Maple Leaf Foods Inc. et al. v. Schneider Corporation et al.
Pente Investment Management Ltd. et al. v. Schneider Corporation et al.
[Indexed as: Maple Leaf Foods Inc. v. Schneider Corp.]

42 O.R. (3d) 177
[1998] O.J. No. 4142
Docket Nos. C29945 and C29923

Court of Appeal for Ontario
Osborne, Weiler and Feldman JJ.A.
October 20, 1998

Corporations -- Take-over bid -- Directors not having obligation to conduct auction of company's shares where company is for sale -- Public statements by members of family which controlled company not giving rise to reasonable expectations in non-family shareholders that auction would be held -- Trial judge not erring in holding that offer for shares not "exclusionary" so as to trigger coattail provisions in target company's articles of incorporation.

M Inc. announced its intention to make an unsolicited take- over bid for S Co. (a competitor of M Inc. which was controlled by the S family) at $19 a share. The Board of Directors of S Co. established a special committee consisting of independent non-family directors to review the M Inc. offer and to consider other alternatives. Subsequently, M Inc. made an offer of $22 a share, but this offer was rejected by the family. Ultimately, the family told the special committee that the only offer it would accept was an offer made by SF Inc. that, at the time, was equal to $25 a share. In order for the family to accept the SF Inc. offer, which would have had the effect of enabling SF Inc. to "lock-up" control of S Co., the Board had to take certain steps which, on the advice of the special committee, it took. Despite this, M Inc. made a further offer of $29 a share to S Co.'s common and Class A shareholders. While M Inc. offered the same premium to the Class A non-voting shareholders as it did to the holders of comm on voting shares, it claimed that its bid triggered the coattail provisions in S Co.'s articles of incorporation because the conditions attached to its bid for the non-voting shares was not identical to the condition attached to its bid for the common shares. As a result, M Inc. claimed that the effect of its bid was to convert the non-voting Class A shares into common voting shares. Supported by two small shareholders of S Co., M Inc. attacked the actions of the special committee on the basis that it was not in fact independent and that the advice it gave to the Board was not in the best interests of S Co. and its shareholders. M Inc. took the position that public statements made by the family created an expectation that an auction for the family shares would be held and that those shares would be sold to the highest bidder.

M Inc. brought an action seeking to have the agreement between the family and SF Inc. invalidated. The action was dismissed. M Inc. appealed.

Held, the appeal should be dismissed.

The trial judge did not err in finding that the special committee and the directors exercised their powers and discharged their duties honestly and in good faith with a view to the best interests of S Co. and that they exercised the care, diligence and skill that a reasonable and prudent person would exercise in comparable circumstances in relation to dealing with the take-over bid situation. He also did not err in finding that because S Co. was known to be controlled by the family which could decide whether or not to sell its shares, the company was never truly in play and no public expectation was created that an auction would be held. In Ontario, an auction need not be held every time there is a change in control of a company. An auction is merely one way to prevent the conflicts of interest that may arise when there is a change of control by requiring that directors act in a neutral manner towards a number of bidders. The family did not seek to sell its controlling interest in S Co. The Board received a n offer from M Inc. that it felt was inadequate but, in the final analysis, the best way to judge its adequacy was to determine if higher bids could be elicited through a market canvass. The fact that a market canvass was conducted did not mean that the family would agree to sell its stake. Having undertaken a market canvass, there was no obligation on the special committee to turn this canvass into an auction, particularly because to do so was to assume the risk that the competing offers that the market canvass had generated might be withdrawn.

The trial judge did not err in his interpretation of the coattail provisions. Coattail provisions are designed to ensure that if the common voting shareholders wish to accept an offer that will lead to a change in control and if the price or terms offered to the common voting shareholders are more favourable than those offered to the holders of non-voting shares, the non-voting shareholders get an opportunity to participate in any change of control premium. If the holders of restricted shares, such as non-voting shares, are excluded from participating in the common voting share takeover bid, they will then be given a right of conversion of their restricted or non-voting shares into common voting shares. Coattail provisions are intended to encourage non-exclusionary bids. The trial judge found that to the extent that M Inc.'s bid did not exclude the Class A shareholders from the premium being offered for the family's shares, the coattail provisions were not triggered. Read literally, the coattail provision i n question provided that if even a single common share was tendered to the offer for the common shares, the company making the offer would have to pay for all the Class A shares tendered whether or not any Class A shares were actually taken up and purchased or acquired. However, the wording of a coattail provision must be given an interpretation which accords with its object and the intention of the framers of the provision, and the interpretation of a coattail provision must be viewed objectively and as a reasonably prudent business person would view it. The purpose of adopting a coattail provision is to discourage exclusionary offers, whereas a literal reading of S Co.'s coattail provision gave the opposite effect. In this case, it appeared to the shareholders that the offers were the same because the amount to be paid to both classes of shareholders was the same. M Inc. understood how its offers would be perceived. If, instead, M Inc. was of the opinion that its offer was exclusionary, it could have said i n its offering circular that it intended to apply to the appropriate authorities to have the issue of whether or not the offer was exclusionary determined in court. The interpretation of M Inc.' s offers adopted by the trial judge was consistent with the way a reasonably prudent business person would construe the offer. The trial judge did not err in

holding that the M Inc. offer for common shares was not an exclusionary offer and that the coattail provisions in the articles of incorporation had not been triggered.

APPEAL from a judgment of Farley J. (1998), 40 B.L.R. (2d) 244 (Gen. Div.) dismissing an action to invalidate an agreement for the sale of shares.

Brant Investments Ltd. v. Keep Rite Inc. (1991), 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.), affg (1987), 60 O.R. (2d) 737, 42 D.L.R. (4th) 15, 37 B.L.R. 65 (H.C.J.), supp. reasons 61 O.R. (2d) 469, 43 D.L.R. (4th) 141 (H.C.J.); CW Shareholdings Inc. v. WIC Western International Communications Ltd. (1998), 39 O.R. (3d) 755, 160 D.L.R. (4th) 131, 38 B.L.R. (2d) 196 (Gen. Div.); Paramount Communications v. QVC Network Inc., 637 A.2d 34 (Del. 1934); Revlon v. McAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), consd Other cases referred to 347883 Alberta Ltd. v. Producers Pipelines Inc. (1991), 92 Sask. R. 81, 80 D.L.R. (4th) 359, [1991] 4 W.W.R. 577, 3 B.L.R. (2d) 237 (C.A.); 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), affg (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.); Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, 77 B.C.L.R. (2d) 62, 102 D.L.R. (4th) 96, 150 N.R. 321, [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1; Arthur v. Signum Communications Ltd., [1993] O.J. No. 1928 (Div. Ct.); Barkan v. Amsted Industries Inc., 567 A.2d 1279 (Del. 1989); Canadian Tire Corp. (Re) (1987), 35 B.L.R. 117 (Ont. Div. Ct.); Exco Corp. v. Nova Scotia Savings & Loan Co. (1987), 78 N.S.R. (2d) 91, 193 A.P.R. 91, 35 B.L.R. 149 (S.C.); First Boston, Inc. Shareholders Litigation (In re), [1990] Fed. Sec. L. Rep., para. 95, 322 (Del. 1990); Fort Howard Corp. Shareholders Litig. (In re), Del. Ch., C.A. No. 991, 1988 WL 83147; Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 23 B.L.R. (2d) 286 (C.A.); Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd. (1986), 59 O.R. (2d) 254, 37 D.L.R. (4th) 193 (Div. Ct.), affg (1986), 59 O.R. (2d) 254, 37 D.L.R. (4th) 193 (H.C.J.); Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 C.L.L.C. ô210-006; Saunders v. Cathton Holdings Ltd. (1997), 43 B.C.L.R. (3d) 129, 88 B.C.A.C. 264, [1998] 5 W.W.R. 363, 36 B.L.R. (2d) 151; Slattery v. Slattery, [1945] O.R. 811 (C.A.); Teck Corp. v. Millar (1973), 33 D.L.R. (3d) 288 (B.C.S.C.); Themadel Foundation v. Third Canadian General Investment Trust Ltd. (1998), 38 O.R. (3d) 749 (C.A.); Westfair Foods Ltd. v. Watt (1991), 79 Alta. L.R. (2d) 363, 79 D.L.R. (4th) 48, [1991] 4 W.W.R. 695, 5 B.L.R. (2d) 160 (C.A.), affg (1990), 7 C3 Alta. L.R. (2d) 326, [1990] 4 W.W.R. 685, 48 B.L.R. 43 (Q.B.), leave to appeal to S.C.C. refused [1991] 3 S.C.R. viii Statutes referred to Business Corporations Act, R.S.O. 1990, c. B.16, ss. 134, 248 Canadian Business Corporations Act, R.S.C. 1985, c. C-44 Authorities referred to Dreidger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994), p. 131 Langan, Maxwell on the Interpretation of Statutes, 12th ed. (London: Sweet & Maxwell, 1969), p. 228 Morden, "The Partnership of Bench and Bar" (1982), 16 Law Soc. Gaz. 46, pp. 89-95

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OVERVIEW

THE OPPRESSION CLAIMS, REASONABLE EXPECTATIONS AND THE DUTIES OF OFFICERS AND DIRECTORS
Facts
Determining Whether the Directors Have Acted in the Best Interests of the Corporation
The Special Committee
(i) Should expert evidence have been admitted on the question whether the special committee was independent, and on the process by which the agreement with Smithfield was reached?
(ii) Should members of Schneider's senior management, particularly Dodds, have been permitted to have a significant role in the sale negotiations with potential bidders?
Process Arguments
(i) Should the special committee have been created?
(ii) Should the special committee have created a data room?
(iii) Flawed committee process
(iv) Should the special committee have insisted that Maple Leaf and any other interested party be given an opportunity to make their best and final offer prior to the board of directors of Schneider taking the steps that it did on December 17, 1997 to commit its shares to Smithfield?
Was there a duty to conduct an auction of the shares of Schneider?
Was there a public expectation created by the Family that an auction would be held?
Was the course of action and the advice given by the special committee in the best interests of Schneider and its shareholders? Should the special committee and the Board of Directors have refused to waive the standstill provisions in the confidentiality agreement with Smithfield?

THE COATTAIL PROVISIONS

Did Farley J. Interpret the Coattail Provisions Correctly?
(i) Facts re interpretation of coattail provisions
(ii) Findings of the trial judge
Discussion

THE ANTI-CONVERSION CERTIFICATES
Did Farley J. Err in his Conclusion that an Effective Anti-conversion Certificate Had Been Filed?
The Omission of Maple Leaf to State that its Offers Were Exclusionary in its Offering Circular and the Effect, if any, of such Omission

DISPOSITION

The judgment of the court was delivered by

WEILER J.A.: --

OVERVIEW

The appellants are Maple Leaf Foods Inc. ("Maple Leaf"), a bidder for the shares of Schneider Corporation ("Schneider"), and two small shareholders of Schneider who are supporting Maple Leaf. They raise two principal issues. The first concerns the duties of a special committee of the Board of Directors of Schneider Corporation and of the Board itself when dealing with a bid for change of control of the company. The second involves the interpretation of a provision in the articles of a company commonly known as the "coattail provision".

Schneider Corporation is an 108-year-old Ontario corporation that is controlled by members of the Schneider Family ("the Family") [See Note 1 at end of document.] through a holding company. The issued share capital of Schneider consists of common voting shares and Class A non-voting shares. Both classes of shares trade on the Toronto Stock Exchange, with the Class A shares representing most of the equity in the company. Although the Family only owns 17 per cent of the non-voting shares, the Family controls the company because it owns approximately 75 per cent of the common voting shares.

On November 5, 1997, Maple Leaf, a competitor of Schneider, announced its intention to make an unsolicited take-over bid for Schneider at $19 a share, through its holding company SCH. In response, the Board established a special committee consisting of the independent non-family directors to review the Maple Leaf offer and to consider other alternatives. Subsequently Maple Leaf itself made an offer of $22 a share, but this offer was rejected by the Family. Ultimately, the Family told the special committee that the only offer it would accept was an offer made by Smithfield Foods, an American company that, at the time, was equal to $25 a share. In order for the Family to accept the Smithfield offer, which would have had the effect of enabling Smithfield to "lock-up" control of Schneider, the Board had to take certain steps which, on the advice of the special committee, it took. Despite this, and after the Family had agreed to the

Smithfield offer, on December 22, 1997, Maple Leaf made a further offer of $29 a share to Schneider's common and Class A shareholders.

The law as it relates to the general duties of the directors of a company is well known. The directors of a company have an obligation to act honestly and in good faith in the best interests of the corporation: s. 134(1)(a) Business Corporations Act, R.S.O. 1990, c. B.16 (the "OBCA"). Further, in discharging their obligations, the directors must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: s. 134(1)(b). If the actions of the directors unfairly disregard the interests of a shareholder, unfairly prejudiced those interests, or are oppressive to them, s. 248 of the OBCA comes into play and allows the court to grant any remedy it thinks fit. [See Note 2 at end of document.]

The appellants attack the actions of the special committee on the basis, first, that it was not in fact independent, and second, that the advice given by the special committee to the Board was not in the best interests of Schneider and its shareholders. The appellants allege that the special committee did not act independently because it allowed Dodds, the Chief Executive Officer of Schneider, to negotiate on the Committee's behalf with potential bidders. Furthermore, the appellants submit that Dodds and the members of the special committee were unduly deferential to the wishes of the Family. The appellants' position is that public statements made by the Family created an expectation that an auction for the controlling block of shares of Schneider (the Family shares) would be held and that those shares would be sold to the highest bidder. The appellants say that, because Maple Leaf was not given a chance to bid after the Smithfield offer of $25 a share was received, the special committee, in acceding to the Family's request to accept the Smithfield offer, truncated the auction process. Maple Leaf and the other appellants seek to have this court invalidate the agreement between the Family and Smithfield on the basis that the process undertaken by the special committee and the Board, which led to the Family's agreement with Smithfield, unfairly disregarded the interests of the non- Family shareholders and unfairly prejudiced them.

The second issue involves the coattail provision in Schneider's articles. A typical coattail provision provides that if an offer is made for the voting shares of a corporation and the non-voting shareholders are excluded from that offer because an identical bid is not made for their shares, the non- voting shareholders have the right to convert their non- voting shares to common voting shares. They can then tender to the offer for the common shares.

Maple Leaf offered the same premium to the Class A non-voting shareholders as it did to the holders of common voting shares. But Maple Leaf claims that its bid nonetheless triggered the coattail provision in Schneider's articles because the condition attached to its bid for the non-voting shares was not identical to the condition attached to its bid for the common shares. As a result, Maple Leaf says that the effect of its bid was to convert the non-voting Class A shares into common voting shares. If all Class A non-voting shares were converted into common voting shares the Family's percentage of common voting shares would be diluted to a level where the Family's support might not be necessary for Maple Leaf's bid to be successful. Maple Leaf might then be able to gain control of Schneider despite the Family's lock-up agreement with Smithfield.

Farley J. dismissed the appellants' actions [reported 40 B.L.R. (2d) 244]. In relation to the first issue, he concluded that the special committee and the directors "exercised their powers and discharged their duties honestly, and in good faith, with a view to the best interests of Schneider and that they exercised the care, diligence and skill that a reasonable and prudent person would exercise in comparable circumstances in relation to dealing with the take over bid situation." He also found that because Schneider was known to be controlled by the Family which could decide whether or not to sell its shares, the company was never truly in play and no public expectation was created that an auction would be held.

In relation to the second issue, Farley J. found that to the extent that Maple Leaf's bid did not exclude the Class A shareholders from the premium being offered for the Family's shares, the coattail provisions were not triggered. Even if Maple Leaf's offers were exclusionary, he held that the conversion rights did not arise because, pursuant to Schneider's articles, the Family had filed certificates undertaking not to accept an exclusionary offer without giving written notice to its transfer agent. For the reasons which follow, I am of the opinion that Farley J. was correct.

THE OPPRESSION CLAIMS, REASONABLE EXPECTATIONS AND THE DUTIES OF OFFICERS AND DIRECTORS

Facts

I do not propose to repeat all of the facts outlined in the reasons of Farley J. and the facta of the parties, but some further information is essential to understand the issues which must be determined on this appeal.

The Board of Schneider consists of nine persons: two members of the Schneider Family (Eric Schneider and Anne Fontana), two members of senior management (Douglas Dodds, the chairman of the board and chief executive officer, and Gerald Hooper, the chief financial officer), and five outside directors who are all successful business persons with no connection to the Schneider Family. The Board established a special committee consisting of the five independent non-Family directors to review and consider the Maple Leaf offers and to make appropriate recommendations to the Board.

The special committee retained Nesbitt Burns Inc. as its financial advisor and Goodman, Phillips & Vineberg as its legal advisor.

The first SCH/Maple Leaf offers for Schneider were formally made on November 14, 1997 to both the common voting and Class A non-voting shareholders.

After the first SCH/Maple Leaf offers, the special committee through its financial and legal advisors, and the senior management of Schneider, commenced a process of contacting other parties that might be interested in acquiring Schneider. Schneider also established a data room containing confidential information to be provided to potential bidders. As a condition to being provided with access to the data room, potential bidders were required to sign a confidentiality agreement which contained a standstill provision that prevented them from acquiring or making

any proposal to acquire shares of Schneider for two years without the written consent of the board of directors of Schneider. The form of confidentiality agreement used by Schneider provided that the only representatives of Schneider that potential bidders could contact were Dodds, the chairman and chief executive officer; Hooper, the chief financial officer; and Eric Schneider, the general counsel, secretary and a vice-president.

On November 23, 1997, the Board issued its directors' circular responding to the Maple Leaf offer and recommended that Schneider shareholders not tender to the Maple Leaf offer on the basis that, among other things, the Maple Leaf offer was not reflective of the fair value of the shares of Schneider and that the Family had no intention of accepting the Maple Leaf offer. Under the heading "Alternatives to the Offers" the directors' circular stated:

> The Board of Directors is committed to maximizing Shareholder value. In this connection, the Corporation and Nesbitt Burns have held discussions with several interested parties concerning possible transactions which would result in Shareholders receiving greater value for their Shares than under the Maple Leaf Offers. The Board of Directors and Nesbitt Burns are actively exploring alternatives to maximize Shareholder value. The Schneider family, which collectively beneficially owns or controls approximately 75% of the Common Shares and approximately 17% of the Class A shares on a fully-diluted basis, has advised the Board of Directors that it might consider accepting a financially more attractive offer for its Shares.

Also on November 23, 1997, the Family confirmed in writing to the Board that:

> The undersigned also confirm that they might consider alternative control transactions involving the Corporation and acknowledge that, on the basis of such confirmation, Nesbitt Burns Inc., financial advisor to the special committee of the Board of Directors constituted to consider the Offers, is pursuing alternatives to the Offers.

On December 2, 1997, Schneider adopted a temporary shareholder rights plan. A rights plan is a common interim measure intended to give a Board time to see if there are other bids for a company and to stall an unsolicited or hostile take- over bid. Here, the rights plan provided that if a purchaser acquired 10 per cent or more of the shares of Schneider, both classes of shareholders had the right to purchase Class A shares at 50 per cent of the market price as at November 4, 1997 ($13.25) following a special meeting of shareholders. The press release announcing the rights plan stated:

> In the midst of ongoing discussions with several parties who have expressed interest in the company, the Board of Directors of Schneider Corporation today announced that, on the recommendation of its Special Committee, the Corporation has adopted a temporary Shareholder Rights Plan. This measure has been enacted to ensure that the Board and its advisers have the opportunity to fully explore all options for maximizing shareholder value . . . "The Board adopted the Rights Plan to create a stable environment in which it will have the time and flexibility it needs to explore and evaluate the options for maximizing value for all Schneider's shareholders" said Douglas W. Dodds, Chairman and CEO.

On December 11, 1997, Dodds wrote to Maple Leaf and requested that it deliver enhanced offers by December 12, 1997, stating that:

> The process of shareholder value maximization in which our Board of Directors has been engaged since receipt of your offers is fast approaching its climax. Schneider Corporation will be receiving alternative offers to the Maple Leaf Foods offers from interested parties by this Friday December 12, 1997 . . . Accordingly, we invite you to deliver to us your enhanced offers by this Friday. We encourage you to put forward your enhanced offers on a basis that most appropriately and fairly reflects the inherent and strategic values to Maple Leaf Foods of Schneider Corporation. Please also advise how we may be in contact with you and your advisers over this weekend.

On December 12, 1997, Maple Leaf increased its offer for Schneider shares to $22 per share and allowed Schneider's shareholders to elect to receive part of this consideration in the form of shares of Maple Leaf Foods Inc. On the same day, Schneider received written proposals from each of Booth Creek Inc. and Smithfield to acquire all of the shares of Schneider. The proposal from Booth Creek contemplated a take-over bid for all of the outstanding shares of Schneider at a price per share of $24.50 cash, conditional upon 66 2/3 per cent of the common voting shares and non-voting shares being deposited under the offer. The proposal from Smithfield contemplated a take-over bid for all of the outstanding shares of Schneider, with Schneider shareholders receiving shares exchangeable into shares of Smithfield. Based on the closing price of Smithfield shares on December 12, 1997, and the relevant exchange rate on that date, the Smithfield proposal was worth approximately $23 per share.

Prior to the announcement of the unsolicited bid by Maple Leaf's subsidiary on November 5, 1997, the Family had no intention of selling its shares. By December 13, 1997, the Family had indicated a tentative preference to sell its shares to Smithfield and doubted that either Booth Creek or Maple Leaf would enhance their offers sufficiently that the Family would tender to them. However, the Family had made no decision to sell, and if they were to sell, to whom, or at what price. The criteria used by the Family to evaluate offers were first arrived at on December 13.

On December 14, 1997, at a meeting of the Board of Directors, management advised that it believed that Schneider was "too big to be small and too small to be big", and that a strategic merger was in the best long-term interests of Schneider. The Family stated that it shared this belief. The Family also advised the board of directors that it had reviewed the amended Maple Leaf offer as well as the proposals from Booth Creek and Smithfield in terms of three factors: financial value, continuity of Schneider in a manner consistent with the Family's desires, and the effect of any transaction on customers and suppliers. The Family told the Board that, while the Smithfield proposal did not meet its financial adequacy criteria, it did meet the Family's other two criteria and that, assuming that Smithfield could satisfy the Family's financial adequacy criteria, a strategic merger would be in the best interests of Schneider.

Following this, a meeting was held by a working group that included Dodds and advisers from Nesbitt Burns and Goodman's. This group made the decision that Dodds should go to see Luter,

the Chairman of the Board and Chief Executive Officer of Smithfield, and enter into negotiations with Booth Creek.

On December 15, Dodds conducted further negotiations with Booth Creek and on the morning of December 16, he met with representatives of Smithfield, including Luter. Dodds explained why Schneider was historically undervalued.

Around lunchtime, Smithfield increased the value of its offer to $25 per share on the basis of the price of Smithfield's shares and the relevant exchange rate on that date. In addition, Dodds obtained Smithfield's agreement that it would not sell Schneider for at least two years, and would allow the Schneider family to appoint a representative to Smithfield's board of directors. Luter told Dodds that this was his best, last offer and that if he had any suspicion Schneider was using Smithfield's offer to try to obtain higher offers from others, he would withdraw his offer and make a public announcement disclaiming any interest in the company. The Smithfield offer was open until 8 a.m. on December 18. That same day, Dodds reported this offer to the Family and Mida, the director of mergers and acquisitions at Nesbitt Burns and an adviser to the special committee.

After Dodd's meeting with Luter, the Board issued an amended directors' circular recommending that Schneider shareholders not tender to the revised Maple Leaf offers. The Board of Directors did not disclose that the Family would evaluate the offers using criteria additional to financial considerations. Under the heading "Alternative Transactions" the circular stated:

> The Board of Directors has been actively engaged in a process of identifying other transactions that might result in greater value to Shareholders than was offered under the Original Offers. On December 12, 1997, the Board of Directors received proposals for, and is in the process of negotiating, alternative transactions which might result in greater value to Shareholders than is being offered under the Amended Maple Leaf Offers.

At 5 p.m. on December 17, 1997, Booth Creek made a revised written proposal to Schneider increasing the value of its offer to $25.50 cash and stated that its offer was open until 8 p.m. that same evening. At $25.50 the Booth Creek proposal was less attractive financially to the Family than the Smithfield share exchange proposal, which would yield them a tax saving of $4 per share. Non-family shareholders, depending on their individual tax position, might or might not be in the same position. Booth Creek, a private company, could not offer a share exchange transaction.

At the meeting of the Board on December 17, 1997, the Family announced that it wanted to accept the revised offer from Smithfield. Among other things, the Family stated to the Board that:

> We also think that it is important to reiterate that we as a family did not seek to sell this company but that through the process of the last 6 weeks we have come to the conclusion that now is the time to sell the control of the company.

At a subsequent meeting of the special committee that night, Nesbitt Burns advised that while the Smithfield proposal was within the $25-29 fair price range, the risk associated with adverse share price movement and exchange rate movement during the short period until the offer could be formally accepted should be reflected by applying a 6 per cent discount to the offer so that its present value was $23.50. Nesbitt Burns also told the Special Committee that, in its view, if the Smithfield offer were permitted to expire and no other change of control transaction involving Schneider were consummated, the shares of Schneider would settle in a trading range between $18 and $20 a share.

The special committee then recessed and Dodds made inquiries of Smithfield as to whether it would raise its offer. Smithfield refused to pay more but Dodds was successful in negotiating a slight improvement in the exchange rate aspect of the offer.

The original proposal, as submitted by Smithfield, contemplated that the transaction would proceed by way of a plan of arrangement or merger. That is, the Board would approve of the Family entering into a lock-up agreement for its shares with Smithfield, then the merger proposal would be voted upon by all shareholders and approved by the court. Before asking the shareholders and the court to approve the merger the Board would have had to provide an opinion that the transaction was fair. In light of Nesbitt Burns' discounted valuation of the Smithfield proposal, the Board was unwilling to do so.

To avoid the Board having to issue an opinion that the proposed transaction was fair, Smithfield made offers by way of take-over bids to acquire any and all common voting shares and all Class A shares of Schneider on the condition that the Family agree to tender its shares. The shares of Schneider were to be exchanged for .5415 of a share in a newly incorporated, wholly-owned Canadian subsidiary of Smithfield. Each whole exchangeable share would then be exchangeable for one common share in Smithfield. The structure of this second transaction meant that Smithfield might not be able to acquire two-thirds of the Class A shares and, therefore, might not be able to take Schneider private.

In order for the Family to accept the offer from Smithfield, it was still necessary for the Board to waive the standstill provision in the confidentiality agreement Smithfield signed and to remove the rights plan. The Family asked the board to do this. Upon the recommendation of the special committee, the Board did so. On December 18, 1997, the Family entered into the lock-up agreement.

On December 22, 1997, Maple Leaf announced that, despite the Family's lock-up agreement with Smithfield, it was increasing its offer to $29 per share, cash, conditional on obtaining two-thirds of each class of share. Prior to this, Maple Leaf entered into deposit agreements with two funds to buy Maple Leaf's shares at $29, no matter what the outcome of its latest bid was. On December 30, 1997, five Class A shareholders, holding in aggregate 675,000 shares, representing more than 10 per cent of the total Class A shares outstanding, wrote a letter to Schneider's Board of Directors complaining that "the actions or inaction of the Special Committee, together with those of the Schneider family have in effect, contaminated the value maximization process outlined by the board in its directors' circular and in its public statements."

Determining Whether the Directors Have Acted in the Best Interests of the Corporation

The mandate of the directors is to manage the company according to their best judgment; that judgment must be an informed judgment; it must have a reasonable basis. If there are no reasonable grounds to support an assertion by the directors that they have acted in the best interests of the company, a court will be justified in finding that the directors acted for an improper purpose: Teck Corp. v. Millar (1973), 33 D.L.R. (3d) 288 (B.C.S.C.) at pp. 315-16, adopted as the law in Ontario by Montgomery J. in Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd. (1986), 59 O.R. (2d) 254 at 255, 37 D.L.R. (4th) 193 at 194 (H.C.J.), affirmed (1986), 59 O.R. (2d) 254, 37 D.L.R. (4th) 193 (Div. Ct.).

One way of determining whether the directors acted in the best interests of the company, according to Farley J., is to ask what was uppermost in the directors' minds after "a reasonable analysis of the situation.": 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123 at p. 176 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); CW Shareholdings Inc. v. WIC Western International Communications Ltd., No. 98-CL-2821 (May 17, 1998), Toronto (Gen. Div.) [reported 39 O.R. (3d) 755, 160 D.L.R. (4th) 131]. It must be recognized that the directors are not the agents of the shareholders. The directors have absolute power to manage the affairs of the company even if their decisions contravene the express wishes of the majority shareholder: Teck Corp. Ltd. v. Millar, supra, at p. 307. However, acting in the best interests of the company does not necessarily mean that the directors must act in the best interests of one of the groups protected u nder s. 234. There may be a conflict between the interests of individual groups of shareholders and the best interests of the company: Brant Investments Ltd. v. Keep Rite Inc. (1987), 60 O.R. (2d) 737, 42 D.L.R. (4th) 15 (H.C.J.), affirmed (1991), 3 O.R. (3d) 289 at p. 301, 3 O.R. (3d) 289 (C.A.). Provided that the directors have acted honestly and reasonably, the court ought not to substitute its own business judgment for that of the Board of Directors: Brant Investments v. Keep Rite Inc., supra, which deals with the analogous section of the Canadian Business Corporations Act, R.S.C. 1985, c. C-44. If the directors have unfairly disregarded the rights of a group of shareholders, the directors will not have acted reasonably in the best interests of the corporation and the court will intervene: 820099 Ontario Inc. v. Harold E. Ballard Ltd., supra.

The appellants have urged this court to consider the actions of the directors pursuant to a standard which is derived from statute law in the State of Delaware known as "enhanced scrutiny". The key features of the enhanced scrutiny test are a judicial determination of the adequacy of the decision-making process employed by the directors, and a judicial examination of the reasonableness of the directors' actions in light of the circumstances then existing: Paramount Communications v. QVC Network Inc., 637 A.2d 34 at p. 45 (Del. 1934). The directors have the onus of satisfying the court that they were adequately informed and acted reasonably. Some Canadian authorities such as Exco Corp. v. Nova Scotia Savings & Loan Co. (1987), 35 B.L.R. 149, 78 N.S.R. (2d) 91 (S.C.) and 347883 Alberta Ltd. v. Producers Pipelines Inc. (1991), 80 D.L.R. (4th) 359, 92 Sask. R. 81 (C.A.) have adopted a proper purpose test, which is similar to enhanced scrutiny in that it shifts the burden of proof to the directors to show that their acts are consistent only with the best interests of the company and inconsistent with any other interests. These cases recognize that there may be a conflict between the directors who manage the company and the interests of certain groups of shareholders, particularly those s. 248

is designed to protect, and have espoused shifting the burden of proof as a method of overcoming the potential conflict.

The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision: Paramount, supra, at p. 45; Brant Investments, supra, at p. 320; Themadel Foundation v. Third Canadian General Investment Trust Ltd. (1998), 38 O.R. (3d) 749 at p. 754 (C.A.). This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrele vant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction: Brant Investments, supra, at pp. 314-15.

A common method used to alleviate concerns that a conflict of interest exists between directors, who may be major shareholders, and the interests of a minority or non-voting group of shareholders, is the creation of a special committee from among the independent members of a board who do not have a conflict. The purpose of a special committee is to advise the Directors and to make a recommendation as to what the Board should do. It appears that under the law of Delaware, where a Board acts on the recommendation of a special committee, the decision will be accorded respect under the business judgment rule, provided that the special committee has discharged its role independently, in good faith, and with the understanding that in a situation where a change of control transaction is contemplated, the special committee can only agree to a transaction that is fair in the sense of being the best available in the circumstances: In re First Boston, Inc. Shareholders Litigation, [1990] Fed. Sec. L. Rep., p ara. 95, 322 (Del. 1990).

The duty of directors when dealing with a bid that will change control of a company is a rapidly developing area of law and, as I have indicated, Canadian authorities dealing with the question of the onus, or burden of proof, have not been uniform. In Brant Investments, supra, the issue whether the burden of proof is on the directors to justify their actions as being in the best interests of the company or on the shareholders challenging the actions of the company was also raised. McKinlay J.A., at pp. 311-12, found it unnecessary to decide the question because the trial judge had dealt with the issues on a substantive basis, and his decision did not turn on which party had the onus or burden of proof. [See Note 3 at end of document.] The same is true in the present case. [See Note 4 at end of document.] I would add, however, that it may be that the burden of proof may not always rest on the same party when a change of control transaction is challenged. The real question is whether the directors of the target company successfully took steps to avoid a conflict of interest. If so, the rationale for shifting the burden of proof to the directors may not exist. If a board of directors has acted on the advice of a committee composed of persons having no conflict of interest, and that committee has acted independently, in good faith, and made an informed recommendation as to the best available transaction for the shareholders in the circumstances, the business judgment rule applies. The burden of proof is not an issue in such circumstances.

The members of the committee acted in good faith in the sense that they acted honestly. The committee's decision was also informed, in the sense that the committee was aware that any offer for Schneider's shares might be bettered by Maple Leaf, and that the Family would not sell to Maple Leaf. While the appellants have challenged Farley J.'s finding that the Family would not sell to Maple Leaf, there is ample evidence to support this finding. Even at $29 a share, when tax considerations were factored in, the Maple Leaf offer was only as advantageous as the Smithfield offer to the Family, not more advantageous. Apart from financial criteria, Maple Leaf did not meet the Family's expressed concern about the effect of a change of control on the continuity of employment for Schneider's employees, the welfare of suppliers, and the relationship with its customers, whereas Smithfield did. Once again, the real questions are whether the committee was independent and whether the process undertaken by the special commi ttee was in the best interests of Schneider and its shareholders in the circumstances. While Paramount, supra, indicates that non-financial considerations have a role to play in determining the best transaction available in the circumstances, here it was conceded that the court should only have regard to financial considerations.

The Special Committee

> (i) Should expert evidence have been admitted on the question whether the special committee was independent, and on the process by which the agreement with Smithfield was reached?

Farley J. declined to admit the proposed evidence of the expert witnesses, Messrs. Cameron and Beck. The appellants seek to overturn the finding of Farley J., that the directors and the Family did not act improperly. In part, they do so on the basis that he erred by refusing to admit the proposed evidence of the two expert witnesses.

The proposed evidence of Messrs. Cameron and Beck was contained in two reports. The report of Mr. Beck was essentially a statement of his views on the legal rights and obligations which arose under Ontario law from a set of facts communicated to him. The report of Mr. Cameron consisted largely of his conclusions based on a set of assumed facts given to him and his inferences from those facts on the appropriateness of senior management's participation in negotiations with potential bidders, the process conducted by the special committee, and the expectations created by public statements made by the Family.

Farley J. ruled that the qualifications of the experts related to corporations, their securities, takeover bids and directors' obligations. He declined to receive the experts' reports on three bases: (1) that the opinions expressed related to domestic law, a matter upon which a court ought not to receive opinion evidence; (2) that there was no specialized and standardized body of conduct to study in this area; and (3) that he did not need the assistance of the experts in understanding the evidence or the concepts and principles involved.

For the reasons given by Farley J., I would not give effect to this ground of appeal.

> (ii) Should members of Schneider's senior management, particularly Dodds, have been permitted to have a significant role in the sale negotiations with potential bidders?

The appellants submit that Dodds had a conflict of interest because he had an interest in continued employment with Schneider and a further conflict arising out of his loyalty to the Family.

A potential conflict of interest arises because as a director of a target company, the senior executive has a duty to act in the best interests of the shareholders, but as a member of senior management the executive retains an interest in continued employment. In actively negotiating with a potential bidder the executive is negotiating with his potential boss or executioner. The appellants rely on the decision of Blair J. in CW Shareholdings Inc., supra, for the proposition that no senior executive of a company being sold should be permitted to have a significant role in the sale process.

The raison d'être of a special committee independent of management and the controlling shareholder is to protect the interests of minority shareholders and to bring a measure of objectivity to the assessment of bids. If, as was the case in CW Shareholdings, senior management in the target company is a member of the special committee, the purpose in setting up the special committee might be compromised and less reliance placed on its assessment of a particular bid than if the committee were truly independent. Blair J. recognized this and he was critical of the role played by senior management in CW Shareholdings. In the end, however, he concluded that the involvement of management in the special committee did not so taint its approval of the Shaw Communications bid as to undermine the transaction. He also found that the committee had conducted itself in a fashion that enabled the directors to carry out their objective of maximizing shareholder value. In that case, Blair J. upheld the Boar not accepted.

A major distinction between the CW Shareholdings decision and this case is that senior management, including Dodds, was not part of the special committee that was set up, and consequently had no vote as to whether to recommend a bid. A potential conflict of interest still existed, however, because of the active role Dodds played in negotiating with the bidders.

Farley J. recognized that in allowing Dodds and, to a lesser extent, Hooper, the chief financial officer of Schneider, to deal with bidders directly, a potential conflict of interest existed but that this had to be balanced against the benefits to be obtained. He stated:

> It would be appropriate, however, to comment as well [th]at the use of the two management directors, Dodds and Hooper, in dealing with the bidders and advisors directly, would not seem inappropriate. Potentially there could be conflict, but that must be balanced against the reasonable benefits to be obtained. They knew the operations of the business -- what the bidders would be interested in and they were guided by the advisors. They reported to the special committee which could make the "final" decisions and give directions. Potential conflict was minimized by the bail-out packages granted them. From the material before me it would not appear that these management persons acted or behaved inappropriately overall. It would be undesirable to subject each step they took to isolated microscopic inspection. I note in passing that Dodds would have received approximately $1,000,000 in stock and options value extra if the Maple Leaf $29 offer had been accepted as opposed to the Smithfield one; of course no one b ut Maple Leaf knew how much it would have offered if it had been solicited on December 17.

Dodds' employment agreement entitled him to resign within two years following a change of control transaction with 30 months' severance. In CW Shareholdings, Blair J. commented that a golden parachute did not eliminate the potential for conflict of interest that exists when a member of senior management negotiates directly with bidders. Here, however, Dodds was not given any assurances by Smithfield of continued employment, although he knew that Smithfield intended to leave Schneider's management in place and allow it to operate as an autonomous unit. On the other hand, Dodds was given some assurance of continued employment by Maple Leaf if Schneider was taken over by it. He was told that he would manage the integration of Schneider for two years, and be a candidate to head the meat operations of the two companies. He was also told that he would retain his salary and be issued additional options in Maple Leaf. In addition, at the time, Dodds held 250,000 options in Schneider with a strike price of $13 and it was believed that Maple Leaf would top any bid that was openly made for Schneider. It seems that if there was any financial bias arising out of Dodds' self interest in continued employment it would have been a bias in favour of Maple Leaf.

The appellants also submit that Dodds had a conflict of interest in conducting the negotiations because his loyalties were to the Schneider Family. But the Family did not ask Dodds to negotiate with potential bidders. After Nesbitt Burns suggested that Smithfield might be a potential bidder, Dodds' meetings with Smithfield were at the behest of the special committee, or its advisers, Nesbitt Burns and Goodman, Phillips & Vineberg. Farley J. found that the deadline for considering bids had been set by Mida, the vice-president of Nesbitt Burns and its director of mergers and acquisitions, as an appropriate deadline in order to prevent the process from stalling. He also found that it was appropriate for Dodds to keep the Family informed of the progress of the negotiations since they could veto any sale. Counsel for the appellants strenuously submitted that in as much as Dodds advised the Family of the result of his negotiations with Smithfield on December 16, and did not advise any member of the special commit tee of the negotiations, an inference should be drawn that Dodds' loyalties were to the Family and that this was illustrative of yet another conflict that Dodds had. The evidence indicates that although Dodds did not advise any members of the special committee directly on the 16th, he called Mida of Nesbitt Burns, the advisor to the special committee. It does not appear that Mida told anyone on the special committee of the Smithfield proposal, as the evidence indicates that the committee was unaware of it until it met on the evening of the 17th. In the circumstances there would appear to be no reason to impute bias to Dodds because of this omission.

The appellants also allege that it was Dodds' suggestion to Luter that Smithfield proceed by way of a takeover for any and all shares of Schneider -- as opposed to a plan of arrangement -- and that this suggestion also indicates Dodds' bias against Maple Leaf. The proposal to proceed by way of takeover as opposed to merger was not a suggestion that came from Dodds, but one that had been identified previously as the alternative Luter was prepared to pursue if the Board could not recommend the Smithfield proposal.

Farley J. found that Dodds pressed the negotiations with the bidders diligently and did nothing inappropriate. His conclusions are supported by the evidence. There is no merit in this ground of appeal.

Process Arguments

(i) Should the special committee have been created?

The appellants submit that by creating a special committee, hiring advisers, and setting up a data room, the Family used Schneider's money to better the offer from Maple Leaf, which it was not entitled to do. In addition to being rejected by Farley J., a similar argument was rejected by Montgomery J. in Olympia & York, supra, at p. 272. The reason is obvious; the appointment of a special committee is intended to ensure that the interests of those the oppression remedy is intended to protect are not unfairly disregarded or prejudiced. It is clearly in the interests of a company, and of all shareholders, for alternatives to an unsolicited takeover offer to be explored. It might give the shareholders a higher price for their shares. The creation of a special committee was part of the process undertaken by the Board to obtain the best transaction available in the circumstances.

(ii) Should the special committee have created a data room?

The appellants' submission that proprietary confidential information obtained from the data room was a valuable corporate asset that was either given away to the acquiring company or dissipated must also fail. As Farley J. pointed out, access to the data room was essential in order to conduct a market canvass for alternative offers. Other bidders, particularly those who had not operated in the Canadian market, needed to gain an appreciation of market conditions, and of Schneider's business. That could only be obtained with access to Schneider's confidential information. No alternative bid would have been elicited without access to Schneider's confidential information. Maple Leaf, as a competitor of Schneider for many years, had an appreciation of market conditions and of Schneider's business and did not require further information in order to make its bid.

The decision to establish a data room at the company's expense was that of the special committee, made with full knowledge of the Family's position that it was not committed to selling. The Board did not seek the approval or the consent of the Family to establish the data room, for the use of information, or for the nature of the confidentiality agreements that were signed with prospective bidders.

In creating a data room the special committee acted independently and reasonably. The creation of a data room made confidential information available to all bidders as part of a process to get the best transaction available to the shareholders in the circumstances. I see no merit in this ground of appeal.

(iii) Flawed committee process

The appellants submit that the trial judge ignored or failed to appreciate the evidence given by Ruby, the chairman of the special committee, to the effect that the special committee had no involvement in any negotiations with prospective bidders, that Dodds conducted the negotiations, and that the special committee did not consider whether Dodds had any conflict of interest. After considering the circumstances under which Dodds acted, I have already concluded that Dodds did not have a conflict of interest.

The special committee had no prior experience in dealing with a take-over bid and did not have the in-depth knowledge of Schneider that Dodds did. It was therefore appropriate for the special committee not to conduct the negotiations with potential bidders directly. Farley J. found that although the special committee did try to determine the views of the Family "recognizing its gatekeeper and veto role", there was no evidence that the approval of the Family was sought with respect to any decision taken by the special committee. The evidence supports the conclusion that the members of the special committee acted independently in the sense that they were free to deal with the impugned transaction on its merits. This ground of appeal also fails.

> (iv) Should the special committee have insisted that Maple Leaf and any other interested party be given an opportunity to make their best and final offer prior to the board of directors of Schneider taking the steps that it did on December 17, 1997 to commit its shares to Smithfield?

The appellants submit that the Board was obliged to keep the bidding process alive by going back to Maple Leaf after it received the Smithfield bid on December 17. This submission has two alternative premises: (1) the directors could only discharge their duty to act in the best interests of the corporation by conducting an auction of the shares of Schneider; (2) a public expectation had been created by the comments made by the Schneider family that an auction would be held and therefore both the Family and the Board were under a duty to ensure that an auction was conducted.

The appellant's first premise is wrong in law. The second is contrary to Farley J.'s findings of fact and those findings are supported by the evidence.

> Was there a duty to conduct an auction of the shares of Schneider?

The decision in Revlon v. McAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), stands for the proposition that if a company is up for sale, the directors have an obligation to conduct an auction of the company's shares. Revlon is not the law in Ontario. In Ontario, an auction need not be held every time there is a change in control of a company.

An auction is merely one way to prevent the conflicts of interest that may arise when there is a change of control by requiring that directors act in a neutral manner toward a number of bidders: Barkan v. Amsted Industries Inc., 567 A.2d 1279 at p. 1286 (Del. 1989). The more recent Paramount decision in the United States, supra, at pp. 43-45 has recast the obligation of directors when there is a bid for change of control as an obligation to seek the best value reasonably available to shareholders in the circumstances. This is a more flexible standard, which recognizes that the particular circumstances are important in determining the best transaction available, and that a board is not limited to considering only the amount of cash or consideration involved as would be the case with an auction: Paramount, supra, at p. 44. There is no single blueprint that directors must follow. Although the decision in Paramount and the other decisions of the courts in Delaware to which I have referred are not the law of Ontario, they can, however, offer some guidance.

When it becomes clear that a company is for sale and there are several bidders, an auction is an appropriate mechanism to ensure that the board of a target company acts in a neutral manner to achieve the best value reasonably available to shareholders in the circumstances. When the board has received a single offer and has no reliable grounds upon which to judge its adequacy, a canvass of the market to determine if higher bids may be elicited is appropriate, and may be necessary:
Barkan, supra, at p. 1287, citing In re Fort Howard Corp. Shareholders Litig., Del. Ch., C.A. No. 991, 1988 WL 83147.

The Family did not seek to sell its controlling interest in Schneider. The Board received an offer from Maple Leaf that it felt was inadequate, but, in the final analysis, the best way to judge its adequacy was to determine if higher bids could be elicited through a market canvass. The fact that a market canvass was conducted did not mean that the Family would agree to sell its stake. Indeed, Farley J. found as a fact that the Family's decision to sell was highly conditional on a satisfactory offer being received.

The appellant submits that there was considerable evidence indicating that the Schneider Family had by December 17, if not before, concluded that a sale of its shares was inevitable. Having undertaken a market canvass, however, there was no obligation on the special committee to turn this canvass into an auction, particularly because to do so was to assume the risk that the competing offers that the market canvass had generated might be withdrawn. There was no obligation on the special committee or the Board to go back to Maple Leaf on December 17 and ask it to make another offer. A market canvass and not an auction was being conducted; the special committee and the Board only had a short time within which to consider Maple Leaf's offer; Maple Leaf had already been asked to make an appropriate offer and there was no certainty it would make a higher bid. There was an obligation on the special committee and the directors to consider the bids which their market canvass had realized in addition to Maple Leaf's bid. Farley J. found Maple Leaf knew, or should have known, that the bidding process was almost over when it made its $22 per share bid. Maple Leaf's board had authorized the issuance of enough Maple Leaf shares to finance a $29 a share bid for Schneider before the bidding process entered its final stage. Maple Leaf was nonetheless content to let its $22 bid stand despite knowing that there were competing bids that might be accepted in preference to its own, and despite the fact that Maple Leaf's board had authorized a higher $29 bid. This was a risk Maple Leaf chose to assume.

Was there a public expectation created by the Family that an auction would be held?

Conduct which disregards the interests of any shareholder and not simply a shareholder's legal rights will infringe s. 248 of the OBCA. This is because the oppression remedy is basically an equitable remedy and the court has jurisdiction to find an action is oppressive, unfairly prejudicial, or unfairly taken in disregard of the interests of a security holder if it is wrongful, even if it is not actually unlawful: Westfair Foods Ltd. v. Watt, [1990] 4 W.W.R. 685, 48 B.L.R. 43 (Alta. Q.B.), affirmed [1991] 4 W.W.R. 695, 79 D.L.R. (4th) 48 (Alta. C.A.), leave to appeal refused [1991] 3 S.C.R. viii.

A statement made to shareholders in a press release can create a public expectation that is deserving of protection through the oppression provisions of the OBCA. As Carthy J.A. stated in Themadel Foundation, supra, at p. 753:

> The public pronouncements of corporations, particularly those that are publicly traded, become its commitments to shareholders within the range of reasonable expectations that are objectively aroused.

While s. 248 protects the legitimate expectations of shareholders, those expectations must be reasonable in the circumstances and reasonableness is to be ascertained on an objective basis. [Find Note 5 at end of document.] The interests of the shareholders of a company are intertwined with the expectations that have been created by the company's principals:
Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 23 B.L.R. (2d) 286 (C.A.).
Therefore, the question is whether the statements made by the Family, and widely reported in press releases issued in response to Maple Leaf's bids, created a reasonable expectation that an auction would be held. Whether or not a reasonable expectation has been created is a question of fact: Arthur v. Signum Communications Ltd., [1993] O.J. No. 1928 (Div. Ct.), Campbell J., for the court, at paras. 6-7. After examining the press releases and the evidence, Farley J. found that any expectations of the claimants, who were non-Family shareholders, were not reasonable or founded in fact.

A summary of his findings on this point is as follows:

> -- The Family's position on selling its controlling shareholding in Schneider was always conditional to a high degree. The Family only said that they "might consider" selling. The conditional nature of the Family's position was always clearly expressed by the Board in its public statements.
>
> -- It was inappropriate for Maple Leaf to ignore the plain meaning of the public statements made by the Family and the Board. Maple Leaf "wished" that there was an unrestricted auction for Schneider but in fact there never was.
>
> -- The claimants had not proved that their reasonable expectations were thwarted. "When the gatekeeper shareholder merely indicates that it 'might consider' accepting a more financially attractive offer, then the shareholders are speculating that a deal on that basis may come to pass in which they could participate."

There was more than adequate evidence to support these findings and they cannot be disturbed.

In as much as there was no reasonable expectation on the part of the non-Family shareholders that an auction would be held after receiving the last Smithfield bid, the special committee was not obliged to give Maple Leaf an opportunity to make a third bid for Schneider's shares.

> Was the course of action and the advice given by the special committee in the best interests of Schneider and its shareholders? Should the special committee and the Board

of Directors have refused to waive the standstill provisions in the confidentiality agreement with Smithfield?

The appellants allege that the advice given by the special committee to the Board of Schneider was not in Schneider's best interests or those of its shareholders. They submit that the special committee should have refused to waive the standstill provisions in the confidentiality agreement with Schneider, thereby preventing the agreement between the Family and Smithfield. The appellants also submit that if the Board of Schneider could not enter into a share exchange with Smithfield because of fairness concerns it could not agree to a takeover bid. These submissions are really alternative ways of saying that the transaction with Smithfield was unfair to the non-Family shareholders, that it was not in the best interests of the company.

If the Smithfield offer can reasonably be considered to be the best available offer in the circumstances, then the Smithfield offer was not unfair or contrary to the best interests of the company. This is also essentially a fact driven question on which Farley J. made the following findings:

> -- The Smithfield offer was solicited by Schneider. Smithfield, a reluctant suitor, had to be "coaxed" to make a bid. Smithfield imposed a "no-shop" condition on its offer to the Schneider Family and did not want to haggle.
>
> -- There was no breach of confidence in the communications between Smithfield, and the Schneider Board and the Family. The spirit of the standstill provision between Smithfield and Schneider was honoured. Confidential information was used appropriately in the best interests of the shareholders. At all times the Schneider Board remained in control of the process dealing with the Smithfield offer.
>
> -- It was reasonable for the Board to accommodate a transaction between Smithfield and the Family by waiving the standstill provision contained in the Smithfield confidentiality agreement in view of advice received that the share price of Schneider would fall back to a range of $18 to $20 per share in the absence of a change of control transaction.
>
> -- Maple Leaf could not have made an offer that would have been satisfactory to the Schneider Family at that time.
>
> -- The Board exercised their powers and discharged their duties honestly and in good faith.
>
> -- The Board pursued all available opportunities to maximize shareholder value and achieved reasonable results for all of the shareholders of Schneider.
>
> -- It was unfair to say that the special committee had the Family's interests uppermost in its mind not those of the shareholders generally, or the non-Family shareholders specifically. It was beyond the power of the special committee to insist that the Family give up its veto power and the special committee realized this.

As Farley J. emphasized, one of the particular circumstances having a bearing on a board of directors' attempts to obtain the best deal available in the circumstances was whether the company has a controlling shareholder. For example, in Paramount, supra, control of the corporation was not vested in a single person, entity, or group, but was widely held by a number of unaffiliated shareholders. In that case, the proposed sale of shares represented a premium for the change and consolidation of control of the company in a group that would have the power to materially alter the interests of the widely dispersed shareholders. Here, the control premium for the shares of Schneider belongs to the Family. The unaffiliated shareholders do not own, and are not giving up, the power to control the company's future.

Another distinction between this case and Paramount is that the offer from Maple Leaf, which was before the special committee at the time it was asked to make its decision, was considerably less than the Smithfield offer. In coming to its conclusion that it was not in the interests of the non-Family shareholders to prevent the Family from entering into a lockup agreement with Smithfield the Special Committee considered, among other things:

(a) that the shares would likely trade in the $18 to $20 range if no sale was effected;

(b) the position of the Family that it would not accept the Maple Leaf offer at $22 or the Booth Creek offer -- or indeed any other offers from them; [See Note 6 at end of document.]

(c) that Smithfield would publicly withdraw its offer if the offer was shopped and, if this happened, the amount that Maple Leaf would be prepared to offer was problematic.

While Smithfield's offer was not within the range that Nesbitt Burns had placed on the shares as fair value, "a decent respect for reality forces one to admit that . . . advice [of an investment banker] is frequently a pale substitute for the dependable information that a canvass of the relevant market can provide": Barkan, supra, at p. 1287. It was widely known that a change of control was being considered, and few rival bids were forthcoming over an extended period of time: these facts support the decision to proceed with the impugned transaction.

The Board acted on the advice of the special committee in agreeing to facilitate the Smithfield bid by passing a resolution waiving the standstill provision, thereby allowing Smithfield to bid and to enter into the lock-up agreement with the Schneider Family. Unless another bid was received that was not conditional on the tender of any of the Schneider Family shares, which was highly unlikely, this decision by the Board had the effect of making the Smithfield bid the only one which would effectively be available to the shareholders. Implicit in the steps taken by the Board was a decision by the Board that the Smithfield bid was in the best interests of all the shareholders and therefore a bid which the Board could recommend to the shareholders.

The special committee was entitled to make, and did make, business and negotiating judgment calls which, having regard to the interests of the non-Family shareholders, were reasonable in the intense and time-limit-driven context. The deal with Smithfield was the only deal that the controlling shareholder was willing to consider. With respect to the alleged pre- empting of the process by not going back to Maple Leaf, Farley J. stated:

> . . . it appears that this merely prevented a further round of enquiry of Booth [Creek] and Maple Leaf which may or may not have elicited a higher bid than Smithfield whose last bid was tested.

If Maple Leaf was given an opportunity to top the Smithfield bid and that bid was then publicly withdrawn, then there was no guarantee that Maple Leaf would make a higher offer. There was no alternative bid which was definitely available and clearly more beneficial to Schneider and all its shareholders than the Smithfield bid. The Board acted on the advice of the special committee. The advice given and accepted was reasonable at the time and fair to the non-Family shareholders.

I would dismiss the first main ground of appeal.

THE COATTAIL PROVISIONS

There are three sub-issues here:

(a) whether Farley J. erred in his interpretation of the coattail provisions;

(b) whether, as held by Farley J., the filing of anti- conversion certificates by Schneider prevented the coattail provisions from being triggered; and

(c) whether Maple Leaf's failure to disclose the exclusionary nature of its offers in the take-over bid circulars and notices of variation is an omission of a material fact, and if so, what the remedy should be.

Did Farley J. Interpret the Coattail Provisions Correctly?

(i) Facts re interpretation of coattail provisions

Coattail provisions are designed to ensure that if the common voting shareholders wish to accept an offer that will lead to a change in control and if the price or terms offered to the common voting shareholders are more favourable than those offered to the holders of non-voting shares, the non-voting shareholders get an equal opportunity to participate in any change of control premium.

The provisions work in the following way. If the holders of restricted shares, such as non-voting shares, are excluded from participating in the common voting share takeover bid, they will then be given a right of conversion of their restricted or non-voting shares into common voting shares. Coattail provisions are intended to encourage non-exclusionary bids. When triggered, the non-voting shareholders then have the opportunity to participate in the take-over bid.

The Schneider Family proposed that a coattail provision be added to its articles of incorporation in a tradition of "fair dealing" in 1988, even though a company listed on the Toronto Stock Exchange ("TSE") was not required to have a coattail provision at that time. The Schneider coattails are consistent with the present TSE policy requirements. Mr. MacKay, Schneider's

lawyer at the time, obtained the particular wording for the coattail from a precedent provided by the TSE. It was intended that the Class A shareholders would be entitled to share in the control premium only if the requisite number of common voting shareholders accepted the offer and the premium was in fact paid to the holders of common shares. Instead, in the coattail provision provided by the TSE as a precedent, and adopted by Schneider, even if it was apparent that a change of control would not take place because a sufficient number of common shares had not been acquired or purchased pursuant to the offer to the common shareholders, the co mpany making the offer would have to take up and pay for all the shares held by the Class A shareholders who tendered to the offer.

Read literally, the coattail provision provided that if even a single common share was tendered to the offer for the common shares, the company making the offer would have to pay for all the Class A shares tendered whether or not any Class A shares were actually taken up and purchased or acquired. This is because the definition of exclusionary offer in para. 12(e) of the articles of Schneider uses the word "tendered" as opposed to the word "purchased" or "acquired".

Paragraph 12(e) defines an exclusionary offer as follows:

> (e) "Exclusionary Offer" means an offer to purchase common shares of the Corporation that:
>
> > (i) must by reason of applicable securities legislation . . . be made to all or substantially all holders of common shares . . .; and
> >
> > (ii) is not made concurrently with an offer to purchase Class A Non-Voting shares that is identical to the offer to purchase common shares in terms of price per share and percentage of outstanding shares to be taken up exclusive of shares owned immediately prior to the offer by the Offeror and in all other material respects and that has no condition attached other than the right not to take up and pay for shares tendered if no shares are tendered pursuant to the offer for common shares.

(Emphasis added)

If the word acquired or purchased had been used in the definition of "exclusionary offer" instead of tendered there would not have been a problem with coattail provision. But Maple Leaf's lawyers recognized the problem. Maple Leaf's offer to purchase the common shares of Schneider was made concurrently with its offer to purchase the Class A shares. The offer to the Class A shareholders contained a condition entitling Maple Leaf not to take up and pay for any Class A shares deposited if Maple Leaf did not acquire any common shares pursuant to the offer to purchase common voting shares. This was not the condition permitted under the coattail provisions. The coattail provisions gave the right not to take up and pay for Class A shares if no common shares were tendered. Because the condition attaching to its Class A shares was different, Maple Leaf submits that its offer to the common shareholders was an exclusionary one.

(ii) Findings of the trial judge

With respect to the coattail provision in the articles of Schneider, Farley J. made the following findings:

> -- the so called "flaw" in the coattail was recognized by Maple Leaf well before it made its offer;
>
> -- a literal or technical interpretation of the wording of the Schneider coattail would be impractical and lead to a commercial absurdity;
>
> -- when Maple Leaf made its offer, the intention and the effect of the conditions it imposed in its offer was to make its offers identical for both the voting and non-voting shares of Schneider;
>
> -- Maple Leaf did not disclose to the shareholders that its offer was exclusionary in its original take-over bid circular or in any subsequent amendment to that circular prior to the announcement of the Smithfield lock-up agreement with Schneider on December 19, 1997. It was not until January 8, 1998, that Maple Leaf issued a notice of variation which disclosed to all shareholders for the first time its belief that its offer was exclusionary;
>
> -- Schneider's directors, on the other hand, described the Maple Leaf offer as a non-exclusionary offer in the directors' circular which was submitted to shareholders on November 23, 1997;
>
> -- he did not accept any of Maple Leaf's reasons for failing to disclose its belief that its offer was exclusionary.

With respect to Maple Leaf's failure to disclose its belief that it had made a non-exclusionary offer, the trial judge made the following findings:

> -- Maple Leaf put too narrow a focus on its obligation to disclose that its bid was designed to be exclusionary. It was inappropriate and misleading for Maple Leaf not to set out in an obvious fashion the information which a reasonable shareholder requires to make an informed decision;
>
> -- Maple Leaf "lay in the weeds" about its interpretation of the coattail, notwithstanding its knowledge of the Schneider directors' statement that Maple Leaf's offer was non-exclusionary. Maple Leaf did so because it did not want other competitive offerors to "twig" to its scheme;
>
> -- the technical interpretation now urged by Maple Leaf was not consistent with the intention of instituting the coattail at any time leading up to and including the time of the takeover.

In view of his findings, Farley J. held that the word "tender" should be construed as "tendered and taken up" thereby embodying the concept of "acquired" or "purchased".

Discussion

The following principles are of assistance in determining whether Farley J. correctly interpreted the coattail provisions:

> -- The interpretation of a word or words is not a technical exercise undertaken in isolation from the objective or purpose sought to be accomplished: see Dreidger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at p. 131; thus, where giving a word its ordinary grammatical construction would lead to a contradiction of its apparent purpose or to a commercial absurdity, a construction may be put upon it which modifies the meaning of the word: P. St. J. Langan, Maxwell on the Interpretation of Statutes, 12th ed. (London: Sweet & Maxwell, 1969), at p. 228.
>
> -- A purposive approach is to be used whether one is interpreting a provision of a statute, a contract or other form of private legal document. In many respects the problems are the same in all three. A document is also a form of "sub-legislation" respecting those governed by its provisions: see Morden, "The Partnership of Bench and Bar" (1982), 16 Law Soc. Gaz. 46, and cases cited therein at pp. 89-95; Dreidger on the Construction of Statutes, at p. 131; Maxwell on the Interpretation of Statutes, at p. 228.
>
> -- The words of a statute to be interpreted are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament: Rizzo v. Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193. (This decision holds that although the literal reading of the words in the Employment Standards Act entitling an employee to severance, termination or vacation pay upon termination by the employer would not include the employer's bankruptcy, when the words are examined in their entire context they must be interpreted to include a termination resulting from the bankruptcy of the employer.) So, too, here, the wording of the coattail provision must be given an interpretation which accords with its object and the intention of the framers of the provision.
>
> -- The interpretation of a coattail provision must be viewed objectively and as a reasonably prudent business person would view it: Saunders v. Cathton Holdings Ltd. (1997), 88 B.C.A.C. 264 at p. 272, 36 B.L.R. (2d) 151.
>
> -- When the public interest is involved, evidence with respect to the understanding and intention of the provision is admissible to assist in determining whether a proposed interpretation is consistent with the public interest: Re Canadian Tire Corp. (1987), 35 B.L.R. 117 (Ont. Div. Ct.) at pp. 143-44.

The purpose of adopting a coattail provision is to discourage exclusionary offers, whereas a literal reading of Schneider's coattail provision gives the opposite effect. Certainty of meaning is of paramount importance in commercial transactions that affect the public. Those considering whether or not to tender to an offer to purchase their shares must know what investment decision they are making: see Saunders, supra, at pp. 272-73. In this instance, it appeared to the shareholders that the offers were the same because the amount to be paid to both classes of

shareholders was the same. Maple Leaf understood how its offers would be perceived. If, instead, Maple Leaf was of the opinion that its offer was exclusionary, it could have said in its offering circular that it intended to apply to the appropriate authorities to have the issue of whether or not the offer was exclusionary determined in court as was done in CW Shareholdings, supra. Maple Leaf did not.

The interpretation of Maple Leaf's offers adopted by Farley J. is consistent with the way a reasonably prudent business person would construe the offer. The outcome he reaches is consistent with public expectations and is commercially sound. It employs a purposive approach. Farley J. did not err in holding that the Maple Leaf offer for common shares was not an "exclusionary offer" and that the coattail provisions in Schneider's articles had not been triggered.

THE ANTI-CONVERSION CERTIFICATES

> Did Farley J. Err in his Conclusion That an Effective Anti- Conversion Certificate Had Been Filed?

The articles of Schneider provide that conversion of the Class A non-voting shares into common voting shares does not arise, even if an offer is an exclusionary offer, if the holders of 50 per cent or more of the common shares file a certificate with the transfer agent and the secretary of the corporation, under s. 16, indicating that they will not accept an exclusionary offer without giving the transfer agent written notice of their intention. Such a certificate can be a standing certificate filed before an offer is made (a 16(a) certificate), or a certificate filed within seven days of the making of an exclusionary offer (a 16(b) certificate). It is only if no certificate under s. 16 is filed that conversion rights arise.

The purpose of the filing of a s. 16(a) certificate with the transfer agent is to have an outside entity receive confirmation of the controlling shareholder's intention concerning exclusionary bids. Unless and until a bid for change of control of the company is made, the transfer agent does not have to take any further steps. As soon as possible after the seventh day after an offer is received, art. 17 and 18 of Schneider's articles require the transfer agent to send holders of Class A non-voting shares a notice advising them whether they are entitled to convert their Class A non-voting shares into common shares (presumably on the basis whether a s. 16(a) or s. 16(b) certificate is filed) and the reasons they are, or are not, entitled to convert their shares. The manifest purpose of the provision is to make the Class A non-voting shareholders aware of their rights.

Farley J. found as a fact that when the coattails were adopted, Schneider's secretary filed a 16(a) certificate under cover of May 2, 1988, with the transfer agent of Schneider which, at the time, was the Canada Trust Company.

Royal Trust Corporation succeeded Canada Trust as transfer agent for Schneider and later sold its transfer agency business to a company, which became CIBC Mellon Trust Company, Schneider's current transfer agent. Schneider did not file a new 16(a) certificate with Royal Trust when it became its transfer agent. CIBC Mellon has no record of having received the 1988

certificate from any source prior to receiving it from Goodman Phillips & Vineberg on December 29, 1997 -- after the Maple Leaf offers had been made. A representative of CIBC Mellon testified that he would not expect Canada Trust to have forwarded the April 29, 1988 certificate to Royal Trust or its successors because CIBC Mellon's practice, and the practice in the industry generally, was not to do so. He testified that this is the type of document a company would redeliver. Mr. MacKay, however, testified that he had arranged for Canada Trust to deliver this certificate to Royal Trust. Farley J. accepted MacKay's evidence on this point. Assuming the certificate was received by Royal Trust, there was no evidence what Royal Trust did with the certificate once Royal Trust sold its business to CIBC Mellon.

Article 16 of Schneider simply states that the certificate is to be delivered to "the transfer agent". Farley J. stated:

> . . . the coattails provisions as provided for in the TSE precedent and adopted by Schneider provides for the certificate to be given to the transfer agent and to the secretary of Schneider. It does not say that it is to be given to the Secretary "for the time being". The context of the delivery of the certificate is that it be given to both at the same [general] time.

The articles of Schneider do not require the controlling shareholder to redeliver a s. 16(a) certificate when the company changes transfer agents. Farley J. held that in the circumstances the s. 16(a) certificate did not have to be redelivered by Schneider. I agree with this interpretation. The role of a transfer agent is to maintain the records of a corporation. When there is a change in transfer agent, as with a change in trustee, it does not deprive the shareholders of the effect of the document. The notice to the original transfer agent is valid: see Slattery v. Slattery, [1945] O.R. 811 at p. 819 (C.A.).

Even if the Maple Leaf bid was an exclusionary bid the 16(a) certificate delivered in 1988 was effective and blocked the conversion of the Class A shares into common voting shares.

There is a further alternative argument raised in relation to the anti-conversion certificates. It is whether the filing of a s. 16(b) certificate after Maple Leaf's bid was made was effective.

Following notice that Maple Leaf's holding company SCH proposed to make a bid for Schneider, Eric Schneider delivered to himself as corporate secretary on November 11, 1997 a s. 16(b) certificate, but it was not provided to CIBC Mellon until December 22, 1997 and was therefore ineffective because it was not delivered within seven days of the "offer date" by SCH. On December 12, 1997, Maple Leaf, and not its holding company SCH, made a bid for the shares of Schneider and increased its offer to $22 a share. In addition, for the first time shares of Maple Leaf were offered as partial consideration for the shares of Schneider. Schneider again filed a s. 16(b) anti-conversion certificate dated December 19.

Farley J. found that the Family had a consistent intention to implement an effective anti-conversion certificate against any exclusionary offer. He acknowledged that under the ordinary principles of contract law a change in the essential terms of the offer such as occurred here between the November 11 offer and the December 12 offer, would be a new offer. He held, however, that the December 12 bid by Maple Leaf was not a new offer having regard to the

definition of "Exclusionary Offer" contained in art. 12(e)(ii) of the coattails provision which says in part:

> . . . if an offer to purchase common shares is not an Exclusionary Offer . . . the varying of any term of such offer shall be deemed to constitute the making of a new offer unless an identical variation concurrently is made to the corresponding offer to purchase Class A Non-Voting shares;

I am of the opinion that Farley J. erred in holding that the December 12 offer by Maple Leaf was not a new offer on the basis of art. 12(e)(ii). The words construed by Farley J. are a saving provision. The saving provision presupposes that an offer was originally non-exclusionary and the offer is varied with the result that unequal terms are offered to the common and Class A shareholders. In those circumstances the offer will be considered to be a new offer which is exclusionary. The deeming provision of article 12(e)(ii) does not deprive the controlling shareholder of the substantive right in art. 16(b) to file an anti-conversion certificate if the original offer made is exclusionary and the subsequent offer is also exclusionary but completely different as to its terms. This interpretation is supported by regard to art. 16(b). Under art. 16(b), the anti-conversion certificate must be delivered within seven days after "the offer date". The "offer date" is defined in art. 12(g):

> Offer Date means the date on which an Exclusionary Offer is made.

Thus, whenever an offer which is exclusionary is made, Schneider has seven days to deliver an anti-conversion certificate.

Based on both the wording of the articles and on general contract principles, the offer of December 12 was a new offer and the 16(b) anti-conversion certificate filed was effective.

> The Omission of Maple Leaf to State that its Offers Were Exclusionary in its Offering Circular and the Effect, if any, of such Omission

Farley J. did not find it necessary to decide this issue and I am of the opinion that it is unnecessary to do so in view of my conclusions concerning the other issues raised.

DISPOSITION

For the reasons given, the appeals from the judgment of Farley J. are dismissed. Because I have held that Farley J. did not err in holding that the offer to purchase common shares made by Maple Leaf to shareholders of Schneider was not an exclusionary offer within the meaning of the articles of Schneider, it was not necessary to deal with the cross-appeals by the Family. I have, however, dealt with one aspect of the cross-appeals, namely, the effectiveness of the anti-conversion certificates. If it were necessary to do so, I would allow the cross-appeal to the extent necessary to grant relief in accordance with para. (a) of the Family's notice of cross- appeal. The balance of the cross-appeal has not been considered and is dismissed. If necessary, I would also allow the cross-appeal of Smithfield which relates to the same point, namely, the effectiveness of the anti-conversion certificates.

Counsel have asked to make further submissions concerning costs. I would invite the respondents to file their submissions in writing within 15 days from the release of these reasons and the appellants ten days thereafter. Reply submissions respecting costs, if any, should be filed within a further five days.

Appeal dismissed.

APPENDIX

Business Corporations Act, R.S.C. 1995, c. B.16

134(1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholders agreement.

. . . . .

248(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 186(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3)(f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Notes

Note 1: There are four branches of the Schneider Family. In this appeal, "Family" refers to: the collective family holding company J.M. Schneider Family Holdings Limited (Family Holdings); the four individual family holding companies (Harbour Glen Securities Limited, Kinspan Investments Limited, Laurel Ridge Investments Limited, and Jadebridge Holdings Limited); and seven of the eight Family members who serve as directors of Family Holdings, Herbert J. Schneider, Frederick P. Schneider, Jean M. Hawkings, Betty L. Schneider, Anna Fontana, Eric Schneider, and Bruce Hawkings.

Note 2: For the sake of convenience I will refer to s. 248 as the "oppression remedy". For ease of reference the text of ss. 134 and 248 is attached to these reasons as an appendix [at p. 214 post].

Note 3: Reversing the burden of proof was rejected by Farley J. in this case. He declined to adopt the test in this case and to place the burden of proof on the directors. He indicated that the rights of shareholders in Ontario were protected by s. 248 of the OBCA and he would apply it. The enhanced scrutiny standard was also rejected by Blair J. in CW Shareholdings Inc., supra at p. 27, in dealing with an application under the Canadian Business Corporations Act to set aside defensive measures taken by a company respecting a takeover. He commented that to the extent "enhanced scrutiny" imposed the initial evidenciary burden on the directors of a target company to justify their actions and their business decisions it went too far and did not represent the law in Ontario. While s. 248 of the OBCA does not clearly state on whom the onus lies, the use of the term "complainant" in s. 248 and the broad definition of a "complainant", which includes any other person whom the court considers a proper person, suggest that the onus is on the person alleging that the directors have unfairly prejudiced, disregarded, or acted oppressively towards the person. In many cases the facts necessary to found such a complaint will be in the knowledge of the person alleging them and the burden of adducing evidence on those facts should rest on that person. The cases arising under these sections are, however, fact specific. In cases where trust property is the subject of the litigation and it is alleged that a personal benefit has been

given to members of the Board as a result of its actions, the Board may bear the burden of adducing evidence as to the nature of the transaction.

Note 4: There are fewer and fewer situations today where the resolution of the questions turns on the onus of proof. See the comments of Sopinka J. in Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96.

Note 5: It is worthwhile noting however that on a subjective basis no shareholder testified that any public pronouncment made by the family created an expectation that an auction would be conducted.

Note 6: Recall that the Maple Leaf and the Booth Creek offers were worth considerably less to the Family and to the non-Family shareholders, provided they were in a similar tax position to the family. Smithfield's share exchange offer was worth approximately $4 a share more to them.