**Ontario Supreme Court**
**Pente Investment Management Ltd. v. Schneider Corp.,**
**Date: 1998-05-10**

Pente Investment Management Ltd. and Cascade Holdings Ltd., Plaintiffs

and

Schneider Corporation, Douglas W. Dodds, Anne C. Fontana, Gerald A. Hooper, Frederick D. Morash, Larry J. Pearson, Brian J. Ruby, Eric N. Schneider, Ronald J. Simmons, Hugh W. Sloan, J.M. Schneider Family Holdings Limited, Frederick P. Schneider, Betty L. Schneider, Herbert J. Schneider, Jean M. Hawkings, CIBC Mellon Trust Company, Smithfield Foods Inc., SCH Acquisition Inc., and Maple Leaf Foods Inc., Defendants

Maple Leaf Foods Inc. and SCH Acquisition Inc., Plaintiff

and

Schneider Corporation, Douglas W. Dodds, Anne C. Fontana, Gerald A. Hooper, Frederick D. Morash, Larry J. Pearson, Brian J. Ruby, Eric N. Schneider, Ronald J. Simmons, Hugh W. Sloan, J.M. Schneider Family Holdings Limited, Frederick P. Schneider, Betty L. Schneider, Herbert J. Schneider, Jean M. Hawkings, Bruce Hawkings, CIBC Mellon Trust Company and Smithfield Foods Inc., Defendants

Royal Mutual Funds Inc., Royal Bank Investment Management Inc. and Mackenzie Financial Corporation, Plaintiffs

and

Schneider Corporation, Douglas W. Dodds, Anne C. Fontana, Gerald A. Hooper, Frederick D. Morash, Larry J. Pearson, Brian J. Ruby, Eric N. Schneider, Ronald J. Simmons, Hugh W. Sloan, J.M. Schneider Family Holdings Limited, Frederick P. Schneider, Betty L. Schneider, Herbert J. Schneider, Jean M. Hawkings, Bruce Hawkings, CIBC Mellon Trust Company, Smithfield Foods Inc., SCH Acquisition Inc. and Maple Leaf Foods Inc., Defendants

Ontario Court of Justice, General Division [Commercial List] Farley J.

Heard: April 14-24, 1998

Judgment: May 10, 1998[1]

Docket: 98CL-1011, 98-BK001935, 95-BK-001935A

*Harvey T. Strosberg, Q.C., Wesley Voorheis and Michael D. Woolcombe, for Pente Investment Management Ltd. and Cascade Holdings Ltd.*

*Peter H. Griffin, Linda Fuerst and Lawrence Thacker, for Royal Mutual Funds Inc., Royal Bank Investment Management Inc. and Mackenzie Financial Corp.*

*J. Edgar Sexton, Q.C., Lyndon A.J. Barnes, David A. Stamp and Eric Lay, for Maple Leaf Foods Inc. and SCH Acquisitions Inc.*

[1] Affirmed at (October 20, 1998), Doc. CA C29923, C29945 (Ont. C.A.); additional reasons at (July 31, 1998), Doc. 98-GD-42580, 98-BK001935 (Ont. Gen. Div. [Commercial List]).

*William Hourigan and Lynn McArdle, for CIBC Mellon Trust Company.*

*Dennis R. O'Connor, Q.C., James D.G. Douglas and Freya Kristjanson, for J.M. Schneider Family Holdings Ltd., Anne Fontana, Eric Schneider, Frederic Schneider, Betty Schneider, Herbert Schneider and Jean Hawkings.*

*Benjamin Zarnett, Alan Mark, Jessica Kimmel and Nando De Luca, for Schneider Corporation, Douglas, Dodds, Gerald Hooper, Frederick Morash, Larry Pearson, Brian Ruby, and Hugh Sloan.*

*Thomas G. Heintzman, Q.C., R. Paul Steep and Susan Rothfels, for Smithfield Foods Inc.*

***Farley J.*:**

[1] These three cases involving the take-over fight for Schneider Corporation, a public corporation controlled by the Schneider family but whose equity was 77% owned by non-family shareholders, were heard jointly. This real time litigation was greatly facilitated by efforts of all counsel who practiced the communication, co-operation and common sense guidelines of the Commercial List. Their focus and dedication was greatly appreciated. It permitted this pressing litigation to be heard and decided on a timely basis.

***Cast of Characters***

Booth Creek - "Booth" a bidder for shares of Schneider Corporation ("Schneider")

Borden & Elliot - "Bordens", special legal counsel to the Schneider family ("Family")

Douglas Dodds - "Dodds", President and Chairman of the Board of Directors of Schneider

John Embry - "Embry", Vice-President, Royal Bank Investment Management Inc.

Anne Fontana - "Fontana", a member of the Family a director and senior executive of Schneider, shareholder and director of J.M. Schneider Family Holdings Limited ("Holdings"), the Family holding company

Goodman, Phillips & Vineberg - "Goodmans", advisor and counsel to the Special Committee and the Board of Directors of Schneider

Stephen Halperin - "Halperin", a Goodmans lawyer and legal advisor to the Special Committee and the Board

Gerald Hooper - "Hooper", Chief Financial Officer of Schneider

Warren Jansen - “Jansen”, client relations manager of CIBC Mellon Trust Company (“CIBC Mellon”)

Joseph Luter - “Luter”, Chairman of the Board of Directors and Chief Executive Officer of Smithfield Foods, Inc. (“Smithfield”)

Maple Leaf Foods Inc. - “Maple Leaf”, bidder for shares of Schneider

Gorden MacKay - “MacKay”, former solicitor to Schneider and Holdings

MacKenzie Financial Corporation Inc. - “MacKenzie”, manager of mutual fund holding Class A shares of Schneider

Wallace McCain - “McCain”, Chairman of Board of Directors of Maple Leaf

McCarthy Tetrault - “McCarthys”, Canadian Special Counsel to Smithfield

Daniel Mida - “Mida”, Vice-President, Director, Mergers and Acquisitions of Nesbitt Burns Inc.

Thomas Muir - “Muir”, Executive Vice-President and Chief Financial Officer of Maple Leaf and Director and Officer of SCH Acquisitions Inc. (“SCH”)

Nesbitt Burns Inc. - “Nesbitt”, financial advisor to the Special Committee of the Board of Directors of Schneider

Ian Osler - “Osler”, portfolio manager, MacKenzie

Osler, Hoskin & Harcourt - “OHH”, solicitors to Maple Leaf and SCH

RBC Dominion Securities - “RBC Dominion”, financial advisor to Maple Leaf and SCH

Royal Bank Investment Management Inc. - “Royal”, manager of mutual funds holding Class A shares of Schneider

Brian Ruby - “Ruby”, director of Schneider and Chairman of the Special Committee

SCH Acquisitions Inc. - “SCH”, a special purpose subsidiary of Maple Leaf incorporated to make bid for Schneider shares

Schneider Corporation - “Schneider”

J.M. Schneider Family Holdings Limited - “Holdings”, a corporation indirectly owned by members of the Family

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Schneider Family - “Family”, members of the 3rd and 4th generation of the founder of Schneider who exercised voting control upon Schneider through indirect shareholdings in Holdings

Betty Schneider - “Betty”, shareholder and director of Holdings

Eric Schneider - “Eric”, director, Secretary, Vice-President and General Counsel of Schneider and shareholder, director and Secretary of Holdings

Frederick Schneider - “Fred”, shareholder and director of Holdings, formerly director and Chairman of Schneider

Herbert Schneider - “Herb”, shareholder and director of Holdings, formerly director and Chairman of Schneider

Scotia McLeod Investments - “ScotiaMcLeod”, supplementary financial advisor to Maple Leaf and SCH and formerly to the investment house which took Schneider public (with an officer being on the Schneider board into the 1990s)

Hugh Sloan - “Sloan”, director of Schneider and member of Special Committee

Smithfield Foods Inc. - “Smithfield”, a bidder for shares of Schneider

The Toronto Stock Exchange - “TSE”, the exchange on which the common and Class A shares of Schneider are listed

**Background and Recent Events**

[2] Schneider is a 108 year old company now governed by the *Business Corporations Act* (Ontario) (“OBCA”) which went public three decades ago. The Family, consisting of the third and fourth generations, through Holdings retained control through a two class share structure. The Family held 70.5% of the voting common shares representing 7.6% of the total equity of Schneider and 17.2% of the non-voting A Shares representing 15.3% of the equity; thus the Family held 22.9% of the equity but a control block of the votes that was sufficient to pass a special majority if only the common shares were taken into account. However, in the tradition of fair dealing espoused by the founder J.M. Schneider, when the sharing of premium previously attributable to multiple voting shares as opposed to single shares became an issue in the Canadian Tire case (*Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd.* (1987), 35 B.L.R. 117 (Ont. Div. Ct.)), the Family was instrumental in adopting a coattails provision in amending Schneider articles of incorporation in 1988 even though it was not required to do so

at that time as it was not issuing any further shares then. There were pronouncements made that the A shareholders would be treated equally and equitably as if they were partners with the common shareholders.

[3] The initial draft of the coattails provision was rejected by staff at the TSE without analysis. Rather, staff provided a specimen to act as a precedent. MacKay followed the specimen without material deviation except to provide the necessary changes to acknowledge that Schneider's two classes of shares were voting common and non-voting A shares. The coattails provision adopted by Schneider included the following as a definition of an Exclusionary Offer:

> 1.(e) "Exclusionary Offer" means an offer to purchase common shares of the Corporation that:
>
> (i) must by reason of applicable securities legislation or the requirements of a stock exchange on which the common shares are listed, be made to all or substantially all holders of common shares who are in a Province of Canada to which the requirement applies and for greater certainty for the purposes of this legislation shall be deemed not to require an offer to be made to all or substantially all holders of common shares who are in a Province of Canada to which the requirement applies if an exemption from such requirement is granted by the applicable regulatory authority in such Province; 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,
>
> and for the purposes of this definition if an offer to purchase common shares is not an Exclusionary Offer as defined above but would be an Exclusionary Offer if it were not for subclause (ii), 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;

(emphasis added)

[4] While the TSE had reviewed the MacKay redraft, it merely observed that there were some commas and a bracket missing. What apparently was missed by everyone at that time was that the TSE precedent did not follow the language of its July 30, 1987 policy which indicated: "…which identical offer has no condition attached other than the right not take up and pay for shares tendered before no shares are *purchased* pursuant to the offer for common shares…" (emphasis added). When the wording of the coattails came under a microscope as it did when Maple Leaf was organizing its campaign to acquire Schneider in 1997 and OHH did an analysis, it was recognized that the Schneider coattail was "flawed". Extreme care was counselled. The problem was that an offeror would be obliged to purchase the tendered non-voting A shares even if it did not purchase (acquire) any common shares but one common share was tendered to the offer. Thus from a practical point of view this presentation of the condition would preclude any offeror from incorporating the Schneider condition. This would be contrary to the purpose of the coattails on a general basis which I find was to encourage non-exclusionary bids. Meanwhile it appears that the market as exemplified by Embry and Osler merely had a recognition that Schneider was a two class of shares company and vaguely that there was a coattails provision (without having any knowledge or concern for the specifics of the coattail). It should be observed that the TSE did not require any particular form of coattails (many companies had different formats in the sense of individualistic wording), and the TSE had to approve the form adopted by each listed company. The language of the TSE precedent is awkward and convoluted. It is perhaps unfortunate that the drafting of clauses such as this has become so intricate that one has difficulty in understanding the structure even after repeated readings. It is therefore not surprising that MacKay would not have questioned the wording of the draft coattails provided by the TSE - after all it was language developed by those who would be regarded as "experts in the field" and could be safely used as a precedent. Holdings forthwith on April 29, 1988 filed a paragraph 16(a) certificate with Canada Trust Company, Schneider's transfer agent, and with MacKay, Schneider's Secretary, with a view to avoiding the conversion rights coming into effect (with the result of the A shares becoming voting shares if an Exclusionary Offer were made for the common shares). This certificate was required by the coattails provision to be filed with the Secretary and the transfer agent of Schneider. Paragraph 1(i) defined "transfer agent" as "means the transfer agent for the time being of the common shares".

[5] Later in 1988 the Canada Trust Company ceased to be the transfer agent; it was replaced by the Royal Trust Company whose transfer agent business was sold some years later to what is now CIBC Mellon. No new coattails anti-conversion certificate was filed to “replace” the 1988 one.

[6] Schneider in 1995 completed an amalgamation with its wholly owned subsidiary. No new anti-conversion certificate was filed.

[7] In my view the general objective of coattails is to elicit non-exclusionary bids. It would seem appropriate that the Schneider one not be interpreted so as to reach a contrary objective, unless that conclusion is required.

[8] From July 1990 to October 1996 MacKenzie acquired A shares for a mutual fund it managed; from May 1992 to March 1997 Royal acquired A shares for mutual funds it managed. The result was that the MacKenzie fund held 8.4% of the Schneider equity with those A shares and the Royal funds 15.1%, for a total of 23.5% (or just slightly more equity than the Family). Curiously enough, while other mutual funds managed by Royal held A shares, these are not part of Royal’s claim. Embry advised that the shares had been acquired for their earnings potential; this had not been translated into share price increase over these years. It appears that Royal continued to accumulate to a substantial percent notwithstanding Embry’s observation that there was a lot more “thin” when Royal stuck by Schneider “through thick and thin”. The take-over battle with an increased level of share price then came as a pleasant surprise to these mutual fund managers. However now having hit upon an unexpected type of “thick”, these plaintiffs now wish in this litigation to have the opportunity to tender to the highest bidder without any restriction. They assert that it is inappropriate to have the choice only of retaining their A shares or tendering to the Smithfield share exchange offer (based on the Schneider common or A shares being valued at $25.00 Canadian on a basis of a Smithfield share at $32.50 U.S., with the opportunity of remaining as a shareholder of a Smithfield Canadian company or exchanging that Smithfield Canadian share for a Smithfield U.S. share). They would prefer that an auction be allowed so that Schneider goes to the highest bidder - or otherwise that they be able to tender to Maple Leaf’s $29.00 Canadian cash offer. This Maple Leaf offer arose subsequent to the Family entering a hard lock up agreement with Smithfield to tender to its forthcoming offer. There was a consensus however that a hard lock up effectively terminated the bidding process. Thus while Maple Leaf did not

characterize its November 14, 1997 $19.00 bid (following its November 5th press release) as an Exclusionary Offer (nor its December 12th increase to $22.00), it now asserts (after the Smithfield lock up) that it made an Exclusionary Offer and further that there was no effective anti-conversion certificate in place.

[9] Schneider and Maple Leaf are major players in the Canadian meat market. By virtue of this competition each has a fair degree of market production intelligence about the other. It was recognized that a combining of the two operations would result in what some refer to as significant synergies but what for the most part would be more aptly termed benefits from rationalization whereby certain facilities would be shut down to utilize increase capacity of the remaining facilities. Foreign based meat companies such as Smithfield and Booth would not have the same degree of knowledge of the Canadian market and of Schneider and nor would they be able to take as much advantage of the synergies/rationalization as Maple Leaf. It was recognized that Maple Leaf, if it were so inclined, would be in a position to pay the top dollar for Schneider. Absent unusual circumstances, Maple Leaf would have the opportunity to therefore be able to top the bid of any other bidder. This was recognized and likely was a significant factor in the difficulty of finding other companies willing to participate in the process. Certainly, Luter of Smithfield was adamant that he not waste his time and Smithfield's resources in pursuing Schneider if the end result were only that he were being used as a stalking horse to get a higher from Maple Leaf which had signalled that it would adopt a topping strategy.

[10] The initial contact on behalf of Maple Leaf was from a Mr. Rason of RBC Dominion in August 1997, who in contacting Herb warned him that Maple Leaf would be very aggressive if a consensual arrangement were not forthcoming. Maple Leaf was desirous of obtaining a lock up arrangement as to the Family's shares. The Family had had numerous enquiries about selling out over the years; each time they had rebuffed that interest and the enquiror had not pursued the matter. Dodds had been approached to have a meeting to discuss a merger; he reported this at the Board meeting of Schneider on September 5, 1997. The Board recognized that this was advanced in the context of gaining an audience with the Family as controlling shareholder. At that same meeting, but it would appear independent of any take-over concern, it was (eventually) recognized that the share structure of Schneider was inappropriate. Notwithstanding that ScotiaMcLeod's predecessor had taken Schneider public and one of its officers had remained on the Schneider Board until the mid 1990s, apparently it

was not appreciated that the articles of Schneider had a cap on the number and dollar consideration for the A shares - and this cap had now been reached. ScotiaMcLeod eventually came back into the picture, not on the side of Schneider (the Special Committee of the Board had chosen Nesbitt over ScotiaMcLeod as its financial advisor) but rather as a supplemental financial advisor to Maple Leaf. The Board proposed to have these articles amended at the November 14, 1997 meeting of shareholders and in this amendment the A shareholders would have a vote. Dodds did meet with McCain and Muir on September 16 but not in Kitchener as suggested since this would have led to speculation, but rather in Toronto where more anonymity could be found. Dodds agreed with the obvious that there would be synergies with a merger; further he undertook to see if the Family would meet McCain and Muir, although he held out no optimism in this regard. In the grand scheme of Maple Leaf it was proposed that Dodds would have a continuing and potentially major role; it did not seem to me that Dodds encouraged this approach or was anything other than a polite recipient of this information. I do not think that McCain and Muir should have read any encouragement out of this meeting. Certainly given McCain's extensive experience in acquiring family businesses, he appreciated that the sale of a family business is a very emotional issue for a family. It would seem that he impressed upon Muir that the foremost issue to be hurdled was the emotional one in such circumstances, not the financial concerns. Certainly they cannot have been encouraged when they did not get an audience with the Family after waiting over a month and a half (even though as it turns out Dodds was not able to discuss this request with the Family given their schedule until a Holdings meeting on October 29th) and observed what they perceived as preparations against a take-over with the proposed change in the A share structure to allow the directors to issue an unlimited number of A shares.

[11] Maple Leaf attacked by releasing an announcement on November 5th that it was making an offer to acquire all common and A shares for $19.00 cash (which were then trading in the $13.00 range and had historically had never been higher than $14.25):

> The offers will contain customary conditions, including that two-thirds of the Common Shares and two-thirds of the Class A Shares are deposited under the offers. It will also contain a condition that the resolutions proposed at the Special Meetings of Shareholders of Schneider Corporation to be held on November 14. 1997 not be approved. There are no conditions relating to financing or due diligence. If, however, Maple Leaf Foods is provided an opportunity to do due diligence, it is prepared to

consider increasing the price. In addition, if requested by the Schneider Corporation Board of Directors, Maple Leaf Foods is prepared to consider an alternative to the cash offer that would involve Maple Leaf Foods shares.

Over the last two months. Maple Leaf Foods management have had discussions with Mr. Doug Dodds, Chairman and Chief Executive Officer of Schneider Corporation, concerning an acquisition of Schneider Corporation. Maple Leaf Foods has asked to meet with members of the Schneider families, but to date have not been provided an opportunity to do so.

Recently, Maple Leaf Foods became aware that Schneider Corporation had called Special Meetings of its shareholders, to be held on November 14, 1997, to consider resolutions relating to, among other things, Schneider Corporation's Articles, By-Laws, Board of Directors and Stock Option Plan. The effect of the resolutions, if approved, would be to increase the discretionary powers of the Board and weaken the position of the Class A Shareholders, possibly reducing opportunities to maximize shareholder value in certain situations, including consideration of our offers.

Maple Leaf Foods has decided to proceed with its public offers because it has not heard directly from members of the Schneider Corporation shareholders than they could achieve through any alternative transaction.

[12] In response that day, Schneider issued a press release indicating that there would be established an Independent Special Committee of its Board to explore such offer and report on it to the shareholders. This was quite timely in recognising the obligations under the securities legislation that a board has to advise its shareholders of its views as to any offer (see section 95(1)(2) of the *Securities Act (Ontario)*). Thus nothing too much should be read into this announcement. Neither would I think that too much should be read into the fact that a Special Committee of the Board was struck (consisting of all the outside members of the Board). While not mandatory, they can provide flexibility and agility when dealing with a large board (although the Schneider Board would not fit in this category in my view). However, a committee without representatives of the Family (Eric and Fontana) and without management (Dodds and Hooper) would allow for an independent view of matters from the point of view of the "minority" shareholders (ie. the balance of the common and A shareholders outside the Family) without considering the concerns of the controlling Family shareholders or the concerns of management who may or may not have an ongoing role in event of a take-over.

Dodds (and Hooper), in the process on November 14, 1997, had been given considerable independence cushioning by a change to his contract which allowed him to opt to resign any time within two years of a change in control and receive thirty months severance inter alia. No one on the Board had prior experience with a take-over. In proceeding as they did in the Special Committee, they were assisted by the advice of legal and financial advisors who had experience in this regard - namely Halperin of Goodmans and Mida of Nesbitt and their colleagues. It should be remembered that National Policy No. 38 of the Securities Commissions of Canada does not presume that take-over situations can be dealt with in any particular way (thus recognising that take-over situations are not “cookie cutter” situations).

[13] That same day McCain wrote Dodds again asking for a meeting with the Family. It must be appreciated that the Family as controlling shareholders did not have to sell to anyone or to any bid, no matter how lucrative that bid may be seen on any objective basis. They could say at any time “Thank you but NO!” or words to that equivalence. They could act in what they perceived as their interests (and logically even against their interests if they chose to do so). Did the Family at any time do anything - or omit to do something which they ought to have done - which would preclude them from maintaining that position - or preclude them from selling to someone else on a basis that may not be as financially attractive a deal as a third party may be offering? While this latter concept may jar against the view that persons should act in their best financial interests - that is that one should be rational in a dollar sense - there is to my view no obligation to do so in these circumstances. I pause to note that if one however gets into a situation where one is voting in a corporate situation and the vote effects the class within which one is voting, then Viscount Haldane in *British America Nickel Corp. v. M.J. O’Brien Ltd.,* [1927] A.C. 369 (Ontario P.C.) would appear to place a restriction on a shareholder’s discretion to act in his own interests when he observed at pp. 371-3:

> They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.

…

> But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must confirm to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member.

[14] Of course if the Family decided not to sell or to sell to someone else, then in practical terms an offer to acquire the balance of non-family shares (even if unanimously accepted) could not be regarded as a “successful” one by another bidder. In effect the Family held a veto on any offer. Thus any potential offeror would functionally have to acquire the Family’s shares. Otherwise the offeror would always fall short of getting at least two thirds of the common shares, a usual condition (with a eye on a subsequent arrangement to squeeze out the minority which did not tender). The Family not only had a veto as to the end deal - but is should also be viewed as a gatekeeper since it could stop the process at any stage (unless it had otherwise committed itself to the process playing out to a particular end).

[15] The Family met in a Holdings meeting on November 5th and were advised by Dick Menuier of their ongoing Kitchener legal counsel. The minutes reflect the following:

> Eric Schneider distributed the November 5, 1979 letter from Wallace McCain and the November 5, 1997 press release from Maple Leaf Foods which state that Maple Leaf will be making an offer for all Schneider Corporation’s shares at $19 per share.
>
> The family is not obliged to respond to the press release - or the offer, if Maple Leaf in fact proceeds with an offer. The board of Schneider Corporation is obliged to respond once an offer is made under securities legislation, and Doug Dodds informed the family that the board would be putting an appropriate process in place to respond to the Maple Leaf bid.
>
> The family stated that it did not wish to sell its controlling interest in Schneider Corporation. Dick Meunier reviewed possible actions which a hostile competitor could make while seeking to make a takeover of Schneider. Dick Meunier will prepare a draft certificate which could be filed by the family to prevent conversion of A’s to commons.

[16] It would seem that either those concerned had forgotten about the 1988 anti-conversion certificate, had concerns about its efficacy or wished to adopt a belt and suspenders approach to matters. In due course a number of paragraph 16(b) anti-conversion certificates were filed. However, in what might be characterized as an unusual Agreed Statement of Fact (although I appreciate the intent with which it was offered):

> The Schneider Family concede that on a balance of probabilities, the trier of fact will find that the November 11 certificate was not delivered to the transfer agent until December 22, 1997.

[17] Such timing of delivery would be beyond what might be termed an “efficacy date”.

[18] On November 11th the Board confirmed that at to the November 14th meeting of shareholders, any resolution which would not garner a majority support could be withdrawn. The meeting was subsequently “cancelled” and Maple Leaf was advised of this on November 13th. In business warfare each side tries to assess the motives and potential strategy of the other and to predict what steps will be taken by the enemy in the future. Military and business intelligence are not perfect. Sometimes it is uncannily accurate - at other times it is astonishingly bad. Of course sometimes battles are won not because the “right” decisions were taken but because the “wrong” decisions were taken by the victor. At a Holdings meeting of November 12, 1997 with all eight Family representatives present along with Dodds, Hooper and a Bordens lawyer, the minutes reflect the following:

> Since the family said no to Wallace McCain already, the family considered reasons why Maple Leaf might still be proceeding. It could be that Maple Leaf intends to waive its minimum conditions and take up a “blocking” position (i.e. more than 34%) of Class A shares. This could severely limit Schneider Corporation’s ability to raise capital as Maple Leaf could prevent further Class A shares being issued. This could leave the Corporation vulnerable in areas where Maple Leaf has considerable control—eg. hog war, pricing war—as well as areas where Maple Leaf has less control—hog market cycle, strike. Another disadvantage to the Corporation should Maple Leaf acquire a block position in the A’s would be that the Corporation would then be less attractive to other potential suitors. Should Maple Leaf be able to hold onto its blocking position for a sufficient length of time to enable one of the “cash attack” strategies described above to unfold.

Doug Dodds acknowledged the family's right to refuse to sell its shares to Maple Leaf or any other bidder. In light of the risk posed by Maple Leaf's ability to mount a "cash attack" on Schneider he suggested that it would be prudent for the family to consider whether the medium to long term future of the Corporation would be better a stand-alone entity or as part of a strategic alliance with a deep pocket partner. He then withdrew from the meeting.

After discussion, the family reached unanimous consensus that it did not wish to sell its shares to Maple Leaf or anyone else for $19 in a transaction that would effectively end the Corporation. The family also agreed that it was willing to consider alternatives and that, under the right circumstances, it might be willing to sell control. It was emphasized, however, that no decision had been made to sell at this time and that the ultimate decision might well be not to sell. All options were to remain open.

[19] The *British America Nickel* case, *supra,* may have presented some difficulty for Maple Leaf in adopting a blocking position—if that blocking position were contrary to the best interests of the shareholders as a class.

[20] The Maple Leaf offer sent out on November 14th was an offer by SCH, a wholly owned subsidiary of Maple Leaf to acquire all shares, common and A for $19.00 a share. The offer was silent as to whether it was an Exclusionary Offer or not. The conditions of the common share offer had numerous conditions attached dealing inter alia with the *Competition Act,* governmental and regulatory approval, lack of material adverse events and the lead in provided:

**6. Conditions of the Common Share Offer**

The Offeror reserves the right to withdraw the Common Share Offer and not take up and pay for any Common Shares deposited under the Common Share Offer unless all of the following conditions are satisfied:

a. there being validly deposited under the Offers and not withdrawn such number of Class A Shares and Common Shares that represents at least 662/3% of each such class on a diluted basis (the "Minimum Condition");

b. the applicable waiting period under the *Competition Act* (Canada) shall have expired…

[21] The conditions on the Class A offer were expressed as follows:

> **5. Condition of the Class A Offer**
>
> The Class A offer is conditional upon the Offeror acquiring any Common Shares pursuant to the Common Share Offer. The Offeror reserves the right to withdraw the Class A Offer if the Offeror does not acquire any Common Shares pursuant to the Common Share Offer. Accordingly, if the conditions to the common Share Offer are not satisfied or waived the condition to the Class A Offer will not be satisfied. For a description of the conditions to the Common Share Offer, see section 6 of the Offers to Purchase.

(emphasis added)

[22] No one appeared to twig to the use of the word “acquire” (which would be the equivalent of “purchased” in the TSE policy) as opposed to “tendered”.

[23] To the extent that anyone turned their mind to the question it appears that since the offers for both A and common shares were equal as to number, dollar amount and the two thirds condition as well as the back door condition expressed: “accordingly if the conditions of the common share offer are not satisfied or waived, the condition to the Class A offer will not be satisfied”, then the two offers were treated or considered as “identical” offers so as not bring into play the question of Exclusionary Offer as defined in the Schneider articles. It is likely that this assumption was supported by the aspect that what one would normally expect to see - namely “if the offeror does not *acquire* any common shares” (emphasis added) was there, which would be compatible with the 1987 TSE policy and the language adopted by other companies in their coattails provisions. It was not presented as a blinking neon light. McCain and Muir signed a certificate after 29 pages of text that:

> The foregoing contains no untrue statement of material fact and does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made. In addition, the foregoing does not contain any misrepresentation likely to affect the value of the material price of the shares which are the subject of the offer.

[24] Given that the OHH memorandum which analysed the coattails provisions of Schneider in great detail and concluded that extreme care should be taken given what was

said to be a “flawed” arrangement, I am concerned that too narrow a focus was placed upon the disclosure obligation by Maple Leaf to indicate that its bid was in fact designed to be an Exclusionary Offer in the sense at least that it did not wish to be caught with the “tendered” condition whereby it could be forced to acquire all the A shares tendered if a single common share were tendered. Apparently Maple Leaf preferred to keep this to themselves so as to avoid any other competitive offerors from twigging onto this. Now in this litigation however it, after having lain in the weeds, now wishes to play this as a potential trump card to upset the fundamentals of the Smithfield deal by having the A shares converted into voting shares if there is no operative anti-conversion certificate in effect.

[25] Maple Leaf continued to sit in the weeds notwithstanding the Schneider Directors Circular of November 23, 1997 which discussed Exclusionary Offers. While the text referred to “if no shares are tendered pursuant to the offer to purchase common shares” which would follow the wording in the articles, again it appears that no one twigged to the difference between the articles (“tendered”) and the Maple Leaf offer (“acquire”):

> An Exclusionary Offer means an offer if no shares are tendered pursuant to the offer to purchase Common Shares.
>
> **Capital Structure**
>
> The Corporation is authorized to issue 747,254 Common Shares and 10,802,000 Class A Shares. As at November 21, 1997, 738,954 Common Shares are issued and outstanding and 6,105,565 Class A Shares were issued and outstanding. The Common Shares and Class A Shares are referred to collectively as the “Shares”. Holders of Common Shares are entitled to one vote in respect of each Common Share held by them at all meetings of the Shareholders. The Class A Shares are “restricted shares”, in that they are generally non-voting and vote only in limited circumstances on matters respecting the attributes of the class itself or in relation to the Common shares where class approval is specifically required under the *Business Corporations Act* (Ontario). The holders of Common Shares and the holders of Class A Shares are referred to collectively as the “Shareholders”.
>
> If an Exclusionary Offer (as defined below) is made, each outstanding Class A Share shall be convertible into one Common Share at the option of the holder during the period commencing on the eighth day after the date of the Exclusionary Offer and terminating

on the last day upon which holders of Common Shares may accept the Exclusionary Offer. An election by a holder of a Class A share to exercise this conversion right shall be deemed to also constitute irrevocable elections by such holder to deposit the Common Shares resulting from such conversion ("Converted Shares") pursuant to the Exclusionary Offer (subject to such holder's right to subsequently withdraw the Converted Shares from the Exclusionary Offer) and to exercise the right to reconvert any such Converted Shares in respect of which such holder exercises his, her or its right of withdrawal, or which are otherwise not taken up under the Exclusionary Offer, into Class A shares.

An Exclusionary Offer means an offer to purchase Common Shares that (i) must, by reason of applicable securities legislation or the requirements of a stock exchange on which the Common Shares are listed, be made to all or substantially all holders of Common Shares who are in a province of Canada to which the requirement applies; and (ii) is not made concurrently with an offer to purchase Class A 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 to purchase 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 to purchase Common Shares. The Offer to acquire the Common Shares made by the Offeror is not an Exclusionary Offer.

The conversion right referred to above is deemed not to come into effect if, prior to the time the Exclusionary Offer is made or, if the Exclusionary Offer has been made, within seven days of the date of the Exclusionary Offer, there is delivered to the transfer agent and the Secretary of the Corporation a certificate or certificates signed by or on behalf of one or more Shareholders owning, in the aggregate, as at the time the Exclusionary Offer is made, more that 50% of the then outstanding Common Shares, exclusive of Common Shares owned immediately prior to the Exclusionary Offer by the offeror, confirming (a) such ownership of Common Shares, and (b) that each such Shareholder shall not (i) accept the Exclusionary Offer, (ii) shall not make or is not making any Exclusionary Offer, (iii) is not an associate or affiliate of, or acting jointly or in concert with, any person or company that makes or that has made any Exclusionary Offer, and

(iv) shall not transfer any Common Shares, directly or indirectly, during the time at which any Exclusionary Offer is outstanding.

(emphasis added)

[26] At no time did Maple Leaf quarrel with or question this conclusion that its offer was not an Exclusionary Offer. It was submitted that Maple Leaf had no obligation to do so; this is puzzling given the wording of the certificate and the fact that Maple Leaf is now emphasizing and heavily relying on the offer being an Exclusionary Offer by the definition of the flawed wording. While one has sympathy for those who prepare such documents, especially here where the coattails provision even if it had been in non-flawed form is awkward and convoluted, it strikes me as a simple principle that an offer (or other corporate document) sent out to shareholders should be expressed in language that the recipient will be able to understand so as to make a reasoned decision. That reasoned decision requires appropriate information as a foundation; that is what must be put to the recipient. As well the information put forward should allow a reasonable businessperson to make the decision - without the necessity of having to hire the equivalent of OHH to prepare a memorandum on the coattails.

[27] If there is a distinction, then the distinction should be clearly set out and distinguished. It is to my view inappropriate and misleading if the language used was “cute”; rather it should be set out in obvious fashion. Otherwise what we have is an exercise in sophistry. While I take the point made by Maple Leaf that the Schneider directors in going on to discuss the anti-conversion certificates did not indicate whether any anti-conversion certificates had been filed, I did not find attractive or compelling the proposition put forward that whether or not the Maple Leaf offer was an Exclusionary Offer would only be material if an anti-conversion certificate had not been previously or would not be filed in a timely fashion. It would have been a simple matter to state that conversion rights arising pursuant to an Exclusionary Offer could be defeated by the appropriate filing of an anti-conversion certificate but that Maple Leaf did not know if one had been or would be filed on a timely basis. I also reject the proposition that such was not material since there appeared to be little effect on the market price as that would overlook the fact that the Maple Leaf certificate had no market price considerations in the first sentence of the certificate - but only in the second sentence. Further I did not find attractive the proposition advanced that Maple Leaf did not discuss with Schneider that it considered its offer to be an Exclusionary Offer by the flawed definition

because it wished to avoid a wrangle between legal counsel. Certainly Maple Leaf had no such qualms about alleging the Schneider shareholder rights plan was invalid.

[28] Once Maple Leaf announced its offer, Schneider and Nesbitt started to canvass who could be invited to be a white knight (or perhaps someone who, notwithstanding the legitimate self interested concerns of such entities, could be found as a stalking horse to get the Maple Leaf bid up). I pause again to note that the Family could have effectively shut down the process if they had indicated that they were not interested *under any circumstances* in selling their control position. Conceivably if the Family had done so even after Maple Leaf announced its offer, the process would have aborted and the Family would have remained in control but with a likely disgruntled body of other shareholders who would have been tantalized by the significant bump that the Maple Leaf offer gave their shares only to find the stocks settled back once the Family said NO! This would have made things difficult for Schneider to raise additional (share) capital which the Board, Family and management perceived as necessary for future needs since such would require special majority approval of the A shareholders to amend the articles. It should be kept in mind that Rason (on behalf of Maple Leaf) warned Herb in August 1997 that Maple Leaf would be aggressive and in effect would be prepared to make life very difficult for Schneider if rebuffed. This advice that if the Family were not amenable to Maple Leaf's entreaties (then an indication of a 30 to 40% bump on the market price) on a one only offer basis, then there would be the threat of an unfriendly take-over, would have done nothing to endear Maple Leaf to the Family. However, it appears that even at a distance, the Family was familiar and comfortable with Smithfield's operating style, including relative operating autonomy for required companies (with actions speaking louder than promises in words). Maple Leaf was an ardent, persistent but unwanted suitor; Smithfield on the other hand had to be coaxed into becoming a suitor and therefore its conditions would appear to have been more favourably received as being fair and reasonable in the circumstances.

[29] Confidentiality agreements were prepared for execution by those parties who had expressed an interest. Booth and Smithfield executed such an agreement on November 20th in order to get access to the Schneider data room. The confidentiality agreement had a (reasonable) hook - it contained a standstill agreement as follows:

> 10. During the period of two years from the date hereof, you and your affiliates (including any person or entity, directly or indirectly, through one or more intermediaries, controlled by or under common control with you) shall not, without the prior written authorization of the board of directors of the Company: (i) acquire or agree to acquire or make any proposal to acquire, in any manner, any securities or property of the Company or its affiliates; (ii) assist, advise or encourage any other persons to acquire or agree to acquire, in any manner, any securities or property of the Company or its affiliates; (iii) solicit proxies of the Company's shareholders, or form, join or in any way participate in a proxy group; (iv) seek any modification to or waiver of your agreements and obligations under this Agreement; or (v) make any public announcement with respect to the foregoing, except as may be required by applicable law or regulatory authorities.



[30] While Maple Leaf had indicated that with due diligence (which it could have achieved by accessing the data room) it was prepared to consider increasing its offer, it did not avail itself of that opportunity (notwithstanding McCain's letter to Dodds of November 25th that Maple Leaf was interested in gaining access to the data room). Rather it appears that it was content to rest with its then business intelligence and have the resultant flexibility of not being bound by a standstill arrangement which would have prevented it from acting on its own initiative and with its own timing.

[31] The Schneider Board met on November 21st. Mida confirmed that the Maple Leaf offer of $19.00 was inadequate even if there were no other alternative transactions being considered by Schneider. Eventually Nesbitt concluded that *from a financial point of view* the range of fairness would be from $25.00 to $29.00. It was indicated that "follow-up meetings with Class A shareholders to keep them up to date will also be arranged". Apparently less that concerted attempts were made to do so but there did not appear to much interest in this by the major shareholders. It is unclear what information could be passed along that was not already out in the market. In any event it would seem that the market considered that Maple Leaf's announcement put Schneider in play and there would not appear to have been any focus on the potential veto of the Family. Perhaps in large part this was due to the fact that the Family had not immediately said NO! However the Schneider Board noted:

> The guidance that the Special Committee and Nesbitt Burns are looking for from the Family is that the Family supports the process being undertaken to deal in a credible

manner with alternative bidders. Nesbitt Burns requested a declaration from the Family as early as possible.

[32] Throughout the piece the Family was kept aware of what was happening. From one technical point of view it is inappropriate to provide one group of shareholders with information that is not made available to the rest of the shareholders at the same time. However, from a practical point of view, it would be awkward and counterproductive to keep the Family uninformed. It would be fruitless to proceed down a particular avenue to find that the Family having and effective veto did not wish to pursue that route - but rather another route or no route at all. At a November 21st Holdings meeting attended by all eight Family representatives the following notations were made in the minutes:

> **1. Update of Week's Events**
>
> …
>
> Other activities taken by Schneider Corporation included approaching possible "white knights", although Mr. Dodds noted that it always remains open to the family to say 'no'. There are a limited number of white knights based in Canada, but a larger group in the U.S. Targeted (sic) and other bidders who have identified themselves were reviewed.
>
> **2. Discussion of Valuation of Schneider Business**
>
> Potential improvements in earnings of Schneider Corporation over the 1998-2000 period were presented in the context of how well the Corporation would do on its own under normal market conditions. Nesbitt Burns had taken management's 1998 earnings forecast and calculated possible share price ranges using various methodologies.
>
> Pros and cons of Schneider Corporation's current situation were reviewed. It is significant that as the business in which Schneider Corporation participates becomes larger and more international, it goes through restructuring every 3 to 5 years. At each plateau—as Schneider becomes smaller compared to the remaining players—Schneider becomes more disadvantaged.
>
> Schneider does not generate enough cash to grow on its own. Other risks such as negative control of Class A shares, hog wars and other attacks on Schneider's balance sheet were considered. In particular, it was noted that Maple Leaf Food's strategy might involve acquiring a "blocking position" of Class A shares which would severely limit

Schneider's future ability to finance or engage in merger or other corporate transactions. If Schneider does not face the cash crunch issue today, it will be forced to face it within 5 years. Even if the current attempt to take over the Corporation is defeated, the other issues are likely to arise again. The issue become, is the Corporation more attractive now than at some other point over the next 5 years?

…

**5. Declaration of Position of Family**

Prior to leaving the meeting, Mr. Dodds stated that the Special Committee of the Directors of Schneider Corporation had met and had raised two issues in respect of which the Special Committee wished to have input from the family. The first was that the Committee wished to know the family's position on the Maple Leaf Foods offer; the second was that, in any discussions that might be had with other possible bidders, the question would come up whether the family was at all prepared to sell. The Committee was also concerned that the family might go out and try to negotiate its own transaction, which could undermine the position of the Committee. At the same time, it was also understood by the Committee that the family was free to make its own decisions and had made no decision to sell. Mr. Dodds was informed that the family would take these issues into consideration. Mr. Dodds and Mr. Hooper then left from the meeting.

Paul Mingay reviewed the legal considerations relating to any declaration by the family of its position. Eric Schneider noted that Schneider Corporation was obliged to make reasonable inquiries in this regard of 10% shareholders to fulfill its obligations in connection with that company's Directors' Circular in response to the Maple Leaf offer. Various family members emphasized that no decision had yet to be made and that there were many possibilities, including no sale. At the same time, it was acknowledged that, in order for other possibilities to be explored with potential bidders, it was appropriate to acknowledge that the family might consider some offer which was financially more attractive than the $19 Maple Leaf offer. After discussion, it was moved, seconded and carried unanimously that the family inform the board through the chairman of the Special Committee, that it considered the Maple Leaf Foods offer inadequate and that it did not intend to tender any shares. Any director or officer of J.M. Schneider Family Holdings Limited was authorized to execute a letter in substance the same as the draft presented

at the meeting with such minor amendments as the director or officer deemed appropriate on the advice of counsel.

[33] In the end result a Holdings letter (cosigned by the four individual holding companies owning Holdings) dated November 23, 1997 was delivered to the Board to the attention of Ruby as Chairman of the Special Committee:

> The undersigned confirm that they have reviewed the Offers and consider them to be inadequate and that none of the undersigned intends to tender any Shares beneficially owned, directly or indirectly, or over which they exercise control or direction, under the Offers.
>
> The undersigned also confirm that they might consider alternate control transactions involving the Corporation and acknowledge that, on the basis of such confirmation, Nesbitt Burns Inc., financial adviser to the special committee of the Board of Directors constituted to consider the Offers, is pursuing alternatives to the Offers.

(emphasis added)

[34] What was reflected in the Directors Circular of November 23, 1997, recommending rejection of the Maple Leaf $19.00 offer as to the Family's views was set out in the transmittal letter of Dodds as follows:

> Schneider's Board and its financial adviser are actively exploring alternatives to maximize shareholder value. In this connection, the Schneider family has indicated that it might consider accepting a financially more attractive offer for its shares.

[35] (emphasis added)

[36] The summary and general parts of the text of the Circular were to the same effect. The November 24th Schneider's press release stated:

> Dodds noted that, while the Board has recommended rejection of the Maple Leaf offers, the Board and its financial adviser are actively exploring alternatives to maximize shareholder value. Dodds said that the Board's efforts in this regard were supported by the Schneider family, who have indicated that they might consider accepting a more financially attractive offer for their shares.

(emphasis added)

[37] It should be noted that the public disclosures are more broadly cast that the Family's letter, which merely talked of "might consider alternative control transactions." It would seem that the discussion within the Holdings meeting of "might consider some offer which are *financially more attractive*" (emphasis added) was imparted into the public documents although this letter was not qualified by "than the $19.00 Maple Leaf offer". There does not appear to be any kind of commitment explicitly made to the concept of maximization of shareholder value. However I would note that the Family took no issue with or attempted to correct anything which they considered to be a mischaracterization of their position. In my view they must therefore shoulder the weight of any statement thus made and not otherwise corrected or clarified forthwith.

[38] I also note that a similar certificate to that on the Maple Leaf offer was signed by Dodds and Ruby on behalf of the Board of Directors and that no directors have disassociated themselves from anything in the Directors Circular - including the two Family nominee directors, Eric and Fontana who acted as a conduit between the Family and the Board.

[39] Muir, a person with considerable experience in acquisitions and mergers, did not understand that the Family was making a commitment to accept necessarily the highest offer. I am of the view that this observation by him was appropriate—and it should not be obscured by additions or modifications.

[40] McCain wrote the Family on November 25th asking for a dialogue to see "how our offers could be tailored to maximize benefits to you and all Schneider Corporation shareholders. This could include the price of our offers, including some Maple Leaf Foods shares in the offers and the structuring of the offers to include assistance in tax planning, if you so desire". Eric on behalf of the Family responded on November 28th:

> Your formal offer has initiated a process that causes examination of whether the bright future we see for ourselves and other shareholders in a "stand alone" Schneider Corporation is the best that can be achieved. <u>An association of Schneider with a partner - whether Maple Leaf or another company that preserves and promotes the best of both - may or may not be the most attractive alternative</u>.

(emphasis added)

[41] Maple Leaf would have extreme difficulty in reconciling this statement with an unrestricted auction in my view.

[42] In order to attempt to get more time for better proposals to surface Schneider Board adopted a shareholder rights plan on December 2, 1997. On December 3rd, Schneider issued another press release which talked of maximizing shareholder value. On December 5th Maple Leaf issued a Notice of Variation to its offers which notice indicated that its counsel OHH advised that the shareholder rights plan was invalid. That same day Dodds reported to the Board:

> **Update on Activities**
>
> D.W. Dodds summarized the contacts undertaken by the financial advisers to the Special Committee. Three candidates were identified as having strong interest. Their respective strengths and weaknesses were discussed. Three others were considered as having lesser interest. All interested parties believe that Maple Leaf may have greater synergistic benefits and are concerned they may be being used as stalking horses to get Maple Leaf's bid up. They may require a form of lock up arrangement in order to come forward with their most attractive offers.

[43] This meeting followed a Holdings meeting of which the same information was discussed. RBC Dominion that same day advised Nesbitt that Maple Leaf would not agree to a standstill clause in the confidentiality agreement but was flexible on price and structure of the offer:

> Access to the data room requires that execution of Schneider Corporation's confidentiality agreement. The present form of confidentiality agreements need some modification, as it precludes Maple Leaf Foods from acquiring Schneider Corporation shares without the authorization of Schneider's Board of Directors.

[44] On December 10th, McCain wrote Dodds indicating inter alia;

> Our financial adviser, RBC Dominion Securities Inc., has advised us that you have now had ample time to explore alternatives to maximize shareholder value.
>
> In my letter to you of November 25, 1997, I expressed interest in Maple Leaf Foods being allowed to access to your data room on reasonable terms, recognizing that we have made our Offers. We have since received a draft confidentiality agreement from

your counsel. On further reflection, we have concluded that it will be unnecessary for Maple Leaf Foods to do due diligence in order to consider increasing the price of our Offers.

If you have any interest in seeking to maximize shareholder value by talking to us, I would ask that you do so prior to December 12th.

(emphasis added)

[45] This letter was shared with the Special Committee and the Family. Dodds wrote back on Thursday, December 11th (that is, the deadline day set by McCain). This letter in its entirely stated:

Over the past few years, Schneider Corporation has taken significant strides to reposition and rationalize its operations with a view to long-term maximization of shareholder value. As noted in our Directors' Circular, neither the benefits of our efforts in these regards, which benefits Schneider Corporation and its shareholders have now begun to realize, nor the synergies that may result from a combination of our companies is reflected in your $19.00 per share offers.

Since receipt of your offers, our Board of Directors has been actively engaged in a process of pursuing shareholder value maximizing alternatives to your offers - alternatives which recognize both the inherent and strategic values of Schneider Corporation. We have, we believe, been responsive to your requests in this process and continue to encourage you to participate. In this regard, Nesbitt Burns Inc., financial adviser to our Special Committee, and Goodman Phillips & Vineberg, special counsel to the Special Committee, assure me that they have responded to the inquiries and requests of your financial and legal advisers, respectively, on a timely basis. I likewise responded to your letter of November 25, 1977 (copy of response attached). We have invited Maple Leaf Foods to access our data rooms on terms no less favourable than has been offered to and agreed by other interested parties. To date, you have declined this invitation.

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. In your letter to me of yesterday

(which has been shared with each member of our Board of Directors), you state that you have concluded that it will unnecessary for Maple Leaf Foods to do due diligence in order to consider increasing its offers. You have also alternative consideration structure comprising cash and/or shares, which alternative consideration structure may be of interest to certain of our shareholders. Accordingly, we would 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 reflect 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.

(emphasis added)

[46] Given the use of "fast approaching its climax" (especially when one considers its advice the previous day that Schneider has had ample time to explore alternatives and Maple Leaf's own deadline) it should have come as no surprise to Maple Leaf that the process was almost over, A process of the nature of a takeover situation must have some deadline to prevent it from inappropriately stalling. While Dodds did not state: "give us your best and final offer as we will not consider any further offers", it should have been obvious to Maple Leaf that the Special Committee was interested in something very close to the best offer. Certainly, the letter conveyed that there was no interest in a minor bump but rather a bump which reflected the significant synergies which had been discussed in September with Dodds, as well as Schneider's own improvements. Of course, there was no obligation on Maple Leaf to present its best or close to best offer then but it would risk being overtaken by a competitive bidder if this were other than a single bidder race. As it turns out there were more entires in the race (Booth and Smithfield) and Smithfield effectively lapped Maple Leaf. It is rather interesting that on December 22nd Maple Leaf raised its offer to $29, after the Smithfield lock-up (if effective) effectively ended the process. One may either assume that the $29 bid reflects some of the significant synergies and improvements or that the $29 bid was in essence a bid to create Schneider shareholder dissension and unrest or possibly both in varying degrees.

[47] On December 12th, Maple Leaf held a board meeting. A new offer was approved. Curiously a copy of the Notice of Variation was not attached to the minutes presented in evidence; however the management recommendation was to have up to 6.25 million Maple

Leaf shares authorized for issuance. At the weighted average trading price then prevailing at $16.13 this would be the equivalent of $29 approximately per Schneider share. However, the press release and Notice of Variation of December 12th increased the bid to only $22 cash (or 1.35 Maple Leaf common shares provided that the number of these shares not exceed 4.65 million). Maple Leaf advised that it was also prepared to consider financially enhancing its offers further, should Schneider shareholders receive financially more attractive offers from another party. Maple Leaf also concluded that it would be best to deliver its enhanced offer not only directly to Schneider, as requested, but also to Schneider shareholders.

[48] After considerable encouragement a reluctant Luter came to Canada to review the Schneider situation. He was a busy man who did not wish to waste his time or Smithfield's resources in making a futile foray into a new country only to be used as a stalking horse to get Maple Leaf to increase its bid. Initially he was of the view that Maple Leaf's $19 offer was a good one which should be favourably considered. It was with considerable difficulty that Nesbitt and Dodds convinced Luter to return to Canada on December 10-11. After some field and data room due diligence, Luter, who has been variously described as mercurial and intransigent, was enticed to make a bid. It was only on December 11th that he retained McCarthys as Canadian counsel. Luter's view of acquisitions is to make what he considers to be a fair offer. His conduct in this case leads me to believe that likely he does not make his offers on a final take it or leave it basis, but it would seem that he is not one for extensive haggling. Having made his business deal, he instructed counsel that he wishes them to implement the deal he has negotiated - they should not try to better it nor should they accept less. Apparently, he then signs what they give him without reviewing it. This habit will not protect him from the *Marvco* doctrine (*Marvco Color Research Ltd. v. Harris* (1982), 141 D.L.R. (3d) 577 (S.C.C.)) but it does illustrate that he does not waste time and for him a deal is a deal and an offer is *the* offer. Smithfield's December 12th proposal was that Schneider's shares be valued at $24 based on getting Smithfield shares valued at $35 U.S. Luter also sent along to Dodds a "no shop" agreement with a breakup fee of $8 million provisions as well as a lock-up agreement for the Family.

[49] Booth also on December 12th forwarded a proposal to Nesbitt which involved a cash offer of $24.50 and a breakup fee of $7.2 million.

[50] The Special Committee was advised on December 13th of these three proposals ranging, if one looked merely at the face dollar value from a low of $22 by Maple Leaf to $24 by Smithfield to a high of $24.50 by Booth. A cash transaction would trigger capital gains taxation whereas a share deal would allow for a rollover deferral of tax which would be viewed as a benefit. The Maple Leaf offer would allow for up to half of the consideration to be in Maple Leaf shares; the Smithfield proposal was an all share deal; the Booth one was all cash. It was indicated that the tax deferral benefit of the Smithfield proposal for the Family was in the range of $3-4. None of the proposals reached the face value range of Nesbitt's $25-29 fairness from a financial point of view.

[51] A Holdings meeting was held on December 13th at which all eight Family representatives attended. Dodds reported that:

- he expects the process will be completed by Wednesday, December 17, 1997
- the Family should be prepared to make a decision by Wednesday, December 17, 1997 because best bids should be known by that time.

[52] I do not find this advice unusual or inappropriate in the circumstances. Given the number of Family members (and assuming different viewpoints are possible) it would be necessary to advise them to be ready (with a single voice) to make a decision on a timely basis and that the process was reaching a necessary climax in the sense that it could not go on indefinitely or the interested parties would lose interest and likely suspect they were being used as stalking horses. After Dodds left the meeting the following discussion was reported:

> Maple Leaf Foods may make a higher bid - conditional upon 66-2/3% again - if the board or family does a deal with someone else - perhaps just to embarrass Schneider. The family does not wish to hold Maple Leaf paper because the family believes it is overvalued already and not likely to sustain growth over the long term. Therefore the family will discount Maple Leaf and Booth Creek proposals to the extent they involve taking cash since cash will immediate tax consequence.

[53] Dodds rejoined the meeting once the Bordens lawyer of the Family explained that the Family had the following three issues:

> 1) Anti-flip provision will be required by family for any buyer that wants family locked up.

2) Board approval appears unlikely at current proposed bid prices. The family would prefer that the Board recommend any offer that the family might be willing to accept which meant that the offer prices would have to be improved. Nevertheless, it was acknowledged that even if proposals are increased, there could be a difference of opinion between the family and board's advisor due to the family's long term outlook and Nesbitt's "cash is king" short term outlook.

3) The family would be prepared to enter into a lockup with a bidder that requests one in its proposal to the Corporation if the bid is otherwise acceptable to the family. As a corollary, why should the Corporation pay a break up fee (eg. Smithfield proposal) if family is locked up and the offer is any and all?



[54] An anti-flip agreement would require a successful bidder to operate and deal with Schneider for a period of time before selling out to third parties. If one wished to ensure that the bidder chosen (partly) on the basis of longer term objectives kept with Schneider for at least this period of time, this would be one device. It would also save the Family from the embarrassment of selling at one figure and then rather immediately having the chosen purchaser sell out for a higher figure - and possibly to a non-chosen suitor such as Maple Leaf which had been rejected in part because of the Family's paternalistic concerns for the shareholders such as the employees, suppliers, customers and communities.

[55] The Special Committee met December 14th. The minutes prepared by a Goodmans lawyer as secretary of the meeting referred in two places to participation in the "auction process". These minutes were signed by Ruby as chairman and no change was requested for this wording by any member of the committee. It was submitted that the use of "auction process" was confirmation that the highest bidder would "win Schneider" and implicitly that all bidders would have a chance to increase their bids to overcome the highest extant bid. Ruby testified that this phraseology had been missed by him. One should remember the context of all these dealings; the pace and intensity of what was going on was not conducive to a luxury of a fine tooth comb review as afforded by this lawsuit. While it is true that the Special Committee was attempting to get the best offers out of the finalists as this Committee was charged with the responsibility of looking out for the best financial interests of the non-Family shareholders, I do not see the loose use of these words as obligating (or confirming any commitment by) anyone to a true auction process. Certainly as Ruby said the Family preempted matters on the 17th from proceeding so that another round of bids could be

solicited; however it does not appear that anyone on the Special Committee or its advisors challenged the right of the Family to do so. Thus they may have felt that the Family's decision was premature or unwise but apparently no one said that they had committed not to do so. This in my view is just a variation of the recognition that the Family could have said NO! to any proposal and thereby stopped the matter immediately. What the Family did on the 17th was say NO! to everyone but Smithfield. (Please note that I am not dealing here with the aspect of reasonable expectations as established by any public documents or announcements).

[56] No one contacted Maple Leaf over the weekend or at any time leading up to the events of December 17th. However, no one said definitely that they would contact Maple Leaf. Certainly Maple Leaf did not make any inquiries - rather it seemed that it was content to let its $22 bid stand, likely with the expectation that Schneider was having trouble getting anything better and therefore there was no sense bidding against oneself. This cautious approach was also evidenced when Maple Leaf only went up to $22 (as opposed to going all out as may be the case with their $29 bid).

[57] This December 14th Special Committee meeting was held during a recess in a Board meeting. The minutes further reflect that Eric and Fontana, the two Family representatives on the Board had advised the Board of the Family's rules in relation to the three proposals:

> In particular, the Schneider Family advised the Board of Directors that it had reviewed the various proposals in terms of three factors: financial value, continuity of the Corporation in a manner consistent with the Schneider family's desires, and the effect of any transaction on the Corporation's various stakeholders, including shareholders, employees, suppliers and customers. The Schneider Family advised that on the basis of these factors, it had concluded that the $22 Maple Leaf offers were inadequate and unacceptable and that it doubted whether any offer from Maple Leaf could provide sufficient value to mitigate its concerns that any transaction involving Maple Leaf would not be in the best interests of the growth of the Corporation or the best interests of the Corporation's various stakeholders. The Schneider family advised that the Booth Creek proposal came closer to satisfying its concerns, but that it believed that Booth Creek was already very highly leveraged which might restrict the future growth of the Corporation and that Booth Creek did not offer the Corporation the benefits that Smithfield could

> offer. The Schneider family lastly advised that it believed that while the Smithfield proposal did not meet its financial adequacy criteria, the Smithfield proposal did meet the Schneider family's other two criteria.
>
> Management then advised the Board of Directors that it believed that the Corporation 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 the Corporation, The Schneider family stated that it shared this belief and on that basis, assuming that Smithfield could satisfy its financial adequacy criteria, that a strategic merger with Smithfield would be in the best interests of the Corporation.

(emphasis added)

[58] It was clear from Halperin's advice to the Special Committee that there was recognition that these last two of the three criteria were not the mandate of the Special Committee which was concerned with obtaining the best financial results for the non-Family shareholders. He is reported as stating:

> Stephen Halperin confirmed to the Special Committee that Goodman Phillips & Vineberg was counsel to the Special Committee, to which it owed its primary duty, and that it has acted, and would only continue to act as special counsel to the full Board of Directors and to the Corporation in connection with the Maple Leaf offers and the related change-in-control process, to the extent that the interests of the Special Committee and its members were aligned with those of the full Board of Directors and the Corporation.
>
> Mr. Halperin then reviewed with the Special Committee that its mandate in the circumstances was to obtain the best available result for shareholders having regard to all of the circumstances and, in this regard, that the Special Committee's responsibilities was first to the shareholders of the Corporation other than the Schneider family. Mr. Halperin advised the Special Committee that it ought not to take into account criteria other than financial value when comparing available alternatives, unless the various available alternatives are indistinguishable in terms of the financial values offered thereby.

[59] Ruby noted that the Family was concerned inter alia with Schneider remaining intact with the ability to grow, so that 4000 people/employees would have a future. Smithfield was observed as being satisfactory as to the second and third criteria in the view of the Family

although they were not happy as to the financial value; however it was noted that Maple Leaf met none of the three criteria.

[60] The Family via Holdings and its constituent shareholders gave the Board, through Ruby as Chairman of the Special Committee, a further confirmation of their view so that the Directors' Circular in response to the Maple Leaf $22 offer could be prepared. In a December 15, 1997 letter to the Schneider Board they rejected the Maple Leaf offer and advised:

> The undersigned also confirm that they might consider alternative control transactions involving the Corporation and acknowledge that, on the basis of such confirmations, Nesbitt Burns Inc., financial advisor to the special committee of the Board of Directors constituted to consider the $22 Offers, is pursuing alternatives to the $22 Offers.

(emphasis added)

[61] The Directors' Circular of December 16th stated:

> The Schneider family also confirmed to the Board of Directors that it might consider accepting a financially more attractive offer for its Shares.
>
> **Alternative Transactions**
>
> The Board of Directors has been actively engaged in a process of identifying other transactions that might result in greater value to Shareholders that 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.

(emphasis added)

[62] I do not find attractive the Family and Board submission that *"more attractive"* in this context does not mean the "*most* attractive" when stated as simply as this with no conditions. I would have thought it appropriate to also comment upon the other two now revealed criteria.

[63] In my view however, Fred was off base when he assumed in question 558 of his examination that the Family and non-Family shareholders had identical interests:

558 Q. So if two thirds of the class A shareholders disagreed with you about what was their best interests, what would happen?

A. Well, if we thought that what we were doing was in the best interests of the shareholders, all of the shareholders including ourselves, who were fairly major shareholders, that it would also be for theirs.

[64] On December 16th Dodds travelled to Virginia to do due diligence on Smithfield but more importantly to see if he could get Luter to increase his offer. Nesbitt did not accompany Dodds as it would appear that there was some friction between Luter and Mida Luter's view was that Nesbitt was not going to spend Smithfield's money and that Luter had considerably more experience than Nesbitt when it came to buying meat companies. It appears that Dodds struck several right notes with Luter, as he got Luter to recognize that Smithfield's stock was trading at a lower level than when he made his offer and that Schneider had made improvements which cost it in its financial results in the immediate past, but which would allow it to reap substantial benefits in the future. Luter identified with this approach to business, as he had suffered through the same problems. Luter in the result enhanced his proposal to a $25 Schneider Share based on a $32.50 U.S. Smithfield share. He continued to be adamant about not being used as a stalking horse. Late that night McCarthy's sent Dodds a letter, with a McCarthys lawyer signing its "as attorney for" Luter. The letter stated:

Following our discussions on Tuesday, I have enclosed a revised draft Tender Offer Agreement and Lock-Up Agreement. Please share these documents with your board of directors and the Schneider family. Our offer, as reflected in these agreements, is open until 8:00 a.m. on Thursday, December 18, 1997. Both contracts must be signed for either one to be effective.

Should the parties decide to accept our offer, and sign the agreements, they should be returned to our lawyers at McCarthy Tetrault by 8:00 a.m. on Thursday.

(emphasis added)

[65] Booth also sent along its formal proposal on December 17th. It increased the minimum tender percentage from two thirds of the common share to 90 per cent. There was to be a lock-up of the Family shares to this offer; however the break up fee was eliminated as unnecessary if the Family committed to the lock-up. I would comment specifically on two aspects of this proposal. Firstly, as with the Smithfield proposal, there was a recognition that

matters were reaching a conclusion. This is not surprising since there has to be some sort of deadline established to keep up the momentum and to draw out the bid that is anticipated to be the best one. It appears that Nesbitt was the one who was advocating this type of schedule. Of course, both sides can play this game as such a schedule gives the offeror the opportunity to put a short time fuse on its offer. This led to the second aspect whereby both Smithfield and Booth demonstrated their concerns about having their offers shopped by putting in a tight response time. Booth was even more rigorous than Smithfield - Booth left its price blank until it faxed the price of $25.50 after 5 p.m. that day, demanding a response by 8 p.m. that evening. Luter had advised he wanted an immediate response; McCarthy's interpreted this as 8 a.m. the next day which I would view as a rather relaxed immediacy.

[66] Holdings held another meeting on December 17th afternoon, again with all eight Family representatives present. The minutes reflect that Booth was expected to make an offer in the $25-26 range, that Smithfield captured its synergies by operating entities and not as a corporate group (implying that there was a certain degree of subsidiary independence) with its offer being $25 per Schneider share when the Smithfield share is at $32.50 U.S., requiring a hard lock-up and being subject to a waiver of the shareholder rights plan and the standstill and that Maple Leaf's offer of $22 remained in place. Dodds advised that Nesbitt's position was that it would not take into account growth potential and the tax advantage of the rollover on Smithfield proposal. It is of course recognized that each shareholder will have a different cost base for his shares and a different tax position; thus it would be difficult to impossible to quantify the tax benefit for shareholders generally so that perhaps the most that could be said would be that there is potential benefit which each shareholder should consider. As for the aspect of growth potential, this too is somewhat elusive. While it would seem that Smithfield had enjoyed recognition in the stock market for its superior financial performance, it is equally true that anyone could purchase Smithfield shares in the open market to participate in that growth potential (this assumes that there is a significant float available and that the size of the deal is not such that the demand for shares could not be met in this fashion). In the end result however Nesbitt in valuing the Smithfield offer apparently applied a 6 per cent discount to bring the value down to $23.50 so as to allow for volatility in the stock and currency market prior to a closing of the deal. Either Nesbitt felt that the prognosis was negative or it adopted a conservative approach to assuming negatives and not allowing for any possible positive outcome.

[67] The minutes further reflect:

> The family discussed the situation at considerable length and determined that the Smithfield proposal was the most desirable alternative from the possibilities available on a financial basis in both the short and long terms. It was noted that Smithfield was the North American leader in pork and a combination with Schneider Corporation would be the best investment in this industry for the long term and allow the family to participate in the synergies created and future growth. Neither Booth Creek nor Maple Leaf offend the same benefits, even if the prices offered were higher. Accordingly, the family decided it wished to tender its shares to the offer proposed by Smithfield and was willing to enter into a hard lockup agreement to do so.
>
> On motion duly made, seconded and carried unanimously it was resolved that the family accept the Smithfield proposal and enter into a hard lockup, subject to the proposal being available by virtue of its conditions as to waiver being met.
>
> In view of the earlier request of the outside board members that the Schneider family meet with them, all eight family members agreed to stay and attend at the meeting of the full board of directors of Schneider Corporation later on December 17, 1997, to stale the family's position.

[68] At the Board meeting which commenced approximately on hour later. Fontana as the spokesperson for the Family read the following statement, apparently verbatim:

> The family has supported the effective process that the Board and the Special Committee have pursued in response to the original MLF bid that came unexpectedly six weeks ago. We believe that not it would be important to that process for the family to state its opinion at this time.
>
> 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.
>
> During the last six weeks we have recognized the following points.
>
> 1. The 108 year history of this company results in a strong feeling with this family. It always has been and we hope that it can continue in the future.

2. We recognize that the meat packing industry has been evolving into larger players that can withstand the financial vagaries of commodity markets and that have the financial resources to invest in the business.

3. For a Canadian company to takeover our company we believe that there would have to be significant rationalization of our company and that J.M. Schneider Inc. would essentially disappear and that the Schneider brands may be eroded over the long term.

4. We would like to see Schneiders grow and take advantage of the opportunities that we believe are available to the pork industry and that J.M. Schneiders tried to take advantage of on their own in their business plans.

5. We would like to see a healthy pork industry evolve with several large players in Canada. This would be good for the many stakeholders of the Canadian pork industry.

These general issues are important to the family but all offers must be considered from a financial perspective as well.

[69] There are essentially three offers on the table:

The $22 MLF offer has been rejected by the Family but we recognize that why (it) will top any bid.

The Gillett deal at $25.50 is a straight cash offer. We believe that this deal could satisfy many of the other issues that we have raised but for the family there are tax considerations that make this offer less attractive than the other offers. In addition the conditions of the offer are such that it amounts to option to decide later rather than commit now to the company and the pork industry. Only the family is required to commit now. These conditions are on the extreme end in favour of the buyer rather than the seller.

The last offer is from Smithfield. It offers the family the ability to take all shares therefore sallowing us to continue to participate in the growth of the pork industry. It also allows the family to take advantage of tax considerations. These conditions are available in the MLF offer but we, as a family, believe that the following points support the Smithfield offer:

1. The opportunity for share growth and value enhancement is greater with the Smithfield share.

2. For family shareholders wanting to diversity in the future, the liquidity of this stock is attractive.

3. Smithfield/JMS company will be a dominant North American player that is growing in international markets.

4. The family will have a representative in the Smithfield board.

5. There is greater opportunity in the Smithfield offer for the Schneider brands and the company to grow.

6. We know that Smithfield has been active in the past purchasing other companies. We understand that after these purchases, they have allowed the companies to continue to operate and grow relatively independently.

In conclusion, the family has unanimously agreed that we will support the Smithfield bid.

(emphasis added)

[70] This decision, especially in the way that it was presented in such a forceful way as with all eight Family representatives present in an emotionally charged atmosphere, surprised the remainder of the Board. The statement was reinforced by Fred advising that the Family's decision was in fact unanimous. There was the opportunity for questions of the Family before they withdrew and the meeting was turned into one of the Special Committee. Curiously, although apparently questions were asked, none of the witnesses were able to recall what they were. However if we turn to the Board minutes it is recorded inter alia that:

> The family told the board that they wished to accept the Smithfield offer and they were prepared to and wished to enter into the hard lock-up requested by Smithfield in order to allow the transaction to proceed.
>
> …
>
> The family then advised the Board that it wished to accept the Smithfield offer and that it would not accept any offer from Maple Leaf or Booth Creek.

(emphasis added)

[71] The secretary of this meeting was Eric. No director, including Fontana, has apparently questioned the accuracy of these minutes directly. Fontana and Betty in their examinations appeared to disagree in that conclusion that no offer from Maple Leaf would have persuaded the family to go with Maple Leaf. Perhaps this is second guessing in light of Maple Leafs $29 "after the fact" bid which on the surface even taking into account the relative values of the tax rollovers would on a face dollar value been more than Smithfield's - even better than a $1 topping bid. However, it seems to me that as alluded to by Herb in his testimony it was not reasonably conceivable under the circumstances that then seemed to be prevailing that Maple Leaf would be able to come up with an offer which the Family found acceptable, especially when one factored in the other two criteria. Eric also told the Board according to him that if Maple Leaf were to make a further offer it was unlikely to be sufficiently higher than Smithfield's to take into account the other features of tax considerations and the differences in business philosophies. I would also observe that the December 31, 1997 Directors Circular which was certified on behalf of the Board (and not objected to) stated: "on the basis of statements of the Schneider family that it would not accept any offer by Maple Leaf or the other alternate offeror….".

[72] The Special Committee then huddled. Nesbitt advised that its appraisal of the Smithfield offer was below the $25 face because of the discount factor discussed supra. Thus it would fall below Nesbitt's fairness range and therefore as the Special Committee would be guided by that, it would be unable to recommend the Smithfield offer - even though it was the deal which the Family (with its veto of any deal) wished to enter. I see nothing sinister in the Committee questioning Nesbitt as to whether it had taken all factors into account when valuing the Smithfield offer; this was nothing more than these directors being diligent in their responsibility. These directors also quite correctly asked Nesbitt as to what range the Schneider shares would settle in if the Smithfield offer expired and there were no other control transactions; the response was a range of $18-20.

[73] Dodds was then requested to contact Luter to attempt to get a better deal. Dodds woke Luter from a nap thereby catching him somewhat off guard. It would seem that Dodds vigorously and diligently attempted to persuade Luter to do better. Given the nature of Luter, I think it commendable that Dodds was able to even get a small adjustment based on a change in exchange rates. Clearly Luter was not going to change his spots and make any negotiating/bargaining changes in the sense of upping his offer - in his mind he had made a

fair offer and he would stick to it, adjusting only on the principled basis for the exchange rate. Was he bluffing? - only he knows for certain in this deal. (If Smithfield dropped the breakup fee then that may have been recognition of redundancy aspect once the lock-up was assured - that however is something between Luter who does not read legal documents and McCarthys). Dodds was criticized for advising Luter that the Board would not stand in Smithfield's way. However, it appears that this comment was made only after Luter had refused to make any bargaining concession and thus should be viewed as an effort to keep the Smithfield deal from going off the rails. As well in getting Luter to change the offer from a plan of arrangement concept to a tender for all or any shares, the recommendation of the Directors of Schneider became considerably less important.

[74] However, the Board then had a veto. By virtue of the standstill that Smithfield had signed, the Board could have torpedoed Smithfield by refusing to waive its terms. Would this tactic have overcome what was perceived as a Family preemption of the process which the Special Committee apparently anticipated would not be absolutely over by December 17th but would allow for perhaps a further round of seeing whether anyone including Maple Leaf wanted to improve a bid. It would seem to me likely that such a stand would not have been courageous but rather foolhardy. I think there was much merit in Ruby's observation that, if the Board had refused to waive the standstill in the circumstances, he would have been facing Mr. Strosberg in a class action case where dissatisfied shareholders would have been suing Ruby for not allowing them the opportunity of either tendering their shares to the $25 Smithfield bid or keeping them as opposed to merely seeing the shares sink back to the anticipated range of $18-20. The fairness opinion only truly matters in the relationship to whether the Special Committee/Board could recommend the Smithfield proposal - its lack did not prevent Smithfield from making the proposal.

[75] I find that the reasons given by the Special Committee are appropriate in the circumstances:

> After much discussion, the Special Committee determined that it was not in the best interests of shareholders of the Corporation, other than the Schneider family, to prohibit the Schneider family from entering into a lock-up agreement with Smithfield, having regard to, among other things, the following factors:

(i) the concern of the Special Committee (based in part upon the views expressed by its financial adviser as to the likely "settle" trading value of the Corporation's common shares and class A shares in the absence of any control transaction) that the equity securities of the Corporation would likely trade at a level significantly lower than the consideration to be offered under the Smithfield offer, with attendant illiquidity and additional adverse risk to share values if the Corporation was to continue to compete in a "stand-alone" or status quo scenario;

(ii) the advice of management that a strategic merger involving the Corporation would be in the best long-term interests of the Corporation and would reduce the risks and uncertainties affecting the Corporation as a result of its competitive position in a "stand-alone" or status quo scenario;

(iii) the advice of the Schneider family that it would not accept the $22 Maple Leaf offers or the Booth Creek offer and would not consider any further or other offer from Maple Leaf or Booth Creek;

(iv) the fact that the consideration to be offered under the Smithfield offer resulted from arm's length negotiations and had been increased from Smithfield's initial position, the advice of management that it did not believe that Smithfield was prepared to further increase the consideration to be offered under the Smithfield offer, and the concern that Smithfield might withdraw its offer if a further increase to the consideration to be offered thereunder was demanded; and

(v) the fact that Smithfield offer was proposed to be structured on an "any or all" basis such that shareholders could participate in the premium to be offered to the Schneider family for its shares or could elect not to deposit their shares to the Smithfield offer and continue as shareholders of the Corporation.

The Special Committee resolved therefore to recommend to the full Board of Directors that it waive the "standstill" provisions of the Smithfield confidentiality agreement to permit the Schneider family to enter into the proposed lock-up agreement with Smithfield.

[76] The Board then proceeded to waive and release Smithfield (and the others) from the standstill provisions. The lockup with the Family was not executed until after the standstill restrictions were waived and the proposals were made conditional upon a waiver being

obtained. Thus there was no effective proposal until the waiver was obtained. There was no proposal made publicly until the waiver was achieved.

[77] There was an objection that it was an earlier violation of the standstill when Smithfield directed its December 16th offer to the Board and *to the Family.* To my mind that is the most technical interpretation of the standstill provisions and ignores the "chicken or egg" situation present here. Everyone recognized the veto position of the Family - in fact, as discussed above, it was more in the nature of a gatekeeper's veto. If the Family wished to, it could terminate the process at any time. It was only by the sufferance of the Family that the process was allowed to proceed to the limit it did. At some stage the Family had to be informed so that its views could be canvassed. As well the joint transmittal of the Smithfield offer to the Board and the Family was done openly with no attempt to backdoor the Board in the sense of a deal to lockup the Family being presented as a *fait accompli* to the Board. The spirit of the standstill was honoured and the Board maintained control over public disclosures of offers - save and except for Maple Leaf which decided to forego access to the data room to maintain its flexibility of making public takeover bids as it wished. Luter had been dealing with Dodds and Nesbitt both of whom were encouraging Smithfield to make an offer, all with the knowledge of the Board and which background recognized the necessity/desirability of a lock-up to get the best offer.

[78] On December 18th the lock-up agreement was executed and a press release was issued as to the Smithfield deal. Maple Leaf responded on the 19th with its press release when it stated that it:

> was disappointed that the Schneider family and the Board of Directors and management of Schneider Corporation have attempted to shut down the auction process that was underway to maximize value for all Schneider shareholders. Mr. Muir, Chief Financial Officer of Maple Leaf Foods said, "Their recent actions are inconsistent with statements contained in Schneider's Directors' Circulars that they are 'committed to maximizing shareholder value'.

[79] On December 19th, Dodds wrote what he described as a courtesy note to a Smithfield executive:

> I had a most enjoyable time visiting with Joe Luter, yourself and Tim Sely and I must say I am delighted that Joe and I were able to put together an offer that the Schneider Family found attractive….

[80] I find nothing sinister in this comment. It is perhaps a penetrating glance at the obvious - if the Family had not found the offer attractive then there would have been no Smithfield deal to put forward to anyone else.

[81] OHH on December 19th prepared a memo for Muir as to how to use the coattail situation to pursue obtaining control of Schneider without the support of Schneider's Board or the Family. The Maple Leaf bid would be revealed as an Exclusionary Offer based upon its use of "acquire" as opposed to "tendered" as the condition. If no effective anti-conversion certificate had been filed either (a) before the offer or (b) after the offer, the As would become voting shares so that the Family would only have 22.9 per cent of the votes (the same percentage as their equity). It would not matter that the Family was locked up with Smithfield; the non-Family shareholders holding 77.1 per cent of the vote could be wooed with the more attractive offer from Maple Leaf than the Smithfield one. OHH doubted that a 16(a) pre-offer anti-conversion certificate had been filed as there was no mention of that in the Schneider's Directors Circular when anti-conversion certificates were discussed. I would have thought it more appropriate that disclosure have been made.

[82] Maple Leaf seized on this possibility and sent out a Notice of Variation to its offer to increase the cash offer from $22 to $29 with an equivalent increase in the share alterative. Curiously enough there is no mention of any change in the maximum number of shares available in the minutes of the directors; however the notice refers to that number being 6.2 million as opposed to 6.25 million. Maple Leaf noted that it had locked up (in a soft lock-up) the Schneider Shares held in the mutual funds in question managed by Royal and Mackenzie. No mention was made in the Notice as to Maple Leaf's prior offer having been an Exclusionary Offer. Nesbitt advised that the Maple Leaf offer of $29 was *fair from a financial point of view* but that the Smithfield one was not as it fell below Nesbitt's fairness range of $25 to $29. Therefore the Special Committee could not recommend the Smithfield offer to the Board, nor the Board to the shareholders because of this situation. However, that was not an impediment to the proposal being made.

[83] Booth, the other disappointed bidder, wrote on December 22nd to complain that Smithfield's bid was not as good as Booth's "in accordance with the rules of the auction process". Booth's President referred to:

> When I was asked by Nesbitt Burns to consider bidding for the Company I was assured that the "auction" process consented to by the Family would in fact be an auction run by the Board's Special Committee with the assistance of Nesbitt Burns and that the best proposal would be successful. Schneider made several public statements that its Board was soliciting bids from interested parties in order to "maximize value" to the shareholders. I was comforted by the public statements by the Board that its objective was to "maximize" shareholder value.

[84] I would observe however to the contrary that it was recognized that in an "unrestricted" auction process that Maple Leaf would have an advantage over all other potential bidders since it could "afford" to pay more than anyone else. The unrestricted auction scenario thereby almost automatically assumes that Booth would be a loser. This does not make sense from Booth's point of view. Certainly it and the other ultimate bidder Smithfield did not want their bids to be shopped.

**[85] Oppression Claims, Reasonable Expectations and Duty of Officers and Directors**

[86] Was there such an auction process with such rules? Was there a commitment to maximize shareholder value and an undertaking by the Family to proceed with the bid which maximized shareholder value? Was this maximisation of the highest face amount? What were the public statements made - either supported by "internal" documentation from the Family or not disputed by the Family? Certainly there was no public announcement of an auction or an auction process per se.

[87] In *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (Ont. C.A.), Carthy J.A. for the court stated at p. 4:

> The parties do not dispute the appropriate legal issues that are applicable to these circumstances. 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.

[88] This was in reference to my views in this case (1995), 23 O.R. (3d) 7 (Ont. Gen. Div.) where I stated at pp. 6, 9 and 13:

> It strikes me that once the "promise" has been made (in a corporate/securities legislation sense as we have here through the information circulars and press releases which are to be translated into the issuer bids), then this promise becomes a reasonable expectation which deserves protection through the oppression provisions of both the C.B.C.A. (Ss. 241 and 248) and OBCA (ss. 248 and 253). (p. 6)
>
> I think it reasonable that shareholders be entitled to rely on written and public pronouncements of what corporations in which they hold shares will do. This is especially so in the case of corporations which offer their shares to the public as it is an offence for such corporations to be other than truthful in public pronouncements: see s. 122(1)(b), *Securities Act,* R.S.O. 1990, c. S.5. (p. 9)
>
> What we have to consider is not what is the result of any particular construction, but what was the meaning which ordinary men of business would attribute to the notice at the time they received it. (p. 13) The test is, what is the fair business-like construction which business men in the position of shareholders would place on this document when they received it? And it is by applying that test that I propose to try the validity of the notice. (p. 13)

[89] The reciprocal of this is that the shareholders and the market must take what is said in such public announcements and documents into account when forming their reasonable expectations. They cannot take into account what they wish was being said nor can they blame Schneider or the Family if they rely on others who have not taken into account the high conditionality of "might consider" or distort it by only focussing on "maximization of shareholder value" or "accepting a financially more attractive offer".

[90] There was however a statement that the Board was looking at alternative methods to maximize shareholder value and that the Board's efforts were supported by the Family. As well there was a statement made that the Family's criteria was "a more financially attractive offer", as opposed to any public indication that the Family had (eventually, perhaps upon greater reflection) two other material criteria. It should be noted that this phrase of "a more financially attractive offer" is ambiguous in the sense that tax planning is a financial consideration although not specifically mentioned - and as noted that this aspect will vary in

impact from shareholder to shareholder. *However the key aspect is that anyone who considered the Family's position would see that it was conditional to a high degree. The Family "might consider accepting a more financially attractive offer…" It was not said that the Family would consider accepting let alone that they would accept such an offer.* Osler could not come up with a word which denoted conditionality better than "might"; no one appeared to focus on "consider". The market, Booth (if the December 22nd letter is taken as other than sour grapes) and Maple Leaf may have thought there was an unconditional auction going on because that is what they wished was going on. However, if Booth, Maple Leaf, Royal, MacKenzie, Pente or Cascade had truly informed themselves with the information available they should have appreciated that the Family was still the gatekeeper with a veto. In making this observation, I do not wish to be seen as unduly critical of small shareholders of Schneider if they did not make themselves aware of this information; it would be unreasonable for someone, say, with 1000 shares which were not registered so that he would get the material directly including the Circulars to do other than rely on his broker for such research analysis (recognizing that if that broker is a discount broker then such research would not be available and one would have to rely upon one's own resources). Another possibility would be to rely on the financial press; however, this can be dangerous and it should be appreciated that while it is marvellous how often the "papers" (or other media) get it right, they traditionally disclaim any responsibility for securities news, accuracy and advice. The media however can always provide a useful additional warning system to alert someone to check out the situation; is it fact or unfounded rumour or something in between? It is however unfortunate when those with larger stakes either consciously or inadvertently fail to do appropriate analysis. Wishing that there was a binding auction will not make it so. Mutual fund managers are paid to manage and manage well - that would imply that their research be as accurate as reasonably possible. However it seems to me that it is absolutely inappropriate for someone like Maple Leaf to ignore the plain meaning of "might consider" given its sophistication and experience, assisted as well by financial and legal advisors who seemed to fine tooth comb everything. I appreciate that what the Family did may not be perceived as the model of economic rationality in the stock market - however they were not short-term players and McCain and Muir knew of the very emotional primary issue for the Family. Under these circumstances it is inappropriate to assume that this situation would fit any standard pattern which Muir may have observed when he was director of mergers and acquisitions of a major brokerage house.

[91] See *Benson v. Third Canadian General Investment Trust Ltd.* (1993), 14 O.R. (3d) 493; 13 B.L.R. (2d) 265 (Ont. Gen. Div. [Commercial List]) at p.273 (B.L.R.) where I observed:

> I would also observe that the "in play" concept only becomes relevant in the aspect of concentrating on maximizing shareholder value when a corporation is *truly* in play. If there is a veto block of shareholders who are entitled to ignore, disregard and/or reject an offer, then if that be the circumstances under the prevailing law, how can one say that the corporation is in play? The ballgame would only be played if the veto block were disqualified in some legal way. If not, the first pitch is not thrown. If not in play, then it is my view that maximizing shareholder values is only a subset of the best interests of the corporation for which the directors must have regard. See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div., affirmed by Ont. Div. Ct. at pp. 168-172.

[92] See also *Cogeco Câble Inc. c. CFCF Inc.* (May 21, 1996), Doc. C.S. Montréal 500-05-018360-964 (Que. C.S.); and *Armstrong World Industries Inc. v. Arcand* (1997), 36 B.L.R. (2d) 171 (Ont. Gen. Div. [Commercial List]). In that my view there was not an unrestricted market auction but rather a market canvas always under the shadow of the Family being able to truncate it at any time. While the "market" may have perceived that Schneider was "in play", it was not truly "in play". As well a perfect market assumes perfect intelligence and knowledge; that is not possible in a takeover situation where there are varying forms of poker (with bluffing) being played by all concerned. As was the case and discussion about "bread" permutations in *Benson,* given the Family's gatekeeper role here, a full loaf would only be in play if the Family agreed to a full unrestricted auction in some way. If the Family said NO! at any time, then there would be no loaf; if not, then there was the possibility of a fraction of a loaf.

[93] Schneider's January 9, 1998 press release observed:

> Douglas Dodds, Chairman and Chief Executive Officer of Schneider Corporation, stated "Our Board of Directors, its Special Committee of its independent directors, and management take exception to Maple Leafs suggestion that Schneider Corporation's process of attempting to maximize shareholder value was anything but proper. We retained Nesbitt Burns to search for bidders, travelled across North America to meet with interested parties, and solicited proposals from several prospective bidders. Ultimately,

only one bid could succeed because of conditions of the other bids which would not be satisfied."

"The Schneider family never advised us, nor did we ever communicate to our shareholders, that the family would accept any offer for its shares or would accept the highest offer for its shares. Rather, we were advised and have always communicated to our shareholders only that the Schneider family might consider a financially more attractive offer than the $19 per share offer and then the $22 per share offer from Maple Leaf," Dodds said.

[94] I do not find the limitation on the Family's intentions suggested here (of merely having to be better than $22) attractive since there was always the context of maximization of shareholder value. The press release went on to state:

Schneider Corporation confirms that, as previously disclosed by it, Maple Leaf's offers are not "Exclusionary Offers" and, in any event, certificates have been delivered by its controlling shareholder which negated any conversion rights. Thus even if the Maple Leaf offers were exclusionary, the conversion rights set out in Schneider Corporation's Articles would not come into effect.

Dodds said "If Maple Leaf's offer was exclusionary, that would have been material to Schneider Corporation shareholders and Maple Leaf would have disclosed it in its initial $19 offer on November 14, 1997. It didn't make that disclosure because the offer wasn't exclusionary."

[95] Oppression lawsuits are fact driven; they must be decided in context of the overall picture and not with the benefit of microscopic and perfect hindsight.

[96] It would seem to me that the Board of Directors and specifically the Special Committee 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 takeover bid situation: see section 134 OBCA While they had no prior experience in the field, they retained legal and financial advisors experienced in the field and acted positively and responsively to anticipated and unanticipated events in a common sense fashion. Oppression cases are of course fact driven. I think it would be too critical to focus on what were isolated as imperfections in their actions - what should be recognized as important

is to take a wider scope view of the context of the situation overall. One would not then be so concerned with a single action but rather a course of actions. The Special Committee pursued the available opportunities to maximize shareholder value (recognizing that the Family were gatekeepers with a veto) and achieved reasonable results. It was a difficult task given that prospective bidders would have to be wary not only of the danger of being used as a stalking horse for the Maple Leaf bid when it was known that Maple Leaf was in the best position to pay more because of synergies/rationalizations and had indicated a topping agenda, but also they would have to be mindful that the Family, which had previously rebuffed all enquiries, would have to overcome the primary emotional issue of losing control of the paternalistically run. 108 year old family business, when all that was certain was that the Family "*might consider* a financially more attractive offer". As I stated in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.); affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) at pp. 176-7.

> This conclusion however does not seem to impart the necessary objectivity that s. 134 OBCA requires. I think it would have been better expressed as "The question is, what was it the directors had uppermost in their minds *after a reasonable analysis of the situation*."
>
> I cannot but think that directors in exercising their duty of care towards the corporation must consider the shareholders generally not only the shareholders with the votes, but also shareholders (common and preferred).
>
> While it is not legally necessary for the directors to consult a shareholder, ordinarily it would be prudent to do so when the directors are contemplating major transactions that will affect the position of a very material minority shareholder. (They may not wish to if they were concerned that the shareholder deal with the information in some way inimical to the corporation) The directors would at least benefit from a first-hand view of what that particular shareholder feels his interests are.

[97] It seems to me that the Special Committee proceeded appropriately; it did try to determine the views of the Family recognizing its gatekeeper and veto role. These views were publically announced so that all shareholders and the "market" would have access to those views. When faced with the reality that the Family had pre-empted the process (although it appears that this merely prevented a further round of enquiry of Booth and Maple Leaf which

may or may not have elicited a higher bid than Smithfield whose last bid was tested) the Special Committee appropriately recommended to the Board that the standstill be waived to permit the Smithfield deal to proceed. It was better to give the shareholders a half loaf choice than no loaf. I do not think the Directors should be criticized for failing to change a sow's ear into a silk purse—it was beyond their control to insist that the Family give up either its gatekeeper or veto power. For this reason I think it unfair to characterize them as having uppermost in their minds the Family as opposed to the shareholders generally and the non-Family shareholders specifically. As for the aspect of allowing a valuable corporate asset to be used—ie. the proprietary confidential information in the data room, I am of the view that this should be tempered with the realization that it would be virtually impossible and truly impracticable to think of interesting any potential bidders to buy a pig in a poke (unless like Maple Leaf, one had a good deal of business intelligence already) and further that the confidentiality provisions remained intact (although I recognize that from a practical point of view such restrictions are not foolproof). Thus, the confidential information was appropriately used in the best interests of the shareholders and neither given away or dissipated. The directors were also criticized for spending corporate funds and management time in pursuing alternatives; I ask rhetorically would they not be more justifiably criticized for not doing so. Maple Leaf, without encouragement but rather the opposite, initiated the process by launching a hostile takeover. With that, the Directors had no choice but to respond as well as they could given the restrictions of reality.

[98] In my view in the circumstances the Family had to be kept in the information loop to a fair degree on a timely basis. To do otherwise was to risk going out on a limb and finding that it was (or worse still had been) been cut-off or to attempt to slow down a process (to give the Family sufficient time to consider not only its emotional issue but the other issues more related to dollars) when that process by its very nature requires very quick decisions. From the evidence before me it does not appear that the bounds were transgressed.

[99] It would be appropriate, however, to comment as well 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 but Maple Leaf knew how much it would have offered if it had been solicited on December 17th.

[100] Can anyone be criticized for not contacting Maple Leaf between December 12 to 17? Possibly there might be some mild criticism but no fault found. However, it is important to appreciate that Maple Leaf did not find it appropriate to enquire why it had not been contacted (and certainly it did not volunteer to pay more in this interim). That is reasonable conduct on balance with Maple Leaf—and one would assume that it would have maintained its view that Schneider was having trouble interesting other bidders and it would be foolish to bid against oneself, even if Schneider had contacted Maple Leaf. The Special Committee did anticipate making a last call of Maple Leaf; however that step evaporated when the Family opted for Smithfield. Given that the Family had committed to Smithfield it would have been foolhardy for the Special Committee to risk the evaporation of Smithfield to pursue Maple Leaf or Booth which had been declared effectively out of the race by the Family (DNF as opposed to DNS).

[101] I would have to observe that I find it puzzling for Fontana to suggest that the Family had not ruled out Maple Leaf when she had taken no objection to the minutes or Directors Circular. The Family (and therefore their two nominee directors Eric and Fontanta, who should communicate Family views) can be criticized for not advising the Special Committee and Board earlier if they had criteria other than shareholder maximization of value in mind so that this could have been reflected in the public announcements and documents. While one may on one basis applaud the paternalistic views of the Family (and Mr. O'Connor responded in argument submissions as to how this may translate into benefits in the long term for the corporation), it does not fit the general short term mould widely anticipated by the market. However, given the high conditionally invoked by "might consider", it would seem to me that this failure by the Family is superceded by this *proviso.*

[102] I think it helpful to appreciate what was being said in *Mills Acquisition Co. v. MacMillan Inc.* (1989), 559 A.2d 1261 (U.S. Del. Super.) at pp. 1286-7 and p. 1280:

> Directors are not required by Delaware law to conduct an auction according to some standard formula, only that they observe the significant requirement of fairness for the purpose of enhancing general shareholder interests. That does not preclude differing treatment of bidders when necessary to advance those interests. Variables may occur which necessitate such treatment. However, the board's primary objective, and essential purpose, must remain the enhancement of the bidding process for the benefit of the stockholders.
>
> "Fair price," in the context of an auction for corporate control, mandates, that directors commit themselves, inexorably, to obtaining the highest value reasonably available to the shareholders under all the circumstances. *Weinberger,* 457 A.2d at 711.

[103] Thus, even if there is an "auction" (which I did not find here as it would appear this was what the "others" wished was happening but not what was actually happening although there were some (non-exclusionary) indicia of same), the only requirement would be to obtain the highest value *reasonably* available. If the whole loaf has been denied by circumstances beyond the control of the Board, then their obligation would be to get the largest number of slices of bread available.

[104] Maple Leaf certainly focussed the attention of the management, Family and Board of Schneider to Schneider's long term viability situation on a stand-alone basis after initiating the hostile take over. Its announcement of a competing Manitoba Hog Plant to rival Schneider recent development there would appear to confirm that Maple Leaf would take potentially very harmful positions to Schneider in the future such as price wars and blocking positions as to new equity requirements for capital expansion or working capital requirements. Luter was requested to make the proposal by Dodds and Nesbitt; it is reasonable for him to assume that they were acting with the authority of the Special Committee/Board and that as the Family had to be satisfied for the process to go forward that their views would be addressed. It would also appear that implicitly the Special Committee/Board were relying on management (including Dodds) and Nesbitt as to the financial advisor with extensive experience in take over situations to spearhead the quest to find alternatives to the Maple Leaf offers. Substance in this regard should prevail over form.

[105] The short answer to the oppression claim is that these claimants would have to prove that their reasonable expectations were thwarted and they have not done so. Nor can they -

reasonable expectations also denotes the expectations be grounded on a reasonable foundation in fact, not that they are assumed to have foundation. When the gatekeeper control shareholder merely indicates that if “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. Instead what they have here is the opportunity of tendering to the Smithfield offer (a lesser financial offer than the after the fact Maple Leaf $29 one) or holding onto their shares. If there is a squeeze out, then they will have the opportunity to obtain what is then determined to be “fair value”. Here as opposed to the Family not agreeing to any change of control transaction (no loaf), the Family has agreed to an offer (half loaf) which will allow the non-Family shareholders to realize an “immediate” substantial gain over what the Schneider shares were trading at ($13 range) before Maple Leaf launched its hostile bid of $19 although less than Maple Leaf’s $29 offer (possibly a whole loaf) would have netted them. I would therefore dismiss the oppression claims.



**Exclusionary Offer and Anti-Conversion Certificates**

[106] There was a question as to whether each variation of offer made by SCH and then with Maple Leaf joining in was a new offer. Under the ordinary principles of contract law, they would be. It would not seem to be that the provisions of the *Securities Act,* which deals with variations in offers is of any assistance here since they deal with procedural aspects such as extension of time and not with the substance of the offer.

[107] However, buried in the verbiage of the coattails is the following which was not mentioned as I recall:

> (e) “Exclusionary Offer” means an offer to purchase common shares of the Corporation that:
>
> …
>
> and for the purposes of this definition if an offer to purchase common shares is not an Exclusionary Offer as defined above but would be an Exclusionary Offer if it were not for subclause (ii), 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;

[108] Thus, it seems to me that the articles of Schneider would prevail and render a variation of it identically applies to both A and common shares not a new offer.

[109] Let me now examine the question of transfer agents sending along documentation relating to their customer issuer to a replacement transfer agent. Jansen testified as to transfer agent practice in the industry as follows:

> 75. Q. And so I take it, when the person looked through the Canada Trust file, they did not find any copy or the original of this 1988 certificate?
>
> A. That's correct.
>
> 76. Q. Why is it that you would not have expected it to be transferred?
>
> A. When you're being appointed as a successor transfer agent, you receive documentation from the issuer, like bylaws and articles of amendment, and you ask for new certified copies. These are part of the documentation that a trust company will ask its issuer, its client, to give them upon appointment. (emphasis added)
>
> 77. Q. So you would have expected to have received a certificate directly from the Schneider Company?
>
> A. Agreed.

[110] Thus it does not appear that Jansen would expect a predecessor transfer agent to hand over what I might refer to as "constating documents" of the issuer. But curiously enough he would also ask for new certified copies. I take it that this demonstrates a bell and suspenders cautious attitude to see that nothing is missing. While not technically a corporate constating document of the issuer, an anticonversion certificate would seem to me to be of similar significant importance that it should be handed on. Of course it goes without saying that the predecessor would maintain a copy. What one would not expect to be handed over may be old certificates, records of shareholder votes, etc. I do not fault Jansen or his colleagues at CIBC Mellon since apparently they were not made aware of the 1988 anti-conversion certificate by Royal Trust Company when CIBC Mellon acquired its transfer agency business so there would be no reason for them to ask anyone including the issuer Schneider for it.

[111] While I do accept MacKay's evidence that he was assured by Canada Trust Company that it would transfer over "everything" to Royal Trust Company (which would include the 1988

anticonversion certificate), this does not help out since there was no evidence what the Royal Trust Company did with it (assuming it in fact received it) once the transfer agent business was transferred to CIBC Mellon.

[112] Was it sufficient to deliver the 1988 anti-conversion certificate to the Canada Trust Company, the transfer agent of Schneider at the time the certificate was executed (as well as to the Secretary of Schneider at the time) as was done? What meaning should be given "transfer agent for the time being of the Common Shares"? I am urged to interpret or treat this as meaning that the phrase "for the time being" relates to the present time and so refers to CIBC Mellon. Maple Leaf relies on *Troop Sailing Ship Co., Ex parte* (1899), 29 S.C.R. 662 (S.C.C.) at p. 672:

> and it was also contended that persons who became owners of the vessel after the transaction were not "owners for the time being" within the meaning of the Act. As to this last point the New Brunswick Supreme Court held that these words mean the owners at the time of action brought. This seems clearly so. The words import a fluctuating body of persons. They are not the determinate owners who made default but the owners for the time being, the words "for the time being" denoting not a time fixed but the transaction in question but one that is variable according to the happening of another event.

[113] This was in conjunction with the interpretation of s. 213 of the *Merchant Shipping Act,* 1854, allowing for the Crown to "sue for and recover said wages and expenses [of a seaman who is left behind in a foreign port] either from the master of such ship as aforesaid [namely the master who left the seaman behind without adequate provisions], or from the person who is owner of it for the time being…". Between the leaving behind and the bringing of the action, the ship changed owners. However, when one reads along at p. 672 it is clear that the case was decided in the context of the Crown having a lien against the ship:

> Then, inasmuch as the debt is made a change upon the vessel following and binding her even on change of ownership, and even when she has ceased to be a British and becomes a foreign ship, the evident intention is to make the personal liability co-extensive with this.

[114] It therefore seems to me that this phrase then was interpreted within the context of the legislation, including the lien provisions, and does not stand for a general principle of being the current "office holder" as suggested. It seems to me that the determination of the proper

transfer agent (in the sense of “for the time being”) has to be determined in accordance with who was the transfer agent at the time of the relevant act in issue—namely the delivery of the certificate. A change in transfer agent should not interfere with the validity of the certificate given: see the analogous situation with respect to replacement trustees with notice having been given to the former trustees: *Slattery v. Slattery,* [1945] O.R. 811 (Ont. C.A.) at p. 819; *Wasdale, Re,* [1899] 1 Ch. 163 (Eng. Ch. Div.) at p. 167; *Ward v. Duncombe,* [1893] A.C. 369 (U.K. H.L.) at p. 395.

[115] As well there is the question of Schneider’s 1995 amalgamation with its wholly owned subsidiary—did this affect the status of Schneider or the certificate? Section 179 of the OBCA provides that amalgamating corporations continue as one with the same rights and obligations of the predecessor corporation. An amalgamating corporation survives beyond the amalgamation and carries forward its existing legal rights and obligations: see *Waco Chemical Co. v. Oakville (Town)* (1974), [1975] 1 S.C.R. 273 (S.C.C.) at pp. 282-3; *Stanward Corp. v. Denison Mines Ltd.,* [1966] 2 O.R. 585 (Ont. C.A.) at p. 592. Moreover, upon a short form amalgamation as here, no notice is given to the shareholders and the articles of the parent corporation must remain unchanged: see ss. 177 to 179, OBCA.

[116] By the technical strict interpretation of what was recognized by Maple Leaf as a flawed coattails, Maple Leaf’s offer was an Exclusionary Offer if one only looks at the words. It would not seem that anyone truly intended that the wording of the coattails be structured in such a way as to have that particular result. It would seem obvious to me that MacKay and Schneider relied on the “experts”, the person with experience—the TSE which had developed the policy, which had to approve the language of any coattails for a listed company, which had rejected MacKay’s initial attempt in a rather off-hand manner of indicating that it would be a waste of time to comment on his draft and that to save time the TSE precedent was enclosed and when presented with MacKay’s second draft (which was amended only in recognizing that Schneider was not a multi-vote situation) fine toothed the draft by observing that there should be some adjustments for commas and a missing brackets. The language of the TSE precedent is awkward and convoluted and the provisions rather complex. It would appear that no one attempted to understand them generally until OHH did its analysis last fall. I appreciate that Bordens did some work in 1988 but this was not on the subject of “acquire/purchase” versus “tendered”. There is always a danger in amending documents that changes are made in isolation—sometimes with the result that there are internal conflicts in

the amended documents. Then it would seem since the Directors Circular referred to the Maple Leaf bid as a non-exclusionary one that whoever was in charge of dealing with that aspect focussed on the fact that the offers to the common and the A shareholders were identical in all material respects as to numbers amounts and other conditions and that it was assumed without reviewing the flawed language that the coattails was a normal one involving the word and concept of “acquire” (as opposed to “tendered”). I appreciate that this last observation is speculation but it would seem the only logical explanation, as MacKay testified there is a difference in meaning between “acquire” and “tendered”.

[117] I would observe that it would have been better form in the Directors Circular to have advised whether or not anti-conversion certificates had been filed previously. While it could be argued that it was unnecessary to make that statement since it had been stated that the Maple Leaf bid was not an exclusionary one, then similarly it would be unnecessary to put in all the verbiage about the types of anti-conversion certificates possible.

[118] With respect to the strict interpretation of the articles, it is important to remember that Schneider is an OBCA corporation and that OBCA corporations are articles of incorporation corporations. Thus the memorandum of association corporation law is not applicable—thus ruling out reliance on the English cases and certain Canadian ones. See Fraser & Stewart, *Company Law of Canada* 6th ed, (Toronto: Carswell, 1993) at p. 69:

> **Corporations incorporated by articles of incorporation.**
>
> The Act provides in s. 15 that every corporation incorporated under the Act has the capacity and, subject to the provisions of the Act, the rights, powers and privileges of a natural person. Accordingly, the position of a corporation incorporated under this and similar acts is analogous to corporations incorporated by the issue of letters patent.

See also Bruce Welling, *Corporate Law in Canada: The Governing Principles* 2nd ed. (Toronto: Butterworths, 1991) pp. 54-5, pp. 60-1 and pp. 242-3.

[119] It would seem to me that with respect *Fidelity Management & Research Co. v. Gulf Canada Resources Ltd.* (1996), 27 B.L.R. (2d) 135 (Ont. Gen. Div. [Commercial List]) should be carefully analysed in light of this distinction and therefore the comments by the editor in that case at p. 136 would appear to me to be a preferable statement of the law to the obiter mentioned:

**Editor's note**

In many ways this is an unexceptional case. However, in passing, Justice Steele comments that "the Articles are binding in Gulf, the directors and shareholders and any shareholder can insist upon their observation by Gulf." This is most surprising and turns existing corporate theory on its head. Under non-memorandum-of-association statutes such as the CBCA, there is no contract between shareholders and the corporation. See Welling, *Corporate Law in Canada: The Governing Principles* (1991), c.2.

[120] I would also note that rectification has not been pleaded. Therefore as it appears that the articles of incorporation are the documents which are to be relied on, it would not appear to me that they should be treated as contracts, but rather they should be treated as being subject to the rules of interpretation which would govern legislation.

[121] Therefore the doctrine of *Pepper (Inspector of Taxes) v. Hart,* [1993] 1 All E.R. 42 (U.K. H.L.) would come into play. As I have observed above while it appears that the then Board, the then shareholders and the then counsel to Schneider in adopting the coattails in 1988 did not address any particular attention to the wording of "tendered" versus "acquire" which has now been recognized by all concerned as "flawed", it would seem that the intention was to follow the TSE precedent to accord equal treatment for different classes of shares which were otherwise equivalent except for voting power under ordinary circumstances—as to the sharing of any takeover premium if the control of the (enhanced) voting class were agreeable to a change of control. It is obvious that the TSE precedent apparently inadvertently changed the word/concept "purchased" ("acquire") to "tendered" in setting out the precedent derived from its 1987 policy. While technically possible to have such a condition, it would be a commercial absurdity and be an impractical condition under any expected circumstances. It would not appear that the technical interpretation argued by Maple Leaf was the intention of anyone at the time of instituting the coattails nor at any time leading up to and through this takeover situation. Therefore although there is some arguable merit in Maple Leaf's submission that the plain English meaning should be given to the coattails provisions (even though acknowledged by Maple Leaf that this produces a flawed situation), it seems to me that it would be on balance desirable to avoid such a (commercial) absurdity. Maple Leaf otherwise crafted the offers to be identical in all material aspects (it is only as to a secondary element of the condition that the difference between "acquire" and "tendered" rears its head but this was specified as not to make a difference in the offers—as to what I might

characterize as the primary element). No one apparently regarded the offers as different; it does not appear that the "shareholder" plaintiffs had turned their mind to the question of it being an exclusionary offer and Schneider Directors concluded (it would seem focussing on the primary element) that the result was a non-exclusionary offer. For the purposes of this case in these circumstances, I would conclude that on balance the articles of incorporation (as amended by the coattails provision in 1988) should be interpreted as embodying the concept of "acquire" as opposed to "tendered". See Maxwell on Interpretation of Statutes (12th ed) at p. 228, where it was stated:

> Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.

See also *Canada (Minister of Finance) v. Smith,* [1924] Ex. C.R. 193 (Can. Ex. Ct.) at p. 194

[122] I am of the view that there was the intended symmetry between the common and Class A offers. The effect of the condition being attached to the Class A offer was not to make that offer different in some material respect from the common share offer. Rather the purpose, intent and effect of the secondary condition was exactly the opposite—namely to import into and to attach to the class A offer all of the conditions attached to the common offer. Maple Leaf in describing the intent and effect of the condition acknowledged that it was to make the offers identical in every respect. In particular the Class A offer stated:

> **5 Condition of the Class A Offer**
>
> The Class A offer is conditional upon the Offeror acquiring any Common Shares pursuant to the Common Share Offer. The Offeror reserves the right to withdraw the Class A Offer if the Offeror does not acquire any Common Shares pursuant to the Common Share Offer. Accordingly, if the conditions to the common Share Offer are not satisfied or waived the condition to the Class A Offer will not be satisfied. For a description of the conditions to the Common Share Offer, see section 6 of the Offers to Purchase, (emphasis added)

[123] However, as noted above, even if the Maple Leaf offers were determined otherwise to be an Exclusionary Offer, the 1988 anti-conversion certificate would still be effective in preventing the A shares from becoming voting.

[124] The Schneider “shareholders” who testified indicated that it would have been important to them to know whether their A shares became voting as a result of the Maple Leaf offers being an exclusionary offer.

[125] While I am of the view that McKinley J. in *Selkirk Communications Ltd, v. Slaight Communications Inc.* (1985), 51 O.R. (2d) 205 (Ont. H.C.) clearly identified a problem in securities and corporate disclosure when she observed at page 212:

> In balancing the statutory requirements of full and frank disclosure with the worthwhile objective of making the offering and offering circular comprehensible, the draftsman has an onerous task. The inclusion of more information than is necessary can tend to obscure rather than clarify the true terms of the offer.

[126] it would seem to me that neither the Maple Leaf offers nor the Directors Circulars were the models of brevity which dealt with the fundamentals and essence crisply. A few more sentences would not have been the straw that broke the camel’s back with the result of obscurity. The documents are prolix enough to have achieved a substantial result in that direction. Similarly a few sentences less would not make any meaningful dent in the dense material so as to make them any more inviting for all but the most dedicated to read them through cover to cover. I suspect that if these types of documents are read at all by shareholders, it is only the “summary” part. Perhaps a solution would be to strive for something between the summary and the usual dense unsummarized text. I sympathize with the draftspersons—they have to deal with complex and intricate transactions, frequently involving, as here, awkward and convoluted documentation and exceptionally detailed legislation, regulations and policy which may itself be not all that readable, all with very compressed timetables and ever-looming deadlines. However, what has to be appreciated by draftspersons dealing with either this type of documentation or contracts is that they should be able to be understood by the ordinary business person without difficulty—and on the first read-through. Perhaps it would be helpful to have an “outsider” read through the material before it is released or executed to see what the comprehension level is. I do not hold out this

decision as any model of brevity and for that I apologize and offer in half explanation that I did not have enough time to make it short.

[127] I would also point out that 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. Further, it would not appear that the delivery of the certificate to the transfer agent triggers any particular process or next step to be taken by the transfer agent. It appears that the purpose of the delivery of the certificate to the transfer agent is to have an outside entity aside from the corporation itself (in the sense of the Secretary) receive confirmation from the controlling shareholders of their undertaking as to exclusionary bids. Thus, it would appear that such an arrangement is merely a belt and suspenders approach to maintaining this undertaking. Thus, the undertaking has been given and the corporation has notice of it. Of course the history of this 1988 certificate may convince an objective bystander that it would be wise to provide a few more failsafes than merely the belt and suspenders.

[128] In the end result, I am of the view that the 1988 anti-conversion certificate is valid and effective to prevent the A Shares from being converted into voting shares if Maple Leaf's offer were in fact an exclusionary offer. I note in passing that while there may be some merit in an estoppel argument against Maple Leaf, I fail to see how such could apply against the A Shareholders. Having found the 1988 certificate is effective, I do not find it necessary to analyse the question of the later certificates.

**Additional Observations and Conclusions**

[129] I would also observe that it is not helpful in my view for the process to look at differences between valuations which may occur because of fluctuating share prices. What should be recognized is merely that a share exchange offer valuation will fluctuate in price on a continuing basis; it is not a fixed value as is a cash offer; however, it is important as well to recognize that this fluctuation in value will produce numbers which may be above, at or below the snapshot valuation on the day of the announcement. Please see my views in *New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1991), 4 B.L.R. (2d) 71 (Ont. Gen. Div.); and (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div.) as to what limited use can be made of "after the fact" information in relation to valuations which must be at an earlier time.

[130] In the end result I do not find it necessary to deal with Maple Leaf's failure to point out that its offer was an Exclusionary Offer even after Schneider Board had stated its conclusion that the Maple Leaf offer was not an exclusionary one. However, if it had been a situation where this failure would have affected the end result, then I would have exercised my discretion to remedy that. I am of the view that s. 105 of the *Securities Act* requires that the remedy be effected by a scalpel, not a sword. Given that it appears to have been the consistent intention of the Family to have implemented an effective anti-conversion certificate, then it would appear to me that an appropriate remedy would be in order allowing the Family to file an effective 16(b) anti-conversion certificate on a *nunc pro tunc* basis. However, since this remedy would affect non-represented shareholders, then it may well be desirable to advertise for a remedy hearing so as to hear submissions from those shareholders who wished to make representations.

[131] While Holdings is an "affiliate" as defined in the OBCA, it does not appear to me that Holdings (or the Family in the guise of Holdings) has oppressed the other shareholders—once one appreciates the high conditionality of "might consider" and the right of the Family to chose to sell or not to sell.

[132] Can fund managers be complainants in an oppression case as opposed to the legal or beneficial owners of the shares? Certainly s. 245(b)(iii) of the OBCA gives the Court the jurisdiction to declare that "any other person who, in the discretion of the court, is a proper person to make an application under this Part" is a complainant. Normally one would think that where oppression of the shareholders is being claimed that it would be more logical and preferable for that shareholder to be the complainant. However, when the fund manager is acting functionally as if it were operating under a power of attorney given by the shareholder (or unit holder) in the sense of making decisions as to and related to the securities, then it can not be said that the fund manager is a "stranger" to the litigation but rather it would appear that it had a legitimacy to act as a plaintiff on behalf of the true shareholder. Thus, under these circumstances I would accept the fund managers as complainants. However I would point out that there may be some difficulties encountered when the complainant is unfamiliar with the expectations of the shareholder—or where the shareholder as complainant has relied on someone else for financial advice as to the shares in question as opposed to forming a direct view. However, I did not find compelling the submission that the fund manager was an

appropriate person to be a complainant because fund manager's remuneration was performance related.

[133] The evidence was that these oppression actions were commenced by decisions independently of Maple Leaf. However, it would seem to be a fair observation that Maple Leaf had no hesitation in attempting to herd the other plaintiffs along in this direction. While the deposit agreements with Maple Leaf entered into by Royal and MacKenzie may not have affected their status as complainants, one may be puzzled at their lack of curiosity as to the control that they gave Maple Leaf as to these shares while they are locked up. It would be unfortunate if all they saw on the sheet of paper was "$29.00."

[134] American decisions in the takeover area must always be analysed with care since the U.S. jurisprudence relies on fiduciary obligations owed by the directors to the shareholders. However, in Canada protection of shareholders is best achieved through the application of the oppression remedy provisions (including the analysis of reasonable shareholder expectations): see *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.) at pp. 301-2.

[135] I note that the Family had no direct contact with any of the bidders and specifically not with Smithfield. However, it was able to make certain of its conditions known through Dodds and others involved in the process. One may observe that it seems that the Family is taking a great deal on faith as to what it hopes from Smithfield vis a vis Schneider. However, it may be that their general knowledge will turn out to be sufficient due diligence. However, if it is not, then their paternalistic instincts and pursuits will have been frustrated—in which case they will have to suffer not only the scorn of those shareholders who feel that they have been deprived of a better $29 offer by Maple Leaf but also be questioned by those stakeholders they sought to protect (with what might be viewed as a subsidy from themselves voluntarily and from other shareholders not so voluntarily) as to why more adequate safeguards were not sought.

[136] While Maple Leaf was a shareholder of Schneider having purchased 31,800 A shares on November 3 and 4, 1997, and therefore technically would be a complainant, it would seem to me that its complaint about the events was in essence qua bidder and not qua shareholder. Therefore even if oppression were found (which it was not) then this would factor into the question of whether the Court's discretion should be exercised to grant Maple Leaf a remedy. Maple Leaf however, has requested that it be treated as a complainant with the remedy being

directed to non-Maple Leaf (and non-Family) shareholders. While technically this is possible (see *Themadel,* supra), it is not necessary to deal with this since I did not find any infringement of s. 248(2).

[137] I would observe that all involved appear to have been under great pressure, some of it externally created and some internally. Of course it would be desirable to reduce the amount of internal pressure and this is within the control of the various parties. It is appreciated that sometimes this pressure (of either type but especially when combined) will result in persons making decisions and taking (or not taking) action which, with the benefit of a more relaxed and objective view, would not have been the result. All involved may well have been affected to some degree by this problem. While I directed some criticism in these reasons in this regard, my intention was not to embarrass anyone. I recognize how difficult some of these knife-edge situations may be. However, it may be that my critical observations may be of some benefit to those in the field to look at the broad picture reflectively and see where improvements may be made for the future. Perfection is not possible—but what is possible is the reasonable pursuit of perfection as viewed from an objective point using normal vision.

**End Result**

[138] Given the result of these three cases, namely that:

> (1) the A Shares have not become voting (as a result of any one of the determinations that the Maple Leaf offer was not an Exclusionary Offer and the 1988 anticonversion certificate was effective); and
>
> (2) there was no breach of s. 248(2) of the OBCA for which the plaintiffs could legitimately complain of, then I do not find it necessary to deal with the Smithfield claims that Maple Leaf intentionally interfered with Smithfield's agreement with the Family as this agreement remains "intact". I would therefore dismiss the three actions, grant a declaration that the A Shares have not become voting, dismiss the cross-claims and the counterclaims (I believe that I have therefore covered off all the potential claims which are in the end result material; however if I have missed anything material I would be grateful if counsel would so advise).

[139] I would ask counsel to arrange to see me within the next several weeks to work out a convenient and simple way of dealing with costs. I would congratulate all counsel for their presentations which advanced their clients' interests in the best possible light.

*Action dismissed.*