apart from any contractual obligation, under no positive obligation to attend a meeting or to vote as directed but is probably under a negative, fiduciary, duty not to act contrary to his authority. see Gower, Modern Company Law, 3rd edn., p. 487. The position is, or certainly should be, different where that proxyholder has solicited proxies, otherwise, as Gower points out, it would be possible for the management to vote those proxies which were in favour of their motion and disregard those which were not. The CBCA, s. 146, covers this point satisfactorily.

I. DUTIES OF REGISTRANT.

A particular problem arises in the case of a "registrant", defined in CBCA, s. 141, as "a securities broker or dealer required to be registered to trade or deal in securities under the laws of any jurisdiction". Under s. 147 of the CBCA, such a person, in whose name the shares of a corporation are registered

(other than where he is himself the beneficial owner), may not vote those shares unless he has sent copies of all relevant documents (notice of meeting, form of proxy, information circular, etc.) to the beneficial owner and has received from him written voting instructions. The Alberta and Ontario Securities Acts (ss. 79 and 49 respectively) contain broadly similar provisions, but no such provisions are included in the corresponding Companies Act or Business Corporations Act. The following observations may be made:

(a) There seems to be no reason, in principle, why a provincial companies act should not include such a provision, even though it may relate to a registrant who deals elsewhere, since that person is nevertheless the registered shareholder of a corporation incorporated under that act.

(b) It may nevertheless be sufficient to treat the problem as being entirely the concern of securities legislation. The provision appears essentially to be concerned with the prevention of abuse by a broker or dealer of his position, rather than with the protection of shareholders, and a beneficial owner is entitled to solicit a proxy from such a registrant (or from any other person who is the registered holder of his shares).

(c) The provision is only very indirectly concerned with proxy rules and appears rather out of place in this Part of the Act. One possibility might be to extend the scope the provision to <u>all</u> registered shareholders who are not also the beneficial owners of shares, and to include the provision in the Title dealing with "Shareholders". However, it is felt that this is unnecessary and may also be undesirable. In general it is thought that a beneficial owner who, for whatever reason, leaves his shares registered in the name of some

other person should work out with that person whatever action is to be taken. This is consistent with the principle that a corporation is not concerned with the existence of any trust affecting its shares: see CBCA, s. 47(4).

It is therefore suggested that any provision regarding the duties of a registrant or other registered holder should be left to the appropriate securities legislation.

J. DUTY TO CALL FOR BALLOT.

Normally, where a proxy has been given it will be necessary for voting to be by ballot: it may well be that a proxyholder cannot, in any event, vote on a show of hands. It would seem that a proxyholder who has solicited a proxy is obliged to demand a ballot in order to perform his duty under CBCA, s. 146. The same would appear to apply where proxies are given to management (unless unsolicited, which is unlikely). However, where two-way proxies have been solicited the management is likely to know in advance the result of any ballot and it may be desirable in certain restricted circumstances, to permit a ballot to be dispensed with. This is permitted in the Alberta (C.A., s. 143) and Ontario (BCA, s. 121) Acts and in the corresponding Securities Acts (ss. 105 and 88 respectively). These provide that a ballot may be dispensed with where no person (shareholder or proxyholder) present at the meeting demands one and, to the knowledge of the chairman, the total number of proxy votes opposed to the motion which would otherwise be passed does not exceed 5 per cent of the total voting rights attaching to all the shares entitled to be voted and (be) represented at the meeting. In practice these provisions are probably unobjectionable and may expedite the holding of meetings, but it may be observed:

(a) A shareholder who has given his vote by proxy in a particular manner might feel aggrieved if no proper vote was taken and he has to rely on the management's assertion that he would have lost in any event.

(b) The process of calculating the 5 per cent. might not be any simpler than taking the actual vote.

(c) It seems that the chairman's duty to call a ballot arises only if one is demanded. The provisions infer that he has a duty to do so if he knows that proxies have been given. This would seem to confuse the function of the chairman and to identify him too closely with the management. It would be more appropriate to relieve the management, as a soliciting proxyholder, from the duty to demand a ballot.

(d) The Alberta Acts refer to 5 per cent of the shares "entitled to vote and represented at the meeting." The Ontario Acts stated "entitled to vote and be represented at the meeting". There is a vital difference. Under the Alberta provision it is clear that the proxies will not affect the outcome (unless a major shareholder abstains or fails to demand a poll). However, in order to apply the provision a count of votes present must be taken in order to calculate the 5 per cent, in which case it would surely be simpler to go ahead and hold a ballot. The Ontario act is procedurally simpler in that the calculation can be made in advance by setting the known proxies against the total possible vote. On the other hand, it could lead to the absurd result that, though the proxies represented less than 5 per cent, of the total of votes entitled to be cast, they could, if counted, produce a different result.

(e) The 5 per cent rule may be even less appropriate where a special resolution is required, and cannot have been intended to apply where unanimity is needed.

For the above reasons it is suggested that a provision of this nature is, at best, of doubtful value and, if absurdities are to be avoided, needs to be drafted with great care. It may be observed that the CBCA contains no such provision.

PROXIES

SOLICITATION REQUIREMENTS

In my recent note on this subject I made the following suggestions:

(i) Every shareholder is entitled to appoint a proxyholder.

(ii) An issuing company must solicit proxies in prescribed form and otherwise comply with the Securities Act.

(iii) With three exceptions, any person who solicits proxies, whether or not required to do so under (ii), may do so only in a manner which complies with the Securities Act.

Following our discussion on August 10, I think that proposition (iii) calls for further consideration. The exceptions give rise to no problem. Two are concerned with technical points - solicitation by a Registrant under the Securities Act and solicitation by a beneficial order - and the third permits a non-management solicitation of 15 or fewer shareholders. This is felt to be justified particularly where a dissident shareholder proposes a resolution or requisitions a meeting. It would be unreasonable to require such a solicitation to comply with all the detailed requirements of the S.A., and it is suggested that sanctions would still apply in the case of an untrue or misleading solicitation.

The one problem remaining seems to be whether a management solicitation should be permitted, in any circumstances, not to comply with the S.A. requirements. Obviously this should not be allowed in the case of an issuing company, for such a solicitation is mandatory and will already be governed by the S.A. The question therefore resolves itself to whether, in the case of a non-issuing company, the management should be allowed to solicit proxies without sending out an information circular and otherwise meeting the requirements of the S.A.

The arguments may be summarized as follows:

(a) Against permitting this:

(i) It opens the door to precisely that kind of abuse which the regulations are aimed at preventing.

(ii) The CBCA does not permit this. Under s. 144(1)(a), all solicitations by management must comply.

(iii) The management would still be able to apply for an exemption order. This would permit needless formalities to be dispensed with in individual cases whilst ensuring that the proxy system was not abused.

(b) In favour of permitting it:

(i) Alberta, B.C. and Ontario apply the information circular requirements only to mandatory solicitations.

(ii) A shareholder is entitled to solicit not more than 15 persons informally, so that arguably there is discrimination against the management.

(iii) In a small company it may not always be easy to determine whether a particular solicitation is "on behalf of the management" or not, e.g., one sent out by a major shareholder who is a member of the controlling group, but where no resolution of the directors has authorized it: see the definition of "solicitation by or on behalf of the management" in CBCA, s. 141.

(iv) It may be convenient, to ensure that all proxies are valid, for the corporation to send out a standard proxy form in blank to each shareholder, identifying the meeting in respect of which it is given, the shares to be voted, etc. If this is in two-way form and leaves blank the name of the proxyholder it would seem to be unobjectionable. Nevertheless it seems to fall within the definition of a "solicitation" under CBCA, s. 141(c).

If it is thought desirable to relax the solicitation rules in the case of non-issuing companies, then this could be done in a number of ways:

1. By redefining "solicitation" to exclude the sending out of blank proxy forms.

   There are several objections to this:

   (a) There would then be a potentially misleading conflict with the S.A. It would be a solicitation for the purposes of the S.A. but not for the BCA.

   (b) It would be necessary to spell out in detail just what constituted an acceptable "blank" proxy form.

   (c) It might lead to confusion in the case of a non-management solicitation to 15 or fewer shareholders.

2. By revising CBCA s. 144(1) so that it applies only in the case of an issuing company: e.g.

   "In the case of a corporation which is required by subsection 143(1) to send a form of proxy, a person shall not solicit proxies unless..."

   OR

   "In the case of a corporation which issues securities to the public, a person..."

   This may be the most attractive solution, and would be consistent with the present Alberta, B.C. and Ontario positions. However:

   (a) It opens the door for abuse in non-issuing companies, unless some other form of regulation is imposed. The sanction proposed in s. 144(7), for "false" solicitations would, however, still apply.

   (b) It would produce the slightly anomalous result that a dissenting shareholder in an issuing company could not solicit from more than 15 shareholders, whereas one in a non-issuing company could do so.

3. By expressly permitting a "blank" proxy to be used in the case of non-issuing companies, unaccompanied by any information circular, but otherwise requiring compliance with the regulations. This seems to be the optimum solution, but

presents a number of drafting problems. It could be done in any of the following ways:

(a) In the definition of "solicitation", e.g. s. 141. "solicit" or "solicitation"...

(c)...withholding or revocation of a proxy, save that in the case of a corporation which does not issue securities to the public it shall not include the sending of a form of proxy which...

[It would then be necessary to spell out the details of an acceptable form of blank proxy or to refer to some separate Regulations, which would necessarily differ from the S.A. Regs.]

OR

"but does not include...

(f) in the case of a corporation which does not issue securities to the public the sending of a form of proxy which....

The main objection to this course is that it is excessively clumsy and very difficult to state verbally just what constitutes an acceptable blank proxy form.

(b) By re-drafting s. 144. This could best be done by adding another exception to s. 144(2), e.g. "Subsection (1) does not apply to

(a) any solicitation by or on behalf of the management of a corporation which does not issue securities to the public provided that the form of proxy...

[Again, it would be necessary to spell out details or refer to special Regs.]

(c) By some form of administrative practice under the Exemption Order provision in s. 145. A specimen blank form could be published, and exemption be automatically granted to a non-issuing corporation

which used that form and made no other solicitation of any kind. Alternatively, this could be done by way of Regulation.

Again, the drafting of such a Regulation would be a complicated matter and extreme care would have to be taken to ensure that such an "authorized" form could not lead to abuse.

Conclusions.

It may well be that I have exaggerated the difficulties of drafting a satisfactory provision, or that I have overlooked some much simpler solution. However, I think that there are basically three alternatives:

(i) to subject all management solicitations to the same requirements as for mandatory solicitations, as is done in the CBCA, and alleviate the burden on small companies by means of exemption orders under. s. 145:

(ii) to relinquish control over solicitations in non-issuing companies and to rely only on the proposed "untrue solicitation" offence in s. 144(7) - this could still leave considerable scope for abuse by the use of "one-way" solicitations:

(iii) to attempt to draft very complex provisions in order to confer what might be a questionable benefit upon the managements of non-issuing companies which choose to solicit proxies.